COURT FILE NUMBER	1103 14112
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *TRUSTEE ACT*, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "**1985 Trust**")
APPLICANTS	ROLAND TWINN, EVERETT JUSTIN TWINN, MARGARET WARD, TRACEY SCARLETT, AND DAVID MAJESK, as Sawridge Trustees for the 1985 Sawridge Trust (the "**Trustees**")
RESPONDENTS	THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN
INTERVENOR	THE SAWRIDGE FIRST NATION
DOCUMENT	BRIEF OF THE TRUSTEES FOR THE 1985 SAWRIDGE TRUST ON THE THRESHOLD QUESTION

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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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CONTENTS

I. INTRODUCTION

1. On June 28, 2024, the Trustees of the 1985 Sawridge Band Inter Vivos Settlement (the "**Trustees**" and the "**1985 Trust**" respectively) filed a multi-part application for advice and direction (the "**Full Application**") in an attempt to finally bring an end to nearly 14 years of litigation.[1]

2. The Trustees believe the Court's direction on certain initial issues could shape the next steps they take to conclude the litigation. Accordingly, the Trustees identified a very narrow initial issue – that being paragraph 1(b) of the Full Application (the "**Threshold Question**"):

> Affirming that notwithstanding that the definition of "Beneficiary" set out under the 1985 Sawridge Trust is discriminatory, and includes certain non-members of the Sawridge Nation, the Sawridge Trustees may proceed to make distributions to the Beneficiaries of the 1985 Sawridge Trust, including to non-members of the SFN who qualify as Beneficiaries of the 1985 Sawridge Trust.

3. By way of a case management order proclaimed on November 27, 2024, the Court ordered that the Threshold Question would be heard on June 16, 2025 for a full day.

4. By way of Application, the Sawridge First Nation (the **"SFN**") was granted Intervenor status for the application on the Threshold Question by Order of this Court.[2]

5. These submissions reflect the Trustees' position on the issue of the Threshold Question.

II. FACTS

A. Background to the 1985 Trust

i. The 1982 Trust

6. A trust was established in 1982 for the members of the SFN. The 1982 Trust defined its Beneficiaries simply as the members of the First Nation.[3]

ii. The 1985 Trust

7. The 1985 Trust was established on April 15, 1985 by a declaration of trust (the "**1985 Trust Deed**").[4] Upon its establishment, the assets of the 1982 Trust were transferred into the 1985 Trust and no further assets were transferred into the 1985 Trust. The 1985 Trust was established in anticipation of Bill C-31, which included proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Charter* by addressing gender discrimination in provisions governing band membership. It was expected that these legislative amendments would result in an increase in the number of individuals included as members of the

[1] Full Application (For Case Management), filed June 28, 2024. [**Appendix - TAB A**]

[2] Case Management Order of Justice Little, filed January 11, 2025. [**Appendix - TAB B**]

[3] Declaration of Trust dated April 15, 1982**.** ("1982 Trust Deed"). [**Appendix - TAB C**]

[4] Declaration of Trust dated April 15, 1985. ("1985 Trust Deed"). [**Appendix - TAB D**]

SFN[5] or be otherwise "forced" on the SFN as members.[6] Accordingly, Bill C-31 posed a significant risk of dilution of the 1985 Trust by converting a significant number of non-members to members, and under the 1982 Trust, significantly increasing the number of Beneficiaries.

8. The deliberate intention of the 1985 Trust was therefore to protect the assets in the 1982 Trust for the then-Beneficiaries of the 1982 Trust, to keep the Beneficiary group small, and mitigate against the unknown effects of the *Indian Act* amendments.

9. "Beneficiaries" of the 1985 Trust were therefore defined as persons who qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the *Indian Act* RSC 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 (the "**Old *Indian Act***").[7] By cementing the definition of Beneficiary in the Old *Indian Act*, the Beneficiary class would not be impacted by Bill C-31 and the assets would not be diluted.

10. However, by crystallizing a past version of the *Indian Act* in the definition of "Beneficiary" the discrimination which the amendments to the *Indian Act* were intended to eliminate remained within the 1985 Trust, including discrimination against women and illegitimate children. For example, there is an additional provision in paragraph 6 of the 1985 Trust Deed which states:

> Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the *Indian Act* and their status may not have been protested under section 12(2) thereunder.[8] [Emphasis added]

11. Paragraph 11 of the 1985 Trust Deed prohibits amendment to the definition of Beneficiaries as follows:

> The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under sub-paragraph 2(a) of the Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.[9] [Emphasis added]

12. By Order of Thomas J. made on consent and filed on January 22, 2018, it was determined, in part, as follows:

> 1. The definition of "Beneficiary" in the 1985 Trust is declared to be discriminatory insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the *Indian Act* made after April 15, 1982 from being Beneficiaries of the 1985 Trust …. .

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[5] *Twinn v 1985 Sawridge Trust,* 2017 ABCA 419 at para 2. [**Authorities - Tab 1**]

[6] Excerpts of Questioning of Paul Bujold on July 27, 2016 at 23, 3-8. [**Authorities - Tab 2**]

[7] 1985 Trust Deed,*supra* note 4 at para 2(a). [**Appendix - TAB D**]

[8] *Ibid*, para 6. [**Appendix - TAB D**]

[9] *Ibid,* para 11. [**Appendix - TAB D**]

> 4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as a ground upon which the 1985 Trust could be dissolved.[10]

13. This Order focused on the members of the SFN, but the same discrimination would affect women and illegitimate children who are not members of the First Nation.

14. The 1985 Trust Deed confers broad discretionary powers upon the Trustees of the 1985 Trust to distribute assets to its Beneficiaries:

> The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for anyone or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.[11]
>
> The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the fore-going, the power … (b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor;…[12]

iii. *The 1986 Trust*

15. On August 15, 1986 an additional Trust was established: the 1986 Sawridge Trust (the **"1986 Trust"**). The Beneficiaries under the 1986 Trust included all members of the SFN following the amendments to the Old *Indian Act*. It is functionally similar to the 1982 Trust. The SFN transferred cash and other assets into the 1986 Trust to further the purposes of the 1986 Trust. The 1986 Trust was established so that the assets coming into existence subsequent to April 15, 1985 could be held in trust for those individuals who qualified as members in accordance with the definition of membership that existed following amendments pursuant to Bill C-31.[13]

16. The members of the Sawridge community face multiple challenges and the 1986 Trust provides benefits to help address many of these hardships. It currently provides, *inter alia*, a social safety net for Beneficiaries and their children who are ill, education funding, and funding for the elderly. At this time, it is the intention of the Trustees to provide similar benefits to the Beneficiaries of the 1985 Trust as those of the 1986 Trust. The Trustees will need to consult with the Beneficiaries of the 1985 Trust to confirm this approach once the issues in this litigation have been addressed.[14]

17. While the focus of this application is the 1985 Trust, which provides for members and non-members who qualify under the Old *Indian Act*, it is still important to note that the 1986 Trust provides benefits for members of the SFN who are discriminated against in the 1985 Trust.

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[10] Consent Order (Issue of Discrimination) granted by Thomas, J, January 19, 2018 [**Appendix - TAB E**]

[11] 1985 Trust Deed, *supra* note 4 at para 6. [**Appendix - TAB D**]

[12] *Ibid,* para 7. [**Appendix - TAB D**]

[13] Declaration of Trust dated August 15, 1986. ("1986 Trust Deed") [**Appendix - TAB F**]

[14] Distribution Proposal, Order of Thomas, J, filed December 17, 2015 at para 7. [**Appendix - TAB G**]

Regardless of what happens in this litigation, each and every member of the SFN will still have access to the social benefits provided through the 1986 Trust.

18. Further, any person who does not qualify for the 1985 Trust, because of discrimination, may apply for membership in the SFN, thereby become Beneficiaries under the 1986 Trust, and will be able to access benefits that may be effectively equivalent to those available to Beneficiaries of the 1985 Trust.

B. The Trust Has Been a Valid Trust Since 1985

19. The Trustees do not view the validity of the 1985 Trust as being an issue in the Threshold Question. Nevertheless, the Trustees offer the following background for the Court's information in light of the positions proposed to be taken by the SFN.

20. The three certainties required to declare an express private trust were famously set out in the landmark English trust law case *Knight v Knight*, which established the "three certainties" principle. For a trust to be valid, there must be:

    a. Certainty of intention: meaning the settlor must clearly intend to create a trust;

    b. Certainty of subject matter: the property involved must be clearly defined; and

    c. Certainty of objects: the Beneficiaries must be identifiable.[15]

21. The 1985 Trust clearly is a valid trust, as it satisfies the requirements of the three certainties. The Settlor (Chief Walter Twinn) had a clear intention to create a trust. This is not in dispute. This is evident in the 1985 Trust Deed and in the proceedings of the 1985 Trust for the last 40 years. The 1985 Trust has bought and sold property, incorporated businesses, and filed taxes. The only "action" the 1985 Trust is yet to take is to distribute to its Beneficiaries.

22. The 1985 Trust holds significant assets - this is not in dispute.

23. As set out in this brief, the Beneficiaries are clearly identifiable. The Court, the parties and the intervenor have all been able to identify Beneficiaries.

III. ISSUE: THE NATURE AND SCOPE OF THIS APPLICATION

24. It is important to be clear that the Threshold Question before the Court in this Application is limited to the relief sought in paragraph 1(b) of the Full Application. The Threshold Question is the issue that will be adjudicated. How the balance of the Full Application will be pursued will depend on the Court's answer to the Threshold Question.

25. The Trustees have fiduciary duties to the Beneficiaries of the Trust. This Court declared, by Order, that the 1985 Trust is discriminatory.[16] The fact that the 1985 Trust is discriminatory has no effect on whether the Trustees can distribute; there are no grounds or authorities of which the Trustees are aware which justify striking a private trust on the grounds that it is discriminatory.

26. Accordingly, the Trustees request the Court's direction that they can distribute under this Trust.

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[15] *Knight v Knight* (1840) 49 ER 58 at 63. [**Authorities - Tab 3**]

[16] Consent Order (Issue of Discrimination) of Justice D.R.G. Thomas, filed January 22, 2018. [**Appendix - TAB E**]

IV. LAW AND ARGUMENT

A. Application of the Settlor's Intention

27. It is clear Chief Walter Twinn had an intention to create a Trust in 1985 for the benefit of the Beneficiaries of the 1985 Trust.

28. The question now before this Court is whether the Trustees may carry out their fiduciary duty to distribute to Beneficiaries. The Trustees seek the Court's guidance on this point, but have found no law that would prevent them from distributing.

B. Fiduciary and Statutory Duties of the Trustees

i. Trustees Owe Fiduciary Duties to Beneficiaries

29. A trustee is appointed to manage assets for the benefit of beneficiaries in accordance with the trust deed. Trustees have a duty to adhere to the terms of the trust deed.[17] The role of a trustee comes with significant responsibilities and obligations, collectively referred to as fiduciary duties.[18]

30. These duties are designed to ensure that the trustee, who holds legal title, acts in the best interests of the beneficiaries, who hold beneficial title. The Trustee is obligated to manage the trust assets prudently.[19]

31. Trustees have a duty to administer a trust for the benefit of beneficiaries, in accordance with the purpose of the trust, and the law. [20] The duty to follow the trust deed ensures that the trustees' actions align with the settlor's intentions.[21] Trustees must adhere to the instructions and provisions laid out in the trust deed regarding asset distribution, thereby distributing the property in accordance with the settlor's intentions and instructions as set out in the trust deed.

32. Thus, absent any law prohibiting a distribution under discriminatory terms in a private law setting, which does not appear to exist, the Trustees must be permitted to make distributions even where the terms of the trust deed beneficiary definition are discriminatory.

ii. The Trustee Act

33. Alberta's revised *Trustee Act*[22], which came into force on February 1, 2023, aims to clarify trust laws, make trust management more efficient, and limit the need for Court involvement in trust

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[17] *Merril Petroleums Ltd v Seaboard Oil Co* [1957] AJ No 29 at para 83 (SC) 22 WWR 529, aff'd [1958] AJ No 10 (CA), 25 WWR 236 ("*Merril Petroleums*"). [**Authorities - Tabs 4 and 5**] See also Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith, Waters' Law of Trusts in Canada, 5th Ed (Thomson Reuters: Westlaw Edge) ("Waters' Law of Trusts") at 18.0 which states "A trustee is under the duty to adhere to the terms of the trust, and cannot depart from them without the authorization of statute or of the court. The relationship between the general trust obligations imposed by law and the duties set out by the terms of the trust is therefore the first concern of every trustee." [**Authorities - Tab 6**]

[18] Waters' Law of Trusts, *supra* note 17 at 18.II. [**Authorities - Tab 6**]

[19] *Ibid,* at 18.III. [**Authorities - Tab 6**]

[20] *Merril Petroleums, supra* note 17 [**Authorities - Tabs 4 and 5**]

[21] *Martin v Banting* [2001] OJ No 510 at para 29 (SC), 37 ETR (2d), aff'd [2002] OJ No 381 (CA), 46 ETR (2d) 93. [**Authorities – Tabs 7 and 8**]

[22] *Trustee Act*, SA 2022, c T-8.1. [**Authorities - Tab 9**]

disputes. Trustees are legally bound to act in the best interests of the Beneficiaries, adhering to the terms outlined in the trust document.[23] The *Trustee Act*, as revised, applies to the Trustees' current and future actions.

34. The *Trustee Act* of Alberta outlines several statutory obligations that deal with distributions:

    (a) Trustees are bound to consider the needs of the Beneficiaries.[24]

    (b) Adherence to the Trust Document: Trustees must follow the instructions and provisions laid out in the trust document and the *Act*, including specific guidelines regarding asset distribution.[25]

    (c) Legal Obligations: Trustees are legally bound to act in the best interests of the Beneficiaries, adhering to the terms outlined in the trust document.[26]

    (d) Responsibilities: Trustees need to execute distributions in accordance with the settlor's instructions and desires.[27]

35. It would seem that the Trustees are statutorily bound to distribute to the Beneficiaries of the Trust. Thus, it appears, based on the governing statute, that the answer to the Threshold Question must be "yes".

C. Discrimination

36. The only issue before this Court is the answer to the Threshold Question. It is not before the Court to determine if the 1985 Trust is valid. The question that must be addressed is whether distributions can occur notwithstanding that the definition of Beneficiary is discriminatory.

37. Restricting distribution or voiding the 1985 Trust on the basis that the discrimination impugns *Charter* rights is not a valid argument because the *Charter* does not apply to actions between private parties.[28] The Trustees have also not found a case to date, nor have they been provided with a case by the parties to this Action, where the Courts voided a private trust on the basis of discrimination.

38. In *Canada Trust Co. v Ontario Human Rights Commission*, the Ontario Court of Appeal contended with the issue of a discriminatory charitable trust, the Leonard Foundation, which was established in 1923. The Foundation provided scholarships with discriminatory eligibility criteria, including restrictions based on race, religion, and sex. Ultimately, the Court determined that the discriminatory provisions of the trust contravened public policy and were struck out.[29] However,

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[23] *Ibid*, s. 27(1). [**Authorities - Tab 9**]

[24] *Ibid*, ss. 33(4)(a), (c), 47, and 48. [**Authorities - Tab 9**]

[25] *Ibid*, ss. 31(2) and (3). [**Authorities - Tab 9**]

[26] *Ibid*, ss. 27(1)(b), and 42(2)(c). [**Authorities - Tab 9**]

[27] *Ibid*, s. 27(1)(a). [**Authorities - Tab 9**]

[28] *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at para 35; 33 DLR (4th) 174 [**Authorities - Tab 10**]; *Horse Lake First Nation v Horseman*, 2003 ABQB 152 at para 13. [**Authorities - Tab 11**]

[29] *Canada Trust Co v Ontario Human Rights Commission* [1990] OJ No 615 (CA) at 106; 69 DLR (4th) 321. [**Authorities - Tab 12**]

Justice Tarnopolsky specifically distinguished that public policy considerations apply to charitable trusts, but not private trusts:

> A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection: (1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property cy-pres providing they can discern a general charitable intention. This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community (Waters, Law of Trusts, p. 502). It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.[30] [emphasis added]

39. While the Courts have made comments in *obiter dictum* regarding the unpalatable nature of discriminatory private trusts, their decisions to strike private dispositions or bequests have been based on striking the conditions on the bequest. That is not the case in the 1985 Trust. Nor is the issue of amending the 1985 Trust to strike parts of the 1985 Trust in issue in this application.

40. Similarly, other commonwealth jurisdictions have also refused to invoke public policy in response to discrimination in private trusts, evidencing that freedom of disposition prevails. Lord Wilberforce, in *Blathwayt v Baron Cawley*, stated that "[d]iscrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy".[31]

41. The 1985 Trust is a private, non-charitable trust that holds private property in trust for the Beneficiaries of the Trust. The Courts have permitted discrimination in private trusts. While the Courts may note their displeasure with discrimination in private trusts based on public policy concerns, they have to date, and as far as known to the Trustees, not interfered with the validity of a private trust based on discrimination as set out in the 1985 Trust.

D. Limitations – Collateral Attacks are Statute Barred

42. Collateral attacks by the SFN on the validity of the 1985 Trust are inappropriate. The SFN is not a party to the Action and it has not brought an action to challenge the validity of the Trust. In any event, any question about the validity of the 1985 Trust by the SFN is statute barred or void for laches, as also noted by the OPGT in their brief filed March 14, 2025.[32]

43. Further, the elements of the equitable doctrine of *laches* are acquiescence and change in position on the part of the defendant. To balance justice or injustice in this equitable doctrine, the length of the delay and the nature of the acts done during the interval are important considerations. The consequence of the delay must be that it would be unfair for the Court to give relief.[33]

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[30] *Ibid*, at 100. [**Authorities - Tab 12**]

[31] *Blathwayt v Baron Cawley* [1975] 3 All ER 625 at p 697; aff'd in *Blathwayt v Baron Cawley*, [1976] AC 397 (HL) at 426. [**Authorities - Tab 13**]

[32] Brief of the Office of the Public Guardian and Trustee filed March 14, 2025 at paras 50-51. [**Authorities - Tab 14**]

[33] *Lindsay Petroleum Co. v Hurd* [1874] JCJ No 2 at para 2; LR 5 PC 221. [**Authorities - Tab 15**]

44. The SFN is not a party to this Action. It has been involved as an intervenor intermittently over the past 13 years that this Action has been litigated. Therefore, the equitable doctrine of *laches* is also not available to the SFN, as it is neither a defendant or respondent in this Action. Further, should the SFN be permitted to put the validity of the 1985 Trust in issue (as an intervenor), then the consequence would be significant, as it would effectively erase 13 years of advice and direction by the Court.

45. The 1985 Trust is a valid trust. It has been operating as a valid trust for over 40 years. There is no order making the 1985 Trust invalid and thus the trustees must manage the 1985 Trust according to their fiduciary duties, including the duty to distribute.

V. CONCLUSION

46. The Trustees seek an Order stating that, notwithstanding the definition of "Beneficiary" set out under the 1985 Trust is discriminatory and includes certain non-members of the SFN, the Trustees may proceed to make distributions to the Beneficiaries of the 1985 Trust, including to non-members of the SFN who qualify as Beneficiaries of the 1985 Trust in accordance with the 1985 Trust Deed.

VI. APPENDIX OF EVIDENCE

TAB	
A	Full Application (For Case Management), filed June 28, 2024.
B	Case Management Order of Justice Little, filed January 11, 2025.
C	Declaration of Trust dated April 15, 1982. (“1982 Trust Deed”)
D	Declaration of Trust dated April 15, 1985. (“1985 Trust Deed”)
E	Consent Order (Issue of Discrimination) granted by Thomas, J, January 19, 2018.
F	Declaration of Trust dated August 15, 1986. (“1986 Trust Deed”)
G	Distribution Proposal, Order of Thomas, J, filed December 17, 2015.

VII. AUTHORITIES

1	*Twinn v 1985 Sawridge Trust*, 2017 ABCA 419.
2	Excerpts - Questioning of Paul Bujold on July 27, 2016.
3	*Knight v Knight* (1840) 49 ER 58.
4	*Merril Petroleums Ltd v Seaboard Oil Co* [1957] AJ No 29 (SC); 22 WWR 529.
5	*Merril Petroleums Ltd v Seaboard Oil Co* [1958] AJ No 10 (CA); 25 WWR 236.
6	Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, Waters' Law of Trusts in Canada, 5th Ed (Thomson Reuters: Westlaw Edge)
7	*Martin v Banting* [2001] OJ No 510 (SC); 37 ETR (2d).
8	*Martin v Banting* [2002] OJ No 381 (CA); 46 ETR (2d) 93.
9	*Trustee Act*, SA 2022, c T-8.1.
10	*Dolphin Delivery Ltd v RWDSU, Local 580* [1986] 2 SCR 573; 33 DLR (4th) 174.
11	*Horse Lake First Nation v Horseman*, 2003 ABQB 152.
12	*Canada Trust Co v Ontario Human Rights Commission* [1990] OJ No 615 (CA); 9 DLR (4th) 321
13	*Blathwayt v Baron Cawley* [1975] 3 All ER 625; aff'd [1976] AC 397 (HL) at 426.
14	Brief of the Office of the Public Guardian and Trustee filed March 14, 2025.
15	*Lindsay Petroleum Co. v Hurd* [1874] JCJ No 2; LR 5 PC 221.

Form 27
Rule 6.3

COURT FILE NUMBER	1103 14112
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JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**APPLICATION**
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JUDICIAL CENTRE OF EDMONTON
FILED
Jun 28, 2024
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by Email
CLERK OF THE COURT

NOTICE TO RESPONDENT(S)

This application is made against you. You are a respondent. You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	**To be Scheduled before Case Management Justice**
Time:	**To be Scheduled before Case Management Justice**
Where:	**Law Courts, 1A Sir Winston Churchill Square, Edmonton, Alberta T5J 0R2**

Before Whom: **Justice J.S. Little**

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. An Order setting out the following:

    a. Confirming the validity of the 1985 Sawridge Trust;

    b. Affirming that notwithstanding that the definition of "Beneficiary" set out under the 1985 Sawridge Trust is discriminatory, and includes certain non-members of the Sawridge Nation, the Sawridge Trustees may proceed to make distributions to the Beneficiaries of the 1985 Sawridge Trust, including to non-members of the Sawridge First Nation who qualify as beneficiaries of the 1985 Sawridge Trust;

    c. Approving the Distribution Proposal submitted by the Sawridge Trustees;

    d. Confirming that the Office of the Public Guardian and Trustee has fully executed and satisfied its obligations, as of the date this Order is filed, imposed upon them by this Court;

    e. Discharging the Office of the Public Guardian and Trustee from any further duties in relation to this Action;

    f. Declaring that the indemnification and funding of the Office of the Public Guardian and Trustee, as set out in the Order of Justice Thomas, pronounced June 12, 2012, and filed September 20, 2012, is ended; and

    g. Confirming that the litigation has concluded and that nothing in the Order negates the Sawridge Trustees' ongoing duty to act in good faith in carrying out their duties and powers as defined in the 1985 Sawridge Trust, or the Beneficiaries' ongoing right to enforce the bona fides of the Sawridge Trustees in the exercise of their powers and duties as outlined in the 1985 Sawridge Trust Deed.

Grounds for making this application:

2. In 2011, the Sawridge Trustees brought an application for advice and direction to the court seeking certain relief.

3. In 2012, the OPGT was appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

4. In 2015, the Court ordered the Trustees to present a distribution proposal and have it approved by the Court.

5. Also in 2015, the Court Ordered the OPGT to limit its role to four tasks:

    a. Representing the interests of minor beneficiaries and potential minor beneficiaries to ensure that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust; and

    b. Examining on behalf of the minor beneficiaries the manner in which the property was placed / settled in the Trust; and

    c. Identifying potential but not yet identified minors who are children of Sawridge First Nation members or membership candidates as these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

    d. Supervising the distribution process itself.

6. In 2016, the application concerning the 1985 Sawridge Trust distribution proposal was adjourned *sine die*. The issue of the distribution proposal remains outstanding.

7. The Sawridge Trustees wish to begin distributing benefits to the 1985 Sawridge Beneficiaries.

8. The Sawridge Trustees have prepared a draft distribution proposal and have shared that draft with the parties.

Material or evidence to be relied on:

9. The Distribution Proposal of the Sawridge Trustees;
10. Affidavits previously filed in this action;
11. Questionings filed in this action;
12. Undertakings filed in this action;
13. Affidavits of records and supplemental affidavits of records in this action;
14. Such further material as counsel may further advise and this Honourable Court may permit.

Applicable rules:

15. *Alberta Rules of Court,* Alta Reg 124/2010, Rules 1.2, 1.3, 1.4, 4.11, 4.14, 6.3,
16. Such further and other rules as counsel may advise and this Honourable Court may permit.

Applicable Acts, regulations and Orders:

17. *Trustee Act,* SA 2022, c T-8.1, as amended;
18. Various procedural orders made in the within action;
19. Such further and other acts, regulations, and orders as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

20. None.

How the application is proposed to be heard or considered:

21. In person before the Case Management Justice.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

COURT FILE NUMBER	1103 14112
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, AS AMENDED and IN THE MATTER OF THE SAWRIDGE BAND *INTER VIVOS* SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN, AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**CASE MANAGEMENT ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DENTONS CANADA LLP** **Attn: Michael Sestito** 2500 Stantec Tower 10220 – 103 Avenue NW Edmonton, AB T5J 0K4 Phone: 780-423-7300 Email: michael.sestito@dentons.com File: 551860-1/MSS

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
Jan 11, 2025
jh
by Email
CLERK OF THE COURT

ENT

DATE THIS ORDER WAS PRONOUNCED: November 27, 2024

PLACE WHERE THIS ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO PRONOUNCED THIS ORDER: Justice J.S. Little

UPON the Case Management meeting; AND UPON review of an application for intervention status provided by the Sawridge First Nation (the "**Intervention Application**"); AND UPON hearing the submissions from counsel for the Sawridge Trustees, the Office of the Public Guardian and Trustee ("**OPGT**"), and the Sawridge First Nation; AND UPON hearing from Catherine Twinn who is self represented; AND UPON noting the Application from the Sawridge Trustees for certain relief filed June 28, 2024 (the "**Full Application**"); AND UPON being informed by the Sawridge Trustees that they wish to have the court adjudicate the threshold issue regarding paragraph 1(b) of the Full Application before the balance of the application is considered (the "**Threshold Application**"); AND UPON having heard from those noted above with respect to the timing of the Intervention Application and the Threshold Application;

IT IS HEREBY ORDERED THAT:

1. The Intervention Application shall be scheduled for a half day on April 4, ~~2024~~; 2025

2. The Sawridge First Nation, as Applicants in the Intervention Application, shall provide its brief on or before February 14, 2025;

3. The Respondents shall provide written briefs responding to the Intervention Application on or before March 14, 2025;

4. The Threshold Application shall be scheduled for a full day on June 16, 2025;

5. The Sawridge Trustees, as Applicants, shall file their written brief regarding the Threshold Application on April 16, 2025;

6. The Respondents shall provide written briefs responding to the Threshold Application on or before May 26, 2025; and,

7. Following the release of the decision regarding the Intervention Application, the parties and the Sawridge First Nation, should they be granted status as an intervenor, may contact the Court and the other parties, to request modification of the timetable for the Threshold Application.

COURT OF KING'S BENCH OF ALBERTA

Justice J.S. Little

APPROVED AS TO FORM AND CONTENT BY:

KPMG LAW LLP / DENTONS CANADA LLP

Doris C Bonora KC / Michael Sestito,
Co-Counsel for the Sawridge Trustees

CATHERINE TWINN

Catherine Twinn, Self-Represented

HUTCHISON LAW / FIELD LAW

P. Jonathan Faulds KC / Janet Hutchison,
Co-Counsel for the OPGT

MCLENNAN ROSS LLP

Crista Osualdini, Counsel for the Sawridge First Nation

2. The Sawridge First Nation, as Applicants in the Intervention Application, shall provide its brief on or before February 14, 2025;

3. The Respondents shall provide written briefs responding to the Intervention Application on or before March 14, 2025;

4. The Threshold Application shall be scheduled for a full day on June 16, 2025;

5. The Sawridge Trustees, as Applicants, shall file their written brief regarding the Threshold Application on April 16, 2025;

6. The Respondents shall provide written briefs responding to the Threshold Application on or before May 26, 2025; and,

7. Following the release of the decision regarding the Intervention Application, the parties and the Sawridge First Nation, should they be granted status as an intervenor, may contact the Court and the other parties, to request modification of the timetable for the Threshold Application.

COURT OF KING'S BENCH OF ALBERTA

_____
Justice J.S. Little

APPROVED AS TO FORM AND CONTENT BY:

KPMG LAW LLP / DENTONS CANADA LLP

_____
Doris C Bonora KC / Michael Sestito,
Co-Counsel for the Sawridge
Trustees

CATHERINE TWINN

_____
Catherine Twinn, Self-Represented

HUTCHISON LAW / FIELD LAW

_____
P. Jonathan Faulds KC / Janet Hutchison,
Co-Counsel for the OPGT

MCLENNAN ROSS LLP

_____
Crista Osualdini, Counsel for the
Sawridge First Nation

DECLARATION OF TRUST

SAWRIDGE BAND TRUST

This Declaration of Trust made the 15th day of April, A.D. 1982.

BETWEEN:

CHIEF WALTER PATRICK TWINN
of the Sawridge Indian Band
No. 19, Slave Lake, Alberta

(hereinafter called the "Settlor")

of the First Part

AND:

CHIEF WALTER PATRICK TWINN,
WALTER FELIX TWINN and GEORGE TWINN
Chief and Councillors of the
Sawridge Indian Band No. 150 G & H respectively

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

Whereas the Settlor is Chief of the Sawridge Indian Band No. 19, and in that capacity has taken title to certain properties on trust for the present and future members of the Sawridge Indian Band No. 19 (herein called the "Band"); and,

Whereas it is desirable to provide greater detail for both the terms of the trust and the administration thereof; and,

Whereas it is likely that further assets will be acquired on trust for the present and future members of the Band, and it is desirable that the same trust apply to all such assets;

NOW, therefore, in consideration of the premises and mutual promises contained herein, the Settlor and each of the Trustees do hereby covenant and agree as follows:

1. The Settlor and Trustees hereby establish a Trust Fund, which the Trustees shall administer in accordance with the terms of this Agreement.

2. Wherever the term "Trust Fund" is used in this Agreement, it shall mean: a) the property or sums of money paid, transferred or conveyed to the Trustees or otherwise acquired by the Trustees including properties substituted therefor and b) all income received and capital gains made thereon, less c) all expenses incurred and capital losses sustained thereon and less d) distributions properly made therefrom by the Trustees.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Agreement. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein.

4. The name of the Trust Fund shall be "The Sawridge Band Trust", and the meetings of the Trustees shall take place at the Sawridge Band Administration office located on the Sawridge Band Reserve.

5. The Trustees of the Trust Fund shall be the Chief and Councillors of the Band, for the time being, as duly elected pursuant to Sections 74

through 80 inclusive of the Indian Act, R.S.C. 1970, c. I-6, as amended from time to time. Upon ceasing to be an elected Chief or Councillor as aforesaid, a Trustee shall ipso facto cease to be a Trustee hereunder; and shall automatically be replaced by the member of the Band who is elected in his stead and place. In the event that an elected Chief or Councillor refuses to accept the terms of this trust and to act as a Trustee hereunder, the remaining Trustees shall appoint a person registered under the Indian Act as a replacement for the said recusant Chief or Councillor, which replacement shall serve for the remainder of the term of the recusant Chief or Councillors. In the event that the number of elected Councillors is increased, the number of Trustees shall also be increased, it being the intention that the Chief and all Councillors should be Trustees. In the event that there are no Trustees able to act, any person interested in the Trust may apply to a Judge of the Court of Queen's Bench of Alberta who is hereby empowered to appoint one or more Trustees, who shall be a member of the Band.

6. The Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band; provided, however, that at the end of twenty one (21) years after the death of the last decendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and

their status may not have been protested under Section 12(2) thereunder; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act).

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above; and the Trustees may make such payments at such time, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investment authorized for Trustees' investments by The Trustees' Act, being Chapter 373 of the Revised Statutes of Alberta 1970, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or desirable to give effect to the trust purposes set out above,

and to discharge their obligations thereunder other than acts done or omitted to be done by them in bad faith or in gross negligence, including, without limiting the generality of the foregoing, the power

a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefore; and

c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by Federal, Provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them

by this Agreement provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take with notice of and subject to this clause.

12. A majority of the Trustees shall be required for any action taken on behalf of the Trust. In the event that there is a tie vote of the Trustees voting, the Chief shall have a second and casting vote.

Each of the Trustees, by joining in the execution of this Trust Agreement, signifies his acceptance of the Trust herein. Any Chief or Councillor or any other person who becomes a Trustee under paragraph 5 above shall signify his acceptance of the Trust herein by executing this Trust Agreement or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Trust Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Trust Agreement.

SIGNED, SEALED AND DELIVERED
In the Presence of:

Heather York
NAME

1100 One Thornton Court
ADDRESS

A. Settlor: Charles P. Dunn

Heather York
NAME

1100 One Thornton Court
ADDRESS

B. Trustees: 1. Charles P. Dunn

Heather Yost
NAME

1100 One Thornton Court
ADDRESS

Heather Yost
NAME

1100 One Thornton Court
ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

2. [illegible]

3. Walter F Twin

4.

5.

6.

7.

8.

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and **SAMUEL G. TWIN,**
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time

would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

4. The name of the Trust Fund shall be "The Sawridge Band Inter Vivos Settlement", and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and subject to this clause.

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Settlement shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

_____ A. Settlor _____
NAME

_____
ADDRESS

B. Trustees:

_____ 1. _____
NAME

_____
ADDRESS

_____ 2. _____
NAME

_____
ADDRESS

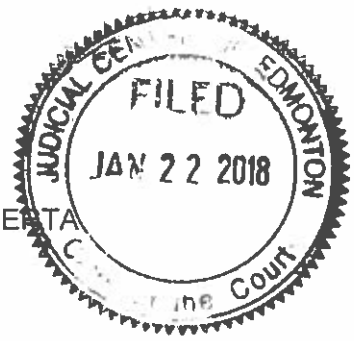
_____ 3. _____
NAME

_____
ADDRESS

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

Clerk's stamp:



COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")

APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (ISSUE OF DISCRIMINATION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5

JUSTICE: D.R.C. THOMAS
DATE: JAN 19, 2018
LOCATION: EDMONTON

Attention: Doris C.E. Bonora
Telephone: (780) 423-7100
Fax: (780) 423-7276
File No: 551860-001-DCEB

I hereby certify this to be a true copy of the original.

for Clerk of the Court

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("1985 Trust"), for which an Application for Advice and Direction was filed January 9th, 2018;

AND WHEREAS the first question in the Application by the Sawridge Trustees on which direction is sought is whether the definition of "Beneficiary" in the 1985 Trust is discriminatory, which definition reads:

> "Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed

all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

AND UPON being advised that the parties have agreed to resolve this specific question on the terms herein, and no other issue or question is raised before the Court at this time, including any question of the validity of the 1985 Trust;

AND UPON being advised the Parties remain committed to finding a remedy that will protect the existence of the 1985 Trust and the interests of the beneficiaries;

AND UPON there being a number of other issues in the Application that remain to be resolved, including the appropriate relief, and upon being advised that the parties wish to reserve and adjourn the determination of the nature of the relief with respect to the discrimination;

AND UPON this Court having the authority to facilitate such resolution of some of the issues raised in the Application prior to the determination of the balance of the Application;

AND UPON noting the consent of the Sawridge Trustees, consent of The Office of the Public Trustee and Guardian of Alberta ("OPGT") and the consent of Catherine Twinn;

IT IS HEREBY ORDERED AND DECLARED;

1. The definition of "Beneficiary" in the 1985 Trust is declared to be discriminatory insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the *Indian Act* made after April 15, 1982 from being beneficiaries of the 1985 Trust.

2. The remaining issues in the Application, including the determination of any remedy in respect of this discriminatory definition, are to be the subject of a separate hearing. The timeline for this hearing will be as set out in Schedule "A" hereto and may be further determined at a future Case Management Meeting.

3. The Justice who hears and determines the remaining issues in this Application may consider all forms of discrimination in determining the appropriate relief.

4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as ~~the sole determinative factor that~~ a ground upon which the 1985 Trust ~~should~~ could be dissolved.

5. ~~The provisions in paragraph 4, above, will not prevent reliance on this Consent Order for any purpose in the within proceedings.~~

The Honourable D. R. G. Thomas

CONSENTED TO BY:

MCLENNAN ROSS LLP

Karen Platten, Q.C.
Counsel for Catherine Twinn as Trustee for the 1985 Trust

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

SCHEDULE "A"

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")
APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**Litigation Plan January 19, 2018**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

1. The remaining steps and procedures are to be completed on or before the dates specified below:

NO.	ACTION	DEADLINE
1.	Case Management Meeting to address Trustee's application for an Order on the Discrimination Issue.	January 19, 2018
2.	Settlement meeting of all counsel for the Parties to continue to discuss remedies;	February 14, 15 or 16, 2018
3.	Interim payment on accounts made to OPGT from the Trustees	January 31, 2018 and February 28, 2018
4.	Agreed Statement of Facts to be circulated to all Parties, by the Trustees on the issue of the determination of the definition of beneficiary and grandfathering (if any).	By February 28, 2018
5.	Further Settlement meeting of all counsel for the Parties to continue to discuss remedies and draft Agreed Statement of Facts.	By March 30, 2018
6.	Responses from the Trustees to the OPGT regarding all outstanding issues on accounts to the end of 2017	March 30, 2018
7.	All Parties to provide preliminary comments on the Trustee's first draft of an Agreed Statement of Facts.	By May30, 2018
8.	Concurrently with the preparation of the agreed statement of facts, all Parties to advise on whether they have any documents on which they respectively intend to rely on the issue of the remedies. If they have documents, they will file an Affidavit of Records	By ~~February 28~~, 2018 April 30
9.	Concurrently with the preparation of the agreed statement of facts, all non-parties may provide records on which they intend to rely to all Parties who will determine if they are duplicates and if not, non party may file an Affidavit of Records	By February 28, 2018
10.	Third 2018 Settlement Meeting of all counsel to continue to discuss remedies and draft Agreed Statement of Facts.	By April 30, 2018
11.	Questioning on new documents only in Affidavits of Records filed, if required.	By ~~May 30~~, 2018 June 15
12.	Non-party potential beneficiaries provide all Parties with any facts they wish to insert in the Agreed Statement of Facts.	By April 30, 2018

13.	Final Response by OPGT and any other recognized party on Agreed Statement of Facts.	By June 30, 2018
14.	Agreed Statement of Facts filed, if agreement reached.	By July 15, 2018
15.	Parties to submit Consent Order proposing revised Litigation Plan including a procedure for the remainder of the application including remedy for striking language or amending the trust under section 42 of the Trustee Act or amending the trust according to the trust deed. Alternatively, Trustees to file application re: same.	By July 15, 2018
16.	All other steps to be determined in a case management hearing	As and when necessary

THE SAWRIDGE TRUST

DECLARATION OF TRUST

THIS TRUST DEED made in duplicate as of the 15th day of August, A.D. 1986,

BETWEEN:

CHIEF WALTER P. TWINN,
of the Sawridge Indian Band, No. 19, Slave Lake, Alberta
(hereinafter called the "Settlor")

OF THE FIRST PART,

- and -

CHIEF WALTER P. TWINN, CATHERINE TWINN and GEORGE TWIN,
(hereinafter collectively called the "Trustees")

OF THE SECOND PART,

WHEREAS the Settlor desires to create an inter vivos trust for the benefit of the members of the Sawridge Indian Band, a band within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, and for that purpose has transferred to the Trustees the property described in the Schedule attached hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Deed, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule attached hereto and any accumulated income thereon;

(B) any further, substituted or additional property, including any property, beneficial interests or rights referred to in paragraph 3 of this Deed and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Deed;

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted; and

(E) "Trust" means the trust relationship established between the Trustees and the Beneficiaries pursuant to the provisions of this Deed.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell, lease or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed.

4. The name of the Trust Fund shall be **"The Sawridge Trust"** and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. The Trustees who are the original signatories hereto, shall in their discretion and at such time as they determine, appoint additional Trustees to act hereunder. Any Trustee may at any time resign from the office of Trustee of this Trust on giving not less than thirty (30) days notice addressed to the

other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee and the power of appointing additional Trustees to increase the number of Trustees to any number allowed by law shall be vested in the continuing Trustees or Trustee of this Trust and such power shall be exercised so that at all times (except for the period pending any such appointment) there shall be a minimum of Three (3) Trustees of this Trust and a maximum of Seven (7) Trustees of this Trust and no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there are more than Two (2) Trustees who are not then Beneficiaries.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the expiration of twenty-one (21) years after the death of the last survivor of the beneficiaries alive at the date of the execution of this Deed, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then alive.

During the existence of this Trust, the Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for trustees' investments by the Trustee's Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Saving Bank Act applies.

8. The Trustees are authorized and empowered to do all acts that are not prohibited under any applicable laws of Canada or of any other jurisdiction and that are necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Trust for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner or to any extent detracted from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with this Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of this Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provision of this Deed may be amended from time to time by a resolution of the Trustees that received the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years and, for greater certainty, any such amendment may provide for a commingling of the assets, and a consolidation of the administration, of this Trust with the assets and administration of any other trust established for the benefit of all or any of the Beneficiaries.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and shall be subject to this clause.

13. Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.

14. All documents and papers of every kind whatsoever, including without restricting the generality of the foregoing, cheques, notes, drafts, bills of exchange, assignments, stock transfer powers and other transfers, notices, declarations, directions, receipts, contracts, agreements, deeds, legal papers, forms and authorities required for the purpose of opening or operating any account with any bank, or other financial institution, stock broker or investment dealer and other instruments made or purported to be made by or on behalf of this Trust shall be signed and executed by any two (2) Trustees or by any person (including any of the Trustees) or persons designated for such purpose by a decision of the Trustees.

15. Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Trust shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

16. This Deed and the Trust created hereunder shall be governed by, and shall be construed in accordance with, the laws of the Province of Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

A. Settlor
CHIEF WALTER P. TWINN

B. Trustees:

1.
CHIEF WALTER P. TWINN

2.
CATHERINE TWINN

3.
GEORGE TWIN

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Dentons Canada LLP** 2900, 10180 101 Street Edmonton, AB T5J 3V5 Attention: Doris Bonora Telephone: (780) 423-7188 Facsimile: (780) 423-7276 File No.: 551880 -1

DATE ON WHICH ORDER WAS PRONOUNCED: December 17, 2015

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of the Office of the Public Guardian and Trustee of Alberta ("Public Trustee"), and Upon hearing from the counsel for: Sawridge First Nation, the Public Trustee, Sawridge Trustees and Catherine Twinn; and Upon the decision of The Honourable Mr. Justice Dennis R. Thomas dated December 17, 2015 (2015 ABQB 799);

IT IS HEREBY ORDERED THAT:

1. The Public Trustee's application for production of records/information from the Sawridge First Nation ("SFN") is denied.

2. Document production by SFN shall only be compelled pursuant to *Rule* 5.13(1) of the *Alberta Rules of Court*, Alta Reg 124/2010.

3. The Public Trustee shall not conduct an open-ended inquiry into the membership of the SFN and the historic disputes that relate to that subject.

4. The Public Trustee shall not conduct a general inquiry into potential conflicts of interest between SFN, its administration and the Sawridge Trustees.

5. The Public Trustee shall be limited to four tasks:

    (a) Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust; and

    (b) Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and

    (c) Identifying potential but not yet identified minors who are children of SFN members or membership candidates as these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

    (d) Supervising the distribution process itself.

6. The Public Trustee and the Sawridge Trustees are to immediately proceed to complete the first three tasks outlined in paragraph 5 above.

7. The Sawridge Trustees will submit a distribution arrangement by January 29, 2016.

8. The Public Trustee shall have until March 15, 2016 to prepare and serve an application, pursuant to *Rule* 5.13(1), on SFN identifying specific documents it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

9. If no Rule 5.13(1) application is made in relation to the proposed distribution scheme, submissions on the distribution proposal shall be made by the Public Trustee and Sawridge Trustees at a case management meeting held before April 30, 2016.

10. The Public Trustee shall have until January 29, 2016 to prepare and serve an application, pursuant to *Rule* 5.13(1), on SFN identifying specific documents for production which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

11. If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any Rule 5.13(1) application by the Public Trustee.

12. SFN shall provide the following to the Public Trustee by January 29, 2016:

    (a) the names of individuals who have:

        (i) made applications to join the SFN which are pending; and

        (ii) had applications to join the SFN rejected and are subject to challenge;

    (b) the contact information for those individuals where available.

13. The Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, (Minors who are children of members of the SFN), the Public Trustee shall file a *Rule* 5.13(1) application by January 29th, 2016.

14. The SFN and the Sawridge Trustees shall have until March 15, 2016 to make written submissions in response to any application by the Public Trustee described in paragraph 13 above

15. The Public Trustee shall not engage in collateral attacks on membership processes of the SFN. The Sawridge Trustees shall not engage in collateral attacks on SFN's membership processes.

16. The decision on costs in relation to the Public Trustee's production application is reserved until the Court evaluates any Rule 5.13(1) applications brought by the Public Trustee

"

"

Honourable Justice D.R.G. Thomas

Thomas J

APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Per:_____

Marco Poretti, Counsel for the Sawridge Trustees

Dentons Canada LLP

Per:_____

Doris Bonora, Counsel for the Sawridge Trustees

Hutchison Law

Per:_____

Janet L. Hutchison, Counsel for the Office the Public Guardian and Trustee

Parlee McLaws LLP

Per:_____

Edward H. Molstad QC, Counsel for Sawridge First Nation

Bryan & Co. LLP

Per:_____

Nancy E Cumming QC and Joseph Kueber QC , Counsel for Roland Twinn, Bertha L'Hirondelle, Margaret Ward and E. Justin Twin

McLennan Ross LLP

Per:_____

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Per:_____

Marco Poretti, Counsel for the Sawridge Trustees

Dentons Canada LLP

Per:_____

Doris Bonora, Counsel for the Sawridge Trustees

Hutchison Law

Per:_____

Janet L. Hutchison, Counsel for the Office the Public Guardian and Trustee

Parlee McLaws LLP

Per:_____

Edward H. Molstad QC, Counsel for Sawridge First Nation

Bryan & Co. LLP

Per:_____

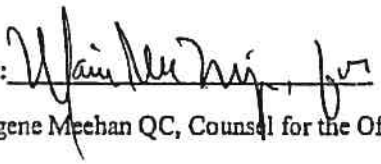
Nancy E Cumming QC and Joseph Kueber QC , Counsel for Roland Twinn, Bertha L'Hirondelle, Margaret Ward and E. Justin Twin

McLennan Ross LLP

Per:_____

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

Supreme Advocacy LLP

Per: 

Eugene Meehan QC, Counsel for the Office the Public Guardian and Trustee

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Twinn v. 1985 Sawridge Trust

Alberta Judgments

Alberta Court of Appeal

M.S. Paperny, B.L. Veldhuis and S.L. Martin JJ.A.

Heard: November 1, 2017.

Judgment: December 12, 2017.

Docket: 1703-0193-AC

Registry: Edmonton

[2017] A.J. No. 1340 | 2017 ABCA 419

Between Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon, Appellants (Applicants), and Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees"), Respondents (Respondents), and Public Trustee of Alberta ("OPTG"), Respondent (Respondent), and Catherine Twinn, Respondent (Respondent), and Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley, Not Parties to the Appeal (Respondents)

(28 paras.)

Case Summary

Appeal From:

On appeal from the Order by the Honourable Mr. Justice D.R.G. Thomas Dated the 5th day of July, 2017, Filed on the 19th day of July, 2017 (2017 ABQB 377; Docket: 1103 14112).

Counsel

N.L. Golding, Q.C., for the Appellants.

D.C. Bonora and A. Loparco, for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust.

J.L. Hutchison, for the Respondent The Office of the Public Guardian and Trustee.

D.D. Risling, for the Respondent Catherine Twinn.

Memorandum of Judgment

The following judgment was delivered by

THE COURT

Introduction

1 This appeal is part of ongoing litigation involving the 1985 Sawridge Trust (the Trust), which was established by

the Sawridge Indian Band No. 19 (the Band, now known as the Sawridge First Nation, or SFN) to hold certain assets belonging to the Band. Disputes regarding membership in the SFN have a history going back decades, but the current Trust litigation deals specifically with potential amendments to the Trust. The Trust litigation has been case managed since 2011, and several procedural orders have been made including the one on appeal: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 (Sawridge #5). The specific procedural issues on this appeal are straightforward: did the case management judge err in declining to add three potential parties to the Trust litigation, and did he err in awarding solicitor and his own client costs against those potential parties?

Background to the Sawridge Trust Litigation

2 In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave denied [2009] SCCA No 248; *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253.

3 The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination, although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended, some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

4 On August 31, 2011, the case management judge issued a procedural order intended to provide notice of the application for advice and direction to potentially affected persons. The current parties to the litigation include four of the Trustees, Roland Twinn, Walter Felix Twinn, Berta L'Hirondelle and Clara Midbo. A fifth Trustee, Catherine Twinn, is a separately named and separately represented party. Ms. Twinn, who was married to the late Chief Walter Patrick Twinn, is a dissenting trustee; although her position is not entirely clear, she seems to take the position that the Trust does not necessarily have to be amended. In 2012, the Public Trustee was added as a party to act as litigation representative for affected minors and those who were minors at the commencement of the proceeding but who have since become adults: 2012 ABQB 365 (Sawridge #1).

The application to be added as parties (Sawridge #5)

5 The application that gives rise to this appeal was filed by three individuals who wish to be added as party respondents to the Trust litigation. Each of the three is differently situated. Patrick Twinn is the son of Catherine Twinn. He is a member of the SFN and a beneficiary of the Trust. Shelby Twinn is Patrick Twinn's niece (she is the daughter of Paul Twinn, who is Patrick Twinn's half-brother). Roland Twinn, one of the trustees, is also Shelby's uncle. Catherine Twinn is her great-aunt. Shelby is a beneficiary of the Trust but not a member of the SFN. The

third applicant, Deborah Serafinchon, is neither a member of the SFN nor a current beneficiary of the Trust. She says that her father is the late Walter Twinn. She is not currently a status Indian under the *Indian Act*.

6 The appellants submit that their interests are directly affected by the Trust litigation and that they should be added as parties to that litigation. Shelby Twinn, in particular, wishes to argue that she may cease to be a beneficiary under the Trust if it is amended. Both she and Patrick Twinn wish to argue that the Trust cannot and ought not be amended. The position to be taken by Ms. Serafinchon is currently unclear.

7 The first procedural order, as amended on November 8, 2011, provided that any person interested in participating in the advice and direction application was to file an affidavit no later than December 7, 2011. Two of the three applicants were served with that order. There was no suggestion any of the applicants was unaware of the application and the time lines.

8 The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the Trust and the assets held in it, and expand the issues beyond those identified during case management.

9 With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

10 With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

11 The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87, he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

12 All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

13 Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v SNC Lavalin ATP Inc*, 2017 ABCA 95 at para 3, [2017] A.J. No. 276; *Goodswimmer v*

Canada (Attorney General), 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta*, 2013 ABCA 148 at para 13, 553 AR 44.

14 Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v (Niagara Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125:

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

15 This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v Bennett Jones*, 2010 ABCA 67 at para 13, 487 AR 111.

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

16 The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

17 Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co v Alberta & Southern Gas Co* (1993), 10 Alta LR (3d) 325 (QB) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v Raphael Tuck & Sons Ltd*, [1956] 1 QB 357 at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

18 In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

19 Neither the record, nor the oral or written submissions of the appellants, puts forward the positions each of the proposed parties intends to advance. As such, it is impossible for us to conclude that each proposed party has an interest that is not yet represented. Given the absence of information about the actual views of the appellants, we have no foundation to conclude otherwise. It is to be presumed that the Trustees and Public Trustee will put forward the various arguments regarding proposed amendments to the Trust and how those proposed amendments could affect the interests of various categories of current and potential beneficiaries. That there is a separately

represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.

20 The case management judge has been involved in the Trust litigation for several years, and deference is owed to his assessment of which parties need to be before the court in order for the questions raised in the litigation to be effectively resolved. His cautious approach to increasing the cost burden on the Trust and its beneficiaries, and unnecessarily expanding the Trust litigation, is well founded. Adding all the beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither advisable nor necessary. We would not interfere with the case management judge's decision not to grant party status to the appellants.

21 The appellants and Catherine Twinn also argue that the process followed here is flawed, as no originating application was filed to commence the Trust litigation. The Trustees say that it was always intended that the Procedural Order made by the case management judge on August 31, 2011 would be the constating document for the application for advice and direction. We agree with the Trustees that the lack of an originating application is not fatal to the litigation. However, the lack of an originating application, setting out specifics of the relief being sought, has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected. The Procedural Order provides details of how the litigation will proceed, including notice provisions and timelines, but it does not address the nature of the relief being sought.

22 During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. A second issue is what procedure will be implemented for beneficiaries and/or potential beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.

Did the case management judge err in awarding solicitor and own client costs?

23 The case management judge awarded solicitor and own client costs against two of the appellants, Patrick and Shelby Twinn, in favour of the Trustees. His rationale for doing so was "to deter dissipation of trust property by meritless litigation activities by trust beneficiaries": see para 53.

24 Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for "frills and extras" authorized by the client, but which should not fairly be passed on to a third party. They are distinct from solicitor-client costs, which allow for recovery of reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation: *Brown v Silvera*, 2010 ABQB 224 at para 8, 25 Alta LR (5th) 70; *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at para 77, 53 Alta LR (6th) 44.

25 Awards of solicitor-client costs are reserved for exceptional circumstances constituting blameworthy conduct of litigation; cases where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: see *Stagg v Condominium Plan 882-2999*, 2013 ABQB 684 at para 25; *Brown v Silvera* at paras 29-35; aff'd 2011 ABCA 109. The increased costs award is intended to deter others from like misconduct. This court has reiterated recently that awards of solicitor and client costs are rare and exceptional; awards of solicitor and "own client" costs are virtually unheard of except where provided by contract: see *Luft* at para 78.

26 In an earlier case management decision in the Trust litigation, the case management judge issued an *obiter*

warning to all parties, including counsel for Patrick Twinn, who seems to have been in attendance, of the possibility of awards for increased costs, saying:

> I have taken a "costs neutral" approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 (Sawridge #4) at para 30.

27 The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

28 In the circumstances, we conclude that there was not a sufficient basis for the award of extraordinary costs against the appellants on this application, and the appeal from the costs award is allowed. The case management judge awarded party and party costs against Deborah Serafinchon in favour of the Trustees, and we make the same award against Patrick and Shelby Twinn.

Memorandum filed at Edmonton, Alberta this 12th day of December, 2017

M.S. PAPERNY J.A.
B.L. VELDHUIS J.A.
S.L. MARTIN J.A.

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COURT FILE NUMBER:	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000, C. T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
APPLICANT in this Application:	OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA
RESPONDENT in this Application:	THE SAWRIDGE FIRST NATION

QUESTIONING ON AFFIDAVIT

OF

PAUL BUJOLD

E. H. Molstad, Q.C.	For Sawridge First Nation
D. C. E. Bonora, Ms.	For Sawridge Trustees
J. L. Hutchison, Ms.	For Office of the Public Trustee of Alberta
Allison Hawkins, CSR(A)	Court Reporter

Edmonton, Alberta
July 27, 2016

testified, happened? That event took place?
A Yes, it did.
Q And what we know, at this time, was that the purpose of the 1985 Trust, when it was structured, was to protect the assets of that Trust from those persons who might be forced upon the Sawridge First Nation as members under what was then Bill C-31?
A That's correct.
Q And -- and having reviewed all of the records that you've been able to gather, do you have any information that the resolution, Exhibit H, was not carried out?
A None.
Q Okay.
A None whatsoever.
Q Would you agree with me that based upon the purpose of the transfer of the assets from the 1982 Trust to the 1985 Trust, there would be no reason for the Sawridge trustees, the Sawridge First Nation, or chief and council to withhold the transfer of any assets?
A Not that I could think of.
Q They were trying to protect these assets, so their objective was to transfer the assets?
A We had a telephone conversation with Morris Cullity, who was the -- the solicitor working with them at the time on the transfer and on the

sum of £10,000, and the objects of the recommendation were the children of the daughter. I am of opinion, that the husband could not have claimed the legacy in right of his wife, and that the wife could not have claimed it for her own use. A settlement upon the wife and children was intended by the testator to be made by the husband and wife. The wife being dead, the settlement cannot be made; and I of opinion, that the children are entitled equally. It was argued that the subject was uncertain, because the testator recommended, that besides the £10,000 of his own, something of the husband's to be settled also; but there being certainty as to that which was in the testator's power, the trust as to this does not fail, because the testator expressed a wish as to something over which he had no power. His wish or recommendation that the husband should settle something of his own is perfectly consistent with his wish or recommendation that the whole of the £10,000 should be settled, whether the husband settled anything or not.

[148] KNIGHT *v.* KNIGHT. *Dec.* 17, 18, 19, 20, 21, 1839; *August* 7, 1840.

[S. C. 9 L. J. Ch. (N. S.), 354; 4 Jur. 839; and in House of Lords (sub nom. *Knight* v. *Boughton*), 11 Cl. & F. 513; 8 E. R. 1195; 8 Jur. 923. See *Holmesdale* v. *West*, 1866, L. R. 3 Eq. 485; *Shelley* v. *Shelley*, 1868, L. R. 6 Eq. 544; *Ellis* v. *Ellis*, 1875, 44 L. J. Ch. 226; *In re Oldfield* [1904], 1 Ch. 553.]

Principles of construction, in cases of precatory words in wills, and the requisites to enable the Court to construe them as imperative.

Where property is given absolutely to one, who is by the donor recommended, intreated, or wished, to dispose of it in favour of another, the words create a trust, if they are such as ought to be construed imperative, and the subject and objects are certain: thus, if a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part to C. D., a trust is created in favour of C. D.

Bequest to A. B. of a residue, with a recommendation to him after his death to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, has been considered sufficiently certain both as to subject and object, as to create a trust.

Where it is to be collected that the donor did not intend the words to be imperative, or if the first taker was to have a discretionary power of withdrawing any part of the subject from the object of the wish, or if the objects, or the interests they are to take, are not ascertained with sufficient certainty, no trust is created.

A testator, R. P. K., was entitled to real estates in tail male, with remainder to his cousins in tail, with remainder to himself in fee as right heir of the settlor, as to part under a settlement, made by his grandfather, and as to other part under the will of his same grandfather. R. P. K. suffered a recovery and acquired the fee-simple. He afterwards made his will, by which he devised all his estates, real and personal, to his brother T. A. K., if living at his decease, and if not to T. A. K.'s son, T. A. K. the younger, and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant, to the next male issue of his said brother, and his next descendant in the direct male line; but in case that no such issue or descendant of his said brother or nephew should be living at the time of his, the testator's decease, to the next descendant in the direct male line of his said grandfather, according to the purport of his will under which the testator inherited those estates which his industry had acquired, &c. He constituted the person who should inherit his said estates his sole executor and trustee, to carry the same and everything therein duly into execution, "confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property according to the plain and obvious meaning of his words:" he then gave some small legacies, and proceeded thus: "*I trust to the liberality of my successors to reward*

any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather." T. A. K. survived the testator. Held, that the words were not sufficiently imperative, and that the subject intended to be affected, and the interests to be enjoyed by the objects, were not sufficiently defined to create a trust in favour of the male line, and that T. A. K. took the property unfettered by any trust in favour of such male line.

Richard Knight being entitled to the manors of Leintwardine and Downton, executed an indenture of settlement, dated the 26th of April 1729, and made between himself and Elizabeth his wife of the **[149]** first part; his four sons, Richard Knight the younger, Thomas Knight, Edward Knight, and Ralph Knight, of the second part; and William Bradley and Joseph Cox of the third part: and it was thereby witnessed that the said Richard Knight, for the love and affection which he bore to his said wife and sons, and for settling an annuity by way of jointure upon his wife in lieu of dower, and "*for settling and assuring the hereditaments hereinafter mentioned, to continue in the name and blood of the said Richard Knight the elder, so long as it should please Almighty God,*" &c.; and to the end that the hereditaments might be settled and established to and for the uses, intents, and purposes, and upon and under the powers, provisoes, limitations, and agreements after expressed, he, the said R. Knight, conveyed the manors of Leintwardine and Downton, and the hereditaments therein described, to trustees, to the use of himself for life; and after his decease, to the use, intent, and purpose, that his wife might receive the annuity therein mentioned, with powers of distress and entry, and subject to the annuity, and the remedies for the recovery thereof, to the use of Richard Knight the younger and his assigns for life; with remainder to the use of the trustees, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other sons of the body of the said Richard Knight the younger, on the body of his then wife to be begotten, and the heirs male of such sons; with remainder to the use of the sons of the body of the said Richard Knight the younger, begotten on the body of any other wife in tail male; with remainder to the use of his son Thomas for life; with remainder to the sons of Thomas successively in tail male; with remainder to the use of his son Edward and his assigns for his life; with remainder to the sons of Edward successively in tail male; with **[150]** remainder to the use of his son Ralph and his assigns for life; with remainder to the sons of Ralph successively in tail male; with remainder to the use of the right heirs of Richard Knight, the settlor himself; the deed contained powers of jointuring and leasing.

Richard Knight, by his will dated the 27th day of October 1744, devised his real estates to trustees, to the uses, trusts, intents, and with and upon and under the same powers, provisoes, limitations, and agreements as he had theretofore settled, conveyed, and assured the manor of Leintwardine; and he directed the residue of his personal estate to be laid out in the purchase of lands, to be settled to the same uses.

The testator died on the 6th of February 1745, leaving his four sons surviving him. Richard, the eldest son, died in 1765, without leaving any issue male. Thomas, the second son, who died in 1764, was the father of the testator Richard Payne Knight and of Thomas Andrew Knight. Edward, the third son, who died in 1780, was the grandfather of the Plaintiff John Knight, and of the Defendant Thomas Knight. Ralph, the fourth son, died in 1754, leaving two sons, both of whom died long ago without issue male. (See the pedigree in the next page.)

The eldest son, Richard Knight, enjoyed the estates until his death in 1765, and was succeeded by his nephew Richard Payne Knight, who held the estates until his death in 1824.

Richard Payne Knight being tenant in tail of the estates, suffered common recoveries thereof, and having thereby barred the entail, became the owner thereof in fee.

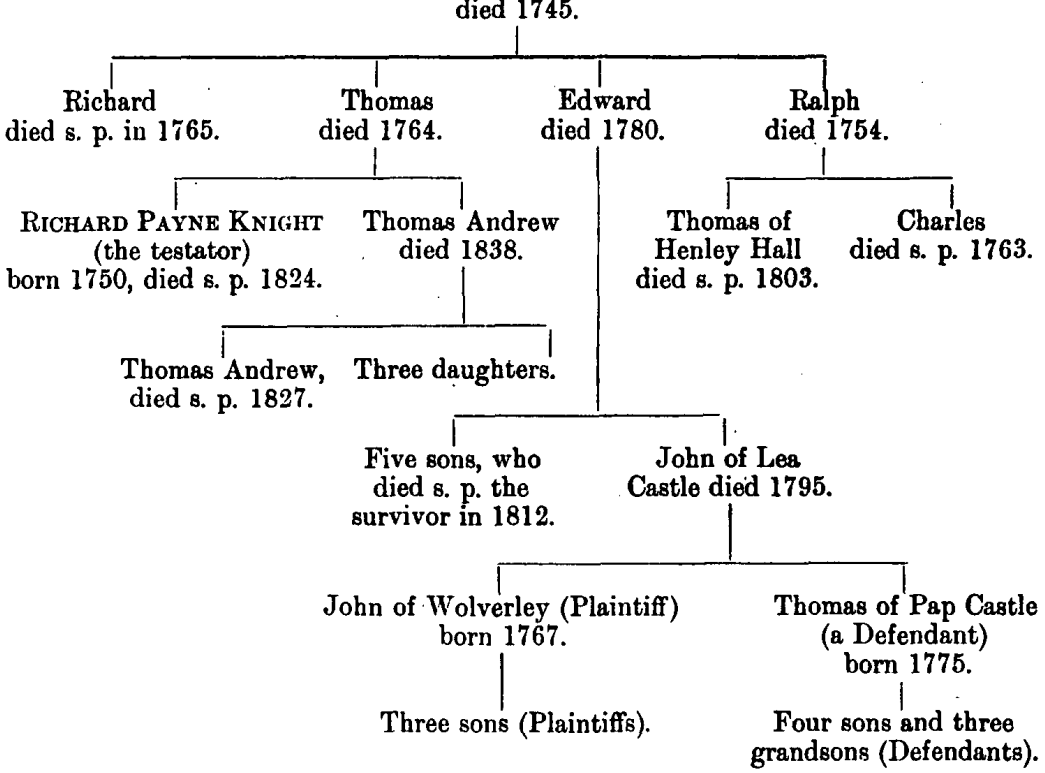
[151] On the 3d of June 1814 he made his will. At that time, his nearest relation, and the next male descendant from Richard Knight his grandfather, was his brother Thomas Andrew Knight, who had an only son, Thomas Andrew Knight, the younger; after his brother and nephew, the next male descendants from Richard

Knight the grandfather, were the Plaintiff John Knight and his sons, and the Defendant Thomas Knight and his sons.(1)

The will was expressed as follows:—"I give and bequeath *all my estates*, real and personal (except such parts as are hereinafter excepted), to my brother Thomas Andrew Knight, should he be living at the time of my decease; and if not, to his son Thomas Andrew Knight the younger; and in case that he should die before me, to his eldest son or next descendant in the direct male line; and in case that he should leave no such descend-**[152]**-ant in the direct male line, to the next male issue of my said brother, and his next descendant in the direct male line; but in case that no such issue or descendant of my said brother or nephew shall be living at the time of my decease, to the *next descendant in the direct male line of my late grandfather, Richard Knight of Downton, according to the purport of his will, under which I have inherited those estates which his industry and abilities had acquired, and of which he had therefore the best right to dispose;* subject, nevertheless, and liable in every case to the following reservations and deductions out of the rents and profits thereof, which I give and bequeath to the purposes and in the manner following, viz.: in the first place, I give and bequeath the sum of £300, to be distributed, within one month after my decease, among the poor of the several parishes of Downton, Barrington, Aston, Elton, Leinthall, Starkes, and the northern division of Leintwardine, all in the county of Hereford, in such portions to each individual pauper or poor family as my executor, or such person as he shall appoint for that purpose, shall think equitable and expedient, on condition that no diminution of the parish allowance to any person receiving the same shall be made in consequence thereof."

"And I do hereby constitute and appoint the person who shall inherit my said estates under this my will *my sole executor and* TRUSTEE, *to carry the same and every thing contained therein duly into execution; confiding in the approved honour and integrity of my family, to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which I make out of so large a property, according to the plain and obvious meaning of my words;* accordingly I give and bequeath in the second place, out of the said reserved rents and profits, the weekly sum of 25s. of good and

(1) PEDIGREE.



lawful money of Great Britain to my faithful old servant Ann Payne, **[153]** to be paid into her hands every seventh day, commencing from the day of my decease, so long as she shall live. And I also give and bequeath the sum of £3 weekly out of the said reserved rents and profits, to be paid in the same manner into the hands of Caroline Elizabeth Gregory, commonly called Ford, of No. 44 Wells Street, Oxford Road, London, as a reward for the affectionate kindness and sincerity with which she has always behaved towards me."

"And I moreover give and bequeath all coins and medals, and all wrought and sculptured articles in every kind of metal, ivory, and gems or precious stones, together with all descriptive catalogues of the same, and all drawings, and books of drawings of every kind, which shall be found in the gallery or western room of my house in Soho Square, to the British Museum, on condition that, within one year after my decease, *the next descendant in the direct male line then living of my above-named grandfather* be made an hereditary trustee, with all the privileges of the family trustees, to be continued in perpetual succession to his next descendants in the direct male line, so long as any shall exist (see 5 G. 4, c. 60); and in case of their failure, to the next in the female line; and also on condition that all duties and other expenses attending the taking possession of and removing the said articles be paid out of the funds of the said Museum. I had, in a will which I hereby revoke, bequeathed these articles to the Royal Academy; and it is not out of any change of sentiment or disrespect towards that body that I now alter that bequest, but because I think that, under the regulations now adopted in the Museum, they will be of more service to the academicians and students, as well as to the public at large, if added to those of my late respected friends Townley and Cratchrode, so as to **[154]** make one great collection, such as no other nation can boast, and afford a more complete comparative view of the rise and progress of imitative art than is anywhere else to be obtained. *I trust to the liberality of my successors, to reward any others of my old servants and tenants according to their deserts, and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather, Richard Knight.*"

Richard Payne Knight died the 29th of April 1824, and his brother Thomas A. Knight proved his will.

The state of the family was not altered during the time which elapsed between the date of this will and the death of Richard Payne Knight.

Thomas Andrew Knight took possession of the estates, and certain indentures, dated the 27th and 28th days of December 1825, and made between Thomas Andrew Knight of the first part, Thomas Andrew Knight the younger of the second part, and Thomas Pendarves Stackhouse of the third part, were executed: whereby after reciting that it was apprehended that Thomas Andrew Knight was not made subject to or bound by any trust of the will of R. P. Knight; or if bound by a trust, that he might exercise or perform the same trust, by settling the devised real estate on Thomas Andrew Knight the younger, his only son in tail male, and by settling the personal estate on him and the heirs male of his body, subject nevertheless to an estate for the life of himself therein; and that T. A. Knight, with the consent and approbation of his said son, had determined to settle the said real and personal estate accordingly; it was witnessed that he conveyed the said real estates to a trustee and his heirs, to the use of Thomas Andrew Knight for life, **[155]** without impeachment of waste; with remainder to the use of Thomas Andrew Knight the younger, and the heirs male of his body lawfully issuing; with remainder to the use of Thomas Andrew Knight in fee, subject nevertheless to the trusts, if any, created by the will of the said R. P. Knight, and which were not thereby performed and duly executed. By the same deeds the personal estate was limited to a trustee, in trust to permit Thomas Andrew Knight to use the same during his life; and after his death, in trust for Thomas Andrew Knight the younger and the heirs of his body.

In Trinity term 1826, a common recovery was suffered of such of the real estates at were situate in the county of Hereford, and Thomas Andrew Knight and his son Thomas Andrew Knight the younger were vouched therein, and the uses thereof were declared to be in favour of Thomas Andrew Knight in fee.

On the 30th of November 1827 Thomas Andrew Knight the younger died intestate and without issue, and his father Thomas Andrew Knight become his legal

personal representative. The trustee of the deeds of December 1825 afterwards died, and the Defendant, Edward W. W. Pendarves, was his legal personal representative.

Thomas Andrew Knight the elder afterwards executed certain indentures, dated the 24th and 25th of April 1835, the release being made between Thomas Andrew Knight of the one part and Sir William Edward Rouse Boughton of the other part; and after reciting that doubts were entertained whether Thomas Andrew Knight was not tenant in tail at law or in equity of the lands therein mentioned, being lands devised by the will of the said Richard P. Knight, and that he was desirous and had **[156]** determined to bar the same estate tail, if any, and enlarge his estate and interest therein to a fee-simple, it was witnessed that, in pursuance of the said determination and of the statute of the 3 & 4 W. 4, c. 74, Thomas Andrew Knight conveyed the lands in Middlesex, Salop, and Gloucester, discharged of all estates in tail and interests of the nature of estates tail, to Sir William Edward Rouse Boughton and his heirs, to the use of Thomas Andrew Knight in fee. The memorial of this deed was duly enrolled.

On the 5th of February 1838 Thomas A. Knight the elder made his will; and thereby, after bequeathing certain legacies, he stated that in the lifetime of his son they had fully considered and arranged as to the settlement and future disposition of the real and personal estate of which his late brother R. P. Knight had died seized and possessed, over which they had a disposing power, and accordingly had executed the deeds of the 27th and 28th of December 1825; and that it was the avowed and fixed determination of his said deceased son, expressed to him in conferences and consultations between them on the subject of their family interests and affairs, that if it had pleased God that his said son should survive him and become possessed of the said real estate, and have no issue, he, the said son, would, in that event, settle or otherwise devise or bequeath the property of the said R. P. Knight unto or amongst or for the benefit of his three sisters Frances Acton, Elizabeth Walpole, and Charlotte Lady Boughton, or their issues, &c., in such manner as he should, under existing circumstances, for the time being and from time to time think most fitting and expedient; his said son considering that it would be, on his part, an act contrary to every principle of natural and moral justice, if, in the events of his surviving him and leaving no issue, whereby the power **[157]** of disposing of the said real estate would reside and rest solely in himself, he should pass by and disinherit those so nearly connected in blood with him as his sisters and their issue and descendants, in order to prefer and benefit remote relations' descendants in the male line of his great grandfather Richard Knight; and that therefore, as under the calamitous and heavily afflicting event which had happened in the death of his son the power and right of disposing of the real estate of his brother, as well freeholds in fee and for lives, as copyholds, and also his personal estate, had devolved on him, he thereby, in accordance with the wishes and intentions of his son, &c., and in the events before mentioned, and also according to his own sense of justice, and wish and desire in all things, made his said will, and thereby devised and bequeathed all his real estates, comprising as well those which were his late brother's as his own (with certain exceptions), to Sir W. E. R. Boughton and Charlotte his wife, and such son as therein mentioned of the said Sir W. E. R. Boughton and Charlotte his wife. And in case it should thereafter be decided that he had not the power of disposing of the estates and property which belonged to his late brother, but which upon the assumption and full conviction that they did belong to him, and that he had such power, he had included in the aforesaid general devise, then he devised his own estate in the manner therein mentioned. He then stated his will to be, that the costs, &c., of the said Sir W. E. R. Boughton, and every other party interested in his will, in establishing his right to the estates of his late brother, and of any appeal to the House of Lords, should, in case the decision should be pronounced against his claim, and such costs should not be decreed to be paid out of such estate of his said late brother, be charged upon and payable out of his own copyhold and leasehold estates.

[158] And the same testator, after giving various other directions by his will, further provided, that if by the judgment it should be ultimately decided that he had not the right and power of disposing of the said real and personal estates of his said brother, &c., as he had done by that his will, then, and in such case only, and if under

any devise and bequest, limitation, or power in his said brother's will contained, he was, in consequence of failure of his own issue male, authorized and empowered to direct the order of succession, and appoint the real and personal estate, &c., to such one or more of the male descendants of his grandfather, Richard Knight, as he should think most proper, he thereby in exercise of his best judgment and discretion, and in order to continue and preserve the real estate in the male line of the family descended from Richard Knight, by limiting and appointing the same in manner after mentioned to the persons in succession, whom he considered the most likely to keep and preserve the same in the family, but subject to the previous devises and bequests, gave and devised the real estates which were the property of his late brother to his cousin the Defendant, Thomas Knight of Pap Castle, for life, and after his death to John Knight, his second son, and the heirs male of his body lawfully issuing, with other remainders over.

Thomas A. Knight the elder died in May 1838.

Previously, however, to this event, John Knight, who was the male heir of Richard Knight of Downton who died in 1745 (see pedigree, 3 Beav. 151 (n)), together with his three sons, filed this bill in May 1836, against Thomas Andrew Knight the elder and others; praying a declaration that according to the true construction of the will of Richard Payne **[159]** Knight deceased, all the real and all the residue of the personal estates of Richard Payne Knight ought to be conveyed and assigned in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight the grandfather, as long as the rules of law and equity would permit; and that the same ought to be so limited that Thomas Andrew Knight should have a life-estate therein, with such remainder to his issue male and to the Plaintiffs as might best answer the purposes aforesaid, and for accounts, &c.

Subsequently to the date of his will, Thomas Andrew Knight the elder put in his answer to the original bill in this cause, and thereby claimed under the will of Richard Payne Knight, with or without the aid of the further title derived under the indentures of the 27th and 28th of December 1825, and the indenture of the 23d day of March 1826, and the recovery suffered, and the said indentures of the 24th and 25th of April 1835, to be absolutely entitled to the whole of the real estates of the testator, Richard Payne Knight, in fee-simple and under the said will, or as next of kin of Thomas A. Knight the younger deceased, to be absolutely entitled to the leasehold and personal estate of the said testator.

Thomas Andrew Knight, as before stated, died on the 11th of May 1838, without having revoked or altered his will; and the necessary parties having been brought before the Court by a bill of revivor and supplement, and the preliminary enquiries having been made by the Master, the causes now came on for hearing.

The question in the cause was, whether the precatory words in the will of Richard P. Knight were imperative on Thomas A. Knight.

[160] Mr. Pemberton, Mr. G. Turner, Mr. J. Humphry, and Mr. Menteath, for the Plaintiffs. The dispositions contained in the will of the testator, Richard Payne Knight, imposed an imperative trust on his brother, Thomas Andrew Knight, to settle the property in the direct male line of the testator's grandfather, Richard Knight.

It has been now firmly established by a long series of decisions, "that whenever a person gives property, and points out the object, the property, and the way in which it shall go, that creates a trust; unless he shews clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." "If a testator shews a *desire* that a thing shall be done, unless there are plain express words or necessary implication, that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust;" *Malim* v. *Keighley* (2 Ves. jun. 335). To create by precatory words such a trust as the Court will carry into execution, there are three requisites; *first*, the precatory words must be sufficiently clear; *secondly*, there must be a certainty as to subject of the gift; and, *thirdly*, the objects to take must be certain; *Wright* v. *Atkyns* (Turner & Russ. 157), *Cary* v. *Cary* (2 Sch. & Lef. 189), *Cruwys* v. *Colman* (9 Ves. 322), *Morice* v. *The Bishop of Durham* (10 Ves. 535), *Paul* v. *Compton* (8 Ves. 380).

As to the first requisite, no particular form of words is necessary; it is sufficient for a testator "to express a *desire* as to the disposition of the property, and the desire

so expressed amounts to a command; *Cary* v. *Cary*. Thus "request," *Eade* v. *Eade* (5 Mad. 118); "desire," **[161]** *Harding* v. *Glyn* (1 Atk. 469); "my particular wish and request," *Foley* v. *Parry* (5 Sim. 138, and 2 Myl. & K. 138); "my last wish," *Hinxman* v. *Poynder* (5 Sim. 546); "recommend," *Tibbits* v. *Tibbits* (19 Ves. 656); *Horwood* v. *West* (1 Sim. & St. 387); *Malim* v. *Keighley* (2 Ves. jun. 333); "entreat," *Prevost* v. *Clarke* (2 Mad. 458, n.); "my dying request," *Pierson* v. *Garnet* (2 Bro. C. C. 38, and 226, and Pr. in Ch. 200, n.); "not doubting," *Parsons* v. *Baker* (18 Ves. 476); "trusting and wholly confiding," *Wood* v. *Cox* (1 Keen, 317, and 2 Myl. & Cr. 684); in short, "any words of recommendation and desire in a will are always expounded a devise," *Eales* v. *England* (Pr. Ch. 200). They also cited on this point *The Duchess of Buckingham's case* (2 Ves. jun. 530), and 1 Jarm. Pow. Devises, 355.

By the civil law, from which most probably the principle was adopted by Courts of Equity, "words of request or confidence *rogo, volo, mando, injungo, desidero, deprecor, fidei tuæ committo, scio te hæreditatem meam restituturum Titio,* are those by which a *fidei commissum* is created; but effect is given to a *fidei commissum*, if it can be collected from any expressions in the instrument that it was the grantor or testator's intention to create it" (2 Burges Comm. 106): and like a declaration of a use in equity, where there has been a transmutation of possession, "any expression whereby the mind of the party may be known that such a one shall have the land is sufficient;" *Jones* v. *Morley* (12 Mod. 159).

Secondly, the subject of the gift is sufficiently certain, being the estates and personal property devised and bequeathed by the will.

[162] Thirdly, the persons to take are sufficiently defined being persons in the male line in succession; a description much more perfect than the expressions "family," "relations," which have been held sufficiently certain to be carried into execution; *Harding* v. *Glyn* (1 Atk 470), *Cruwys* v. *Colman* (9 Ves. 322).

Applying these principles to the present case, the Court finds the testator "TRUSTS to the justice of his successors in continuing the estates in the male succession, according to the will of the founder of the family, his above-named grandfather Richard Knight;" and he "appoints the person who shall inherit his estates his sole executor and TRUSTEE, to carry the same and everything contained therein duly into execution, *confiding* in the approved honour and integrity of his family to take no advantage of technical inaccuracies." These words of trust and confidence are much stronger than many which have occurred, besides which, the person inheriting was also distinctly appointed a *trustee* to carry the will into execution. The clause respecting the hereditary trustee of the British Museum and the first gift over, in case of there being no issue of Thomas A. Knight and his son living at the testator's death, shew how anxious the testator was to keep up the distinction of the direct male line of his grandfather.

If, then, this be a trust binding on Thomas Andrew Knight, he was bound to carry it into effect by a settlement of the property, so as to run so far as was possible in the male order of succession. This was a trust to be executed by him; and the distinction between trusts executed and executory has always been recognised and admitted; *Mortimer* v. *West* (2 Sim. 282), *Jervoise* v. *The Duke of* **[163]** *Northumberland* (1 Jac. & W. 570), 1 Preston Abst. 135. The estate ought, therefore, to have been settled so as to give successive life-estates to the parties *in esse; Leonard* v. *The Earl of Suffolk* (2 Vern. 526), *Papillon* v. *Voice* (2 P. Williams, 470), *White* v. *Carter* (Amb. 670), *Humberston* v. *Humberston* (1 P. Williams, 332), *Hopkins* v. *Hopkins* (1 Atk. 593). In *Lord Dorchester* v. *The Earl of Effingham* (G. Coop. 319, and *post*, p. 180, n.; and see 2 Pow. Devises, 443), a testator, having a power of revocation and new appointment, directed "his estates to be attached to his title as closely as possible," it was held that the effect of his will was to abridge the estates of all persons *in esse*, in the line of the title, from estates tail to estates for life. In *Woolmore* v. *Burrows* (1 Sim. 512), lands were to be purchased and closely entailed to the family estate; and it was decided that every person *in esse* at the testator's death must have life-estates, and no more.

The difficulty of making a settlement so as to meet every event will probably be relied on by the other side; but the Court has frequently, as in several of the cases already referred to, overcome that objection. The same argument was used in *Pierson* v. *Garnet* (2 Bro. C. C. 38); but there it was met by the Court in these terms: the

difficulty and impracticability of carrying the trust into execution has been pressed: "That argument has no weight with me; because if an express trust had been raised, it must have been executed, though it would have been attended with all the same difficulties and impracticabilities stated in this case. However arduous the trust was, the Court must have carried it into execution."

[164] Mr. Spence, Mr. Coote, and Mr. Phillips, for the Defendant Thomas Knight of Pap Castle and his children, concurred in the argument of the Plaintiffs, that the precatory words used by the testator Richard Payne Knight were imperative upon Thomas Andrew Knight; but they contended that he had, by implication, a power of selection amongst the male descendants of the founder of the family; and that it had been duly executed by the will of Thomas Andrew Knight in favour of John Knight and his family; *Brown* v. *Higgs* (4 Ves. 708). That the only object of the testator R. P. Knight was to continue the property in the male line, to the exclusion of females; and there were many events which might happen, as the bankruptcy, insolvency or insanity of the elder male branches, which would render such a power of selection in T. A. Knight absolutely necessary to carry out the intention of the testator of continuing the estates in the family.

THE ATTORNEY-GENERAL [Campbell], Mr. Tinney, Mr. Wilbraham, and Mr. Hodgson, for the widow of the testator and for Mrs. Acton, his daughter, and Pendarves, a trustee;

Mr. Kindersley and Mr. K. Parker, for Sir W. Boughton and children; and

Mr. Richards and Mr. Torriano, for Mrs. Walpole, who claimed under the will of Thomas Andrew Knight, *contrà*, argued to the effect following. The testator, Thomas Andrew Knight, became absolutely entitled to the real and personal estate of his brother Richard Payne Knight, under the will of the latter, unfettered with any trust; or, supposing him to have taken an estate tail under the will, yet by means of **[165]** the recoveries it became afterwards converted in a fee-simple absolute.

The principle of holding precatory words to be imperative has been frequently disapproved of, and the current of modern authority is strongly against it. Lord Chief Baron Richards, speaking of the former decisions on the subject, thus expressed himself (10 Price, 265), "I hope to be forgiven if I entertain a strong doubt whether, in many, or perhaps in most of the cases, the construction was not adverse to the real intention of the testator.

"It seems to me very singular, that a person who really meant to impose the obligation established by the cases, should use a course so circuitous, and a language so inappropriate and also obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself, and to the professional or any other person who might prepare his will. In considering these cases, it has always occurred to me, that if I had myself made such a will as has generally been considered imperative, I should have never intended it to be imperative; but, on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer these whom I postponed to him, and who, next to him, were at the time the principal objects of my regard.

"I am happy to be enabled to state, that in this opinion I have the concurrence of a noble Judge, than whom there has never been, and, I believe, never can be, a person more active and acute in investigating the principles of the law in all its bearings, or more extensively learned on every legal subject."

[166] "In *Wright* v. *Atkyns* (1 Ves. & B. 315), Lord Eldon says, 'This sort of trust is generally a surprise on the intention, but it is too late to correct that.' Again, he says, 'We know the question was, what the word family meant? I do not believe that the testator intended a mere trust, but that must be the construction, if the word "family" is properly construed.' I have said so much as a justification, or rather the foundation, of the opinion which I entertain, that, though I hold myself bound by the decisions, and obliged to follow them, I do not consider it to be my duty to extend the rule of construction which has been adopted in them, and to add to the number of those where the Court appears to me rather to have made than to have given effect to the wills of testators."

In the same case Lord Redesdale said, that "all cases of this description were to be considered with very considerable strictness, as it was a very inconvenient mode of disposition:" *Meredith* v. *Heneage* (1 Sim. 566). And Sir Anthony Hart observes, as

to this equity, that "The first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions has, of late years, been against converting the legatee into a trustee:" *Sale* v. *Moore* (1 Sim. 540), and see *Lawless* v. *Shaw* (1 Lloyd & Goold, 154, and 165, n.; 5 Cl. & Fin. 129; 1 Drury & W. 512).

The words used by the testator are not, and were not, intended to be, imperative upon his successors. There are three instances in which he expresses his confidence; first, he "*confides* in the *approved honour and integrity* of his family to take no advantage of tech-**[167]**-nical inaccuracies, but to admit all the small reservations out of the property; secondly, he *trusts* to the *liberality* of his successors to reward old tenants and servants; and, thirdly, he trusts to their *justice* in continuing the estates in the male succession." In neither of these cases was it the intention of the testator to bind his family, and in every of them he would have deprecated the interference of this Court. If his wishes had been consulted, they undoubtedly would have been to have continued the estate in the family *for ever*. He was aware that this could not be effected by any legal means; he knew that he could not effectually settle his estate so as to be unalienable, further than the minority of the first tenant in tail; and he therefore considered the best mode to accomplish his wishes was to trust to the *honour* of his successors, and to impose on them what is termed "an imperfect obligation," which was to be binding morally only.

His intention, so far as can be collected, was to create a perpetuity, which the law will not allow, and which the Court cannot carry into execution; but taking it to be his wish to settle the estates "according to the will of the founder of the family," then the will of 1744 must be the scheme and model for effecting it. Under that will, Thomas Andrew Knight the elder would have been tenant in tail, and that estate has been barred, and converted into a fee-simple absolute. Again, at the date of the will of 1744, Richard Knight appears to have had seven grandchildren living, who were the children of his son Edward, yet he did not attempt to limit life-estates to the two generations, but gave estates tail to the children of Edward. If then this will is to be taken as a model, the settlement to be made would be very different from that asked by the Plaintiffs, namely, to limit successive life-estates to all the persons *in esse;* **[168]** or, as is stated in the prayer of the bill, to convey estates "in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight the grandfather of the testator, *so long as the rules of law and equity will permit;*" but would have been to Thomas A. Knight for life, with remainder to T. A. Knight the younger in tail.

This case has none of the requisites for enabling the Court to say, that the property is fixed with a positive trust in favour of the Plaintiffs.

First, the words are not sufficiently strong to be construed imperative. The testator trusts to their *justice*, a word clearly importing no legal obligation.

In *Harland* v. *Trigg* (1 Bro. C. C. 142) there was a gift to his brother of leaseholds, hoping he would continue them in the family, and it was held that no trust had been created. *Cunliffe* v. *Cunliffe* (Ambler, 686) was a devise to his son, recommending him if he died without issue to give and devise it to his brother the Plaintiff, and it was held that no trust had been created. In *Bland* v. *Bland* (2 Cox, 351), the testator earnestly requested the party by will to settle, and there no trust was created. In *Sale* v. *Moore* (1 Sim. 534), there was a gift to wife of a residue, recommending to her, and not doubting she would consider his near relatives, and there the decision was against there being any trust. In *Curtis* v. *Rippon* (5 Mad. 434), the testator trusted that the devisee would make such use of it as should be for her own and her children's spiritual and temporal good; remembering always, according to circumstances, the Church of God and the poor; and in *Lechmere* v. *Lavie* (2 Myl. & K. 197) where the **[169]** words were "of course they will leave what they have," &c.; and *Ex parte Payne* (2 Younge & C. 636), where the expressions were "I strongly recommend her to execute a settlement;" and *Meredith* v. *Heneage* (10 Price, 306, and 1 Sim. 542), it was successively held that no trust had been created.

The second requisite, namely, certainty in the subject, is also wanting; the property to be subject to the supposed trust is in the greatest degree of uncertainty. From the word "*continue*," one would suppose that those estates which passed by the will of Richard Knight the founder were alone to be included; as to which, however,

it seems strange that Richard Payne Knight should himself have defeated the will of his grandfather, by suffering recovery of those estates. There are, however, five distinct properties which may be the subject of the supposed trust: first, the realty settled by the deed of 1729; secondly, the realty afterwards acquired by Richard Knight, and devised by his will; thirdly, the personal estate of Richard Knight; fourthly, the real estates acquired by Richard Payne Knight; and fifthly, his personal estate. It is impossible to say, whether all or any, and which, of these different descriptions of property are to be included in the supposed trust. Again, it is clear, that the successors are to have the right of rewarding the old servants and tenants out of the property; and this, then, will have the effect of rendering the residue uncertain, and of making the trust void. *Wynne* v. *Hawkins* (1 Bro. C. C. 179); *Eade* v. *Eade* (5 Madd. 118).

Thirdly, the persons to take; the extent of their interest, and the estates they are severally to enjoy is in no way defined. How is this Court to carry such a trust into execution? What provision is to be made for jointures, **[170]** portions, leasing-powers, &c.? When are the daughters to be let in to take in default of male issue? It is impossible to carry anything so vague and uncertain into execution; and to effectuate the wish fully, a perpetuity must be created, which is contrary to law.

The wish is addressed to all successors in the most remote line; why is it to bind the first taker only?

The distinction between trusts executed and trust executory has always been admitted, but here the testator had no reference to any settlement to be executed, there is no conveyance to execute. It is true, that where a deed is to be executed, the Court will mould the limitation, so as to effectuate the general intention, "but if a party will be his own conveyancer and create the estate, the Court has no jurisdiction to alter it." *The Countess of Lincoln* v. *The Duke of Newcastle* (12 Ves. 238), *Douglas* v. *Congreve* (1 Beavan, 59). In *Gower* v. *Grosvenor*, as reported in Barnardiston (page 62), the Court seems to have considered that a conveyance was to be executed. *Humberston* v. *Humberston* was a gift to trustees to convey. In *Woolmore* v. *Burrows*, there was a direct gift to the executors to be laid out, and closely entailed to the family estate. *Lord Dorchester* v. *The Earl of Effingham* appears to have been a legal devise under a power, and the estate was to be attached to the title as closely as possible.

There is no reported case in which the Court has directed a settlement to be executed upon precatory words, and no case in which words of request have been addressed to so indefinite a series of persons as successors.

Mr. Pemberton, in reply.

[171] *August* 7. THE MASTER OF THE ROLLS [Lord Langdale] (after stating the circumstances of the case, proceeded): The Plaintiff, John Knight of Wolverley, contends, that, under the will of Richard Payne Knight, his brother Thomas Andrew Knight was bound to make a strict settlement of the real and personal estates upon the male descendants of Richard Knight the grandfather.

The Defendant Thomas Knight of Pap Castle contends, that Thomas Andrew Knight was not bound to make a strict settlement of the estates, but was bound to make some settlement thereof upon one or more of the male descendants of Richard Knight, among whom he had a power of selection, which he has duly exercised by his will.

The Defendant Sir William Edward Rouse Boughton, and the widow and daughters of Thomas A. Knight, who claim under his will contend, that he had an absolute estate and interest in the property in question, and had a power of disposition, unfettered by any trust or obligation whatever.

The principal question is, whether a trust in favour of the male descendants of Richard Knight is created by the will of the testator Richard Payne Knight.

That the testator wished that his estates, or at least, that some estates should be preserved in the male line of his grandfather, and had a reliance, or in the popular sense, a trust, that the person to whom he gave his property, and those who should succeed to it, would act upon and realise that wish, admits of no doubt. He has expressed his wish and his reliance in terms which are, to that extent, sufficiently clear.

[172] But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or

enforced as a trust in this Court; and in the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining, whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which this Court ought to deem fit to be, or capable of being enforced as such. In the construction and execution of wills, it is undoubtedly the duty of this Court to give effect to the intention of the testator whenever it can be ascertained: but in cases of this nature, and in the examination of the authorities which are to be consulted in relation to them, it is, unfortunately, necessary to make some distinction between the intention of the testator and that which the Court has deemed it to be its duty to perform; for of late years it has frequently been admitted by Judges of great eminence that, by interfering in such cases, the Court has sometimes rather made a will for the testator, than executed the testator's will according to his intention; and the observation shews the necessity of being extremely cautious in admitting any, the least, extension of the principle to be extracted from a long series of authorities, in respect of which such admissions have been made.

As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust.

[173] First, if the words are so used, that upon the whole, they ought to be construed as imperative;

Secondly, if the subject of the recommendation or wish be certain; and,

Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.

In simple cases there is no difficulty in the application of the rule thus stated.

If a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.

So, if a testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B., after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and that the relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable—so capable of being made certain, that the rule is applicable to such cases.

On the other hand, if the giver accompanies his expression of wish, or request by other words, from which it is to be collected, that he did not intend the wish to **[174]** be imperative: or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request: or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words "free and unfettered," accompanying the strongest expression of request, were held to prevent the words of the request being imperative. Any words by which it is expressed or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told (2 Ves. jun. 632, 633) that the question "never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered." And (10 Ves. 536) "wherever the subject, to be administered as trust property, and the objects, for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the Court as evidence, that the mind of the testator was not to create a trust;

and the difficulty, that would be imposed upon the Court to say what should be so applied, or to what objects, has been the foundation of the argument, that no trust was intended;" or, as Lord Eldon expresses it in another **[175]** case (Turn. & Russ. 159), "Where a trust is to be raised characterised by certainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the Court to say, it is not sufficiently clear what the testator intended."

I must admit, that in the endeavour to apply these rules and principles to the present case, I have found very great difficulty; that in the repeated consideration which I have given to the subject, I have found myself, at different times, inclined to adopt different conclusions; and that the result to which I have finally arrived has been attended with much doubt and hesitation.

The testator, at the date of his will, was entitled in fee to a large real estate, and absolutely entitled to a very considerable personal estate. Of the largest part of the real estate he had been tenant in tail, under the dispositions made by his grandfather Richard Knight; he had suffered recoveries, whereby he became entitled to the same estate in fee; and the question is, whether by the will he meant to impose on his brother, Thomas Andrew Knight, the trust or duty of making such a settlement as is alleged by the Plaintiffs; or such a settlement upon some of the male descendants of the grandfather as would, under the will of Thomas Andrew Knight, give a right to the Defendant, Thomas Knight of Pap Castle; or did he mean that his brother was to have over the estate the same power which he himself had acquired and enjoyed; and which by his will he exercised for the purpose of transmitting the estate to the next male heir of his grandfather, and which he wished his successors to use in the same manner for the further transmission of the estates in the same line. And I **[176]** am of opinion, though, I admit, after great doubt and hesitation, that the testator did not intend to impose an imperative trust on his successor, and that his will ought not to be construed to have that effect.

As he who had made himself absolute owner of the property had conceived himself bound in honour to transmit it to the male line of his grandfather, so he wished the same sentiment to govern his successors. He was pleased to speak of the honour and integrity of his family, and he expressed his trust or reliance on the justice of his successors; but it does not appear to me that he intended to subject them, as trustees, to the power of this Court, so that they were to be compelled to do the same thing which he states he trusted their own sense of justice would induce them to do.

It is a common observation in all such cases, that the testator might, if he had intended it, have created an express trust; but the authorities shew that if there be sufficient certainty, and nothing in the context of the will to oppose the conclusion, the trust may and must be implied; and the question is, whether there is a trust by implication.

He gave all his estates, real and personal (except as therein mentioned), to his brother, or to the next descendant in the direct male line of his grandfather, who should be living at the time of his death. The gift is in terms which make the devisee the absolute owner, and give him the power of disposing of the whole property (with such exceptions as are mentioned) as he pleases. The exceptions, deductions, or reservations consist of certain gifts for charitable and other purposes; and he constitutes his devisee sole executor and trustee to carry his will into execution, "confiding in the ap-**[177]**-proved honour and integrity of his family to take no advantage of any technical inaccuracies;" and the context appears to me to shew, that these words relate to the reservations which he had made out of the general devise and bequest to his brother or the next descendant in the direct male line of his grandfather. The expressions used in his great bequest to the British Museum, afford additional evidence of his wish to maintain the distinction of his family in the same line; but I think that the question in the cause depends on the effect to be given to the last sentence in the will. Having given all his estates, real and personal, to his successor, that is, the next male descendant, and having given a few legacies, he says, "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather Richard Knight."

In this passage there is no doubt of the wish, or of the line of succession, in which

the testator desired the estates (whatever he meant by that term) to devolve or be transmitted.

Contemplating his successors, and, as it would seem, all his successors without limit in that line, he says, that he trusts to their liberality for one purpose, and to their justice for another. So far as he trusts to their liberality to reward any of his old servants or tenants, according to their deserts, he cannot be understood to have intended to create an imperative trust. Notwithstanding the use made of the word "trust," an indefinite discretion was, in that respect, left with the successors; and it is difficult to suppose, that having in this sentence used the word "trust" in a sense consistent with an **[178]** indefinite discretion in the person trusted, he should, in the same sentence, use the word "trust" in a sense wholly inconsistent with such discretion;—in a sense which imposed an absolute obligation to resort to the most refined subtleties of the law for the purpose of executing a trust in such a manner as to preserve, by compulsion, the succession to the estate in the same line for the longest time possible. Admitting the wishes of the testator, which seem to me sufficiently expressed, I have found an insuperable difficulty in coming to a satisfactory conclusion that he did not intend to rely on the honour, integrity, or justice of his family or successors for the performance of his wishes, but did intend to impose upon his successors an obligation to be enforced by legal sanction: and the impression arising from the last words in the will appears to me to be increased by a consideration of the preceding parts. He gave absolute estates; as to the gifts to other persons, he confides in the approved honour and integrity of his family that no advantage will be taken of technical inaccuracies to defeat them; and as to the succession of the estates intended to pass in the line he had chosen, he trusts to their justice. It seems to me, as if he had said, "you see my sense of what is due to the founder of the family; under his will, I have inherited the estates which his industry and abilities acquired, and of which he had, therefore, the best right to dispose. I have, by my own act, made myself absolute master of the estates, but I think it just to continue the succession in the same manner: this I do by my will, and I trust to your justice to do the like." If this were his meaning, it is consistent with an intention that each successor should take from his immediate predecessor, by gift proceeding from a sense of justice, or by descent from the same motive, an absolute interest in the estates; and that the continuance in the line designated should be provided for in that way.

[179] I think, therefore, that there is great reason to doubt the intention to create an imperative trust: and looking to the subject to which his wishes were directed—observing the absolute gift of all his estates, real and personal, with certain exceptions; and that, in the last clause, he has not used the words "my said estate," or any words clearly and certainly indicating all that he had given to those whom he has called his successors, but had simply used the words, "the estates," leaving it be matter of by no means easy construction, whether he intended under that expression to include the personal estate as well as the real; and it not being certain, having regard to the subsequent reference to the will of his grandfather, whether he meant to include more than the estates of his grandfather, to which he had himself succeeded; and observing that some part of the personal estate, at least, was subjected to the liberality of his successors, I think that there is reason to doubt whether the subject is sufficiently certain for a trust of this nature.

The objects do appear to me to be indicated with sufficient certainty, and it seems to me clear in what order he wished them to take. But, unless they were to take successively as absolute owners, I cannot discover what estates they were intended to take. I have not been able to persuade myself that the testator meant to tie down his successor to make such a settlement as is proposed by the Plaintiffs, and nothing less would give the Plaintiffs any right to ask for a decree of this Court in their favour; and if I might be permitted to adapt the words of Lord Rosslyn, in the case of *Meggison* and *Moore* (2 Ves. jun. 633), to the circumstances of this case, I should say, that "if I were imperatively to declare that the successors designated by the will should take only **[180]** for life and their issue in strict settlement, I should do a thing most foreign to the testator's intention. His successor might have done what is suggested. The testator intimated a wish to him, and gave sufficient power; but I cannot say that he has left it to the Court of Chancery to accomplish his wishes."

On the whole, I am under the necessity of saying, that for the creation of a trust, which ought to be characterised by certainty, there is not sufficient clearness to make it certain that the words of trust were intended to be imperative, or to make it certain what was precisely the subject intended to be affected, or to make it certain what were the interests to be enjoyed by the objects.

It appears to me, therefore, that the Plaintiffs have not made out any title, and that the bill ought to be dismissed.(1)

Bill dismissed with costs.

(1) Lord Dorchester *v.* The Earl of Effingham. Rolls. *Feb.* 18, 19, *March* 9, 1813.

[See cases in note to *Knight* v. *Knight*, 3 Beav. 148.]

A. having a power of revocation and new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible." Held, that the estate of B. and all other tenants in tail *in esse* at A.'s death (being in line of the title) were abridged to estates for life only.

The facts of the case, as appearing by the decree, were as follows: under certain indentures, real estates were limited to the use of Guy Lord Dorchester for life, with remainder to his then eldest son Christopher for life, with remainder to Christopher's first and other sons in tail male, with remainder in succession to the other children of Guy Lord Dorchester for life, with remainder to their first and other sons in tail. A power of revocation of their uses, and of making a new appointment by deed or will, was reserved to Guy Lord Dorchester.

Christopher died in 1806, leaving the Plaintiff Arthur Henry, his eldest son, an infant.

Guy Lord Dorchester died in 1808. By his will, attested so as to pass real estate, he expressed himself as follows:—"*All my landed estates to be attached to my title as closely as possible;* all the timber woods **[181]** and trees on my estates I leave to my executors in trust to increase my landed property; all debts due to me from Government, and all my personal property not otherwise disposed of, I leave to my executors in trust to increase my landed property, all which trust shall be lodged in Bank stock, there to accumulate principal and interest, and profits arising therefrom, till my executors find an adviseable purchase adjoining to or near my estates. The executors to have a power, with the consent and approbation of Lady Dorchester, to sell my estates for the purpose of buying others, which may unite or approximate the landed property."

By a codicil unattested, he gave all the timber on his estates, and all his personal property not otherwise disposed of, to his executors in trust to increase his landed property.

After the death of Guy Lord Dorchester, his grandson Arthur Henry, then Lord Dorchester, who, under the limitations in the deeds, taken independently of the will, would have been tenant in tail, filed this bill by his guardian, praying that he "might be declared to be tenant in tail of the said settled estates, under and by virtue of the limitations of the said deeds;" that the deeds and will might be carried into execution, and for a declaration of the rights of the parties.

The parties entitled in remainder, after the limitations to the Plaintiff and his issue, insisted "that the said testator did by his said will alter the uses of the said settlement, and that he had full right and power so to do; and that upon the true construction of the said will, the Plaintiff ought to be declared to be tenant for life of the estates of the said Guy Lord Dorchester; and that they would become entitled upon the death of the said Plaintiff to successive estates for life therein, with remainder to their respective sons in tail male; and the Defendant Guy Carlton claimed to be the first tenant in tail in being of the said estates."

It appears from the registrar's note-book, that the cause came on upon the 18th and 19th of February 1813, when it was ordered to stand over for a fortnight, with liberty for the Plaintiff to amend the bill, and bring the cause again to a hearing as

he should be advised. The cause accordingly came on upon the 9th of March 1813, when

Sir S. Romilly and Mr. Trower appeared for the Plaintiff.

Mr. Leach and Mr. Courtenay, for Lady Dorchester and the Defendants to the amended bill.

Mr. Richards, for the executors.

Sir William Grant, Master of the Rolls, declared "that by the effect of the said testator's will, the estate tail of the said Plaintiff Lord Dorchester, in the said settled estates, and the estates tail of all other the male issue **[182]** or descendants (if any) of the testator *in esse*, at the time of the testator's death, in the same estates were abridged to estates for life only, with remainder to their first and other sons successively in tail male in strict settlement." (NOTE.—See this case reported on another point in G. Cooper, 319; where the former part of the will is stated.)

[182] FRANKS *v.* PRICE. *Dec.* 6, 7, 10, 11, 13, 14, 1839; *August* 8, 1840.

[S. C. 9 L. J. Ch. (N. S.), 383; and at law, 5 Bing. (N. C.), 37; 6 Scott. 710.]

A testator gave life interests in real and personal estate to A. and B., with interests to their issue male in certain events only, and the estate was given over to the heir of the testator on a general failure of issue male of A. and B. Held, that A. and B. took estates tail by implication.

A testator devised his real and personal estate to trustees, and gave life-estates therein to several persons, namely, A., B., &c.; and after their deaths he directed the trustees to pay the income to Moses and Naphthali, during their respective lives, share and share alike; and in case either of them should, *after the deaths of A., B., &c.*, depart this life without leaving issue male of his body, in trust to pay the whole income to the survivor for life; and he directed that if Moses should, *after the deaths of A., B., &c.*, die *before Naphthali, leaving issue male*, then the trustees should *convey*, a moiety of the real estate, to the use of the first and other sons of Moses in tail male, with remainder to Naphthali for life, with remainder to his first and other sons in tail, and in default to the testator's right heirs, and lay out a moiety of the personal estate in land, and convey the same to trustees to the like uses. The testator made a similar disposition *mutatis mutandis* of the other moiety in case of the death of *Naphthali, after the death of A., B., leaving issue male*, and he provided that in case Moses and Naphthali should die without leaving issue male, or if such issue male should die without leaving any issue male, the trustees should convey the property to such person as should, at the death of the survivor of Moses and Naphthali, be the right heir of the testator. It will be seen that no provision was made for the event (which happened), of *Moses dying without issue before the death of A., B.* Naphthali survived Moses and A., B., &c., and Moses died without issue. Held, first, that the words "after the deaths of A., B.," &c., did not import contingency, but were merely words of reference, shewing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession until those prior gifts were satisfied or had become inoperative. Secondly, that the words, "if Moses should die before the death of Naphthali, leaving issue male," must have their natural meaning, and be taken to provide only for the particular cases expressly described. Thirdly, that to effectuate the general intent, Naphthali took an estate tail by implication in both moieties of the realty, and an absolute interest in the personalty. And, fourthly, that the trusts on which the question arose were not executory so as to alter the construction as arising on an executed trust.

The question in this case arose on the will of the testator Moses Hart, and was, whether, under the will and in the events which had happened, Naphthali Hart took an estate for life, or an estate tail by implica-**[183]**-tion, in the real and personal estate of the testator. In the former case alone the Plaintiff would be entitled.

The testator, by his will, dated the 2d of April 1756 (after bequeathing several annuities and certain legacies, and specifying various personal property to which he

Merrill Petroleums Ltd. v. Seaboard Oil Co.

Alberta Judgments

Alberta Supreme Court

Egbert J.

August 28, 1957.

[1957] A.J. No. 29 | 22 W.W.R. 529 | 1957 CarswellAlta 56

Between Merrill Petroleums Limited and Cancoll Oil & Gas Company Limited, and Seaboard Oil Company, Canadian Superior Oil of California, Limited and Honolulu Oil Corporation

(108 paras.)

Counsel

C.E. Smith, Q.C., W.M. Mackay, and J.M. Thomson, for the Merrill Petroleums Limited. R.A. MacKimmie, Q.C., for the Cancoll Oil & Gas Company Limited. D.P. McLaws, Q.C., Michael Bancroft and C.A.G. Palmer, for the Seaboard Oil Company. G.H. Steer, Q.C., for the Canadian Superior Oil of California Limited. J.V.H. Milvain, Q.C., and J.H. Laycraft, for the Honolulu Oil Corporation.

EGBERT J.

1 At the opening of this trial it was agreed by counsel for all parties that issues to be tried should be confined to the question of the "liability" of the defendants to the plaintiffs, leaving the question of damages, if it should be necessary to ascertain them, to be determined at a further hearing. Accordingly no evidence as to the damages allegedly suffered by the plaintiffs was adduced at this hearing.

2 On December 1, 1948, the defendants Seaboard Oil Co. (hereinafter called "Seaboard"), Honolulu Oil Corpn. (hereinafter called "Honolulu") and the predecessor of the plaintiff Merrill Petroleums Ltd. (hereinafter called "Merrill"), Barnsdall Oil Co. entered into an agreement (referred to throughout the trial and hereinafter referred to as "the three-way agreement") for the purpose of jointly acquiring, exploring and developing petroleum and natural gas lands in Canada. Nothing turns in this action upon the acquisition by Merrill of the Barnsdall company's interest in this agreement, or upon the acquisition by the other plaintiff Cancoll Oil & Gas Co. (hereinafter called "Cancoll") of 40 percent of Merrill's interest. It is I think common ground that for the purpose of this action the three-way agreement may be deemed to have been originally entered into between Seaboard, Honolulu and Merrill and that Merrill and Cancoll may be regarded as one party, so that hereinafter where reference is made to "Merrill" that reference can be regarded, unless the context otherwise requires, as including Cancoll. Each of these parties, Seaboard, Honolulu and Merrill, is the owner of a one-third undivided interest in the "premises" as defined in the agreement. In order finally to dispose of Barnsdall Oil Co., it is sufficient to say that while it was originally designated as "operator" in the three-way agreement, it was later by agreement between the parties replaced by Seaboard, so that during the period to which this action relates, Seaboard was always the "operator" under the three-way agreement.

3 Since the rights and obligations of the parties largely turn upon the provisions of the three-way agreement, it is necessary to examine it closely and to quote some of its provisions. The agreement recites that the parties (referred

to as "participants") are the owners or tenants in common of certain Crown leases, operating agreements, option agreements and other rights and interests of and in Crown and freehold lands in the province of Alberta, and desire to acquire hereafter, as tenants in common, additional Crown reservations, etc. in Alberta and in other provinces of Canada. (This last provision and the operating section relating to it were later amended by mutual agreement so as to confine the operation of this agreement to lands, etc. in Alberta.) The agreement goes on to recite that the participants desire to enter into this operating agreement to provide for the acquisition, exploration, development and operation of the premises (hereinafter defined) by a single operator on behalf of all participants.

4 Clause 1 is the definition clause, and provides inter alia:

> "(a) 'Premises' shall mean initially the Crown reservations, leases, operating agreements, option agreements and other rights and interests of and in Crown and freehold lands, in the Province of Alberta ... now owned or hereafter acquired by participants as tenants in common under this agreement, and from time to time thereafter such of the premises as remain subject to this agreement.
>
> ...
>
> "(d) 'Participating Equity' shall mean that percentage which is equal to the undivided ownership of each participant ....
>
> "(e) 'Operator' shall mean the person, firm or corporation selected as provided in this agreement to act as operator for participants under this agreement.
>
> "(f) 'Common Operation' shall mean the acquisition, exploration, development and operation of the premises pursuant to this agreement."

5 The agreement then goes on to provide, inter alia, as follows:

> "2.(a) Operator as such shall not be liable to any participant for any loss or damage which shall not result from the gross negligence or wilful misconduct of operator, ...
>
> "2.(g) It shall be the duty of operator to carry out all instructions and determinations made pursuant to Paragraph 3 hereof. Operator shall not be obligated to proceed with any common operator requiring approval or determination by participants, as aforesaid, unless and until approval thereof shall have been given or determination thereof made as herein provided.
>
> "2.(i) It is the intention of each participant to establish operator as its agent under this agreement for the sole purpose of exploring, developing, operating and protecting its interest in the premises to the extent set forth herein.
>
> "2.(j) If and when a participant is 'operator' (which has been the situation throughout the life of the agreement) such participant shall not thereby be deprived of any of the rights, or relieved of any of the duties or liabilities of a participant but shall have all such rights aid duties and liabilities of a participant in addition to those of operator.
>
> "3. Except as otherwise expressly provided in this agreement all exploration, drilling, development and producing operations shall be in accordance with and subject to the approval of not less than fifty percent (50%) in number of participants owning sixty-six and two-thirds percent (66 2/3%) or more of the participating equities of all participants, and except as otherwise provided in this agreement all questions which may be determined under this agreement by participants shall be determined by agreement of not less than fifty percent (50%) in number of the participants owning sixty-six and two-thirds percent (66 2/3%) or more of the participating equities of all participants, and all matters so determined shall be binding on all participants ... The acquisition of additional Crown reservations, leases, operating agreements, and other rights and interests in Crown and freehold lands shall be subject to the unanimous authorization or approval of participants."

6 The clause goes on to appoint an agent of each participant with full power and authority to represent and bind

such participant in all matters relating to the agreement. Each participant has had through the life of this agreement such a named agent, although this agent has (except in the case of Honolulu) been changed from time to time.

7 By an amending agreement dated July 24, 1953, clause 4(d) was added to the agreement whereby the operator was granted a lien upon the interest of any participant as security for any indebtedness of such participant.

> "9.(a) The premises have been acquired and may hereafter be acquired in the name of one or more participants or in the name of a nominee or nominees. All the premises shall be held in trust for participants, and beneficially owned by them in proportion to their respective participatory equities. Subject to the applicable law any participant may elect at any time to cause assignments to be made to participants of their respective participatory equities in the premises or any of them. None of the premises shall be sold or otherwise disposed of except with the unanimous authorization or approval of participants or as otherwise provided in sub-paragraph (c) of this Paragraph 9.
>
> "9. (c) This clause provides that any party desiring to sell or assign any interest hereunder or in the premises shall give notice thereof to the other participants who shall have the right to purchase it on like terms. Except as provided in this clause no participant may sell, assign or transfer any interest.
>
> "12. During any time that the participants have the right to surrender or quitclaim any of the premises, any participant may tender to the other participants an assignment to such other participants as tenants in common, in proportion to the participating equities of such participants, respectively, covering the entire right, title and interest of such assigning participant in and to the premises desired to be surrendered or quitclaimed by such participant. If such assignment is tendered, the other participants shall be deemed to have accepted the same if the right to surrender or quitclaim the premises therein described continues to exist for not less than twenty (20) days and such participants do not, within such period, elect, by notice in writing to such assigning participant, to join with such assigning participant in surrendering or quitclaiming such premises. If such participants accept such assignment they shall thereby ipso facto indemnify the assigning participant against all obligations and liabilities with respect to such premises, except obligations and liabilities actual or contingent then accrued, and the assigning participant shall thereby ipso facto be released and discharged of all obligations and liabilities to the other participants under this agreement except obligations and liabilities actual or contingent then accrued, and the entire right, title and interest so assigned, if less than the entire interest of the assigning participant under this agreement, shall be excluded from this agreement and included in a new operating agreement in the same manner as is provided in paragraph 9(c) hereof with respect to partial assignments of interests under this agreement."

8 The participants operated under this agreement from the time of its inception, acquiring, exploring and developing various lands in Alberta. In June, 1953, Seaboard, with the approval of Merrill and Honolulu, entered into an agreement (hereinafter called the Superior agreement) with Canadian Superior Oil of California Ltd. (hereinafter called "Superior") with reference to certain lands in Alberta held, as lessee, by Superior. This agreement was entered into by Seaboard pursuant to the provisions of the three-way agreement.

9 The agreement dated June 22, 1953, recites that

> "Seaboard is desirous of conducting certain reflection seismograph work in said area in order to obtain the right to earn an interest in some or all of said lands ...." (Italics mine.)

10 It goes on to provide inter alia as follows:

Part 1:

> "Sec. 6. The term 'anomalous area' shall mean the land within the surface outline ... of an area containing some of said lands which, in the opinion of the parties hereto, embraces as completely as possible a particular geophysical or geological anomaly favourable to the accumulation of petroleum substances and within which the parties shall have designated a test well area within which the test well may be drilled to adequately test such anomalous area."

11 The section goes on to provide for the fixing of the boundaries of an anomalous area in the event of disagreement between the parties.

> "Sec. 12. The term 'seismic period' as used herein shall refer to the period of two years next succeeding the effective date hereof ...." (The effective date is later fixed as August 1, 1953.)

Part II:

12 Sec. 1. Seaboard agrees prior to the end of the seismic period to conduct a fixed minimum amount of reflection seismograph work on the lands. (This minimum amount of work was in fact completed by February, 1955.)

Part III:

13 Sec. 1. Provides that during the seismic period the parties shall meet from time to time upon the request of either for the purpose of selecting and defining anomalous areas upon which either party may be desirous of drilling test wells.

> "Sec. 2. Seaboard may select as many separate anomalous areas as it chooses to drill test wells upon, and shall notify Superior in writing on or before the end of the seismic period of the anomalous areas chosen ... upon which it desires to drill test wells ...." (Italics mine.)

14 The section goes on to provide that any anomalous area on which Seaboard, before the end of the seismic period, has not given notice of its intention to drill shall then cease to be an anomalous area.

> "Sec. 3. If and when Seaboard shall notify Superior of its election to drill test wells upon one or more of the anomalous areas chosen ... such notice shall constitute a covenant on Seaboard's part to drill a test well at its sole cost, risk and expense in such anomalous area ....
>
> "Sec. 4. Upon the drilling of each such test well at the time, in the manner and subject to the provisions of Part IV hereof to contract depth and subject to the provisions of this agreement, Seaboard shall earn an undivided one-half (1/2) interest in and to Superior's interest in said lands lying within the particular anomalous area within which such test well is drilled."

15 Sec. 7. When a well has been drilled to contract depth or alternative contract depth (as defined in the agreement) and Seaboard has complied with all the other provisions of the agreement, Superior shall assign to Seaboard a 50% undivided interest in the well, and "the undivided interest Seaboard has earned" in the lands of the particular anomalous area.

> "Sec. 9. Except as expressly provided in the agreement, Seaboard shall have no rights whatsoever with respect to said lands."

Part IV:

16 Sec. 5. If Seaboard fails to drill or complete any test well it is obligated to drill Superior is entitled to drill it at Seaboard's expense, or to recover liquidated damages or terminate the agreement with respect to the particular anomalous area in which event "Seaboard shall not be entitled to earn any interest in said lands lying therein."

Part V:

17 Sec. 2. Seaboard is named operator in respect to wells in which commercial production has been discovered with exclusive charge and control of and obligation to conduct all drilling, development and other operations on such operating unit.

Part VI:

18 Sec. 4. Provides for sale, assignment or transfer by either party in whole or in part subject to the provisions of the agreement.

> "In the event of any such sale, assignment, transfer or farm-out by Seaboard, Seaboard shall remain liable for the full and faithful performance of its obligations set forth in the agreement."

19 Some evidence was adduced as to the circumstances under which the Superior agreement was entered into. Merrill contends that it first became interested in the Superior lands and brought them to the attention of Seaboard; Seaboard claims that at one time before negotiations with Superior were completed, and the agreement signed, it appeared as if Merrill were no longer interested in the deal.

20 There was also some evidence to the effect that while Merrill was at the outset conducting some preliminary negotiations with Superior, Tanner, the president of Merrill, inquired whether it would be satisfactory to Superior to enter into the agreement with Seaboard rather than Merrill, and that Superior replied that it would prefer entering into the agreement with a "senior" company.

21 I think none of this evidence is very material to the questions in issue. It is sufficient to say that negotiations were conducted and the agreement entered into in the name of Seaboard with the consent and approval of all the participants.

22 On July 8, 1953, Seaboard wrote to Superior (Ex. 3) advising that it was executing the three-way agreement that day, and referring to par. (b), sec. 4, Part VI, which prohibited an assignment by any party of an interest under the agreement or in joint Crown lands amounting to less than an undivided 10 percent net therein. The letter went on to state that the benefits and obligations of the Superior contract would be held by Seaboard for the joint account and benefit of the following companies under the three-way agreement, as follows: Seaboard, 33 1/3 percent: Honolulu, 33 1/3 percent; Merrill, 20 percent; Cancoll, 13 1/3 percent; and that if Seaboard desired to assign to Cancoll its undivided interest in the Superior lands, the interest so assigned would amount to less than 10 percent in the said lands, and that it was therefore agreed between Seaboard and Superior that Superior would at any time during the life of the agreement consent in writing to such assignment -- the letter being expressed to be by way of supplement to the agreement, and not a modification or construction thereof. The letter is accepted and agreed to by Superior.

23 On September 9, 1954, Seaboard wrote a further letter to Superior (Ex. 28) outlining the history of the three-way agreement, and stating that as the present "operator" it holds all properties and contracts acquired and made under the three-way agreement for the use and benefit of the participants (whose various interests are again set forth as above) and will continue to act as operator on behalf of all the said tenants in common, and that Superior may continue to rely solely on Seaboard's acts and determinations under the contract being binding on all the said tenants in common.

24 On August 13 Seaboard wrote to Merrill and Honolulu (Ex. 7) referring to the agreement and its execution. This letter concluded:

> "Accordingly the rights and interest acquired by virtue of said agreement of June 22, 1953, are considered as 'premises' under the said operating agreement of December 1, 1948, and are held in trust for the participants and beneficially owned by them as tenants in common in proportion to their respective participating equities, pursuant to the provisions of par. 9(a) of said operating agreement."

25 On August 14, A. W. Mitchem (on behalf of Seaboard) wrote to E. N. Tanner (on behalf of Merrill) (Ex. 8):

> "Pursuant to the request contained in your letter of August 11, 1953, I am enclosing herewith our acknowledgment that the interests acquired by Seaboard under the Canadian Superior agreement are held in trust for the participants under the Three-way Operating Agreement.
>
> "In the absence of agreement to the contrary, all acquisitions made by Seaboard, in the province of Alberta, are held in trust for the participants pursuant to par. 9(a) of the Operating Agreement."

26 As I have said, the geophysical work contemplated by the agreement was completed by February, 1955. In addition during the seismic period, Seaboard, with the approval of the other participants, selected a number of anomalous areas and drilled test wells thereon. The participants proportionally bore the cost of the seismic and drilling operations, Merrill's share thereof being in excess of $900,000. The procedure by which these anomalous areas were chosen was in general terms as follows:

27 Certain members of the technical staff of each participant -- geologists, geophysicists, etc. -- met as an exploration committee and considered the information received from geophysical work, drilling, etc. They would then define certain anomalous areas and make recommendations regarding them. These recommendations were then considered by a management committee, consisting of the named representative of each participant, assisted in most cases by other officers or employees of the participants, but with the voting right confined to the named representatives. If the exploration committee had recommended the development of an anomalous area and the management committee unanimously approved of this recommendation, then the requisite notice was given by Seaboard to Superior, the anomalous area was selected, this involving an obligation on Seaboard's part to drill a well at the location named, and the test well was duly drilled. The evidence is that none of these anomalous areas was chosen unless there was unanimous agreement by the members of the management committee.

28 Matters proceeded without any particular incident or difficulty until toward the close of the seismic period. It will be remembered that the seismic period was the period of two years next succeeding the effective date of the Superior agreement, and the effective date was named as August 1, 1953. Accordingly the seismic period would ordinarily expire at midnight on July 31, 1955, or possibly at midnight on August 1, 1955, since the period was the two-year period next succeeding the effective date. Since it happened that July 31 fell on a Sunday, counsel in their written briefs have quoted authorities to the effect that the seismic period expired at midnight on July 30, 1955. I think it might have been argued, and in fact it is my opinion, that it did not expire until midnight August 1, 1955, but this position is not taken in any of counsels' briefs. However, in the light of what transpired, I am unable to see that it is material on which of these three days the seismic period expired.

29 Toward the end of the seismic period began those events out of which this action arises. For several days toward the end of June the exploration committee met and discussed the areas which might possibly be selected before the end of the seismic period. As a result of their deliberations they reported on seven different areas, making varying recommendations as to each. Their report, embodied in a written document (Ex. 24) was duly considered by the management committee at a meeting on July 6, 1955. The proceedings at this meeting were embodied in a "memorandum of meeting" (Ex. 27). The evidence is that various matters arising out of the three-way agreement were discussed and dealt with, and that the matter of selections under the Superior agreement was then discussed. The memorandum deals only with the Superior lands. It is a two-page document -- one page containing only the names of those present at the meeting -- 13 individuals in all, of whom, of course, only three were the official representatives of the participants entitled to make the actual decisions. The second page contains the relevant record and reads as follows:

> "Participants considered the recommendations of Messrs. Vitt, Cross and Hancock [the official exploration committees -- Ex 24] on areas of interest in the Canadian Superior area, as contained in their memorandum of meeting June 20-24. Seaboard Oil Company, as a participant, advised participants that it was not interested in the acquisitions therein recommended. Messrs. Cranson for Honolulu and Walker for Merrill stated that they would advise the operator of any action that they would care to take regarding these recommendations for their own account at a later date."

30 There seems no doubt from the evidence that Merrill indicated at this meeting that it was interested not only in the areas referred to in the report of the exploration committee, but in additional selections, that Honolulu was noncommittal, and that Seaboard definitely indicated that it was not interested in making any further selections under the Superior agreement, principally on the ground that the test wells already drilled had disproved the most promising anomalies, and that it did not consider further great expenditures warranted on less promising prospects. The meeting of July 6 accordingly terminated without decisive action.

31 Apparently after the meeting of July 6 the technical men of Merrill, Superior and Seaboard met and discussed from time to time the merits of the various lands in the Superior area. King, the general manager of Merrill, says that Bud MacDonald, the senior landman of Seaboard, was authorized by all the participants to negotiate with Superior on behalf of all of them. There seems no doubt that MacDonald was present at all or most of the meetings held by the technical staffs, and gave his assistance to the evaluation of the various areas under discussion.

32 Despite the approach of the end of the seismic period, and despite Seaboard's announcement at the meeting of July 6 that it was not interested in making further selections, nothing definite appears to have been done by the senior officers of any of the participants from the time of the meeting of July 6 until toward the end of July.

33 About July 23 King saw Feldmeyer of Superior at Seaboard's office, along with technical men from all the companies when the various areas were thoroughly discussed, King endeavouring, as he says, to learn Superior's geological and geophysical thinking on the lands. At this meeting some modifications in drilling obligations under the Superior agreement were also discussed.

34 This brings us to the last few days in July commencing with July 26, during which there was some hectic activity among all the parties concerned. I think it is not necessary to deal with these activities chronologically or in detail. During this period it became abundantly apparent that Seaboard, supported by Honolulu, did not intend to make any selection of anomalous areas with the exception of one called "Bentley A." Merrill was informed definitely of this on July 28, and even more definitely on the morning of July 29. An effort was made by Merrill to persuade Honolulu to join with it in making the selection of the other 12 areas that Merrill wanted to have selected, King apparently being under the impression that a two-third majority would force Seaboard to make the selections. King suggested to Cranson of Honolulu that the latter should assign to Merrill its interest after the selections had been made. Cranson informed King that Honolulu would take no part in any such arrangement as he considered it contrary to the provisions of the three-way agreement, and in any event Honolulu would not force either of its "partners" to select lands in which it was not interested.

35 Seaboard's position throughout was that it would make the 12 additional selections requested by Merrill -- which, incidentally, were not notified to any of the other parties until July 28 -- only if it and Honolulu were completely released by Superior of any liability under the Superior agreement, except as to lands previously selected. Merrill desperately and unsuccessfully attempted to make a separate deal with Superior whereby the latter would accept Merrill as the contracting party instead of Seaboard, and would release Seaboard and Honolulu. Mitchem of Seaboard also tried to persuade the officers of Superior to accept Merrill in its place contending that Merrill was completely able to fulfil the financial obligation under the Superior agreement involved in the selection of the 12 areas. Superior consistently took the stand that its contract was with Seaboard, that Merrill was entitled to make as many selections as it pleased through Seaboard, but that Superior would look to Seaboard to fulfil the obligations involved in such selections. Numerous meetings and conferences and telephone conversations were held over a period of about five days, all for the same purposes: (1) To induce Seaboard to make the selections desired by Merrill; or (2) To persuade Superior to accept Merrill in place of Seaboard and to release Seaboard and Honolulu from further contractual liability.

36 On July 29 Merrill wrote to Seaboard (Ex. 10), the letter being delivered to Mitchem on the evening of the 29th. In this letter were enclosed draft copies of letters that Merrill proposed that Seaboard should send to Superior, one relating to the "Bentley A" area, and the other to the other 12 areas in which Merrill was interested. This letter read in part as follows:

> "We understand that Seaboard Oil Company is not interested in making the requests contained in the said draft letter on its own behalf, and therefore this Company exercises its right under the Operating Agreement, dated December 1, 1948 ... to require Seaboard Oil Company as Operator thereunder on behalf of Merrill Petroleums Limited and others to make such requests on behalf of Merrill Petroleums Limited.

"Merrill Petroleums Limited hereby undertakes to hold Seaboard Oil Company harmless from any consequence arising out of the making of the aforesaid requests, and will provide such reasonable assurance thereof as Seaboard Oil Company may require.

"Merrill Petroleums Limited hereby gives notice to Seaboard Oil Company that it will hold Seaboard Oil Company responsible for all loss occasioned by the failure of Seaboard Oil Company to comply with the requirements of Merrill Petroleums Limited as set forth in this letter, the enclosed draft letters, and the attachments thereto, within the time and in the manner provided for in the captioned agreement [i.e., the Superior agreement]."

37 Seaboard replied to this letter on July 30 by letter (Ex. 25) which in part states:

"This is to advise you that with the exception of the Bentley 'A' anomaly therein described, it is not our intention to give Canadian Superior of California Ltd. the notice therein referred to because there is nothing in our records which would indicate that the participants to the participating agreement dated December 1st, 1948, referred to by you in your said letter have ever unanimously agreed to acquire the properties represented by the twelve remaining anomalies described in the enclosures contained with your said letter of the 29th instant, nor do our records indicate that there is any agreement by participants representing two-thirds of the Participatory Equities to drill the wells which you desire committed to Canadian Superior of California Ltd. as required by the above-captioned agreement.

"We do not find any right vested in you pursuant to the agreement of December 1, 1948, which you require us to comply with, as is suggested in the second paragraph of your said letter of the 29th instant.

"In spite of the foregoing and without prejudice to our position and without admission of liability so to do, we hereby offer to assign to you the above-captioned agreement insofar as it relates to the twelve anomalies referred to in the enclosures with your letter of the 29th instant, provided that, before making such assignment, you obtain from Canadian Superior Oil of California Ltd. the written release in our favour of our obligation to remain liable to Canadian Superior Oil of California Ltd. for the performance for the terms and conditions of the above-captioned agreement in the event of an assignment thereof. Such a release would, of course, only relate to the above-mentioned anomalies.

"This offer of assignment would include all interests which Honolulu Oil Company has or may have in the above-captioned agreement in respect of such twelve anomalies."

38 On July 30 a number of somewhat frantic meetings took place between officers of the various companies involved -- in some cases all companies being represented and in others only two or three being represented. Merrill was strenuously attempting either to have Seaboard exercise its right of selection under the Superior agreement, and in the course of such endeavour offering to furnish a satisfactory bond of indemnity to Seaboard, or to have Superior accept it, instead of Seaboard, as the contracting party.

39 Seaboard, Superior and Honolulu all remained adamant. Seaboard refused to make any selections (other than Bentley "A") unless it and Honolulu were released from liability by Superior. Honolulu refused to join with Merrill in its selections and Superior refused to release Seaboard and Honolulu and to accept Merrill in place of Seaboard, standing flatly on the agreement to which only Superior and Seaboard were the contracting parties. As a result the seismic period and the right of Seaboard under the Superior agreement to select anomalous areas expired, with no selections being made other than Bentley "A."

40 On August 2, 1955 (after the expiration of the seismic period) Merrill wrote to Superior (Ex. 23). After referring to the Superior agreement and the various conversations which had taken place in the previous week, this letter stated:

"As you know Seaboard in entering into the above-captioned agreement with you was acting as operator on behalf of itself, Merrill Petroleums Limited, Honolulu Oil Corporation and Cancoll Oil & Gas Company Limited, and it is our view that Seaboard at our request had a duty to apply for the above-mentioned certain areas on our behalf. However that may be, we hereby on our own behalf make application pursuant to the

terms and conditions of the above-captioned agreement as if we were a party thereto for eleven (11) anomalous areas comprising the following lands, and for eleven (11) test well areas therein."

(Then follows a description of the anomalous areas and the test well areas.) The letter goes on to say:

"Merrill Petroleums Limited agrees to drill or cause to be drilled as if drilled by Seaboard Oil Company under the above-captioned agreement, each test well in each test well area as above set out, and in accordance with the above-captioned agreement and to contract depth.

"It is agreed that when each test well above noted has been drilled that you will in each case assign to us an undivided fifty (50%) percent of your interest in and to the following lands ...."

41 The letter concludes:

"It is agreed between us in respect only of the aforementioned Canadian Superior lands that

"(a) Merrill Petroleums Limited shall have the rights of Seaboard under sec. (2), Part V of the above-captioned agreement to be Operator;

"(b) You waive the right to become Operator under sub-sec. (i) of sec. 4 of Part VI of the above-captioned agreement, but solely in favour of Merrill Petroleums Limited and not in favour of any transferee of that Company."

42 This letter was not replied to because as Mr. Jones, general counsel for Superior says, Feldmeyer was absent on vacation and it was left for his attention, and before his return this action was commenced. In any event, no action was taken pursuant to Merrill's letter.

43 During the trial evidence was adduced by the plaintiff purporting to show a general course of conduct by the participants in assigning to one or more of the other participants lands in which the assigning party was not interested. This evidence took the form of 25 letters, all filed as Ex. 22.

44 Mr. Williams, the solicitor for Seaboard, explained that these letters fall into two classes. Those in the first class dealt with land which was never acquired by the participants or any of them under the three-way agreement. If one participant became interested in the acquisition of land, it notified the other parties, as it was required to do under the three-way agreement, and if one or more of the other parties was not interested, it or they approved of the acquisition of the land by the party desiring to acquire it, and it was then acquired by such party on its own account. A form letter was prepared to cover such situations. Seaboard, as operator, would stamp on such form the words "rejected for three-way acquisition." The letter was then circulated among the participants who indicated their wishes by signing the letter in the appropriate place, under either the heading "participants acquiring" or "participants releasing." As I have said, land so acquired did not come within the operation of the three-way agreement. The letters in the second class related to lands which had been acquired and which were "premises" under the three-way agreement, with respect to which one or more of the participants no longer wanted to meet the obligations involved in retaining them, and accordingly desired to surrender them. In such a case if one or more participants desired to retain the land, those desiring to surrender would assign their interest to those desiring to retain.

45 The evidence of Williams makes the following points clear in connection with both types of letter:

(1) In every case where an assignment was made, the arrangement received unanimous consent at a meeting of the management committee.

(2) In no case was there a continuing liability on the consenting or assigning parties.

(3) In no case were Superior lands involved.

46 Williams says that such an assignment was made, not because of any obligation of the assigning party, but

voluntarily, after discussion at a management meeting. That is, of course, probably a question of interpretation of the agreement rather than one of fact.

47 The evidence leaves no doubt that prior to the execution of the Superior agreement, Superior knew that Merrill and Honolulu were interested in the proposed agreement, and that Seaboard was acting on behalf on these companies as well as for itself. After the execution of the agreement the interests of the various parties were set forth in Seaboard's letter to Superior of July 8, 1953 (Ex 3). It seems equally clear that Superior had not, before the commencement of action, seen a copy of the three-way agreement, and had not been apprised of its details, or of the mutual obligations and rights of the parties thereunder.

48 On the basis of these facts the plaintiffs launched this action. They allege, inter alia:

(1) That the three-way agreement included a provision that in the event that any of the parties did not wish to participate in any specific programs they would assign their interest or right to interest in such specific program to the remaining party or parties, being entitled to be indemnified by the latter against any liabilities to be incurred.

(2) That the defendant Seaboard in entering into the Superior agreement was acting as trustee and representative of the parties to the three-way agreement, and that the interest obtained by Seaboard under the Superior agreement became subject to and part of the three-way agreement.

(3) That Seaboard refused to select the 12 anomalous areas requested by Merrill.

(4) That the defendants Seaboard and Honolulu did not at any time comply with the provisions of the three-way agreement in that they did not unconditionally relinquish their interest in the said 12 anomalous areas in favour of the plaintiffs.

(5) That Honolulu appointed Seaboard to act as its agent in all matters relating to the performance of the Superior agreement, and Seaboard did so act and that the request of the plaintiffs that the 12 anomalous areas be selected was knowledge obtained by Seaboard on its own behalf and as agent of Honolulu.

(6) That Honolulu having obtained the above knowledge was bound to assign to the plaintiffs Honolulu's interest in the said anomalous areas, but that it refused and neglected to do so, and as a result the plaintiffs were seriously damaged.

(7) That Honolulu by neglecting and refusing to assign as aforesaid deprived the plaintiffs from becoming the owner of two-thirds of the interest obtainable by Seaboard under the Superior agreement.

(8) That Merrill by letter of August 2, 1955, to Superior selected the said 12 anomalous areas pursuant to the provisions of the Superior agreement, and Superior refused or neglected to acknowledge such selections and thereby caused the plaintiffs serious damage.

(9) That time is not of the essence of the Superior agreement.

(10) That Superior was informed by Seaboard of the interests of the other parties to the three-way agreement, and that Seaboard was holding the interest obtained under the Superior agreement as trustee for the plaintiffs and Honolulu, and that accordingly Superior was holding the lands described in the Superior agreement as trustee or trustee de son tort for the cestuis que trust named in the letter of July 8, 1953 (Ex. 3), and in permitting Seaboard to breach its trust, and Superior learning of such breach and standing to gain thereby, caused the plaintiffs serious damage.

(11) That Superior by conferring directly with the plaintiffs in July, 1955, and by its conduct led the plaintiffs to believe that Superior was admitting the plaintiffs' right to make selections and is thereby estopped from denying the plaintiffs' right to make such selections, and that the verbal selection made by the plaintiffs to Superior is a good and sufficient selection of the 12 anomalous areas pursuant to the Superior agreement.

(12) That the facts alleged in the last paragraph above constituted a novation of the said agreement and the establishment of a new contract on the same terms between the plaintiffs and Superior, pursuant to which the plaintiffs selected the 12 anomalous areas.

(13) That Superior in July, 1955, acquiesced in the plaintiffs' selection of the 12 anomalous areas and thereby agreed that such selection was properly made.

(14) That at all material times Superior knew that Seaboard was acting for the plaintiffs as disclosed principals.

49 The plaintiffs therefore claim, inter alia:

(a) An order restraining Superior from dealing with or disposing of its interests in the twelve anomalous areas.

(b) An order that Seaboard select the 12 anomalous areas.

(c) An order compelling Superior to accept the aforesaid selection as if properly made prior to August 1, 1955.

(d) An order that Seaboard assign to the plaintiffs all rights obtained by virtue of such selection and acceptance.

(e) In the alternative an order that plaintiffs may select the said areas and that such selection be accepted by Superior.

(f) In the further alternative an order that Seaboard and Honolulu assign to plaintiffs their rights in the 12 areas, and that Merrill be now entitled to select such areas from Superior and thereby obtain all rights Seaboard would have had had the selection been made prior to August 1, 1955.

(g) Damages against all the defendants. (This is not in issue in this proceeding.)

50 Probably the clearest way to deal with the matters in issue is to discuss seriatim the above allegations made by the plaintiffs in their statement of claim, in an endeavour to ascertain whether these allegations can be substantiated and whether, if true, they constitute an enforceable cause of action against the defendants or any of them.

51 (1) The first allegation is that the three-way agreement included a provision that any party not wishing to participate in any specific program would assign its interest therein to the remaining party or parties.

52 A consideration of this allegation involves, of course, an examination of the three-way agreement which I have quoted extensively above. This allegation must be based on the provisions of clause 12 of the three-way agreement above quoted, as there appears to be no other applicable clause. It will be observed that clause 12 reads that any participant may tender to the other participants as tenants in common, the entire right, title and interest of the assigning participant in and to any premises desired to be surrendered. (Italics mine.)

53 The plaintiffs endeavour to construe these words as constituting an obligation on any participant desiring to surrender any particular premises. In other words, the plaintiffs endeavour to interpret the word "may" as meaning "shall" or "must."

54 I know of no principle of law which would satisfy such an interpretation of the word "may." While in In re Commercial Taxi and Highway Traffic Board [1950] 2 WWR 289, affirmed (1951) 1 WWR (NS) 465, I adopted that principle of construction that holds that where a statutory power is conferred upon a public authority, the bestowal of the power may be coupled with a duty to exercise it, and so the word "may" in such cases may be interpreted as "shall." But that decision and those authorities on which it was based, e.g., the leading case of Julius v. Oxford (Bishop) (1880) 5 App Cas 214, 49 LJQB 577, dealt with the interpretation of statutory enactments, and had nothing to do with the language chosen by individuals when entering into contractual relationships. The cardinal principle of

the construction of contracts is that each word must have assigned to it its plain, ordinary meaning. Beard v. Moira Colliery Co. [1915] 1 Ch 257, 84 LJ Ch 155.

55 Therefore when parties choose certain words to express their meaning and to define their relationships, there is no excuse for distorting those words out of their ordinary plain meaning. The word "may" in its plain, ordinary meaning, is a word of permission and not of command. As Talbot J. said in Sheffield Corpn. v. Luxford [1929] 2 KB 180, 98 LJKB 512:

> '"May' always means may. 'May' is a permissive or enabling expression ...."

56 In In re Baker; Nichols v. Baker (1890) 44 Ch D 262, 59 LJ Ch 661, Cotton L.J. said:

> "I think that a great misconception is caused by saying that in some cases 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning ...."

57 The parties to the three-way agreement were evidently trying to create an escape clause for a participant who did not want to incur the obligation attached to certain specific land. It was permitted to assign to the other participants, and if such an assignment was accepted by the latter, the assigning participant was entitled to be indemnified by them against the liability attaching to that land. But the parties entirely failed by their language to impose any imperative duty on any participant to assign. If his wishes are overborne by a majority vote in accordance with the agreement, he has two choices -- he may continue to share in the particular land and be subject to his proportionate part of the liability attaching to it, or he may tender an assignment to the other participants, and if it is accepted he is divested of his interest in the land and entitled to be indemnified against the obligations attaching to it. If it is not accepted he has no alternative but to retain his interest and remain liable for his proportionate share of the expenses. But nowhere in the agreement does it say that he "must" or "shall" tender such an assignment. The remaining part of clause 12 makes it abundantly clear that when the parties meant to use the word "shall" they used it, with the expected mandatory meaning attached to it in each case.

58 The plaintiffs in their written brief suggest that this clause 12 is very difficult to understand, and that the insertion of additional words is required to give it any reasonable interpretation. It was obviously difficult for the plaintiffs to understand it and I think a great deal of the dissension that has arisen between the parties was caused by the plaintiffs' misinterpretation of this and certain other clauses of the agreement. If the words of the clause are given their plain, ordinary meaning, it seems to me that its interpretation offers no difficulty -- it means exactly what it says. I think the plaintiffs' difficulty arose because no provision was, in fact, made by the agreement whereby a minority participant could retain "premises" if the majority decided to surrender them and were unwilling to assign their interest to such minority participant. This in a sense might work a hardship upon a participant who had shared in large expenditures for exploration and who wished to retain what it considered to be valuable lands, but the agreement clearly contemplates the making of all decisions by a majority vote of at least two-thirds in interest. Merrill was entirely familiar with the terms of the agreement when it took over its predecessor's interest therein, and if it did not consider these provisions fair it should, of course, not have become a party to the agreement. Having become a party to it, it is bound by its terms.

59 To take the matter a step further. I am of the opinion that this is not a case where the plaintiffs can rely at all upon the provisions of clause 12 of the three-way agreement. It appears to me that the plaintiffs have again misinterpreted the nature of the events which took place at the end of July, 1955. Clause 12 envisages the surrender or quit-claiming of premises held under the agreement. This was not a case of quit-claim or surrender. The Superior agreement is essentially an option agreement -- the consideration for the granting of the option is the covenant of Seaboard to do certain seismic work. Seaboard has an option upon the completion of the seismic work, but within the seismic period, to designate certain lands within the area in which it desires to acquire an interest. If this option is not exercised within the seismic period it lapses and Seaboard can acquire no interest in any lands not selected within the requisite period. If it exercises its option as to any of the lands, the consideration to be given for its interest therein is the drilling and completion of an oil well to stipulated depth. It is only when such work is completed that it "earns" its interest in the specified land. In other words, it has not purchased its interest until it drills the wells. What is acquired by the exercise of the option is the right to purchase an interest in specified lands.

The plaintiffs seek to interpret the failure to exercise this option as a "surrender" or "quit-claim" of premises within the meaning of the agreement. There is, of course, no doubt that whatever rights Seaboard acquired under the Superior agreement were "premises" within the meaning of the three-way agreement, but those premises in the first instance consisted merely of an option to acquire a right to purchase, and that option could be exercised by Seaboard only in accordance with the provisions of the three-way agreement -- that is, by a majority vote of the participants -- whether by a unanimous or a two-thirds vote is immaterial in the light of the circumstances.

60 In my view, the failure to exercise the option was not in any way a surrender or quit-claim of the "premises." The Superior agreement is still in force as to those areas selected during the seismic period so that it cannot be said that there was a surrender in the sense of the termination of the agreement. All that happened was that by reason of a two-thirds majority decision of the participants, the option expired as to those lands not already selected under the agreement. There was no surrender or no quit-claim of anything.

61 A surrender or quit-claim implies some positive act of release on the part of the person surrendering or quitclaiming, and that act must take place, in the case of the surrender or quitclaim of rights under an agreement, during the currency of the agreement; where the rights are simply permitted to elapse by effluxion of time no surrender or quit-claim thereof is possible (Insinger v. Cunningham [1924] SCR 8). In this case the Superior agreement in fact remained and still remains in force as to those areas selected prior to the end of the seismic period. All that lapsed by effluxion of time was Seaboard's option or right to make further selections of land. This, in my view, is not a surrender or quit-claim within the meaning of clause 12 of the three-way agreement. Accordingly, even if this clause bore the interpretation suggested by the plaintiffs -- which it does not -- it would still not be applicable to the situation that actually occurred, and there is no other clause to which the plaintiffs can resort to substantiate their claim that there was an obligation on either Seaboard or Honolulu to assign its interest in the 12 areas.

62 I think I should make some references to the extraordinary results that might follow if effect were given to the plaintiffs' interpretation of clause 12. As I have said, the three-way agreement makes it abundantly clear that all decisions of the participants must be made by a majority -- in some cases by a unanimous vote -- in all others (excepting those detailed matters of operation where the "operator" was empowered to make its own decision) by a two-thirds vote. If the plaintiffs' interpretation of clause 12 is correct it would mean that one participant might force a second to assign its interest to the first, and could then by a two-thirds vote force the third participant, however unwilling, to participate. This was clearly not the intention of the agreement.

63 I should also mention the fact that despite Merrill's contention that there was an obligation on Seaboard and Honolulu to assign, there is no evidence whatever that any demand for such assignment was ever made on either of them.

64 I am of the opinion that the first allegation of the plaintiffs cannot be substantiated.

65 (2) The plaintiffs' second contention is correct to a point. There seems no doubt that Seaboard in entering into the Superior agreement was, as between itself and the other participants, acting as trustee and representative of the participants to the three-way agreement, and that the interest thereby obtained by Seaboard became subject to the three-way agreement.

66 It is doubtful, however, if this situation pertained as far as Superior was concerned, it merely made an agreement with another oil company and it can well be argued that insofar as it was concerned, Seaboard's capacity was merely that of a co-contractor. The effect of Seaboard's trustee position as regards its fellow participants will be considered later in dealing with the other contentions of the plaintiffs.

67 (3) The plaintiffs' third allegation is undoubtedly correct. Seaboard did refuse to select the 12 anomalous areas designated by Merrill.

68 (4) The plaintiffs' fourth allegation is that Seaboard and Honolulu did not comply with the provisions of the three-way agreement in that they did not unconditionally relinquish their interest in the said 12 anomalous areas in favour of the plaintiffs.

69 I have already dealt with this contention in discussing the plaintiffs' first allegation. There is no doubt that neither Seaboard nor Honolulu relinquished any interest to the plaintiffs, but, as I have pointed out, they were under no obligation to do so, and so no breach of this part of the three-way agreement occurred.

70 At this point I should probably make some reference to the evidence as to the offer made by Seaboard and Honolulu to assign conditional upon receiving a complete release from Superior of all liability with respect to the 12 anomalous areas. Considerable evidence was adduced as to Seaboard's reasons for refusing to select and for insisting upon a release from financial responsibility. It was suggested that Seaboard's reason was its doubt of Merrill's financial ability to meet the obligations entailed in the selection of the 12 areas, and that such doubt was groundless as Merrill was financially well able to meet the obligation, and, in fact, was prepared to provide Seaboard with a satisfactory bond of indemnity against such liability. On Seaboard's part it was suggested that it did not want to remain under a liability, indefinite in amount and time, in respect of lands in which it had no interest. I thought at the trial, and I am still of the opinion, that this evidence had little relevance to the matters in issue. The question is not why Seaboard refused to select and to assign to Merrill, but whether it was entitled to do so under the terms of the three-way agreement. In my view it was not bound to select except upon the decision of the requisite majority as set forth in clause 3 (above quoted) of the three-way agreement, and this majority did not exist, and it was not bound to assign because no provision of the three-way agreement requires it to do so.

71 The plaintiffs' fifth allegation is that Honolulu appointed Seaboard to act as its agents in all matters relating to the performance of the Superior agreement, that Seaboard so acted and that the request of the plaintiffs for the selection of the 12 areas was knowledge obtained by Seaboard on its own behalf and as agent for Honolulu.

72 There is no evidence to support the plaintiffs' general contention that Honolulu appointed Seaboard to act as its agent in all matters pertaining to the agreement. The only evidence is that in the last two or three days of the seismic period Honolulu did authorize Seaboard to inform both Merrill and Superior that it would not make any further selections, and that it would assign its interest to Merrill conditional upon a complete release of liability from Superior. Seaboard acted as Honolulu's agent only in respect of these matters on July 29 or July 30. The allegation as to the knowledge obtained by Honolulu through its alleged agent, Seaboard, is quite immaterial, as there is no doubt that Honolulu obtained knowledge direct from Merrill of its desire to select the 12 areas.

73 I have already dealt with the plaintiffs' sixth and seventh allegations. In my view there was no obligation on Honolulu to assign to the plaintiffs its interest in the 12 areas.

74 The eighth and ninth allegations of the plaintiffs should be considered together. The plaintiffs say that by Merrill's letter of August 2, 1955, to Superior, Merrill selected the said 12 areas pursuant to the provisions of the Superior agreement, and that Superior caused the plaintiffs damage by refusing or neglecting to acknowledge such selections, and that time is not of the essence of the Superior agreement.

75 The only parties to the Superior agreement were Superior and Seaboard. It is true that Superior knew before the execution of the agreement that Seaboard was acting for Merrill and Honolulu as well as itself, but it is also true that until after the execution of the agreement Superior did not know the respective interests held by the various parties, and that Superior did not know until after this action was commenced the contents of the three-way agreement or the mutual rights and liabilities of the participants thereby established.

76 It is also a fact that during the discussions leading to the agreement, Superior expressed its preference for dealing and contracting with a "senior" oil company, and that Seaboard entered into the agreement in its own name with the full knowledge and consent of Merrill and Honolulu. Superior was entitled, in my opinion, to look to its co-

contractor, and to it alone with respect to all matters arising under the agreement. It was not concerned with the mutual obligations of the parties as among themselves. If Seaboard advised Superior that it was making certain selections pursuant to the terms of the agreement, Superior was not bound to look behind Seaboard's selection to ascertain if it had been approved by the other participants to the three-way agreement. Similarly, if Seaboard advised Superior that it was not making selections, particularly if that decision was confirmed by the approval of one or the other participants owning a one-third interest under the three-way agreement (as it was in this case) Superior was also entitled to rely upon that advice, even in the face of a protest from a minority participant. Superior's only contractual duty was to Seaboard, and that was to perform its agreement with Seaboard according to its terms. It was entitled to remain passive until the end of the seismic period, and if within that time Seaboard had not exercised its option of selection, to consider the contract at an end in so far as it related to lands not previously selected. Neither Merrill nor Honolulu, not being parties to the agreement, had any contractual rights thereunder, nor was Superior under any obligation, nor had it any right, to rely on the performance of its contract by a third person not a party thereto. It was entitled to do as it did, to look to Seaboard and to Seaboard alone for the performance of the contract.

77 The governing principle is clearly laid down in Pollock on Contracts, 13th ed., p. 170:

> "There is clear and distinct authority for these propositions; when two persons for valuable consideration as between themselves contract to do some act for the benefit of another person not a party to the contract --
>
> "(1) That person cannot enforce the contract against either of the contracting parties [exceptions are only apparent];
>
> "(2) But either contracting party may enforce it against the other although the person to be benefitted had nothing to do with the consideration."

78 Even if Merrill had any right, as alleged, to make selections, that right was not exercised within the proper time. The seismic period expired at the latest at midnight on August 1, 1955. Merrill's letter was written on August 2, 1955. Merrill suggests that time, not being expressed to be so, was not of the essence of the agreement.

79 The answer to that contention is, as I have said, that the Superior agreement was, until the end of the seismic period at least, in essence an option agreement, and it is clear that an option cannot be exercised after the time for exercise has passed. Time is always of the essence of an option agreement: 8 Halsbury, 3rd ed., p. 165, art. 281; Dibbins v. Dibbins [1896] 2 Ch 348, 65 LJ Ch 724; Lowes v. Herron (1911) 3 Alta LR 438, 18 WLR 167; Evans v. Bonneau (1911) 17 WLR 243; Roots v. Carey (1914) 6 WWR 27, 49 SCR 211; Forbes v. Connolly (1857) 5 Gr 657.

80 Moreover, this was an agreement relating to petroleum and natural gas lands, and as I pointed out in Can. Fina Oil Co. Ltd. v. Paschke (1956) 19 WWR 184, affirmed (1957) 21 WWR 260, the oil industry is a fast-moving industry in which, to the general knowledge of the public, quick action is required. Upon appeal this finding was enlarged upon by Porter J.A. (per curiam) who held, in effect, that "time is of the essence in the oil production business" because events affecting activities and values can occur unpredictably and with great suddenness. It is incredible that two experienced and "senior" oil companies entering into a contract providing for the exercise of an option during a certain period, and taking care to define the limits of that period, should have intended that the right of exercise should extend beyond the limit so carefully fixed.

81 Taking into account the nature of the agreement, and all the surrounding circumstances, there is no doubt in my mind that time was of the essence of this agreement, and that no right existed, even in Seaboard, one of the contracting parties, to exercise any option right or right of selection after the expiration of the seismic period.

82 The plaintiffs' 10th allegation is that Superior having been informed by Seaboard of the interests of the parties to the three-way agreement, and that Seaboard was holding the Superior interest as trustee for the plaintiffs and Honolulu, Superior became the trustee or trustees de son tort of the said lands for the cestuis que trust named in Ex. 3 (the letter of July 8, 1953) and that it, standing to gain thereby, permitted Seaboard to break its trust and thereby became liable to the plaintiffs for the damages sustained by them. In so far as Superior, at least, is

concerned, I find this allegation difficult to understand. The allegation, of course, raises three separate questions: (1) Was Seaboard guilty of any breach of trust? (2) Did Superior become in any sense a trustee for the plaintiffs? (3) Did Superior permit any breach of trust by Seaboard whereby it (Superior) incurred liability to the plaintiffs?

83 There is no doubt, as I have said before, that all interests or "premises" acquired by Seaboard under the three-way agreement, were held by it in trust for the participants to that agreement. While it is also true that there are certain general obligations imposed by law on any trustee (e.g., the duty not to profit from the trust at the expense of the beneficiaries) the more specific obligations and duties of a trustee are set forth in the instrument creating the trust -- in other words, except for those general duties imposed by law on all trustees, the terms of a trust are to be found within the four corners of the trust instrument. The three-way agreement sets forth in considerable detail the right, duties and obligations of the "operator" or trustee, and the trustee is bound to follow the provisions of this agreement even though the instrument might in some instances run counter to the general law of trusteeship. In other words, the first duty of this trustee (as of all trustees) was to follow implicitly the terms of the trust instrument, and, secondly, to observe those general principles of trustee law which did not run counter to the express terms of the trust. Probably the most important obligation imposed on the trustee by the three-way agreement was to act only upon the decision of the participants arrived at in the manner set forth in the agreement. This obligation is imposed by clause 3 of the agreement quoted above. It will be observed that all exploration, drilling development and producing operations are to be subject to the approval of not less than 50 percent in number of the participants owning not less than 66 2/3 percent of the participating equities; the clause then goes on to provide that all questions that may be determined under the agreement shall be decided by the same majority. Finally, the clause creates an exception to this general provision by providing that the acquisition of additional Crown reserves leases, operating agreements and other rights and interests in Crown and freehold lands shall be subject to the unanimous authorization or approval of the participants. The operator or trustee was bound by the provisions of this clause -- this, and not some general principle of trust law, was the condition of the exercise of the trust.

84 To make the matter still more clear, clause 2(g) of the three-way agreement links up with clause 3 and provides that it shall be the duty of the operator to carry out all instructions and determinations made pursuant to clause 3, and that the operator shall not be obliged to proceed with any common operation requiring approval or determination by participants unless and until approval thereof shall have been given, or determination thereof shall have been made as herein provided.

85 In my view, the selection of lands during the seismic period (i.e., the exercise of the option) constituted the "acquisition" of lands within the meaning of clause (3) so that the unanimous approval of the participants was necessary before any selection could be made. The evidence is that in every case of selection actually made under the Superior agreement unanimous approval was obtained.

86 However, it is not necessary to decide this point because the selection of any land under the Superior agreement involved exploration, drilling, development and producing operations within the meaning of clause 3, since the selection imposed an obligation on Seaboard to drill a well upon each area selected, and accordingly required the two-thirds approval mentioned in the first part of clause 3. Seaboard was not entitled under the agreement to assume such an obligation, and thus impose liability for their proportionate share of costs upon the other participants without obtaining the approval required by clause 3. In any event, the selection of land was at least one of the "questions which may be determined under this agreement" likewise requiring the two-thirds approval. The evidence is clear that no approval under any of the above headings was ever obtained to the selection desired by Merrill.

87 There can be no doubt of the right of any participant to withhold its approval of any proposed action under the agreement, there was no duty on either Seaboard or Honolulu to join with Merrill in the proposed selections -- they were as free to oppose such selections as Merrill was to approve them. Since the requisite majority, whatever it may have been, was lacking, Seaboard was not only under no duty to make the selections desired by Merrill, but had no right, under the provisions of the agreement to make them. Had it, as operator made such selection, while refusing as participant to approve them, Honolulu, as the other non-approving participant, might well have had a

good cause of action against it for any damages sustained by it by reason of such selection. There was, in my opinion, no breach of trust by Seaboard in refusing to make the selections requested by Merrill alone.

88 I should, perhaps, at this point, deal with several arguments advanced by plaintiffs in their written brief, though not specifically raised in the pleadings. The plaintiffs refer to clause 2(i) of the three-way agreement (quoted above) and particularly the words "protecting its interest in the premises" and suggest that by permitting the seismic period to elapse without Merrill's selections, it failed, as trustee, to protect Merrill's interests. The answer to this argument is, of course, contained in what I have just said as to the trustee's right of action being defined and limited by the terms of the agreement. Since no approval within the terms of the agreement was obtained for the action proposed by Merrill, the trustee, as I have said, had neither a duty nor a right to take the proposed action. Since Merrill chose to become a party to an agreement whereby a minority participant was bound by the decision of the requisite majority, it cannot now be heard to complain that any action or lack of action of the trustee, pursuant to such a majority decision, was a failure by the trustee to protect its (Merrill's) interests.

89 The plaintiffs next refer to clause 9(a) of the three-way agreement, and particularly to the words "None of the premises shall be sold or otherwise disposed of except with the unanimous authorization or approval of participants," and argue that the failure to make Merrill's selections was a "disposal" of the lands there involved without the unanimous approval of the participants, since Merrill strenuously failed to approve. In my view, this argument merits very little discussion. The lapse of an option or right of selection by the expiration of time is clearly not a "disposition" of premises within the meaning of this clause. I do not propose to discuss the law on this point as to my mind it is clear, but I would refer to the following authorities: Brassey v. Chalmers (1852) 16 Beav 223, 51 ER 763; Winters v. McKinstrey (1902) 14 Man R 294; In re Tancred's Settlement [1903] 1 Ch 715, 72 LJ Ch 342; Confederation Life v. Clarkson (1903) 6 OLR 606; Harman v. Gray-Campbell Ltd. [1925] 1 WWR 1134, 19 Sask LR 526; and the American cases of Allen v. Hawk, 245 SW 170; Phelps v. Harris, 101 US 370; and Scott v. State, 64 SE 1005.

90 The plaintiffs refer to the oft-quoted statement of Cardoza C.J. of the New York Court of Appeals, in Meinhard v. Salmon, 164 NE 545, as to the mutual obligation of co-adventurers. Again I say that the rights and duties of co-adventurers are defined by the agreement constituting their adventure, and whatever may be their duty of "joint loyalty" to their co-adventurers, this duty cannot override the specific provisions of an agreement voluntarily entered into by the parties. Despite the suggestion of the plaintiff there is no evidence at all that Seaboard acted improperly, or profited in any way by its actions. It advised Merrill as early as July 6 that it was not interested in making any further selections under the Superior agreement, and except for selection of Bentley "A," this attitude was never altered in the interval before the expiration of the seismic period. There can be no basis for any suggestion that it acted unfairly or lulled Merrill into a sense of false security. Knowing Seaboard's attitude on July 6, Merrill chose to do nothing in particular until its frantic activity in the last three or four days of July. Seaboard did nothing except to adhere to the terms of the three-way agreement as it had a right to do and was bound to do.

91 I find that there was no breach of trust on the part of Seaboard.

92 The second question raised by the plaintiffs' 10th allegation is whether Superior became a trustee for the plaintiffs. While it is alleged in the pleadings that it did, the plaintiffs make very little reference to this allegation in their written brief, and they simply say that because of Superior's knowledge that Seaboard was acting on behalf of the plaintiffs, and its knowledge prior to the expiration of the seismic period that Seaboard was not going to make the selections desired by Merrill, that Superior then had a right to deal directly with Merrill and permit it to make the selections that Seaboard refused to make.

93 Again I point out that Superior's contract was with Seaboard, and that it was entitled to deal with Seaboard and with Seaboard alone in all matters arising out of that contract. If the plaintiffs' contention were correct, Superior would have found itself in an impossible position, it would have had to deal not only with Seaboard but with Merrill, Honolulu and Cancoll (because Cancoll's interest was also set out in Ex. 3) all of whom might have had divergent views as to what should be done. Superior at the outset insisted on making its agreement with a "senior" company,

the participants to the three-way agreement all consented to the Superior agreement being made in that way, and they were all committed by the three-way agreement to Seaboard's actions in respect of the Superior agreement being controlled by the provisions of the three-way agreement. Superior with no knowledge of the terms of the three-way agreement was entitled to look only to Seaboard for performance of the Superior agreement. It was entitled to assume that Seaboard's activities were in accordance with the provisions of the three-way agreement. It was entitled to say to Seaboard or any of the other participants, as it did say -- "We stand on the terms of the agreement, the seismic period lapses at a certain time, and Seaboard is entitled at any time before then to make any selections it pleases of our lands." I can conceive of no basis on which Superior ever became a trustee for the plaintiffs.

94 On this whole question of trust I would refer to In re Schebsman [1943] Ch 366, 112 LJ Ch 338; [1944] Ch 83, 113 LJ Ch 33, where in the Court of Appeal Greene M.R. pointed out the danger of confusing the case of a trust and the case of a contract between two persons for the benefit of a third:

> "It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention."

95 In my opinion this case is very similar to the Schebsman case, that of a contract between two persons for the benefit of third persons, as well as one of the contracting parties, but conferring on such third persons no right of intervention and no right of action, and certainly not constituting the other contracting party a trustee for those third persons.

96 The third question involved in the plaintiffs' 10th allegation was whether Superior permitted any breach of trust by Seaboard whereby Superior incurred liability to the plaintiffs. Since I have found that Seaboard did not commit a breach of trust this question answers itself, but I would go further and say that even had Seaboard been guilty of a breach of trust, Superior was in no way liable to the plaintiffs in respect thereof. It was entitled to rely upon its agreement with Seaboard and did so. If Seaboard was in breach of the three-way agreement, or committed a breach of trust, in my view Superior was in no way liable therefor.

97 Before leaving this question of trusteeship I would refer to the last argument raised by the plaintiffs in their written brief -- an argument not based on any allegation in the pleadings. They suggest that the interests surrendered to Superior at the close of the seismic period were of considerable value, that Superior acquired these without consideration and was accordingly a volunteer with knowledge of Merrill's equity, and takes the said interests subject to such equity, and became a constructive trustee or trustee de son tort in favour of Merrill in respect of such equity.

98 The answer to this argument is, of course, that there was no "surrender" of anything to Superior. Under the Superior agreement Seaboard had merely an option or right which it did not exercise and which expired by lapse of time. This is no more a "surrender" of an interest than it is a "disposition" thereof. The second answer is that Merrill had no "equity" attaching to the said interests. Merrill's rights were defined by the three-way agreement. It elected to place itself in a position where its minority wishes might be overridden by the majority wishes of the other participants. That is what actually occurred, and once it had occurred, any interest or "equity" of Merrill disappeared by virtue of the provisions of the very agreement to which it became a party. In any event, Superior was entitled to look only to Seaboard, its co-contractor. It was not put on its inquiry as to the relationship between Seaboard and Merrill.

99 The plaintiffs' 11th allegation is one of estoppel -- that Superior led the plaintiffs to believe that Superior was admitting the plaintiffs' right to make the selection and is thereby estopped from denying such right, and that, moreover, Merrill's verbal selection made before the close of the seismic period was a selection made pursuant to the Superior agreement.

100 The evidence quite clearly disposes of the allegation of estoppel. Merrill did not, in fact, get in touch at all with the officers of Superior until the closing days of July, 1955. Superior consistently took the position that it stood firmly

on its agreement with Seaboard, that Seaboard alone was entitled to make the selections, that it could make as many as it pleased before the close of the seismic period, and that Superior would not release Seaboard or Honolulu from liability in respect of any selections made. Superior never at any time deviated from this stand, and there is no basis whatever for the allegation that the plaintiffs were led by Superior to believe that it was admitting the plaintiffs' right to make selections. In so far as the second part of the allegation is concerned, the plaintiffs' verbal selection was not made to Superior but to Seaboard, although during the course of the numerous conversations on July 29 and 30, Superior undoubtedly became aware of the selections desired by Merrill.

101 In any event, however, as I have already pointed out, Merrill had no right under the provisions of the Superior agreement to make any selections, and was so advised by Superior.

102 The plaintiffs' 12th allegation is that the facts alleged in its 11th allegation constituted a novation of the Superior agreement and the establishment of a new agreement as between Superior and the plaintiffs. As I have pointed out these facts did not exist and accordingly there is no basis for this allegation.

103 The 13th allegation is that in July, 1955, Superior acquiesced in the plaintiffs' selection of the 12 areas and thereby agreed that such selection was properly made. Again the evidence completely fails to support this allegation. Superior at no time acquiesced in any selections by the plaintiffs.

104 The 14th allegation is that at all material times Superior knew that Seaboard was acting for the plaintiffs, as disclosed principals. I have already dealt with the extent of Superior's knowledge of the interests of the plaintiffs. In my view, the plaintiffs were bound by the provisions of the agreement which they permitted Seaboard to enter into with Superior, and by the provisions of the three-way agreement. The plaintiffs do not allege in the paragraph of their statement of claim alleging Superior's knowledge any consequences flowing from that knowledge, and, in my view, in the light of all the circumstances, no consequences did flow therefrom. The plaintiffs cannot escape from the consequences of their own agreement and of the agreement made between Superior and Seaboard with their knowledge and consent.

105 The plaintiffs raise one further point by argument which is not covered by the pleadings -- that by a course of conduct of all the participants either they agreed on an interpretation of the three-way agreement, or they varied it by mutual consent. This alleged course of conduct is evidenced by the various letters contained in Ex. 22 relating to the release or assignment of certain lands by one or more of the parties in favour of another or others. I have dealt fully with the explanatory evidence of Mr. Williams, general solicitor for Seaboard, and have pointed out that it is clear from his evidence that in no case did these transactions relate to Superior land, that in no case was there a continuing liability remaining on the releasing or assigning party, and that in every case where an assignment was made it received unanimous consent at a meeting of the management committee. In other words, the transactions and the conditions under which they took place have no resemblance to the transaction which the plaintiffs say should have taken place in this instance, nor to the conditions surrounding it. In my opinion, no course of conduct has been proved which in any way affects the questions at issue here.

106 Counsel for Seaboard in their written argument raise some questions as to the sufficiency of the plaintiffs' statement of claim, particularly by reason of the absence of any allegation that Seaboard's refusal to select the 12 areas was "wrongful," and the absence of any pleading as to a "course of conduct" and the absence of any allegation of gross negligence or wilful misconduct within the meaning of clause 2(e) of the three-way agreement. There may be some substance in these objections, but in view of the decision I have arrived at, I do not consider it necessary to determine this phase of the argument, and I have dealt with the plaintiffs' various contentions as if they were properly pleaded.

107 For the reasons aforesaid I dismiss the plaintiffs' action against all the defendants with costs.

108 On the question of costs, each defendant in the action was in a different position. The interests of Honolulu as a participant were quite different from the interests of Seaboard as the operator, and the interests of Superior were,

of course, not united in any way with those of its co-defendants. The action is in reality three separate actions against each defendant. The defendants all filed separate defences, and were represented, and rightly so, by separate counsel. Under the circumstances I can see no reason why each defendant should not be entitled to its separate costs against the plaintiffs. Accordingly each defendant will have its costs of action, to be taxed on double column 5, including a fee of $200 for the preparation of written argument, R. 738 not to apply.

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Merrill Petroleums Ltd. v. Seaboard Oil Co.

Alberta Judgments

Alberta Supreme Court

Appellate Division

Ford C.J.A., Macdonald and Johnson JJ.A.

May 21, 1958.

[1958] A.J. No. 10 | 25 W.W.R. 236

Between Merrill Petroleums Limited and Cancoll Oil & Gas Company Limited (plaintiffs) appellants, and Seaboard Oil Company, Canadian Superior Oil of California, Limited and Honolulu Oil Corporation (defendants) respondents

(16 paras.)

Counsel

C.E. Smith, Q.C. and W.M. MacKay, for the plaintiffs, appellants. G.H. Steer, Q.C., for the Canadian Superior Oil of California Limited. J.V.H. Milvain, Q.C. and J.H. Laycraft, for the Honolulu Oil Corporation. D.P. McLaws, Q.C. and M. Bancroft, for the Seaboard Oil Company.

FORD C.J.A.

1 In my opinion this appeal depends upon the interpretation of two agreements and the letters written by the parties relative to them. The oral evidence, although extensive, is, so far as it is important, to be viewed as showing the course of conduct of the respective parties in relation to the agreements and the letters.

2 The first agreement, dated December 1, 1948, called an operating agreement, and referred to during argument as "the three way agreement" was originally between Barnsdall Oil Co., Honolulu Oil Co., and Seaboard Oil Co. Under this agreement each of the parties owned 33 1/3 per cent in the joint venture for the search for and the production of oil in Alberta as provided for in the agreement. The various kinds of properties owned or to be acquired were defined as "premises" and this definition as well as the other relevant and important provisions of the agreement are quoted in the judgment of the learned trial judge, and I will not repeat them.

3 The plaintiffs became owners of the interest of the Barnsdall Co. under the agreement; the Merrill Co. to the extent of 20 per cent and Cancoll (in the name of Merrill) of 13 1/3 per cent in the premises as defined in the agreement, and each held such interest to the time the action was commenced. The defendant Seaboard was the operator under the agreement at all times material, acting for itself and the other participants.

4 Seaboard entered into an agreement with the defendant Canadian Superior Oil of California on June 22, 1953, under which Seaboard agreed to do a defined amount of reflection seismograph work, and to drill core holes as an aid to the interpretation of such work, within the defined area of lands on which Superior had petroleum and natural gas leases. The area was an extensive one comprising approximately 195,000 acres and the work was to be done during the seismic period, which was defined in the agreement as the period of two years next succeeding the

effective date of the agreement. As I do not think that anything in the case turns on the exact date of the expiration of the seismic period, no further reference will be made to it. It is sufficient to say that the seismograph work was done by Seaboard and by so doing it had the right under the agreement to select what are described as anomalous areas, defined in the agreement, and meaning as nearly as could be gathered during the argument, areas sufficiently interesting to warrant drilling a well therein or thereon. By drilling a well according to the requirements of the agreement on or in any anomalous area, Seaboard earned a one-half undivided interest or ownership of the anomalous area. The agreement is a very long and comprehensive one covering matters in such a business adventure not relevant to the issues in this case. The important part is that Seaboard expended in the seismograph work a very large sum of money towards which the plaintiffs contributed their one-third share under the three-way agreement.

5 It is essential to the relationship that the interest of Seaboard under this agreement with Superior became part of the "premises" under the three-way agreement, as it was entered into by Seaboard on their behalf as well as on its own, and with their express knowledge and consent, as shown by the letters written at the time it was entered into, and referring to it. These letters, particularly that of August 13, 1953, from Seaboard to the plaintiffs are sufficient to bring such rights and interest under the three-way agreement, and to make Seaboard a trustee of such rights and interest for the participants pursuant to the provisions of par. 9(a)1 of the operating agreement; in fact, it expressly states this.

6 It is quite clear, as stated, that all the rights of Seaboard under this agreement were held by it in trust to be shared by the participants, of which it was one, under the three-way agreement. The important right to be considered in this appeal is that of selecting within the seismic period the 12 anomalous areas on its own and on behalf of the other participants that were not selected. It did select one of the 13 areas (Bentley A) recommended by the plaintiff Merrill, acting for itself and the plaintiff Cancoll, but refused rather than neglected, to select any other area for the reasons set out in its letter to Merrill of July 30, 1955, in answer to that of Merrill of July 29, 1955, in which were described the 13 areas Merrill asked Seaboard as operator to select.

7 The issue in the case depends on the right of Seaboard to refuse to make such selection; or, put it another way, on whether it had the right to make such selection having regard to the lack of approval by Honolulu and itself as authority for it to do so.

8 The learned trial judge, in his reasons for judgment dismissing the action, (1957) 22 WWR 529, has held that the question depends on the interpretation of the relative clauses of the three-way agreement, and in his judgment has pointed out that the admitted trusteeship of Seaboard under clause 9(a) of this agreement is defined and governed by the other clauses relative to it, and particularly clauses 3 and 9(c), the first of which he quotes, and the latter summarizes. He also points out that the plaintiffs cannot rely on clause 12, which he quotes, and I agree with him in this conclusion as to clause 12, as it does not compel a participant to assign his interest in the premises to any other participant.

9 Under clause 3, except as otherwise provided in the agreement - and there are no other stipulations that provide otherwise - all exploration, drilling, development and producing operations are subject to the approval of not less than 50 per cent in number of participants owning 66 2/3 per cent or more of the participating equities of all participants; also, the acquisition of additional Crown reservations, leases, operating agreements and other rights and interests in Crown and freehold lands are subjected to the unanimous authorization or approval of the participants.

10 As was pointed out in the above-mentioned letter of July 30, 1955, to the plaintiff Merrill, and it is supported by the oral evidence, there was no unanimous agreement by the participants to acquire the anomalous areas, with the exception of Bentley A, as to which all participants agreed. Nor was there any agreement by the participants representing two-thirds of the participating equities to drill the wells that must have been drilled had the areas been selected. The drilling of any one of these entailed considerable expense.

11 In my opinion, also, the last part of clause 3, referred to above, although it does not expressly include the acquisition of options - a fact emphasized by counsel for the appellant - is wide enough in its scope to include the acquisition of such rights so as to require the unanimous authorization or approval of the participants.

12 Having pointed out the above, I think it is sufficient to state that having reread the agreements, the evidence and the judgment of the learned trial judge since the argument on the appeal, I think that he has interpreted the three-way agreement correctly, and concur in his reasons dismissing the action.

13 I add that in my view unless Seaboard had the right under the three-way agreement to select the areas on behalf of all the participants, and I consider it did not, there is no ground on which to hold the defendants Canadian Superior Oil or Honolulu Oil liable to the plaintiffs. Furthermore, the argument that Honolulu should have or must be deemed to have assigned its interest in the anomalous areas or its right to acquire same to Merrill so as to have given Merrill the right to demand of Seaboard that it select the 12 areas fails. The fact is it was never asked to do so, and it had the right to withhold its approval of the selection. No more, I think, need be said as all the points are sufficiently covered in the reasons for the judgment appealed from.

14 The appeal will be dismissed with costs to each respondent on double column 5.

MACDONALD J.A.

15 I agree with the reasons for judgment of the learned trial judge, so the appeal must be dismissed with costs.

JOHNSON J.A.

16 I concur with FORD C.J.A.

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WatersTrusts 18.0

Waters' Law of Trusts in Canada, 5th Ed.

18 — Duties Underlying the Office of Trustee
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

18.0 — INTRODUCTION

18.0 — INTRODUCTION

The previous chapter discussed how the "substratum" obligations or requirements which attach to every trustee are fundamental duties arising out of the essence of the relationship of trustee and beneficiary. This chapter examines these principles in more detail. A fiduciary relationship, of which trusteeship is the paradigm example, is a relationship in which one person acts for and on behalf of another. The courts have long recognized that a relationship of this kind has a range of incidents that give effect to the other-regarding nature of the fiduciary's role. Typically, the fiduciary holds powers for the fulfilment of his or her role. These powers must be used for the purpose for which they were granted, and are thus subject to the supervision of the courts. [1] Moreover, because these powers often involve the exercise of personal judgment which has been entrusted to the trustee, there is a general principle—now subject to many exceptions—that forbids delegation. [2] Fiduciaries are also subject to a duty of care and skill in their exercise of their functions, a duty that is quite distinct from the similarly named duty of care that arises in the law of torts. [3] And fiduciaries are also subject to characteristic requirements of loyalty, which disable them from using their fiduciary powers in conflict situations, and which require them to account for any benefit that they acquire in connection with their fiduciary role. [4] All of these elements give effect, in different ways, to the other-regarding nature of the relationship. [5]

The "substratum" requirements were fashioned by courts of Equity over some three centuries, and can be displaced only to the extent to which the legislature of the jurisdiction so decrees or a settlor modifies their operation. In either of those situations, questions can arise as to how far the legislature or the settlor has displaced the obligation in question. A question also arises as to how far a settlor is free to relieve a trustee of any of these fundamental obligations. The trust is an extremely flexible institution, but its flexibility has limits. If, for example, the trustee were allowed to take the property for his or her own benefit, the relationship would likely cease to be properly called a trust. [6]

A trustee is under the duty to adhere to the terms of the trust, and cannot depart from them without the authorization of statute or of the court. The relationship between the general trust obligations imposed by law and the duties set out by the terms of the trust is therefore the first concern of every trustee. It was to this concern that Egbert J. addressed himself in *Merrill Petroleums Ltd. v. Seaboard Oil Co.*: [7]

> While it is also true that there are certain general obligations imposed by law on any trustee (e.g., the duty not to profit from the trust at the expense of the beneficiaries), the more specific obligations and duties of trustee are set forth in the instrument creating the trust—in other words, except for those general duties imposed by law on all trustees, the terms of a trust are to be found within the four corners of the trust instrument ... . [T]he trustee is bound to follow the provisions of this agreement even though the instrument might in some instances run counter to the general law of trusteeship. In other words, the first duty of this trustee (as of all trustees) was to follow implicitly the terms of the trust instrument, and, secondly, to observe those general principles of trustee law which did not run counter to the express terms of the trust.

The present chapter examines what Egbert J. called "general obligations", which in the previous chapter were called "substratum" obligations or requirements. It also considers their amendment by statute, and the extent to which they can be set aside by settlors or testators.

Footnotes

1 Below, Part IV.

2 Below, Part I.

3 Below, Part III.

4 Below, Part II. It is arguable that the trustee's duties to account, and generally to provide information, are also part of the substratum, being duties that apply presumptively to all fiduciaries and that give effect to the other-regarding nature of the relationship. These duties are discussed in chapter 19, Part IV.

5 See generally L. Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014), 130 Law Q. Rev. 608.

6 See, for example, the discussion of "illusory trusts" in *Clayton v. Clayton*, [2016] NZSC 29 at paras. 118-130 and note *Webb v. Webb*, 2020 UKPC 22 (Cook Is. P.C.) at para. 89; compare *Larochelle v. Soucie Estate*, 2019 BCSC 1329, 2019 CarswellBC 2342, 50 E.T.R. (4th) 260 (B.C. S.C.).

7 *Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1957), 22 W.W.R. 529 (Alta. T.D.), affirmed (1958), 25 W.W.R. 236 (Alta. C.A.) at 557 [(T.D.)]. This passage was followed in *Swintuch Estate v. Erickson*, 2016 BCSC 1623, 2016 CarswellBC 2448, 21 E.T.R. (4th) 286 (B.C. S.C.).

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WatersTrusts 18.II

Waters' Law of Trusts in Canada, 5th Ed.

18 — Duties Underlying the Office of Trustee
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

18.II — DUTIES OF LOYALTY

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A. — Introduction

It is a fundamental principle of every developed legal system that one who undertakes to act for and on behalf of another must act exclusively for the benefit of the other, putting his or her own interests completely aside. The core duty of loyalty, therefore, is the duty to use fiduciary powers only for proper purposes.[98]

Starting in the eighteenth century, Equity fashioned two rules that give legal effect to the other-regarding nature of every fiduciary relationship, including that of trusteeship.[99]

One is the rule that fiduciaries may not allow their fiduciary duty to conflict with their self-interest (often called a conflict of interest), or indeed with their fiduciary duty to another (often called a conflict of duty and duty), when exercising their fiduciary powers.[100] The other is the rule that fiduciaries may not retain any unauthorized profit or benefit from their office.[101]

The rule against exercising fiduciary powers in a conflict situation exists to ensure that the fiduciary's judgment is untainted. It prohibits a fiduciary from being in a position where it will be systematically unclear whether the fiduciary performed his or her fiduciary duty to act in what he or she perceived to be the best interests of the beneficiary. The logic of this is that the effect of the conflict is that the beneficiary has not had the benefit of the fiduciary's disinterested judgment in exercising the power. As a U.S. judge once wrote: "Conflict destroys an essential ingredient without which a fiduciary relation cannot function—disinterested judgment."[102] The fact that a conflict has an unknowable effect on the fiduciary's exercise of judgment has been cited by the Supreme Court of Canada as the animating concern about conflicts.[103]

A conflict, therefore, is a situation which is liable to create conflicting pressures on judgment, and the no-conflict rule is activated by the presence of factors which may reasonably be perceived as affecting judgment. This is why it is activated not only by a conflicting self-interest, but also by a conflicting fiduciary duty to another beneficiary; in either case, the original beneficiary cannot be certain that the fiduciary's judgment has been exercised in the beneficiary's sole interest.

The rule against unauthorized profits arises because the fiduciary is acting *for and on behalf of another,* and not for him- or herself. The fiduciary's role is other-regarding, and in the absence of authorization to the contrary, any benefit that the fiduciary extracts from so acting is held for the person on whose behalf he or she is acting.

Because they are protective of the requirement that the fiduciary act for and on behalf of the beneficiary, these two rules are often called duties of loyalty.

The two rules often overlap, but they are distinct because a conflict of interest can give rise to legal remedies whether or not the fiduciary extracted any profit.[104] For example, the conflict rule will allow the beneficiary to set aside a contract made by the fiduciary while in a conflict, without any inquiry as to whether the contract was a fair one; in other words, even if the fiduciary

did not profit. [105] Conversely, it is possible for a fiduciary to acquire an unauthorized profit from his or her office without being in a conflict, and this profit must be surrendered. [106] For example, a trustee acquires investment information through his or her office and uses it to the fullest extent possible to benefit the trust, but also profits personally from the information. So far from there being a conflict of self-interest and duty, rather the trustee's interests are aligned with those of the beneficiaries. But the rule against unauthorized profits applies here and requires the profit to be surrendered. [107] Another example of unauthorized profit without conflict arises where the fiduciary acquires information in the course of performing his or her duties and then resigns, going on to profit from the information so acquired. Since this person is no longer a fiduciary and no longer holds fiduciary powers, he or she cannot exercise fiduciary powers in a conflict situation; but he or she is still liable to surrender the profits so obtained. [108]

B. — Fiduciary Remedies

It is often said, with good reason, that different remedies may be available for a breach of fiduciary duty than for other breaches. It is important, however, to see that each of these remedies has its own logic, tied to the nature of the relationship. It is not the case that by showing any breach of fiduciary duty, one has access to any of the fiduciary remedies.

1. — Improper Purpose: Rescission of Exercise of Fiduciary Powers

Every fiduciary holds the powers that are entrusted to him or her for the achievement of some purpose, and it is for this purpose that the powers must be used. It is no surprise that an exercise is liable to be set aside by the court if the fiduciary acted for an improper purpose. So too, if the fiduciary did not properly exercise his or her own judgment, but rather improperly delegated the power or operated under the directions of some other person. In these cases, the power can be set aside without the showing of any conflict. [109]

2. — Conflict: Rescission of Exercise of Fiduciary Powers, or Disqualification

When a fiduciary uses some fiduciary power while in a conflict situation, that exercise is also liable to be set aside. This is so whether it is a conflict of self-interest and fiduciary duty (i.e., a conflict of interest), or a conflict of one fiduciary duty with another (i.e., a conflict of duty and duty). Thus contracts made using fiduciary powers when the fiduciary is in a conflict are voidable at the instance of the person to whom the duty is owed. [110] This remedy does not require that the beneficiary be a party to the contract; the contract can be rescinded because it was made through the use of a fiduciary power, in a situation in which that power should not have been used because of the conflict. [111] The same principle can apply to other powers, such as the exercise of dispositive discretions.

As noted in the previous section, fiduciaries are disqualified in such situations because of the potential effect on their judgment. What is important about this is that it means that the beneficiary does not need to show that the conflict *actually* affected the fiduciary's judgment, or caused any loss to the beneficiary or any unfair gain by the fiduciary. [112] This is why the courts have often said that, in general, there is no inquiry into whether the contract was fair, and its fairness or the good faith of the fiduciary offer no defences. [113] This is also why the rules about conflicts are often characterized as preventative or prophylactic: they aim to prevent the exercise of fiduciary powers in situations where they are liable to be misused.

Rescission is often seen where fiduciary powers have been used in a conflict situation. If rescission is impossible *in specie,* perhaps because the original assets are beyond recall, it may be effected by monetary substitution. [114] Conversely, if the potential conflict is seen in advance, it may lead to the disqualification of the conflicted fiduciary, unless the fiduciary is able to secure the fully informed consent of all of the beneficiaries, all of them being fully capacitated. If that is not possible, a well-advised trustee will resign or recuse him- or herself in a conflict situation, but the court has the power to do the same thing if necessary. [115]

3. — Non-Disclosure: Rescission by Beneficiary of Contract with the Fiduciary

Another kind of rescission can be sought when the trustee has purchased the trust interest of a beneficiary from the beneficiary. Here the trustee is not deploying fiduciary powers, but acting in his or her personal capacity. In this case, the law does not make the transaction *automatically* voidable, but it puts the burden on the fiduciary to show that he or she made full disclosure to the beneficiary of all the relevant facts, and that the transaction was a fair one. [116] The logic here is that all fiduciaries must disclose to their beneficiary information that they hold and that is relevant to the beneficiary's decision-making. [117] If the fiduciary fails to disclose, then because he or she is under a duty to do so, the effect is the same as the effect of a misrepresentation: rescission is allowed. Again, if *in specie* rescission is impossible, it may be effected by monetary substitution. [118]

4. — Unauthorized Profit: Accountability for Gains Acquired by the Fiduciary

When a fiduciary, trustee or not, acquires a profit "by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it", the fiduciary is accountable for that gain. [119] Generally it is held as trust property. [120] It is not necessary to establish, additionally, a conflict of interest; [121] nor is it necessary to rescind any transaction. Indeed, the transactions that the fiduciary ought not to have entered into were likely the source of the profit, and rescinding them would make it impossible to demand the profit that the fiduciary acquired from them.

Both the express trustee and the fiduciary who is not an express trustee have an obligation to account for such profits: the express trustee, to the trust beneficiaries; and the non-trustee fiduciary, to the person or persons on behalf of whom he or she is acting. [122] At least in a case where the breach was not a serious one, the defendant may be granted an allowance for any efforts he or she expended in securing the profit which is now to be disgorged to the principal. [123]

5. — Non-Disclosure: Compensation for Loss Suffered by the Beneficiary

Breaches of fiduciary obligations increasingly lead to claims for loss suffered as a result. [124] The courts have understood such cases to be based on the breach of a fiduciary duty of disclosure. [125] Usually the fiduciary failed to disclose his or her own self-interest; sometimes, the fiduciary failed to disclose the interest of another for whom he or she was also acting. [126] Very often in these cases the plaintiff's transaction was with a third party. The plaintiff's claim, essentially, is that the plaintiff would never have entered into the relevant transaction if the fiduciary had fulfilled his or her fiduciary duty of disclosure; as a result, the fiduciary may be liable for the loss suffered in the transaction, even if it came about through a fall in the market. [127] Such claims may fail if the plaintiff is unable to establish a causal link between the non-disclosure and the loss suffered. [128] There is, however, authority for the proposition that a fiduciary who has breached a duty of disclosure bears the burden of proof that the loss would have been suffered even if full disclosure had been made. [129] These claims, arising primarily from breach of the duty of disclosure, are not further discussed in this chapter. [130]

C. — Issues Arising from the Strictness of the Rules

Three main problems have confronted Equity in the enforcement of the duties of loyalty. Each of them will be further discussed in the text that follows, but they are highlighted here. The first is to know, who owes a duty of loyalty? This question is increasingly difficult to answer.

The second problem is in defining the limits of the conflict principle. It should not encompass activities which are so remote from the task undertaken that they could not in any reasonable assessment be said to be forbidden. Equity has come to take the view that the solution is provided by an examination of the scope of the agency or task undertaken. If the person who owes fiduciary duties [131] is acting outside the scope of the task he or she has undertaken — that is, in a manner which has nothing to do with the fiduciary role — then the fiduciary will not be required to hand over to the principal any profit which the fiduciary has made, or to desist from any intended activity which would be profitable. Even by narrowing the principle in this way, however, there are bound to be difficult questions of fact as to whether the particular fiduciary was indeed in the circumstances

acting within the scope of his or her fiduciary role when he or she made a profit, or was positioning him- or herself to make such an intended profit. But the difficult questions of fact which have ceaselessly troubled the courts cannot be avoided; they are inseparable from the application of the rule against unauthorized profits.

The third problem has arisen from Equity's conception of what these rules are aiming to do. Within the scope of his or her undertaken task, the fiduciary is required to act in what he or she perceive to be the best interests of the beneficiary. That is the core of the duty of loyalty. But there is a second-order question of how strictly that duty of loyalty will be protected by attaching legal consequences to situations where the fiduciary's self-interest seems to be in conflict with the duty of loyalty, or indeed where the duty of loyalty to one beneficiary conflicts with such a duty owed to another. In other words, the conflict rules may be expressed more strictly or less strictly, depending on how jealously the courts wish to guard the duty of loyalty.

A strict view could be justified on the theory that the conflict principle is concerned to deter the fiduciary from acting for his or her own benefit within the scope of his or her fiduciary task. [132] A strict view could also be justified on the basis that the conflict principle is concerned to protect the beneficiary from ever having to wonder whether the fiduciary's loyalty was truly undivided. [133] The rule against unauthorized profits, for its part, is simply the direct implementation in law of the consideration that the fiduciary, acting in that role, is acting for and on behalf of another, with the result that he or she cannot at the same time act for his or her own benefit. [134] These accounts seek to explain the traditional approach, that it is irrelevant whether the fiduciary was honest and well-intentioned or otherwise, whether or not he or she harmed the interests of the beneficiary by his or her activities, and whether in the circumstances what he or she did was not unreasonable. [135] Once the fiduciary is found to be involved in activities which would result or have resulted in his or her own profit, or to have been in a conflict of interest and fiduciary duty or a conflict of one fiduciary duty with another, then the remedies described above will be available. [136] In large measure, this approach was given approval by Lord Eldon at the beginning of the nineteenth century because of the difficulties for the court in obtaining reliable evidence on what the fiduciary was intending to achieve. [137] Lord Eldon saw grave dangers in the courts being compelled to assess the truth of the agent's assertions that his or her intentions were honest. As Lord Eldon saw it, often in these cases there is no other evidence available to corroborate the witness' story, so that the court is reliant upon its ability to diagnose whether the witness is truthful; there is the added difficulty of discovering from the witness all the attendant circumstances. One could argue that the matter goes beyond the problem of honesty: a person in a conflict of interest may favour his or her own interest without even realizing it. [138] This makes it positively dangerous to allow such defences as that the principal was not harmed by the activity, or that in the circumstances the agent's act was not unreasonable.

If, on the other hand, the object of these rules is not so much to deter conduct, but rather to prevent actual harm to the beneficiary, resulting from an actual breach of the underlying duty of loyalty, then the courts might be justified in taking a more precise approach to the particular facts. The court might inquire whether the fiduciary actually did sacrifice the beneficiary's interests in favour of his or her own interests. The fiduciary would have an opportunity to demonstrate his or her innocence by pointing to what he or she did, the circumstances in which he or she did it, and the nature of the profit which he or she made. Courts which have apparently taken this approach have sometimes been willing to take into account that the agent in question did not cause harm to the principal. [139] They have also been willing to weigh the fact of the good faith of the agent. [140] Others, having heard evidence of the disputed activities and the particular profit made, have been willing to assess whether in the circumstances what the agent did was reasonable. [141]

In examining the different contexts in which disputes have arisen, both approaches will be seen. There is no doubt, however, that the stricter traditional approach is primarily concerned with the protection of the beneficiary; it provides the strongest possible protection, and a claim may lie even though the beneficiary suffered no harm. The alternative approach is concerned with the question of whether the fiduciary should, in all the circumstances, have to surrender the particular profit which he or she has made.

D. — Who is a Fiduciary?

It is evident that a principle which applies to anyone who undertakes a task on behalf of another is applicable to a wide and varied range of persons, and so it has been proved in the courts over two hundred years and more. [142] Equity first conceived of the rules about profit and conflicts in relation to express trustees, and it was from this starting point that they spread to cover the activities of any person who is involved with a position of trust or to whom a task is confided. [143] The executor and the administrator were early included, and then such persons as assignees in bankruptcy, lawyers, directors and officers of corporations, and partners and agents of all kinds were brought within these rules. [144] These are all people who undertake management functions over the property of others. These are relationships which are now *per se* fiduciary. [145] It is important to remember, however, that this does not mean that people holding these positions owe fiduciary obligations in relation to everything they do. As we have noticed already, there is a question of scope. The obligation of loyalty is one which may apply to the exercise or the non-exercise, by a fiduciary, of some right or power; it does not follow that a trustee must spend every waking hour on attempts to further the interests of the beneficiaries. There is a related point: not every breach of duty by a fiduciary is a breach of a duty of loyalty. Carelessness, for example, is not disloyalty. [146]

But the categories of fiduciary obligation are not closed. [147] It is possible for the courts to add new categories of relationship to those which are *per se* fiduciary. Perhaps more importantly, it is possible for the court to find that any particular relationship imports a duty of loyalty, even though it does not fall into one of the *per se* categories.

The first possibility is one which has been embraced by Canadian courts. [148] The Supreme Court of Canada has held that the relationships of parent-child [149] and doctor-patient [150] are fiduciary in nature. It is clear that these relationships are a long way from the kind of entrustment of property which first attracted Equity's intervention. [151] But on the other hand, these are clearly relationships of trust and confidence, in which one person acts for and on behalf of another. The parent's authority over the child is held for the benefit of the child, and the doctor's powers to advise and treat are also held for the patient's benefit. Loyalty in this context means that such powers are used rightfully, for the benefit of the other. The practical consequences of an obligation of loyalty may be different in non-financial contexts. But the basic norm of loyalty is always the same: it requires the fiduciary to act, not in a self-interested way, but in the interests of the beneficiary. In, for example, a doctor-patient relationship, treatment decisions are to be made in the interests of the patient, not of the doctor. [152] In line with the normal fiduciary duty of disclosure, it is not surprising that this issues in the result that a patient should have access to his or her medical records. [153] The future will show whether or not the strict principles discussed in this section, which evolved in the context of property management, should properly be transposed to other contexts in order to protect the duty of loyalty. [154] Similarly, while a sexual assault is always a grievous offence, it seems quite correct to say that an incestuous assault has the further characteristic of a heinous disloyalty or breach of trust. [155]

More effort has been spent in recent years on the other issue — that is, when, outside of one of the *per se* categories, can a person be said to be subject to a duty of loyalty? A plaintiff may have a number of reasons for trying to establish such an *ad hoc* fiduciary relationship. It may be that this will give access to a longer limitation period. [156] It may also be the case that it will be easier for the plaintiff to establish liability if a fiduciary obligation exists. For example, the principles regarding conflicts of interest and duty which are currently under discussion are very strict. [157] The plaintiff may also have access to different and better remedies. [158] Finally, the plaintiff may have access to more generous rules regarding the assessment of damages. [159] But the Supreme Court has said clearly that a fiduciary relationship cannot be built out of the consequences that flow from its establishment. [160] There is no "remedial fiduciary obligation".

How then does the fiduciary relationship arise? In these *ad hoc* fiduciary relationships, the relationship involves the relinquishment of self-interest, and ordinarily, this is something that must be done voluntarily. [161] In *Guerin v. R.*, [162] Dickson J., for the majority, said: "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes

a fiduciary". The case of a statute is relatively rare, and this means that agreement and unilateral undertaking are the most important cases. In a dissenting judgment which subsequently became very influential, Wilson J. posited that there are three indicia of a fiduciary relationship: [163]

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

This formulation suggests that all three elements are required. Unlike the statement of Dickson J. in *Guerin*, Wilson J.'s formulation does not speak to how or why the relationship is understood to arise. It identifies not the cause of the relationship, but rather some of its characteristics when it exists. It would certainly have the effect of reducing the importance of a voluntary relinquishment of self-interest, which is often considered crucial, at least where the fiduciary relationship is not *per se*. [164] Wilson J. was addressing whether a custodial parent owed a duty of loyalty to a non-custodial parent; within the *Guerin* formulation, she might have held that this was a situation in which the custodial parent was obliged by statute to relinquish self-interest. [165] In any event, one effect of the test in *Frame v. Smith* was that it shifted the focus away from what might be understood to *create* voluntary duties of loyalty, and instead onto three characteristics which most fiduciary relationships share.

In *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [166] two commercial parties were in a dispute over a gold mine. One issue was whether there was a fiduciary obligation between them during pre-contractual negotiations. By a bare majority, it was held that there was not; the plaintiff succeeded, however, on the basis that the defendant had breached a duty of confidence, and a constructive trust of the profits of that breach was awarded. This holding is important for a number of reasons. First, it underlines that a person may have a duty to respect confidential information even though there is no duty of loyalty as such. [167] The two are sometimes confused because of the close historical relationship between "trust and confidence", and because in many cases (for example, involving the defection of senior employees), both theories may be available. *Lac Minerals* also stands as authority for the proposition that a constructive trust can be awarded for a breach of confidence, regardless of whether there was a duty of loyalty as such. So far as whether or not such a duty could be found, Sopinka J., writing for the majority, referred to the test from *Frame v. Smith* and held that the third element, vulnerability, is essential for the finding of a fiduciary relationship.

In *Hodgkinson v. Simms*, [168] the plaintiff was a stockbroker and the defendant was an accountant who gave him investment advice. The defendant, however, also acted for some of the promoters of investments he had recommended; he was in a conflict of interest. La Forest J., who had written a minority judgment in favour of a fiduciary duty in *Lac Minerals*, now wrote for the majority, holding that Simms owed a duty of loyalty to Hodgkinson. In his view, vulnerability was not essential, even though it is usually present. There seems to be a great deal of wisdom in this. It seems that vulnerability, and indeed all three of the characteristics described in *Frame v. Smith*, can be found in many relationships which are not fiduciary. [169] For example, the application of the *Frame v. Smith* factors might tend to suggest that a bank which has made a loan to a business client, repayable on demand, automatically owes a duty of loyalty to the debtor. [170] But if vulnerability is not essential, then what exactly is required to find an obligation of loyalty is more difficult to say, because there are many ideas in the majority judgment. It is important to observe, however, that La Forest J. said: [171]

> [O]utside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

Although they disagreed as to whether the facts of the case revealed a duty of loyalty, it is arguable that the dissenting judges, Sopinka and McLachlin JJ., adopted a similar test; in their joint judgment, they said:

> [T]he cases suggest that the distinguishing characteristic between advice *simpliciter* and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other. It is this mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation.

The importance of this convergence of opinion was to re-establish the requirement that a fiduciary obligation generally rests on a voluntary relinquishment of self-interest by the fiduciary. [172] The obligation cannot be unilaterally imposed by the expectations or the reliance of the beneficiary; trust cannot be reposed without the consent of the trusted.

This was confirmed in *Perez v. Galambos*, [173] in which Cromwell J. stated for a unanimous Court that an imbalance of power between the parties, on its own, is not enough to create a fiduciary relationship. [174] The third element of the *Frame v. Smith* formulation was thus rejected as *constitutive* of fiduciary relationships, even though vulnerability may be *characteristic* of most such relationships; many persons are vulnerable without being beneficiaries of fiduciary relationships. The first two elements of the *Frame v. Smith* formulation, however, were confirmed as the Court stated: "It is fundamental to the existence of any fiduciary obligation that the fiduciary has a *discretionary power* to affect the other party's legal or practical interests." [175] More is required, however; the essence of the obligation of loyalty is that the fiduciary is under an obligation with respect to how this discretionary power is used. The question is whether he is obliged to use it in what he perceives to be the best interests of the other party. In almost every case of *ad hoc* fiduciary relationships, what is needed is an undertaking or commitment by the fiduciary to use the power in the best interests of the other: "… what is required in all cases of *ad hoc* fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party". [176] Confirming the formulation set out in *Guerin*, however, Cromwell J. noted that the obligation to exercise a power in the interests of another may arise by statute or by agreement, as well as by a unilateral undertaking, and he expressed the view that in the *per se* relationships, the assumption by the fiduciary of the relevant role (trustee, solicitor, agent, etc.) is equivalent to the giving of the relevant undertaking. [177]

In short, it seems that to find a fiduciary relationship, one must find that one person has a legal or factual power over another person's interests; and, that the fiduciary does not hold that power for their own benefit, but rather holds it for and on behalf of the other. [178] The second requirement typically involves the construction of the grant of the power, whether it be a contract or a statute or the general law; it is here that an undertaking may play a crucial role in the *ad hoc* situations.

A problem sometimes arises with respect to the person who was never asked to undertake a task but who intermeddled with the property being dealt with by a trustee or agent, and thereby made a profit. In *Phipps v. Boardman*, [179] a solicitor and a trust beneficiary, having no valid authority from the trustees since one of the trustees had not given her consent, held themselves out to a third party as persons authorized to act on behalf of the trustees. [180] Acting in this manner the solicitor and the beneficiary secured information from a company about its financial affairs which otherwise would not have been made available to them, and with the aid of this information they were able to purchase shares in the company, thus securing a profit both to themselves and to the trust. The House of Lords, by a majority, held them to be liable to surrender to the trust beneficiaries the personal profit which they had made. At first instance [181] and in the Court of Appeal [182] they were described as "self-appointed agents". The thinking behind this description is that whether a person is appointed to undertake a task on behalf of another, or assumes that role, one way or another he or she takes up the mantle of trust and confidence, and so becomes subject to these rules. [183] The same principle is seen in the law relating to a trustee *de son tort*, who by taking on the role of a trustee becomes subject to the corresponding obligations. [184]

E. — Disapplication of the Rules by Settlor or Beneficiary, or the Law

It is important to remember, however, that the rules do not involve a total prohibition upon activities which present a conflict of interest and duty, nor upon any possibility of acquiring some profit from the fiduciary role. The person who asks the fiduciary to undertake the task, or who condones the assumption of the task, is perfectly free to permit such activity on the part of the fiduciary. A contract of agency may spell out circumstances in which the fiduciary may derive a personal profit, and a will or trust deed may expressly or impliedly give such a permission. [185] Moreover, so far as a trust is concerned, if the trust instrument does not give permission, the beneficiaries of the trust may consent to such intended activity on the part of the trustee, so long as they are fully informed and fully capacitated. [186] In the circumstances it may well be unwise for the principal, testator or settlor, or the beneficiaries of a trust, to give their approval, but that is their choice. In a commercial setting it may be astute for the principal to provide such an incentive for the agent, and even in a trust setting like *Phipps v. Boardman* where both the "agents" and the trust stood to gain — and did in fact gain — it may be a sound move for the testator or trust beneficiaries to give their previous consent. [187]

Where it is alleged the activity was authorized at the time of appointment, this will involve the construction of the instrument appointing the fiduciary or, where there was no such instrument, a determination of what terms were set down. Where it is alleged that the consent was given after appointment or during the time when the task was being carried out, or potentially after an act that would otherwise be an infringement of the no-conflict rule or the rule against unauthorized profits, the fiduciary must discharge the onus of proof that those entrusting the task to the fiduciary, or, in the case of a trust, the trust beneficiaries, were made aware of all the information available to the fiduciary and gave their consent, being thus fully informed. Where the persons entrusting the task, or the trust beneficiaries, are not able due to incapacity or for some other reason to give their consent, the fiduciary may apply to the court for permission to carry out the intended discretion. [188]

In essence the rule is a disclosure rule; full and frank disclosure to the person whose property interest might be prejudiced by the act meets all the requirements of Equity. [189] It must also be remembered that fully informed consent extends only to the particular transaction, activity or profit to which it was given. The fiduciary who has received such consent remains otherwise fully bound by his or her fiduciary duties of loyalty and of disclosure. [190]

The rules can also be modified, of course, by legislation. The most important example in trust law is that legislation has varied the rules against unauthorized profits by allowing trustees to be remunerated. [191]

F. — Circumstances in Which the Rules have been Invoked

Since the duties of loyalty—that is, the rules about unauthorized profits, and about conflicts—may apply to any fiduciary, and since the manner in which private advantage may be sought is infinitely various, it is not possible to be definitive of the factual circumstances in which the rules may be applied. But it is possible to point to several broad sets of situations where they have been applied and, since they have been most rigorously applied to trustees, with whom this study is principally concerned, examples of trustee behaviour are to be found in each of those categories.

1. — A Trustee Must Act Gratuitously Unless Compensation is Authorized

Trustees are regarded as being so much in a position of trust and confidence that since the seventeenth century the law has excluded them even from the right of remuneration for their services. This is the original manifestation of the principle that fiduciaries cannot derive an unauthorized profit from their position. [192] If the settlor has expressly introduced a remuneration clause, this is effective. As with the rules about conflicts, if all of the beneficiaries, being fully capacitated, give their fully informed consent, this too will displace the rule, since the profits in this case are not unauthorized. Particularly where not all beneficiaries can consent, a trustee may seek the court's authorization through an application for advice and directions. [193] Compensation may also be authorized by the general law, as we will see.

The reasoning behind Equity's rule excluding the trustee from an automatic right to remuneration for his or her services was the understanding of a fiduciary relationship as one in which the fiduciary acts for and on behalf of another, not for his or her

own interest. There may have been a fear that, if a trustee were permitted more than his or her proven out-of-pocket costs from the trust fund or the trust beneficiaries, he or she would have the opportunity of running up profit costs. However, as Blake V.C. pointed out in *Meighen v. Buell* [194] when he discussed this rule of Equity, the law has been somewhat illogical. A trustee is permitted by Equity to recover profit costs against third parties, as for example, a mortgagor, even though the rule against profits should equally condemn this type of recovery. A trustee is thus benefiting personally while acting in the discharge of trust business. Moreover, English courts have made an exception to the rule when the solicitor-trustee or his or her firm is acting for the trust in court proceedings. The rule in *Cradock v. Piper* [195] enables such a trustee or his or her firm to claim profit costs, provided that the trustee or firm is acting for the trustees as a body and that those costs do not exceed what would have been charged if the trustee or firm had been acting for the co-trustees alone.

It is evident from the *Cradock v. Piper* exception that the rule excluding the trustee from automatic remuneration for services rendered was an ancient rule, predating the era of the professional trustee. During the nineteenth century, when the professional trustee became a well-known figure, Equity was ill-suited to adapt the rule to these new circumstances. Not only did the rule still require strict construction of express remuneration or charging clauses in wills and deeds, but, even though the courts had power under the inherent jurisdiction to award profit costs, in obedience to the rule they continued to exercise their power only in exceptional cases. [196] Until recently in England and Wales the court had only a limited statutory power to authorize remuneration—namely, when a corporate trustee had been appointed by the court. [197] Since the *Trustee Act,* 2000, professional trustees at least may be entitled to remuneration without court approval. [198]

In Canada, where perhaps the professional trustee has been significantly more familiar, the law took another turn. [199] The *Trustee Acts* of all the common law jurisdictions enable the courts to award "fair and reasonable" compensation to trustees. [200] The statutory jurisdiction of the Canadian courts has given rise to a ready assumption of the legitimacy of the trustee's claim to remuneration, and this could hardly have been better demonstrated than in the case of *Brown v. Gentleman*. [201] A company director, and therefore a fiduciary *vis-à-vis* his company, who owned almost all the issued shares of the company, and who was president and managing director, bought land at $3,100 with the intention of building for the company a service station on the land. He sold the land to the company for $10,000, and built the service station. He himself acted as contractor for the company, and he charged nothing to the company for his services. When the company later went bankrupt, the trustee in bankruptcy claimed from the director the difference between the $3,100 and the $10,000.

The fiduciary had sold his own property to the company at a considerable profit to himself, and in the ordinary course of events, as we shall see, this is a situation where the conflict rule clearly demands an accounting by the fiduciary of his profit. But, though conceding the relevance of the rule, the Supreme Court approached the matter another way and came to the opposite conclusion. Since the director had received no compensation for his work and services in acting as contractor for the company, he was entitled to retain the profit on the sale to the company as that compensation. At first sight this may seem an equitable outcome, but it raises serious problems. In the absence of any agreement between the company and the director, even though admittedly it was effectively a "one man company", should the director have been able after the work was done to claim compensation? There is no reference in the judgments of the courts who heard this case to the statutory jurisdiction. A director and his company were in commerce and primarily concerned with profit and reward. Did the Supreme Court, therefore, contrary to the strict construction practice, imply a right of the director to compensation? Had the case involved a trust and a trustee, particularly a professional trustee, would the answer have been the same? [202] If, indeed, the conflict rule is intended to deter a fiduciary from the kind of conduct in which the director indulged, should it have lain in the mouth of the fiduciary to claim the right to retain a personal profit, which he had been shown to have made, on the grounds that it would serve as payment for earlier services rendered?

2. — Acquisition of Unauthorized Benefits from the Trust Office [203]

The same rule that presumptively forbids remuneration without authority forbids the extraction of any other unauthorized benefit from the trustee's role. Private advantage gained through direct dealing with the trust property, while the most familiar misuse of the trustee's office, is not the only conduct resulting in personal benefit which Equity regards as a breach of the duty of

loyalty. There are many and various ways in which trustees and other fiduciaries can derive personal benefit, as the authorities demonstrate.[204] They range from the acceptance of secret commissions and bribes, to the use of information acquired for personal gain, to profits that may seem quite innocent.[205] In a sense, these various activities cannot be distinguished. The acceptance of a bribe or a secret commission, which are examples of obvious profiteering, is a manifestation of the same improper act as the exploitation of office in more sophisticated ways.[206] But, as the benefit becomes more remote from the immediate role of the trustee or fiduciary, it becomes more questionable whether the disputed activity took place within the scope of the task of the trustee or fiduciary. It is these latter cases which have proved the most controversial, and therefore it is convenient to make a division here between the acquisition of direct profits through the use of the fiduciary's office and the exploitation for self of opportunities arising because of the office.

(a) — Acquisition of Profits Through Use of Trust Property or the Fiduciary's Office

Profits made "on the side" but through the fiduciary role must be surrendered to the beneficiary.[207] Whether the fiduciary is accountable for such a profit depends upon the terms of the relationship between the fiduciary and the beneficiary, and situations can provide considerable variation in that issue. Again, fully informed consent given in advance by a capacitated beneficiary will obviate any difficulty.[208] An Army sergeant who sits in the cabs of Army trucks wearing his uniform, with the intention of discouraging search by guards at the exit of an Army camp, and who afterwards accepts monetary reward for his part in thus assisting the theft of Army supplies, has been held to be a fiduciary, and therefore in breach of the duty of loyalty, because of his improper use of his uniform.[209] Conversely, if a person makes a profit through an act which is merely a breach of contract, and not a breach of a duty of loyalty, the general assumption is probably that so long as compensation is provided for any loss caused by the breach, the breacher can keep the gain. Even this view, however, is beginning to change.[210]

Issues regarding the outer limits of the liability to disgorge profits do not, however, arise with trustees. A trustee occupies the most intense of fiduciary roles, and any profit which he or she makes out of the office without prior permission must be surrendered. The trustee may decide to invest the trust funds in his or her own business enterprise, which is a dealing with trust property such as we have already discussed, or the trustee may accept payments as an inducement to certain conduct. The payor may wish trustee powers of a discretionary nature exercised in the payor's favour, or a secret commission may be the reward for placing contract work on behalf of the trust with the payors. These are obvious cases where, once discovered, the court's role is likely to be little more than ordering the surrender of the improper gains to the trust funds. As we have seen, however, there may be an issue as to whether the improper gain is held in trust for the beneficiaries, or the beneficiaries have a merely personal claim against the trustee that the trustee pay over an equivalent amount of money.[211]

Nor does it matter if the bribe, commission, or other "kick-back" takes a form other than cash. Assets like land, antique furniture, paintings, silverware, or securities can be surrendered to the trust beneficiaries, and just as in the case of cash, if the courts conclude that the trustee's obligation is to hold the asset for the beneficiaries, then a trust remedy will be imposed. If the improper payment has constituted the discharge of the trustee's debts to third persons, it is not impossible to subrogate the trust to the paid-off creditors of the trustee. However, if the payment has taken the form of services gratuitously rendered to the trustee, there is no property which the trust beneficiaries can recover, and in those circumstances they will be left with their personal action against the trustee for breach of trust.

One of the more obvious forms of profiteering, once the facts had been brought to light, occurred in *Hope v. Beard*.[212] The trustee held land on trust for the purpose of sale and the payment of debts. Having managed to pay the debts without recourse to the land, he let it be thought that the lands had been used for this purpose, and the residuary beneficiaries of the trust gave him his release. In fact, the trustee had made a considerable profit out of the commercial use of the land, which profits in themselves would have paid the debts. When this came to light, the beneficiaries resisted his attempt to gain a formal release from the court which would also have vested the land in him personally. The object of the trustee in this case was to secrete the amount of trust property needed to carry out the trust purpose, and to profit thereby first by user of the property, and subsequently with the land itself.

In *Hewson v. Smith*,[213] on the other hand, the trustee was more dextrous. He was already a debtor to the trust estate when he bought, at a discount, a judgment recovered against an insolvent person, whom he knew to be entitled to the residue of the trust. The debt owed to the estate by the trustee greatly exceeded the amount paid for the judgment, so that in this instance the trustee was employing his inside knowledge to reduce considerably, if not cancel out, his debt obligation.

(b) — Acquisition of Gain Through Exploitation of Opportunity Arising out of the Trust Office

(i) Different Approaches. As we saw earlier, the more remote the advantage becomes from the immediate purpose of the trust, the more difficult it is to determine whether the fiduciary is entitled to regard the gain as unrelated to the fiduciary task. For example, the trustee is prohibited from investing the trust funds in his or her own business, but may he or she let it be widely known in business circles that he or she has trust funds to invest, and thus acquire business for his or her professional practice from banks, insurance companies, brokers and accountants anxious to attract the investment of the funds or the handling of trust funds and accounts? Faced with this question, one may instinctively feel that the line of prohibition to the trustee must be drawn at some realistic point. While it is the object of the duties of loyalty to secure to the trust beneficiaries the selfless service of the trustee, it would defeat the need to obtain for wills and trusts both expertise and business efficiency if customary business practices were overlooked, and a wide range of professional persons and institutions were thus excluded from accepting trusteeship.

In Canada, largely as a result of this difficulty, the cases swing between the prophylactic approach which simply condemns certain activity and warns the trustee in advance of the prohibition, and a more flexible approach which permits the trustee to show, in all the circumstances, why the rule should not apply to the gain. The latter attitude was very much in evidence in Bull J.A.'s judgment at the British Columbia Court of Appeal level in *Peso Silver Mines Ltd. v. Cropper*.[214] The learned judge was anxious both to follow the stricter approach of *Regal (Hastings) Ltd. v. Gulliver*,[215] and at the same time to have in mind the complexities caused by interlocking, subsidiary and associated corporations. Because of that complexity, Norris J.A. in dissenting came to the exact opposite conclusion—namely, that beneficiaries in these circumstances can only be protected if the trustee's legitimate activities are circumscribed within rigid limits. In examining the cases, therefore, it may be more useful to move from those in which the profit is closely related to the fiduciary activity, to the more remote situations.

(ii) Examples of Gain. The making of purchases in light of information acquired in the fiduciary role attracts the rule against unauthorized profits.[216] In *Tylee v. R.*,[217] the officer assigned to oversee the construction of the Rideau Canal in Ottawa purchased land in the area where the canal would run. Later, after his death, his representatives claimed title, less the twenty acres actually needed for the canal, but the Court had little difficulty in coming to the conclusion that, if he had intended to acquire a personal interest in the property, he had abused his office. Holders of public office are subject to a strict application of the rule against unauthorized profits in the same way as trustees. Otherwise the whole conduct of public affairs could quickly be brought into disrepute. The courts have ruled against the holder of public office when a profit has been made and that profit is directly related to the discharge of a particular duty. In *Toronto (City) v. Bowes*,[218] for example, the mayor was found to have contracted to purchase at a discount a large number of debentures, expected to be issued by the city as a result of a by-law then under debate. Subsequent to the making of the contract, and without disclosing his interest to the council members or anyone else, the mayor played an active part in procuring the passage of the by-law through the council chamber. During the action he strongly protested that he had not done, or intended to do, anything improper, but Esten V.C. dismissed his objection on the grounds that "a corporate officer, appointed *ad consulendum*, cannot acquire an interest in a matter upon which he has to deliberate in his official capacity for the benefit of others".

English authority[219] has been concerned with the problem of the trustee who is appointed a director of a company in which the trust holds shares. Must such a trustee account for the salary or fees which he or she receives as director? From one point of view it is because the trustee is a trustee that he or she has come to fill the position of a director. The cause and effect cannot be overlooked. From another point of view the salary or fees are consideration for the services which the trustee personally performs for the company. The answer at which the English cases have arrived is that, if the trustee uses his or her position as trustee in order to secure a directorship, the trustee must account for the salary or fees. This would catch the trustee who exercises in his or her own favour a power to appoint directors, or who employs the voting power of the trust shares to the same

end. If there is no such use, the trustee does not have to account. Such a distinction is not unreasonable, but it clearly suffers from being a formula in an area where facts are infinitely variable. [220]

Since the leading decision of Lord Keeper King in *Keech v. Sandford*, [221] it has been unchallenged that a trustee may not take a renewal of a lease in his or her own name when the original lease was held by him or her as a trustee. The trustee must hold the new lease for the benefit of the trust beneficiary. The principle of this case has been applied to all renewals, whether or not there was an option to renew or any other right of renewal, and whether or not the original lease had expired. It has also been extended to the purchase by the trustee of the reversion expectant on a lease, whether or not there was a right or custom of renewal of the lease. Because the prohibition arises from the fiduciary relationship, a trustee is always subject to it. While fiduciary status has been found to exist in personal representatives, agents, and tenants for life, a mere member of the family of a personal representative was held in *Re Biss* [222] not to be a fiduciary.

Acquisition by a trustee of a renewal of lease or the reversion was deemed in *Keech v. Sandford* to be a breach of the rule against unauthorized profits because the opportunity arose from the office. This is why a trustee cannot escape liability by demonstrating that the landlord was unwilling to renew the lease to the trust: the claim does not arise from loss suffered, but from the extraction of benefits from the fiduciary role. The courts would presumably take the same view if there were evidence that the reversioner was unwilling to sell the reversion to the trust. While there is no doubt that *Keech v. Sandford* would be followed in the common law provinces of Canada, it is also true that Canadian courts have gone some way to meet the harshness of this rule. In *Seaton v. Lunney*, [223] for example, one of two trustees holding property for a married woman obtained with her consent a lease of the trust property. The married woman later objected that the rent was an inadequate sum and that she had not been properly advised. The Court granted her request to have the lease cancelled but gave the trustee the option of a new lease on terms to be settled by the Master. This case is not strictly a *Keech v. Sandford* situation; indeed, it was evidently treated by the Court as an acquisition by a trustee of the beneficiary's interest, where, as we have seen, provided the beneficiary is fully informed and at arm's length with the trustee, such acquisitions will be permitted. Nevertheless, the Court was prepared to allow the lease on court-approved terms. The notable feature of *Seaton v. Lunney* is that the trustee had not sought the court's approval of the terms of the lease at the time it was entered into, and was subsequently found to have offered too low a rent. Yet, after these events, the Court was prepared to sanction new terms.

The impression made upon the court by the facts will be all-important, and the uniqueness of the facts in any particular case will tend to enhance their importance. It is in cases of this kind that courts are most subject to the constantly present uncertainty as to whether the rule is unbending, or whether it involves an examination of all the facts, subject to the onus of proof upon the trustee that he or she has not acted improperly. [224] The uniqueness of the facts in a particular case may even encourage the court to take the second approach, since the fact situation will not fall within any of the established deterrence situations. And, if a court takes the second approach, it may well be led to give weight to what the traditionally strict approach would regard as properly irrelevant factors, such as the good faith of the trustee, whether the trust interests suffered, and whether the trust could itself have acquired the particular profit made.

(iii) Leading Cases. The decision of the Supreme Court in *Tornroos v. Crocker* [225] illustrates this latter point. A, B and C each owned one-third of the shares in a private company, and the articles of association required a shareholder on wishing to sell his shares to make a first offer to the remaining shareholders. A died, leaving his residue to his widow and C, as trustees for enumerated objects. The residue included A's one-third of the shares in the company. The instructions to the trustees were to convert and sell the estate with power to retain the shares, but upon conversion the assets were to be invested in authorized trustee investments. Shortly afterwards B died, and his widow as beneficiary offered his shares for sale to C and to A's estate. The trustees of A's estate were advised that the shares were not authorized trustee investments, and C therefore bought B's shares for himself. Subsequently C retired from the trust, and A's widow and the new trustee now sued C for half the number of B's shares.

Looked at from any point of view, C was in a conflict of interest when he acquired the shares. As majority shareholder, C would be able to subject the minority shareholder to his own wishes; he would virtually control the company. It was in the trust's interest for some parity of shareholding to remain so that the trust retained its influence over company policy. There

were several courses of action which A's trustees could have investigated. For example, since A's estate was about to lose its parity with the other shareholders, the Court might have entertained an application under the salvage jurisdiction to permit the trust to purchase B's shares. And C, as the other offeree of B's shares, might have compensated A's estate for the release of its rights of pre-emption.

The majority in the British Columbia Court of Appeal[226] came to the conclusion that there was such a conflict, and for the reasons given here. But the Supreme Court decided[227] that there was no conflict, and reversed the lower court. The crucial point in the Supreme Court's argument was that the trust had no authority to acquire shares in a private company, and the Court had no jurisdiction under the salvage powers to permit this kind of purchase. As for the notion that C might have compensated A's estate for the release of the pre-emptive right, the Court pointed out that C as a trustee would thereby be purchasing trust property, so that in any event such a scheme was impossible. Moreover, it was said, C had an independent right under the articles of association as an existing shareholder to acquire the shares for himself, and he was merely exercising that independent right. One might say that the fiduciary conflict rules apply when a fiduciary is exercising fiduciary powers, but here C's power to buy the shares was held in his personal capacity. The rule about unauthorized fiduciary profits captures gains made via the fiduciary role, or with information derived therefrom, and again one might say that in this case, neither standard captured the gain that C had acquired.

Had the Court taken the view that the function of the rule is to forbid trustees from allowing themselves to be placed in a position where interest and duty conflict,[228] it seems clear that the Court would have had little doubt that, by accepting the trusteeship of A's estate, C had placed himself in precisely that position. Having accepted the office, C had at least to turn every stone to protect the trust's interests, including possibly an application to the court for consent to his exercising his own right of pre-emption. It might be, if *Keech v. Sandford* were followed, that once he had accepted the trusteeship, C excluded himself from the later opportunity to exercise his own right of pre-emption.

At the same time, it seems that the approach that looks to the particular facts could well lead, as it did, to the opposite conclusion. If the trust had no power and could obtain no power to purchase B's shares, was it not being doctrinaire to deny C the right to exercise in his own favour his own right of pre-emption? In view of the trust's impotence, was there actually a conflict in the circumstances which arose? Looking at the facts, the Supreme Court deduced that, by appointing C as an executor and trustee, and by restricting the trustees to the statutorily authorized investments, A, who knew of the articles of the company, must have been content that the trust might find itself a minority shareholder in a company controlled by one who had been his former associate.

In *Peso Silver Mines Ltd. v. Cropper*,[229] the respondent as a company director was clearly a fiduciary towards his company, which was now claiming the profits which he had made in acquiring for himself what proved to be a valuable mining claim. But in this case shades of *Tornroos v. Crocker* appear. On the grounds that the board of the company, including the respondent, had considered the purchase of the claim but turned it down because the company had not the resources with which to purchase, the Supreme Court held that the respondent had discharged his duties to the company and was acting outside the scope of his fiduciary task when he made his own purchase. It therefore dismissed an appeal from a divided lower court. One might say of this case that it took an approach to fully informed consent of the beneficiary that was generous towards the fiduciary, inasmuch as the Court arguably equated the company's decision not to purchase the claim to an informed consent that the defendant be allowed to profit from it.

The House of Lords decision in *Phipps v. Boardman*[230] was also one of these borderline cases involving the exploitation of opportunity arising out of the fiduciary office. The defendants were not trustees, so that the additional issue arose as to whether they were fiduciaries throughout the period of their profit-making. The essential facts of this case have already been given,[231] but the critical factors may be mentioned again. The appellants had not been appointed the agents of the trustees to acquire for the trust more shares in the private company than the trust already held. The trustees had no investment power to make such a purchase, they had no resources with which to make the purchase, and the active trustee had said on numerous occasions that the trustees had no wish to purchase. However, the active trustee wished the appellants every success in the efforts of the latter

to improve, by whatever means, the performance of the company. The information acquired by the appellants concerning the affairs and financial resources of the company was given to them by the board only because they had intimated that they were acting on behalf of the trust, and in the circumstances no one on the board would have thought to have challenged that they were, in fact, so acting. By a bare majority, the House dismissed the appeal, holding the appellants liable to account for their profits on the shares which they had personally purchased from the shareholders.

One division between the members of the Lords was over the existence throughout of a fiduciary relationship between the appellants and the trust. The majority thought it did so exist; the minority thought it ceased before any plan to purchase further shares was canvassed. The two sides of the House also differed as to whether information can, through its confidentiality, become property, in this case the property of the trust. The majority considered that it can, and that in this case it was the property of the trust; the minority considered that Equity will merely enjoin the possessor of such information from transmitting it to another in breach of a confidential relationship, and that information is never property "in any normal sense". [232] Here again one would suggest that much could be said both for the view of the majority, that the appellants ought to account for the profits they had made, and for the view of the minority, that they ought not to be asked to account. [233] The best way to understand the majority holding in favour of liability is arguably to reiterate the distinction between the rule about conflicts and the rule about unauthorized profits. One could agree with the dissenters that it was hard to see a conflict of interest inasmuch as the fiduciaries' interests were *aligned* with those of the beneficiaries; since they held shares in the same company, their fortunes were bound together. At the same time, the opportunity on the fiduciaries to make their gains came entirely from their fiduciary role. There was a strong similarity with the earlier case of *Regal (Hastings) Ltd. v. Gulliver*, [234] in which the fiduciaries were also co-shareholders with their beneficiary; even though their interests were thus aligned, they were unanimously held accountable for their gains on the basis of *Keech v. Sandford,* with almost no mention of conflicts of interest in the speeches of the House of Lords.

It is the view of the majority in *Phipps v. Boardman* which later appeared to find favour in Canada. In *Canadian Aero Service Ltd. v. O'Malley*, [235] the Supreme Court of Canada held that senior executives of a company are fiduciaries, and that the particular respondents were in breach of the rule. [236] For some time they had been engaged in attempting to secure a valuable contract for the appellant company. Just before their efforts came to maturity and bids were sought for the contract, the respondents resigned their positions with the company and shortly afterwards were successful in acquiring the contract for themselves. The question was whether they had to account for their gain on the basis of their acquisition for themselves of a business opportunity belonging to the company. In holding them liable, Laskin J. for the Court stressed that it is irrelevant to the applicability of the rule against unauthorized profits whether the beneficiary of the fiduciary relationship suffered any loss or the fiduciary was honest in what he or she had done. The essential element was whether the fiduciary had acquired any property or business advantage through the fiduciary role. Once the respondents in this case were held to be fiduciaries, rather than employees subject to contractual terms, the decision seems inevitable, so blatant were the facts. However, the judgment of the Court contains a careful analysis of the case law on the subject of the rule, and it seems to have made a twofold contribution to "this developing branch of the law". [237] First, it marked a return in Canada to the application of these rules as a "strict ethic", [238] certainly as far as corporate directors and senior officials are concerned, and, second, it underlined the point that this is a broad equitable principle to be seen and applied as such, rather than in terms of any particular judicial formulation of it. [239]

The decision in *Canadian Aero Service* has since been followed regularly in the lower courts, both as to directors and also as to employees (usually, of course, senior), who can be said to have a field of responsibility where they are entrusted, in the sense that they have the legal power and responsibility to make decisions in the performance of their duties for the good of the employer's enterprise. [240] Once such an individual is held to be a fiduciary, it will often become readily apparent, as in *Canadian Aero Service*, whether he or she was acting within the scope of his or her fiduciary obligation when he or she made the profit. But, where the scope of the fiduciary obligation is controversial, the relationship between the issues of who is a fiduciary and the scope of consequent fiduciary obligation can become difficult. [241]

A recent decision on the solicitor-client relationship, which is clearly a *per se* fiduciary relationship, shows that even where the existence of a fiduciary obligation is clear, its scope in relation to profitable opportunities may be difficult to delineate. *3464920 Canada Inc. v. Strother* [242] concerned a solicitor, Strother, who was an expert on tax shelters and who advised a particular client, Monarch, on how to take advantage of them. Changes to federal legislation undermined the viability of the shelters chosen. The written retainer between Monarch and Strother came to an end in 1997, but Strother continued to act for Monarch under an oral retainer, which was no longer exclusive. In 1998 and 1999, Strother discovered new techniques for pursuing profitable tax shelters, and entered into a business arrangement with a former employee of Monarch to pursue them, earning considerable profits. Monarch sued, seeking disgorgement of profits. By a 5-4 majority in the Supreme Court of Canada, Monarch recovered some of Strother's profits. The crucial issue was as to the effect of the contractual retainer arrangements upon the fiduciary obligations of the solicitor. The dissenting judges would have held that under the oral retainer, Strother was free to take advantage of the opportunities as he did. He had a duty of loyalty to Monarch, but this duty was not in the air; it was attached to his contractual obligations. The dissenting judges also took a very narrow view of what counts as an actionable conflict of interest and duty, stating that "… a conflict arises when a lawyer puts him- or herself in a position of having *irreconcilable* duties or interests". [243] The majority judges did not view the oral retainer so narrowly, holding that it required Strother positively to advise Monarch when he realized that his previous advice was subject to reconsideration. [244] More significantly, as a point which transcends the facts of the particular case, the majority took a different view of the rule against conflicts, and one which, it is suggested, is more consonant with the underlying principles in this field. The no-conflict rule is not only triggered where there is an *actual* conflict, such that one's duties and self-interest are irreconcilable. In this case, it was triggered because Strother had "created a *substantial risk* that his representation of Monarch would be materially and adversely affected by consideration of his own interests". [245]

Although the judges had a disagreement as to the scope and extent of the rules about conflicts of interest, just as in *Phipps v. Boardman,* it is not clear that the rules on conflicts were determinative here. The case was better understood as probing the limits of the rule against unauthorized profits, particularly when those profits are acquired not through the fiduciary role but independently by the fiduciary. In that case, does the fiduciary have a positive duty to offer a profitable opportunity to the beneficiary? The answer is: sometimes, but not always. We will return to this below. [246]

3. — Purchase of the Trust Property

(a) — Introduction

The inability of the trustee to purchase trust property arises, not from the rule against unauthorized profits, but from the rule against using fiduciary powers in a conflict of interest situation. [247] The trustee's power to dispose of trust property is inevitably a fiduciary power, and disposal to the trustee him- or herself, directly or indirectly, is an obvious case of conflict of interest. [248]

The general principle was established in the seventeenth century that a trustee may not purchase any part of the trust property. [249] The rubric is clear and beyond argument. Indeed, Lord Eldon's two famous judgments in *Ex parte Lacey* [250] and *Re James*, [251] where he set out a deterrent rationale behind the conflict of interest and duty rule, were themselves concerned with purchases made by trustees. In *Re James*, he said, [252] "the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases". This authority was invoked by Cooper J.A. in *Re Mitchell,* [253] where a will gave a right of pre-emption over certain shares held by a trust to two classes of persons. The shares constituted half the issued stock in a company, which the deceased and another owned in equal shares. The first class of persons with the pre-emptive right was the deceased's children, and the second, the other shareholder. The widow was one of the trustees, and, on it becoming clear that the only adult child had not the means to buy, the other shareholder made an offer. The widow then offered the sum which the other shareholder was prepared to pay, a fair and reasonable price. No doubt her intention was to maintain her family's

interest in the company, but the Nova Scotia Court of Appeal ruled against her. Not only was she a stranger to the preference, but as a trustee she was barred under the rule in *Re James*.

All manner of fiduciaries are excluded from purchasing the property under their control for the purpose of their tasks. Company directors and officers, agents, agents to sell, executors and administrators, mortgagees acting as trustees, trustees for the benefit of creditors and in bankruptcy, and inspectors in liquidation proceedings have been required by Canadian courts to surrender the property they have thus acquired or the personal profit that they have thereby made. [254] But it is the trustee who above all is held most strictly to the rule, as *Re Mitchell* shows. [255]

A will or instrument may of course enable a trustee or fiduciary to make such purchases, [256] but the court will usually strictly construe such a power. In *Rountree v. Sydney Land & Loan Co.*, [257] for example, where a company secretary was involved, the secretary was permitted to have a five per cent commission on a sale of the company's bonds. Without authority, the directors decided to convert certain preference shares into bonds, and to pay five per cent to the secretary. The shareholders were later informed of the conversion and ratified it, but, since they were not told of the interest the secretary had, he was required to surrender his gain. This was a case of consenting to a commission rather than a purchase, but the principle is the same. Perhaps because of the commercial context, a majority of the Supreme Court of Canada took a fairly generous view of the provisions of a partnership agreement in *Molchan v. Omega Oil & Gas Ltd.*, [258] holding that they authorized the general partner to acquire partnership property for its own benefit.

As with the rule against unauthorized profits, such a transaction may also be valid if all the beneficiaries, being fully capacitated and fully informed, give their consent to it. [259] If the trustee argues that he or she had the consent of the beneficiaries to the purchase, there is a heavy burden upon the trustee to show that the beneficiaries not only were capacitated, but knew as much of the situation as the trustee did. Reported cases suggest that few trustees succeed in this. [260]

Court approval on an application for advice and directions is also possible. [261] If the trustee seeks such prior approval, he or she will have to demonstrate that a sale is most necessary, that no other purchaser has been forthcoming or seems likely to come forward within a reasonable time, and that his or her own offer in the circumstances is a favourable one. [262] Such an exceptional situation was established in the Nova Scotia court in *Re Nathanson Estate*. [263] The assets in question were of a special purpose nature, being the lands, buildings, and equipment of a television station; the trustee had made reasonable efforts to find a purchaser, and, though *Campbell v. Walker* [264] favoured the calling for competitive bids, allowing the trustee to buy if his or her own offer was the best, the court thought that no useful purpose would be served by such a practice in the present case.

Failing authorization of one kind or another, the purchase by a trustee of trust property, and the same applies to all fiduciaries, is not a void but a voidable transaction. [265] The beneficiaries have a choice: either they can have the transaction set aside, or they can hold the trustee to the purchase. In the majority of cases their decision will turn on what they consider to be their financial advantage. Until the beneficiaries or other interested parties succeed in obtaining an order setting the contract aside, the trustee can pass a valid title to the innocent third party who gives value. The protection of such third parties is discussed in the section following the next one.

(b) — Transactional Structures

There are also various ways in which the fiduciary may purchase, and the court will examine the transaction carefully in order to determine whether there has been a breach of the rule. As will be discussed below, a trustee may purchase a trust beneficiary's interest, provided the trustee can show that the beneficiary knew all the facts and was fully capacitated and not under undue influence. [266] In that context, the trustee is not directly purchasing trust property and because he or she is dealing with the beneficiary, the trustee is not using his or her fiduciary trustee powers but acting personally. This possibility has sometimes been used by trustees in order to justify the acquisition of trust property, but the onus of proof on the trustee that that was indeed the character of the transaction is heavy.

In *Wright v. Morgan*,[267] a beneficiary had an option to purchase land held in the trust, and he assigned it to his brother who was one of the will trustees. The trustee exercised the option, and thus acquired the trust land for himself. He argued, when challenged, that the option was a property right, and that he had simply purchased it from a beneficiary who was well aware of the situation. Moreover, it was said, under the terms of the trust the assets could only be sold after valuation; such a valuation had taken place, and the trustee had bought at that price. Therefore, it was said, he had not bought at an artificially low price. The Privy Council refused to accept this argument. The option was a right to acquire trust property from the trustees, and the trustee would therefore be contracting with himself, a paradigm conflict situation. As to the valuation, this did not determine anything because the trustee had the power to choose the time for the sale, possibly a time when prices were not at their highest. Similarly, the best deal for the estate might be a cash sale, while the buying trustee might prefer credit terms. The essential point which condemned the trustee's argument was the conflict of interest, which made it impossible to know whether the trustee was fulfilling his duty towards the estate.

In *Johnston v. Johnston*,[268] the purchase was described by the trustee as a purchase of the beneficiary's interest, but it really was no such thing. A father had handed money to his son with which the son could buy land, and it was the intention of the father that he and his family would come to Ontario and live on the land. The son bought the land in his own name and later persuaded his father, at that time in a state of distress over a death in the family, to accept in lieu another lot of land belonging to the son. Mowat V.C. took the view that the son was an agent to buy, and therefore "a mere trustee"[269] of the land for the father. He had no authority to take the conveyance in his own name, and in effect was acquiring the trust property for an inadequate consideration.

Alternatively, a trustee or other fiduciary may insert another person between him- or herself and the acquisition of the trust property. He or she sells the trust property to another, with the idea of repurchasing from that person. In this way he or she may seek to argue that he or she was not purchasing trust property, but merely dealing with a third party, concerning property which no longer belonged to the trust. Where the trustee simply buys, through a nominee, he or she is clearly attempting to do no more than conceal his or her tracks, and in these circumstances there will be no difficulty in securing the return to the trust of the property or its value.[270] In *Kilbourn v. Coulter*,[271] the Court had ordered a deceased's estate to be sold by tender, and the executor submitted tenders through nominees. Every tender was for a different sum, and the tender of one of the nominees was accepted. The Court simply ordered the sale to be set aside.

The prohibition on trustee purchase through intermediaries applies, of course, not only to intermediaries who are natural persons, but to corporate persons, unincorporated bodies, and partnerships. "It is clear, in my opinion", said Lord Arden M.R., "that this rule [the conflict of interest and duty rule] applies, not only to the sale to a trustee personally, but to any company in which he has a substantial interest".[272] This thinking was applied in *Re International Equities Ltd.*[273] The company wished to dispose of certain assets and instructed Bulmer, a director, to sell as advantageously as possible. Bulmer used a company which he owned, Bulmer Ltd., to carry out the sale, as the co-directors knew he would. But instead of selling the assets through Bulmer Ltd., Bulmer sold the assets to Bulmer Ltd., and this company later sold the assets at a handsome profit. Since the co-directors did not know that Bulmer was using his company to act as a buying principal rather than as an agent to sell, the handsome profit had to be surrendered. Moreover, said the Court, it did not matter whether it was Bulmer or Bulmer Ltd., which received the profit. Once the breach of fiduciary relationship had been demonstrated, Bulmer could be sued for that profit.

(c) — Protection of Third Parties

Where a third party is involved as a purchaser of the trust property, another issue may arise. Was the third party a *bona fide* purchaser? If so, and he or she still retains the trust property, then he or she is entitled to retain it, and the trust beneficiaries can only pursue the trustee, a recourse discussed at the end of this section. As between the beneficiaries and the innocent third party who has given value in good faith, the law follows its usual rule of preferring the third party. It was for this reason that in *Parker v. Thomas*[274] the third party acquired an unassailable title. At a foreclosure sale, an executor bought estate property subject to a mortgage and subsequently mortgaged it to the plaintiffs, who, having themselves foreclosed on the executor, now brought an action of ejectment against the executor, the legatees, and all other interested parties. The plaintiffs were successful. Nor is

the law concerned with any incapacity or ignorance of the true facts in the trust beneficiary. In *Ricker v. Ricker*, [275] where the trustee had bought and then sold to a *bona fide* purchaser, the beneficiary was an infant. Yet the preference for the *bona fide* purchaser remained, and the infant was left with his recovery against the trustee. [276]

In other words, whether the trustee has sold to the innocent third party with the intention of buying the property back, or purchases the trust property and sells it later to such a third party, the defence of *bona fide* purchaser for value gives good title to the third party who meets the requirements of the defence. [277]

Moreover, if the property subsequently passes into the hands of yet a fourth party, that person acquires a good title as against the trust beneficiaries even if the fourth party knows at the time of his or her purchase that the trustee had originally sold, or bought and then sold, in breach of trust. The logic, sometimes called "sheltering", is that the beneficiaries' interests were lost when the third party acquired the property. But — and this is where the chain of good title set up by the innocent third party purchaser does not apply, contrary to the normal rule — if the purchaser from the innocent third party is the original trustee, then the trustee does not get good title as against the trust beneficiaries. In the traditional language of Equity, this person's conscience is obviously affected. The trust beneficiary who sues the original trustee is in a position to recover any trust assets which are found in the trustee's name. [278]

Apart from that case, what remedy does the beneficiary have when, in principle, the trustee's sale of the trust property was voidable, but due to a subsequent good faith purchase by some third party, it is too late for the beneficiary to avoid the sale? In proprietary terms, the beneficiaries can certainly lay claim to the proceeds received upon the sale, as the traceable product of trust property. [279] Those proceeds, however, may not be easy to find, and moreover the beneficiaries may have reason to think that the sold property was worth more than the price that the trustee received for it. Either way, the question of the personal liability of the trustee to restore the trust fund arises. Where rescission *in specie* is no longer possible, the beneficiaries can require the trustee to restore to the trust fund the value of the property that was improperly sold. [280] If they can establish that this was more than what the trustee received for it, the liability will be for the higher value. [281]

4. — Trustee Selling or Loaning Their Own Assets to the Trust

The case of a trustee selling his or her own assets to the trust is just as much a conflict of interest, or a case of self-dealing, as the case of a trustee buying trust property. In both cases, the trustee is using a fiduciary power on one side of the contract, and is acting personally on the other side. If a trustee might convey his or her own property to the trust either by way of sale, exchange, or loan at interest, there is an obvious risk that the trustee might prefer his or her own interest to the objectively assessed needs of the trust. It is the trustee's duty to determine whether the trust has reason to make an acquisition, whether it should acquire particular assets available and at the terms offered, and whether the market at that moment is ripe for making the acquisition. None of these duties can the trustee carry out, or at least be shown conclusively to have carried out, if the trustee also has his or her mind upon his or her own interests as vendor or lender. [282] Any such sale or loan is a voidable transaction.

The most familiar occurrence in this setting is the transfer of the trustee's assets to the trust fund as a trust investment. A good example is *Harrison v. Harrison*, [283] where the trustee was required to invest trust funds in a particular bank stock and in good faith sold some of his own such stock to the trust. The one beneficiary was of age and had consented to the trust acquiring the particular named stock, but because she had not been told that the vendor of the actual stock was the trustee himself, the sale was set aside by Mowat V.C. and the loss which had occurred through the failure of the bank thus fell upon the trustee himself. [284]

However, against the background of modern professional corporate trusteeship, the conflict rule, though it provides a singular protection for trust beneficiaries, can also be an encumbrance to trusteeship practice. The corporate trustee will have departments dealing with every aspect of investment work and trusteeship business, and it is likely that such a trustee will use its corporate resources as a means of making timely investments on behalf of trusts under its trusteeship care, later appropriating the investments to the trusts for which the purchase has been made. No doubt such appropriation will often be made when the existing trust investments can be most effectively realized. Indeed, it may be thought that much of the advantage to be gained

from a corporate trustee would be lost if such a trustee had to conduct its affairs in the same way as a trustee who has merely trust funds to hand, and must inevitably re-invest as and when those funds are realizable. Nevertheless, the Supreme Court in Canada has taken the view that the corporate trustee must act in this way.

In *Osadchuk v. National Trust Co.*,[285] the trust company had invested funds in three mortgages, and alleged it had done so on behalf of a trust in favour of three minors. However, the mortgages were bought by the company not only with its own funds, but in its own name, and only later were the mortgages formally transferred to the portfolio of the trust in question. When the mortgages failed, and the loss would normally have been marked against the trust account, the trust beneficiaries argued that the company had transferred its own assets for value to the trust. The lower courts found for the beneficiaries, and the appeal was dismissed in the Supreme Court principally for the reason that the trustee admittedly had bought with its own funds and in its own name.

There is a difficulty that arises out of this purchasing practice. While it is most unlikely that a corporate trustee would deliberately "unload" a doubtful or actually failing asset onto a client trust, the practice brings the trustee fairly and squarely within the ambit of Lord Eldon's remarks in *Re James*. Can a court ever be entirely certain that no inside dealing of this kind has occurred? Should there not be a prohibition which deters corporate trustees from such a practice? On the other hand, as counsel for the trustee argued, perhaps a distinction should be drawn between (1) a transaction which is the concluding step in the making of investments for an estate, and (2) a transaction by which the trustee disposes of property which it had bought for itself and subsequently found it convenient or desirable to sell to the estate? For the Court, Hudson J. said this was really a question of fact, and, since the trustee in question had bought with its own funds in its own name, he considered that this was sufficiently conclusive against the trustee. However, he added a further point. In a case like this, where the beneficiaries were all very young children, no inference could justifiably be drawn in favour of the trustee. In other words, the Court seems to have been saying that the transaction in question was too close to proposition (2), above, and in any event there could be no question of an informed consent of the beneficiaries to the transfer. But, suppose the beneficiaries had been all ascertained, capacitated, and of age; would that in itself have justified the drawing of an inference in favour of the trustee?

The implication of the judgment is that the Court was condemning any practice which involves the trustee purchasing with its own funds in its own name. But the question remains as to whether there would have been the possibility of a conflict if the trustee had bought with its own funds, but in the trust's name, recompensing itself when trust funds became available. Neither the *Osadchuk* case nor *Laing v. Trusts & Guarantee Co.*,[286] which later applied the same reasoning, dealt with this situation, but, since this would be similar to the agent buying directly for the principal, it is difficult to see what objection there could be to this.

Laing v. Trusts & Guarantee Co. provides an effective argument both for persons or institutions in the position of the *Osadchuk* trustee and also for trust beneficiaries. The Manitoba Court of Appeal by a majority disagreed with the trial judge on the facts. The trial judge found that the trust company there bought with its own funds in its own name. The majority on appeal reversed the trial court, finding that the trustee bought with trust funds and in the trust estate's name. Loss on the investment therefore fell on the trust. For the trustee this demonstrates, given the nature of trusteeship business, how difficult it is to distinguish between those practices which are impermissible and those which are permissible. For the beneficiaries, it can be said that this case underlines how important it is that the trustee clearly distinguish between non-conflict and conflict situations, and that the trustee ensures that he or she keeps his or her books in such a way that they can readily demonstrate that no conflict situation arose. It is interesting to note that, in the United States, *Scott and Ascher*[287] suggest that such transactions, where the records clearly establish the truth of the trustee's assertion that the purchase was for the trust, would probably not be considered self-dealing.

The trustee may also not lend his or her own property to the trust, even if the trustee has the ready resources and is prepared to do so at a lower interest rate than the market affords. But, as in an exceptional situation the court will permit a trustee to buy trust property with the prior consent of the court, so the court may approve of a loan transaction. In *Higgins v. Higgins*,[288] the executors and trustees under a will sought the Court's advice as to whether they might borrow by way of mortgage from the Eastern Trust Co., which was one of the executors and trustees. Baxter J. said that, though such a transaction without prior consent would normally be set aside, if the executors came to the court before any loan was created, he was prepared to examine

the mortgage proposed provided the proposals were put to him, together with an affidavit showing the necessity for resorting to one of the trustees for the loan.

5. — Trustee Borrowing From Trust

Loans by the trust to the trustee are also prohibited, being simply another type of self-dealing transaction. The trustee is simultaneously exercising a fiduciary power—to lend trust property—and acting personally on the other side of the same contract. In this situation at least one Canadian court has not been prepared to waive that prohibition, whatever the circumstances, when asked in advance for that consent. In *Re Lerner*,[289] the trustees had the consent of all interested parties, including a 19-year-old beneficiary, to an exercise of a power of maintenance and advancement which would allow a widow, who was a beneficiary but also a trustee, to acquire trust capital by way of loan and thus purchase a 50 per cent interest in her late husband's business. The Official Guardian on behalf of the minor objected that not only was this proposal outside the scope of the advancement power, and unauthorized by the investment power of the trust, but it was expressly prohibited by the conflict of interest and duty rule. Freedman J. considered with regret that the point was well taken; he was not free to examine the fairness or desirability of the proposed advance.[290] He therefore held that, there having been an objection on behalf of a minor, the proposed advance was not "an appropriate one"[291] for the exercise of the court's statutory power[292] to permit a particular investment not otherwise authorized by the trust or by law.

Trust companies solicit investment business from the public, issuing certificates at interest to lenders. They also pay interest on deposit accounts. The question has naturally arisen as to whether a trust company can invest funds under its administration in a deposit account administered by itself, or in its own loan certificates. The answer the courts have given is that they cannot.[293] In *Re Pick*,[294] the deceased had possessed debentures in the Canada Permanent Trust Co., and on his death those debentures had vested in the same trust company as executor and trustee. The executor was required to set up seven trusts, which it did, and it also redeemed the debentures, issuing Canada Permanent Trust Co. guaranteed investment certificates for the same amount, with the same maturity dates, and with the same rates of interest. These certificates were then held as part of the funds of each trust. In effect, as counsel for the trust company said, the debentures had been transferred from the deceased to the beneficiaries. Friesen Surr. Ct. J. refused to consent to this practice. In his view, it was precisely the same thing as the Supreme Court had condemned in the *Osadchuk* case. "The substance of both transactions is to use estate funds either in the purchase of assets owned by the executor, or using the estate funds to purchase such certificates."[295]

A guaranteed investment or trust certificate is an arrangement whereby the trust company borrows money at a rate sufficiently favourable as to attract investors, but also low enough that the company can make a profit through dealing with the invested funds. A trust company that invests trust funds in this way, as it did in *Re Pick*, is acting both as borrower (on its own behalf) and as lender (as trustee). In British Columbia section 17.1 of the *Trustee Act*[296] lays down that "... a corporation that is a trustee must not invest trust money in its own securities", and in *Ferrier v. Reid*[297] it was held that this was a clear prohibition to the trust company. However, counsel argued that under section 17 of the then Act, the court had a general power in particular cases to approve investments not specifically authorized by the Act.[298] This meant, he continued, that Aikens J. could authorize this type of investment. The argument was not pressed, however, and Aikens J. took little time in rejecting it. In his view, section 17 did nothing to remove or qualify the predecessor of section 17.1. Indeed, so fundamental was the conflict rule that the Act would surely have to spell out such a judicial power, if such was legislatively intended. It is interesting to observe that in the *Ferrier* case the trust company was proposing to make no charges for its administration of the trust, if it were permitted to invest the trust funds in the manner proposed. As far as first instance courts are concerned, there can clearly be no consent to such practice, and it is highly doubtful, in view of the *Osadchuk* decision, whether higher courts would entertain any different opinion.

Why there should be this difference of judicial attitude is not easy to understand. If a trustee merely borrows trust property without the informed and capacitated consent of all the beneficiaries, or of the court, then clearly the trustee has been judge in his or her own cause; but, if the trustee seeks the prior consent of the court and there is precedent for the court at least examining the facts in order to determine whether that consent might be given, there is no logical reason why the courts should be prepared in some cases to examine the evidence but in others to refuse to do so. There is no inherent distinction between a proposed

purchase by a trustee of trust property and a proposed borrowing by the trustee. Nor is there such a distinction between a loan to the trustee and a loan by the trustee. Each is a case where the trustee may have a personal interest, and each is therefore covered by the apparent blanket prohibition of *Aberdeen Railway v. Blaikie Brothers*.[299] The truth of the matter may well be that, in exercising the occasional role of examining the facts and giving a consent to affected transactions, the courts have been less concerned with the preventative principle which underlay *Re James* and *Aberdeen Railway v. Blaikie Brothers* than with the notion that the court, like the beneficiaries, can give an effective consent before the event, if it has been fully informed.

Like B.C., Saskatchewan has a provision expressly forbidding a corporate trustee from investing in its own securities.[300] New Brunswick, to the contrary, now expressly permits it.[301]

6. — Trustee Purchasing from Beneficiary

This situation is slightly different in that it does not involve the fiduciary's exercise of a fiduciary power.[302] Rather, we are considering the situation in which the trustee purchases some or all of a beneficiary's interest. Both the trustee and the beneficiary are acting in their own personal capacity. However, because of the fiduciary relationship, the trustee comes under a duty to disclose all relevant information that the trustee has to the beneficiary.[303] Naturally, this is typically information relating to the value of the property. Arm's-length contracting parties must not make misrepresentations, on penalty of the contract's being voidable, but they are not generally required to volunteer information. This is not true of the fiduciary dealing with his or her own beneficiary. The fiduciary duty of disclosure requires the trustee to be frank in telling the beneficiary everything that is relevant to the proposed transaction. In the presence of this positive duty of disclosure, non-disclosure is juridically equivalent to misrepresentation: it makes the contract voidable.[304]

It has been clear at least since the time of Lord Eldon's judgment in *Coles v. Trecothick*[305] that, provided the trust beneficiary acts with full knowledge of the trust affairs, a sale by the beneficiary of his or her interest to a trustee is a valid contract. As the trustee is not dealing with any part of the trust property itself, and is not exercising fiduciary powers but rather acting on his or her own account, there is no reason why the trustee should not do business with a capacitated and fully informed trust beneficiary concerning that beneficiary's own interest.

However, the onus of proof is on the trustee or fiduciary to show that the beneficiary did indeed have all the relevant information known to the trustee, and the courts are scrupulous in ensuring that no advantage could have been taken of the beneficiary.[306] As Middleton J. said in *Lamb v. Franklin*,[307] "Speaking for myself I do not think that rule can be too rigidly enforced and unless the cestui que trust is quite emancipated and separately advised the transaction should not stand."[308] If the burden is not met, the transaction is voidable by the beneficiary.

There can clearly be no informed consent when information is deliberately withheld from the beneficiary. In *Field v. Banfield*,[309] two executors received an offer from a third party to purchase certain shares in the estate holding. Without revealing this information, the executors persuaded each of their co-beneficiaries to sell his share in the estate to the executors, and, this done, the executors then sold the shares to the third party for a sum three times the purchase price. The purchase from the co-beneficiaries was set aside.

But in less clear-cut circumstances the courts have shown themselves prepared to examine and also to permit transactions which, in fact, present very similar problems to those which arise when the trustee is dealing directly with the trust property. One difficulty is that if even one beneficiary is unable to consent, whether because he or she is a minor, or unascertained, or otherwise, then it is impossible for the trustee to obtain the fully informed consent which is necessary to make the transaction secure. But some cases have allowed transactions to stand nonetheless. In *Re Hutton*,[310] for example, the trustees were holding a legacy for the beneficiary, and one of them sold some horses and equipment to the beneficiary, receiving in return from the beneficiary, a minor, a part assignment of his legacy. Later the trustee paid a debt for which the beneficiary was being pressed, and the beneficiary then assigned his remaining rights in the legacy to that trustee. Ives J. thought there was no need to set

these transactions aside. His criteria were that no advantage had been taken, nothing had been concealed, and the bargains in each case were fair and reasonable. The thesis, of course, is that when the transaction with a beneficiary is approved, the Court is saying that the trustee and the beneficiary were different persons representing the two poles of the bargaining position, and at arm's length. On this view, the transaction is not like a dealing by a trustee with the trust property; in that situation, nobody beyond the trustees can know the true story. Since, however, the property forming the subject-matter of the beneficiary's interest is exclusively under the jurisdiction of one of the parties to the transaction — the trustee — the distinction is hardly persuasive. In *Keech v. Sandford*,[311] for example, it was conclusively shown that the landlord, in renewing the lease to the trustee personally, was only doing so after refusing to renew the lease to the infant beneficiary. If it is necessary to adopt an absolute rule in such circumstances, it is difficult to appreciate why a trustee should be free to demonstrate that, in dealing with the trustee, the beneficiary knew all there was to know. How can the beneficiary or the court be sure that information has been brought out which, it was feared in *Keech v. Sandford*, might be suppressed? And in any event only a fully capacitated beneficiary can give an effective consent.

The case of *McDonnell v. Smyth*[312] brings out this close association of a trust interest with the property which forms the trust fund. A solicitor/trustee held land for beneficiaries who were tenants in common, and, while so acting, purchased the interest of one of the tenants in common. It was pointed out at trial that the interest was not a part of the trust estate, or an outstanding charge against the trust estate, and the purchase was not made at a sale of the estate in furtherance of a judgment. In the Court of Appeal, Graham E.J. for the Court added:[313] "I think [the trustee] had good ground for contending that he was not incapacitated from purchasing this interest, which was not the trust estate nor a claim against the trust estate." The trial judge had ordered the trustee to surrender his newly-acquired interest to his cotenants in return for the price he had paid, on the ground that a trustee could not buy him- or herself into a position of holding both as trustee and, with co-tenants, as a tenant in common. Graham E.J. had grave doubts as to whether the law imposed any such prohibition, but he was not prepared to say the trial judge was wrong. "There might be a case of a person occupying such a relation purchasing such an interest from a third party which would be very like an encumbrance on the estate of his *cestuis que trustent*, having ascertained its value by reason of his position."[314] And, if this were so, he was not prepared to challenge the judgment at trial.

In this case, then, though the transaction concerned a trust beneficiary's interest, at heart the same objection arose, highlighted in the case of co-tenants by the fact that the trustee's concern with that interest may well arise from having learned the real value of the interest. There might subsequently be a finding of mineral wealth, a formal declaration of rezoning as residential or industrial development land, or a compulsory purchase.

Unless there is very little monetary value involved, when the courts will not be anxious to unravel the motives and feelings which went into the transaction, the courts are particularly concerned that family arrangements shall be removed from all suspicion. "In family arrangements", said Garrow J. in *Field v. Banfield*,[315] "it is essential that the parties should be on an equal footing as regards information, and that during the negotiations the parties having the advantage of information should make full disclosure".

However, even Lord Eldon was content that a trust beneficiary, who is capacitated and at arm's length, should be able to assume his or her own risk in selling to a trustee.[316] The courts in Canada, as in the other common law jurisdictions, have not challenged this view. The key is to obtain the fully informed consent of all beneficiaries, who must be fully capacitated. Even if this test is not met, so that a transaction is voidable, it may be the case that a court will refuse to set a contract aside if there has been a subsequent agreement between the fiduciary and the beneficiary settling differences, no demonstration of unfairness, and a considerable lapse of time since the contract was made. This occurred in *Blain v. Terryberry*.[317]

G. — Conclusion: The Nature and Scope of the Rules

1. — When Does a Conflict Exist?

A fiduciary conflict arises when the fiduciary has a personal interest that conflicts with his or her fiduciary duty to act for and on behalf of the beneficiary in the exercise of his or her fiduciary powers. It also arises when the fiduciary has fiduciary duties

to more than one beneficiary, potentially requiring the fiduciary to choose between the two. A potential conflict is any situation in which it is foreseeable that an actual conflict will presently arise. A fiduciary in any one of these situations is obliged to disclose it to the beneficiary.

In any case of doubt, the first solution for the fiduciary, as we have seen, is to obtain the fully informed consent of the beneficiaries in advance. If this is not practicable, the court may be willing to approve a transaction. The prudent fiduciary will take one or the other of these steps and, in any case where neither was taken, the question will always arise as to why not. Of course, a fiduciary can also usually resolve a conflict by resigning the fiduciary office. This may not be an attractive option, but the fact that it exists is one reason which justifies the traditional strict approach to conflicts. [318] Again, it is possible (though perhaps less likely) that beneficiaries will approve a conflict situation (whether a conflict of self-interest and duty, or a conflict between fiduciary duties) after the fact; so long as they do so unanimously and with full information, this will also protect the fiduciary, although by allowing things to get this far, he or she has clearly taken the risk that such consent might not be forthcoming (or might not even be possible, if there are incapacitated or unascertained beneficiaries).

2. — When May a Fiduciary Profit from an Opportunity?

It was suggested above that it is important to distinguish the rules against exercising fiduciary powers while in a conflict from the rule against unauthorized profits. [319] If one attempts to understand all cases of accountability for profits as arising from the presence of a conflict, it becomes impossible to explain the accountability that arises in cases where the fiduciary's interests are fully aligned with the beneficiary, and in cases where the fiduciary is accountable even after resigning. Just as there can be conflict without profit, there can be unauthorized profit without conflict.

The basic rule is that in the absence of authorization, a trustee is accountable for any right, profit or benefit acquired "by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it". [320]

But a trustee, or any fiduciary, is not accountable for any gain at all. As the survey of cases above shows, the most difficult cases are those involving the appropriation by the fiduciary of opportunities which might have been appropriated for the beneficiary. [321] These cases are difficult precisely because not *every* self-interested act by a fiduciary can be impugned. A non-professional trustee is likely to have another employment or a business, and indeed may have been invited to accept trusteeship because of a related expertise in business or investment management. Corporate directors and solicitors are fiduciaries, but they are likely to be engaged outside the scope of their fiduciary roles with work and engagements that are not dissimilar from their activities as fiduciaries.

The basic rule makes it clear that they are accountable from gains arising out of their fiduciary role; and this, even after they have resigned, if they profit from information acquired before resignation. But some cases, particularly in corporate law, reveal fiduciaries being accountable even in relation to opportunities that came to them independently. [322] This requires us to notice that there are different kinds of fiduciaries, and some of them are subject to a wider rule than others.

In these opportunity instances in particular, a crucial element is the scope of the fiduciary's duties. This does not imply any distinction between differing intensities of the duty of loyalty. Loyalty is loyalty. [323] What it implies is an examination of what it is that the fiduciary is required to do loyally, and what he or she is allowed to do for his or her own interest. This factor will vary among fiduciaries as to the way in which it applies. Compare the position of two corporate fiduciaries: one is the Chief Executive Officer of a corporation, and the other is an independent director of the same corporation. Both owe a duty of loyalty to the corporation, but the officer's other duties (all of which are subject to and conditioned by a requirement to act loyally) are much more extensive. The CEO is a full-time employee with positive contractual duties to work for the benefit of the corporation, to advance its interests, and to seek out opportunities from which it may benefit. The independent director is probably employed otherwise, and may be a director of several corporations; his or her positive duties to *this* corporation are probably limited to those imposed by the fiduciary duty of care, skill and diligence. It is this crucial difference which leads to the result that the possibility of taking, for his or her own benefit, a business opportunity which may appear, is much less for the officer than for the independent director. The officer has much more extensive duties, all of which must be performed loyally;

the officer is therefore far more likely to find that any attempt to procure a personal benefit renders him or her accountable. The independent director, who comes across an opportunity in his or her personal capacity and without the use of any information acquired through his or her directorial role, can keep it for his or her own benefit. He or she has no duty to the corporation to make over to it any opportunity that he or she finds, and so he or she is outside the operation of the rule against unauthorized profits. [324] The duty of loyalty does not constrain a director's private life, outside his or her directorial role. [325]

The confirmation that there are two separate norms or situation in play can be found in the cases. When a profit is acquired through the fiduciary role, it does not matter whether the profit had anything to do with the fiduciary's role or duties towards the beneficiary; this is why the basic rule covers things like bribes. But when a director is held accountable even for an opportunity that came to him or her independently, that is, not via his or her fiduciary role, it is crucial that the opportunity be, in some sense, in the line of business of the corporation; it is this factor which places the fiduciary under an obligation to at least offer the opportunity to the corporation.

This distinction finds an echo in the disagreement among the judges of the Supreme Court of Canada in *Strother v. 3464920 Canada Inc.,* [326] over the question of the scope of the oral contract of retainer. Contrary to the dissenting judges, the majority found that the contract required the solicitor to inform his client that his previous advice needed to be reconsidered. It was this positive contractual duty, coupled with the overriding fiduciary duty, that meant that the solicitor was accountable for profits. This also assists in understanding why the solicitor was not accountable for all of his profits, as he would be if they had derived from his fiduciary role. Because they were acquired independently, his accountability was limited by his contractual obligations.

The lay trustee's position is generally likely to be closer to that of the independent director than to that of the executive director who is also an officer. The trustee's duties to the trust are not full-time. The duty of loyalty does not constrain his or her fulltime employment, as it does in the case of a corporate officer. It constrains that which he or she does on behalf of the trust, and it constrains what he or she does with information obtained by acting as a trustee. It is because the fiduciary cannot take advantage of such information that the rule against unauthorized profits can apply even after resignation. [327]

3. — Strict and Flexible Approaches

Throughout this discussion attention has been drawn to the two theories as to the nature of the rule against conflicts. Lord Eldon's concept, one which has been followed both in England and in Canada, is one which forbids trustees and other fiduciaries from exercising their fiduciary powers in conflict situations, and from extracting unauthorized personal benefits from the fiduciary role. The fiduciary's protestation of good faith, and of no harm done to the trust, are irrelevant. This approach is sometimes explained as based on deterrence. Another explanation is that the underlying duty of loyalty always requires the fiduciary to act for and on behalf of the beneficiary: that is, using his or her powers in what he or she perceive to be the best interests of the beneficiary, and holding any benefits so derived for the beneficiary. The strict rule against conflicts exists to protect that underlying fiduciary duty. The underlying fiduciary duty requires the trustee to be motivated by the beneficiary's best interests; the conflict rule forbids the trustee from exercising powers in a situation where his or her motivation will be ambiguous. [328] On this approach, once the conflict is found, the inquiry is at an end; the transaction is voidable, and any gain must be disgorged as arising from the fiduciary role. There may still be room for difficult factual inquiries, in particular to determine whether or not a conflict of interest existed, as discussed in the preceding section.

Many of the leading cases take this traditional approach. [329] The decision of the House of Lords in *Guinness plc v. Saunders* [330] is, if anything, stricter than the majority holding in *Boardman* because the fiduciary was not only required to disgorge his gain, but was denied any allowance for the work he had done.

The second theory, suggested by some of the Canadian cases, tends to merge the two levels of protection. [331] Rather than finding a strict prohibition against conflicts of interest and duty and unauthorized profits, this approach may look directly to the underlying fiduciary duty, the duty to act in the best interests of the beneficiary. On this approach, if the trustee did so act, there may be no reason to require the disgorgement of a gain, even though a conflict of interest may have been apparent on the surface. If the trustee did not actually compromise the beneficiary, why penalize him or her? That is why, on this approach, a court may

be willing to consider such issues as whether the trustee was in good faith, and whether the gain (which the beneficiary now seeks) was one which could not possibly have accrued to the beneficiary.

The difference between the prophylactic theory and the alternative theory, which would look at and weigh all the facts in order to determine whether a profit has to be surrendered, is really one of approach. "Rules of equity", said Lord Upjohn, [332] "have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case". In that process of application, what may strike one member of the court as calling, perhaps to his or her regret, for an injunction or restitutionary order in the cause of maintaining high standards of conduct may strike another as calling for a reasonable and equitable attitude towards the particular defendant. [333] Canadian law could therefore benefit from a clearer commitment to one approach or the other.

The strict view is arguably based on the idea that the underlying obligation of loyalty is a subjective obligation that requires the fiduciary to act in what he or she perceives to be the best interests of the beneficiary. In a conflict situation, it is typically impossible even for the fiduciary, let alone the court, to know whether or not he or she has successfully ignored competing pressures. The decision in *3464920 Canada Inc. v. Strother* [334] suggests that the strict view currently has the upper hand, although only by a fine margin.

There has been some legislative intervention in the corporate field, where there has always been concern over the involvement of directors with contracts entered into by their companies. [335] Directors may also find themselves holding positions on the boards of two or more companies each of which may come into competition with the other. This generates not so much a conflict of self-interest and fiduciary duty, but rather a conflict of fiduciary duty to one beneficiary and fiduciary duty to a different beneficiary. Equity's stance is equally rigorous. [336] Whether it is an adequate response to the problem of the director's conflict of interest and duty for company legislation simply to reproduce the Equitable principle can be the subject of two views. One would have thought that the complexities of modern corporate and commercial business, and the several roles played and interests represented by so many of the participants, require a more precise conception of when we, as a society, expect disclosures. When does the competitive characteristic of business justify non-disclosure of personal interest? What does it mean to say that, whatever the demands of *Keech v. Sandford* — "stern and unbending rule" — the courts must be "realistic"? And to whom is disclosure, when necessary, to be made? [337] Legislation may also govern the case of the municipal councillor [338] and the pension administrator. [339]

The fiduciary relationship is, essentially, a relationship in which one person is authorized and obliged to act for and on behalf of another, or others. The position of the beneficiary of the fiduciary relationship argues most strongly for the retention of the original and strict understanding of the duties of loyalty. In most cases, the trustee is not closely acquainted with trust affairs, and moreover it is the trustee who has so much of the information which the beneficiary needs in order to know whether a conflict situation exists, let alone what precise form it takes. Also, if the time has come to regulate this problem in the corporate field, it is to be noted how many trusts today are interlocked with companies, both as to assets and trustee directors. [340]

If a choice has to be made between rules which favour the beneficiary who may well start with a real informational disadvantage *vis-à-vis* his or her trustee, and rules which permit a trustee to argue his or her way out of a *prima facie* situation of conflict or unauthorized profit when he or she might have avoided the whole difficulty by gaining an informed consent or court approval before entering into the situation, that choice surely cannot be hard to make.

Footnotes

98 Below, Part IV.

99 Equity had exclusive jurisdiction over trusts and the administration of estates, and the principles were first developed in those contexts. They were later extended into fiduciary relationships which have a common law foundation in contract, such as agency and partnership.

100 The case of a conflict of duty and duty is rarer, but Equity's standards are equally high. Such cases can arise when a lawyer or real estate agent acts for parties on both sides of a transaction. See *Moody v. Cox*, [1916-17] All E.R. Rep. 548, [1917] 2 Ch. 71 (Eng. Ch. Div.); *Raso v. Dionigi* (1993), 1993 CarswellOnt 590, 12 O.R. (3d) 580, 100 D.L.R. (4th) 459, 31 R.P.R. (2d) 1, 62 O.A.C. 228, [1993] O.J. No. 670 (Ont. C.A.); *Hilton v. Barker Booth & Eastwood (a firm)*, [2005] 1 W.L.R. 567, [2005] UKHL 8 (H.L.) (where there was also a conflict of interest and duty). Although the cases are often discussed in terms of "conflict of interest", it seems that it is a conflict of duty and duty which underlies cases like *MacDonald Estate v. Martin*, 1990 CarswellMan 384, 1990 CarswellMan 233, EYB 1990-68602, (sub nom. *Martin v. Gray*) [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 77 D.L.R. (4th) 249, [1991] 1 W.W.R. 705, 70 Man. R. (2d) 241, 121 N.R. 1, 285 W.A.C. 241, [1990] S.C.J. No. 41 (S.C.C.), and *Wallace v. Canadian Pacific Railway*, (sub nom. *Canadian National Railway Co. v. McKercher LLP*) [2013] 2 S.C.R. 649, 2013 SCC 39, 2013 CarswellSask 432, 2013 CarswellSask 433, EYB 2013-223917, 42 C.P.C. (7th) 1, 360 D.L.R. (4th) 389, [2013] 10 W.W.R. 629, 446 N.R. 1, 423 Sask. R. 1, 588 W.A.C. 1, [2013] A.C.S. No. 39, [2013] S.C.J. No. 39 (S.C.C.), dealing with whether lawyers can act on behalf of clients whose interests are adverse to other current or former clients. See also *Re Indalex Ltd.*, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, 2 C.C.P.B. (2nd) 1, 354 D.L.R. (4th) 581, D.T.E. 2013T-97, 439 N.R. 235, 301 O.A.C. 1, 20 P.P.S.A.C. (3d) 1, [2013] S.C.J. No. 6 (S.C.C.) at paras. 64, 193-4, discussing the conflict of duty and duty that may arise in relation to members of the board of directors of a business corporation which is also the fiduciary administrator of its employees' pension plan.

101 For corresponding principles in the law of Quebec, see Civil Code of Québec, arts. 322-6; 1309-14; 2138, 2146-7; and, under the prior Civil Code of Lower Canada, *Mongeau v. Mongeau* (1971), 1971 CarswellQue 59, 1971 CarswellQue 59F, [1973] S.C.R. 529 (S.C.C.); *Banque de Montréal c. Ng*, 1989 CarswellQue 126, 1989 CarswellQue 1818, EYB 1989-67838, [1989] 2 S.C.R. 429, 28 C.C.E.L. 1, 62 D.L.R. (4th) 1, 100 N.R. 203, 26 Q.A.C. 20, [1989] S.C.J. No. 98 (S.C.C.) at 436.

102 E.R. Hoover, "Basic Principles Underlying Duty of Loyalty" (1956) 5 Cleveland-Marshall L. Rev. 7, 10. See also R. Valsan, "Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment" (2016) 62 McGill L.J. 1.

103 *Wallace v. Canadian Pacific Railway*, *supra*, note 100, at paras. 38-40. See also *Re Indalex Ltd.*, *supra*, note 100 at paras. 65, 201.

104 In Saskatchewan and New Brunswick, the two rules are codified separately: *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 9; *Trustees Act,* S.N.B. 2015, c. 21, s. 31(1).

105 *Tito v. Waddell*, [1977] 3 All E.R. 129, [1977] Ch. 106 (Eng. Ch. Div.) at 241.

106 A.J. McClean, "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alta. L.R. 218. The opposite view would require a definition of "conflict" that artificially included any unauthorized profit.

107 *Regal (Hastings) Ltd. v. Gulliver* (1942), [1942] 1 All E.R. 378, [1967] 2 A.C. 134 (U.K. H.L.); *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, [1966] 3 All E.R. 721, [1966] 3 W.L.R. 1009 (U.K. H.L), as discussed by McClean, *ibid.,* at 224-8.

108 *Canadian Aero Service Ltd. v. O'Malley*, 1973 CarswellOnt 236, 1973 CarswellOnt 236F, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371, [1973] S.C.J. No. 97 (S.C.C.).

109 Cases are discussed below, Part IV.

110 A leading case is *Aberdeen Railway v. Blaikie Brothers* (1854), [1843-60] All E.R. Rep. 249, 2 Eq. Rep. 1281, 1 Macq. 461, 1 Paterson 394 (U.K. H.L.). In *Tito v. Waddell*, [1977] 3 All E.R. 129, [1977] Ch. 106 (Eng. Ch. Div.) at 240-241, this is called the "self-dealing rule". More detail on the case law is below, Part II f 3-5. Where a principal discovers that his or her agent has been bribed, the principal is entitled to rescind any contract which the corrupt agent has made with the third party briber on the basis of this principle; moreover, the agent forfeits any contractual right to compensation from the principal (*Imageview Management Ltd v. Jack*, [2009] EWCA Civ 63, [2009] 2 All E.R. 666 (C.A.)). Furthermore, the amount of the bribe is recoverable not only against the fiduciary agent (under the rule against unauthorized profits, discussed below) but alternatively against the briber (*Mahesan v. Malaysia Housing Society* (1977), [1979] A.C. 374, [1978] 2 All E.R. 405 (Malaysia P.C.)), regardless of whether the principal affirms or avoids the contract with the briber (*Logicrose Ltd. v. Southend United Football Club*, [1988] 1 W.L.R. 1256 (Eng. Ch. Div)).

111 Below, Part II F 3-5.

112 In *Mayer v. Rubin*, 2017 ONSC 3498, 2017 CarswellOnt 8889, 30 E.T.R. (4th) 239 (Ont. S.C.J.), additional reasons 2017 ONSC 4121, 2017 CarswellOnt 10235, 30 E.T.R. (4th) 250 (Ont. S.C.J.), F.L. Myers J. said (at paras. 13, 36): "Such is the insidiousness of conflict of interest that people with no doubt as to their own *bona fides* can allow themselves to commit significant wrongdoing without thinking that they are doing anything wrong … It is not an insult to anyone's integrity to understand that conflicts of interest are insidious. Conflicts of interest play havoc with peoples' judgment of their own capacity to maintain neutrality and a fiduciary stance."

113 For a range of reasons, conflict of interest transactions in corporate law may be different on this point, being subject to challenge on the basis of substantive fairness.

114 Below, Part II F 3 (c).

115 *Re Lamb*, [1894] 2 Q.B. 805 (Eng. Q.B.); *Mayer, supra,* note 112. See also *Re Indalex Ltd.*, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, 2 C.C.P.B. (2nd) 1, 354 D.L.R. (4th) 581, D.T.E. 2013T-97, 439 N.R. 235, 301 O.A.C. 1, 20 P.P.S.A.C. (3d) 1, [2013] S.C.J. No. 6 (S.C.C.) at paras. 66, 215-18, discussing how the board of directors of a corporation can manage the conflict that may arise between its fiduciary duty to the corporation and to the members of an employee pension plan of which the corporation is the fiduciary administrator.

116 *Tito v. Waddell*, [1977] 3 All E.R. 129, [1977] Ch. 106 (Eng. Ch. Div.) at 240-241, where this is called the "fair dealing rule". See *Tate v. Williamson* (1866), 2 Ch. App. 55, 15 W.R. 321 (Eng. Ch. App.); *Moody v. Cox*, [1916-17] All E.R. Rep. 548, [1917] 2 Ch. 71 (Eng. Ch. Div.); *McKenzie v. McDonald*, [1927] V.L.R. 134 (Australia Vic. Sup. Ct.); *Maguire v. Makaronis* (1997), 188 C.L.R. 449; and the Canadian cases below, Part II F 6.

117 *3464920 Canada Inc. v. Strother*, [2007] 2 S.C.R. 177, 2007 SCC 24, 2007 CarswellBC 1201, 2007 CarswellBC 1202, [2007] 2 S.C.R. 177, 67 B.C.L.R. (4th) 1, 29 B.L.R. (4th) 175, 48 C.C.L.T. (3d) 1, [2007] 4 C.T.C. 172, 281 D.L.R. (4th) 640, [2007] 7 W.W.R. 381, 241 B.C.A.C. 108, (sub nom. *Strother v. 3464920 Canada Inc.*) 2007 D.T.C. 5273, 2007 D.T.C. 5301, 363 N.R. 123, 399 W.A.C. 108, [2007] S.C.J. No. 24 (S.C.C.) at para. 55.

118 As in *McKenzie, supra,* note 116; see also *Mahoney v. Purnell*, [1996] 3 All E.R. 61 (Eng. Q.B.D.) (rescission for undue influence).

119 The quotation is from Deane J. in *Chan v. Zacharia* (1984), 154 C.L.R. 178, 58 A.L.J. 660, 58 A.L.J.R. 353, 53 A.L.R. 417 (Australia H.C.) at 198. See also *Keech v. Sandford* (1726), Sel. Cas t. King 61, 25 E.R. 223, 2 Eq. Cas. Abr. 741, 22 E.R. 629 (Eng. Ch. Div.); *Parker v. McKenna* (1874), 10 Ch. App. 96 (Eng. Ch. Div); *Furs Ltd. v. Tomkies* (1936), 54 C.L.R. 583 (Australia H.C.); *Regal (Hastings) Ltd. v. Gulliver* (1942), [1942] 1 All E.R. 378, [1967] 2 A.C. 134 (U.K. H.L.); *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, [1966] 3 All E.R. 721, [1966] 3 W.L.R. 1009 (U.K. H.L); *Canadian Aero Service Ltd. v. O'Malley*, 1973 CarswellOnt 236, 1973 CarswellOnt 236F, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371, [1973] S.C.J. No. 97 (S.C.C.); *Warman International Ltd. v. Dwyer* (1995), 182 C.L.R. 544, 69 A.L.J. 782, 69 A.L.J.R. 362, 128 A.L.R. 201, 16 Q.L. 147, 15 Q.L. 206 (Australia H.C.); *Rochwerg v. Truster* (2002), 2002 CarswellOnt 990, 58 O.R. (3d) 687, 23 B.L.R. (3d) 107, 158 O.A.C. 41, [2002] O.J. No. 1230 (Ont. C.A.), additional reasons at (2002), 2002 CarswellOnt 1456, 212 D.L.R. (4th) 498, [2002] O.J. No. 1230 (Ont. C.A.); *Howard v. Federal Commissioner of Taxation*, [2014] HCA 21, 253 C.L.R. 83 at paras. 37, 62-63. More cases are discussed below, Part II F 1-2.

120 *Attorney-General for Hong Kong v. Reid* (1993), [1994] 1 A.C. 324, [1994] 1 All E.R. 1 (New Zealand P.C.); *FHR European Ventures LLP v. Cedar Capital Partners LLC*, [2014] UKSC 45, [2015] A.C. 250, [2014] 4 All E.R. 79, [2014] 3 W.L.R. 535 (U.K. S.C.). In Canada, the Court may view the imposition of the trust as discretionary: *Soulos v. Korkontzilas*, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, [1997] 2 S.C.R. 217, 32 O.R. (3d) 716 (note), 46 C.B.R. (3d) 1, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89, 9 R.P.R. (3d) 1, 212 N.R. 1, 100 O.A.C. 241, [1997] S.C.J. No. 52 (S.C.C.), discussed in chapter 11, Part II C.

121 The speeches in *Regal (Hastings),* for example, do not refer to conflicts of interest in describing the liability.

122 The rule, however, is not ordinarily penal. If a partner takes a secret profit, his or her obligation to account nonetheless allows him or her to keep his or her share of the gain: *Olson v. Gullo* (1994), 1994 CarswellOnt 1040, 17 O.R. (3d) 790, 20 B.L.R. (2d) 47, 54

C.P.R. (3d) 497, 113 D.L.R. (4th) 42, 2 E.T.R. (2d) 286, 38 R.P.R. (2d) 204, (sub nom. *Olson v. Gullo (Estate)*) 71 O.A.C. 327, [1994] O.J. No. 587 (Ont. C.A.), leave to appeal refused (1994), 1994 CarswellOnt 5606, [1994] 3 S.C.R. xi (note), 20 O.R. (3d) xv (note), 20 B.L.R. (2d) 47 (note), 56 C.P.R. (3d) vi (note), 116 D.L.R. (4th) vii (note), 41 R.P.R. (2d) 317 (note), 179 N.R. 400 (note), 79 O.A.C. 80 (note), [1994] S.C.C.A. No. 248, 4 E.T.R. (2d) 280 (note) (S.C.C.). Even a trustee who breaches his or her duty of loyalty may be entitled to compensation: *Simone v. Cheifetz* (2000), 2000 CarswellOnt 4093, 36 E.T.R. (2d) 297, 137 O.A.C. 351, [2000] O.J. No. 4191 (Ont. C.A.). As to whether punitive damages may be awarded in an appropriate case, see chapter 25, Part II C.

123 *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, [1966] 3 All E.R. 721, [1966] 3 W.L.R. 1009 (U.K. H.L); *Warman International Ltd. v. Dwyer*, *supra*, note 119; *Slate Ventures Inc. v. Hurley* (1996), 1996 CarswellNfld 64, 139 Nfld. & P.E.I.R. 235, 27 B.L.R. (2d) 41, 433 A.P.R. 235 (Nfld. T.D.), affirmed (1997), 1997 CarswellNfld 203, 156 Nfld. & P.E.I.R. 304, 37 B.L.R. (2d) 138, 483 A.P.R. 304, [1997] N.J. No. 252 (Nfld. C.A.). But contrast *Guinness PLC v. Saunders*, [1990] 2 A.C. 663, [1990] 2 W.L.R. 324 (U.K. H.L.): no allowance, even though the fiduciary was assumed for the purposes of the litigation to be in good faith.

124 For some doubts about claims for loss in this context, see J. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 C.B.L.J. 107; contrast T.G. Youdan, "Liability for Breach of Fiduciary Obligation" in *Special Lectures of the Law Society of Upper Canada, 1996*, at 12-17.

125 *Nocton v. Lord Ashburton*, [1914] A.C. 932, [1914-15] All E.R. Rep. 45 (U.K. H.L.), as interpreted in *Hodgkinson v. Simms*, 1994 CarswellBC 438, 1994 CarswellBC 1245, EYB 1994-67089, [1994] 3 S.C.R. 377, 97 B.C.L.R. (2d) 1, 16 B.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 117 D.L.R. (4th) 161, 5 E.T.R. (2d) 1, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 6 C.C.L.S. 1, 95 D.T.C. 5135, 171 N.R. 245, 80 W.A.C. 1, [1994] S.C.J. No. 84 (S.C.C.) at 415, for the majority; *London Loan & Savings Co. v. Brickenden*, 1934 CarswellOnt 355, [1934] 3 D.L.R. 465, [1934] 2 W.W.R. 545 (Jud. Com. of Privy Coun.) at 469; *Canson Enterprises Ltd. v. Boughton & Co.*, 1991 CarswellBC 269, 1991 CarswellBC 925, EYB 1991-67056, [1991] 3 S.C.R. 534, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 85 D.L.R. (4th) 129, 43 E.T.R. 201, [1992] 1 W.W.R. 245, 6 B.C.A.C. 1, 131 N.R. 321, 13 W.A.C. 1, [1991] S.C.J. No. 91 (S.C.C.) at 542, 558; *Hodgkinson v. Simms*, 1994 CarswellBC 438, 1994 CarswellBC 1245, EYB 1994-67089, [1994] 3 S.C.R. 377, 97 B.C.L.R. (2d) 1, 16 B.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 117 D.L.R. (4th) 161, 5 E.T.R. (2d) 1, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 6 C.C.L.S. 1, 95 D.T.C. 5135, 171 N.R. 245, 80 W.A.C. 1, [1994] S.C.J. No. 84 (S.C.C.) at 393-4; *Swindle v. Harrison* [1997] 4 All E.R. 705 (C.A.) at 718, 720, 732-3 and 735; *Mulligan v. Stephenson*, 2016 BCSC 1941, 2016 CarswellBC 2954, 41 C.B.R. (6th) 34, 71 R.P.R. (5th) 286 (B.C. S.C.) (non-pecuniary loss awarded). For punitive damages, see chapter 25, Part II C.

126 *Canson, ibid.,* was a case in which the non-disclosure was of the interest of another client of the defendant lawyer. The case is analyzed in more detail in chapter 25, Part II B 3. In *Hilton v. Barker Booth & Eastwood (a firm)*, [2005] 1 W.L.R. 567, [2005] UKHL 8 (H.L.), there was actionable non-disclosure of the defendant solicitors' own self-interest, and the conflicting interest of another client.

127 As in *Hodgkinson, supra,* note 125.

128 This happened in *Canson, supra,* note 125, and in *Swindle, supra,* note 125. See also *Mulligan v. Stephenson*, 2016 BCSC 1941, 2016 CarswellBC 2954, 41 C.B.R. (6th) 34, 71 R.P.R. (5th) 286 (B.C. S.C.) at para. 147.

129 *Brickenden, supra,* note 125.

130 See chapter 25, Part II B 3-4, where compensation claims for breach of the duty of disclosure are distinguished from claims that arise out of the stewardship of property and are mediated by accounting.

131 Following common usage, this person will frequently be called "the fiduciary" in what follows.

132 For doubts about deterrence theories of fiduciary law, see L. Smith, "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013), 7 J. of Equity 87. If the rules were really designed to be deterrent, one would expect the remedies to be routinely punitive (*supra,* note 122).

133 In other words, the fiduciary must not only be loyal, but must be seen to be loyal. For an argument along these lines, see L. Smith, "The Motive, Not the Deed" in *Getzler* at 53.

134 L. Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014), 130 Law Q. Rev. 608.

135 In *Parker v. McKenna* (1874), 10 Ch. App. 96 (Eng. Ch. Div.) it was said to be irrelevant whether the beneficiary suffered loss, making evidence on the matter inadmissible. See also *Gray v. New Augarita Porcupine Mines Ltd.*, 1952 CarswellOnt 412, [1952] 3 D.L.R. 1 (P.C.) at 15.

136 However, even though a person is a fiduciary, there can be no recovery for breach of fiduciary duty if no profit or benefit, actual or potential, has been made or taken by him or her, and the beneficiary has suffered no actual or potential loss: *Misener v. H.L. Misener & Son Ltd.* (1977), 21 N.S.R. (2d) 92, 77 D.L.R. (3d) 428 (N.S. C.A.); *Penkala v. Lockwood* (1991), 80 Alta. L.R. (2d) 145 (Alta. Q.B.).

137 *Ex parte Lacey* (1802), 6 Ves. Jun. 625 (Eng. Ch.); *Re James* (1803), 8 Ves. Jun. 337 (Eng. Ch.).

138 In *Re Lamb*, [1894] 2 Q.B. 805 (Eng. Q.B.) at 820, A.L. Smith L.J. said: "It is obvious—everybody knows it who has any knowledge of life—that when a man has a pecuniary interest, his mind is naturally warped in favour of his own interest. It is human nature, and no one can doubt it." See also the quotations from *Mayer v. Rubin*, 2017 ONSC 3498, 2017 CarswellOnt 8889, 30 E.T.R. (4th) 239 (Ont. S.C.J.[Estates List]), additional reasons 2017 ONSC 4121, 2017 CarswellOnt 10235, 30 E.T.R. (4th) 250 (Ont. S.C.J.[Estates List]) at paras. 13, 36 [2017 ONSC 3498], set out *supra,* note 112.

139 *Tornroos v. Crocker*, [1957] S.C.R. 151, 7 D.L.R. (2d) 104 (S.C.C.), discussed below, Part II D 6 b iii.

140 In *Bank of Upper Canada v. Bradshaw* (1867), L.R. 1 P.C. 479 (Lower Canada P.C.), the Privy Council considered that the defendant's good faith and lack of fraud was a factor to be taken into account. Lord Upjohn, dissenting, was also very exercised by the appellants' good faith in *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (U.K. H.L) See also *Rose v. Rose* (1914), 32 O.L.R. 481 (Ont. C.A.): intention of trustee to advance the trust estate's interests: below, Part II D 6 b iii. *Cf. Re Lithwick* (1975), 9 O.R. (2d) 643, 61 D.L.R. (3d) 411 (Ont. H.C.): executor removed because of conflict of interest and duty, undocumented claim by him to be a creditor of the estate, no dishonesty or impropriety shown.

141 *Bank of Upper Canada v. Bradshaw*, *ibid.*

142 See E.J. Weinrib, "The Fiduciary Obligation" (1975), 26 U. of T. L.J. 1; P. Finn, *Fiduciary Obligations* (1977); J.C. Sheppard, *Law of Fiduciaries* (1981), and "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 L.Q.R. 51; J.R.M. Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 Can. Bar Rev. 1; P. Birks, "The Content of Fiduciary Obligation" (2000) 34 Israel L. Rev. 3; D.W.M. Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)" (2001) 80 Can. Bar Rev. 620, esp. 675*ff*; Smith, *supra*, note 134.

143 The rule has also been applied to a person whose sole connection with the trust was that the trustees had at all times to consult them and be governed by their advice: *Re Rogers*, 63 O.L.R. 180, [1929] 1 D.L.R. 116 (Ont. C.A.). Orde J.A. thought that this person's position was anomalous, although in modern practice it is increasingly common to name such a person, who may be called a "protector". Those who create such arrangements may not realize that they are effectively dividing the powers and duties that normally fall to the trustees, and they may be unpleasantly surprised to find that the court treats the protector as owing a fiduciary duty of loyalty. See chapter 4, Part IV. It is possible that some trustees, who are "bare trustees" or "nominees", might not owe duties of loyalty (*Seaboard Life Insurance Co. v. Bank of Montreal*, 2002 CarswellBC 630, 23 B.L.R. (3d) 163 (B.C. C.A.)), just as constructive and resulting trustees, as such, may not, at least until they are fully aware of the trust on which they hold (*Lonrho plc v. Fayed (No. 2)*, [1992] 1 W.L.R. 1 at 11 12; Chambers at 194-200; L. Smith, "Constructive Fiduciaries?" in P. Birks, ed., *Privacy and Loyalty* (1997) at 249, 263-267; *Tan Yok Koon v. Tan Choo Suan*, [2017] 1 S.L.R. 654, [2017] SGCA 13 (Sing. C.A.) at paras. 188-210).

144 For real estate agents, see, for example, *Mulligan v. Stephenson*, 2016 BCSC 1941, 2016 CarswellBC 2954, 41 C.B.R. (6th) 34, 71 R.P.R. (5th) 286 (B.C. S.C.). Partners are mutual general agents in the business of the partnership.

145 In some cases, this is confirmed by statute; e.g., *Partnership Act*, R.S.N.L. 1990, c. P-3, ss. 28-30; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(a); *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 32 (guardian of incapable person's property). For interpretation of the loyalty provisions of the Ontario *Partnerships Act*, see *Rochwerg v. Truster* (2002), 58 O.R. (3d) 687 (Ont. C.A.), additional reasons at (2002), 212 D.L.R. (4th) 498 (Ont. C.A.).

146 See *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361, 362 (B.C. S.C.); this was approved by the majority and the minority in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*)

[1989] 2 S.C.R. 574, 647, 61 D.L.R. (4th) 14 (S.C.C.) at 597-98 [S.C.R.], at 28, 61-62 [D.L.R.]. See also *Bristol & West Building Society v. Mothew* (1996), [1998] Ch. 1 (Eng. C.A.). The Supreme Court of Canada, however, has taken the position that fiduciary duties include not only the duties of loyalty and good faith, but also the fiduciary duty of care and skill, and fiduciary duties of disclosure: *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83, 2018 CSC 4, 2018 SCC 4, 2018 CarswellNat 158, 2018 CarswellNat 159, [2018] 1 S.C.R. 83, 32 Admin. L.R. (6th) 1, 417 D.L.R. (4th) 239, [2018] 4 C.N.L.R. 225 (S.C.C.) at paras. 46, 55, 135, 165 and 176; *Valard Construction Ltd. v. Bird Construction Co.*, [2018] 1 S.C.R. 224, 2018 CSC 8, 2018 SCC 8, 2018 CarswellAlta 261, 2018 CarswellAlta 262, [2018] 1 S.C.R. 224, 65 Alta. L.R. (6th) 1, 73 C.L.R. (4th) 1, 418 D.L.R. (4th) 1, [2018] 4 W.W.R. 217 (S.C.C.) at paras. 2, 13, 18-20, 24 and 34. For an argument that this is correct, and that "fiduciary duties" should rightly refer to any duty that arises out of and gives effect to the other-regarding nature of a fiduciary relationship, see L. Smith, "Prescriptive Fiduciary Duties" (2018) 37 U. Queensland L. Rev. 261.

147 *Lac Minerals*, *ibid.*, at 597 [S.C.R.], 61 [D.L.R.]; *Laskin v. Bache & Co.* (1971), [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (Ont. C.A.) at 472 [O.R.].

148 In *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, 2010 SCC 34, 2010 CarswellOnt 7450, 2010 CarswellOnt 7451, 84 C.C.P.B. 1, 324 D.L.R. (4th) 498, 60 E.T.R. (3d) 1, 2010 C.E.B. & P.G.R. 8408 (headnote only), D.T.E. 2010T-674, 406 N.R. 109, 268 O.A.C. 1, [2010] S.J. No. 34 (S.C.C.) at para. 41, it was held that a pension plan administrator (not being a trustee because it did not hold title to the trust property) was a fiduciary. See also *Re Indalex Ltd.*, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, 2 C.C.P.B. (2nd) 1, 354 D.L.R. (4th) 581, D.T.E. 2013T-97, 439 N.R. 235, 301 O.A.C. 1, 20 P.P.S.A.C. (3d) 1, [2013] S.C.J. No. 6 (S.C.C.) at para. 184, leaving open whether this is an *ad hoc* or *per se* fiduciary category, but noting that "it must surely be rare" that a pension administrator would not be a fiduciary.

149 *M. (K.) v. M. (H.)*, (sub nom. *M. c. M.*) [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 (S.C.C.); see, however, *Louie v. Lastman* (2002), (sub nom. *Louie v. Lastman (No. 1)*) 61 O.R. (3d) 449, 217 D.L.R. (4th) 257 (Ont. C.A.), leave to appeal refused (2003), [2002] S.C.C.A. No. 465, 2003 CarswellOnt 3105 (S.C.C.). See L. Smith, "Parenthood is a Fiduciary Relationship" (2020) 70 U.T.L.J. 395.

150 *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415 (S.C.C.). See D.W.M. Waters, "The Development of Fiduciary Obligations" in DeL. Guth, ed., *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (2000).

151 And for this reason, these holdings may not commend themselves to more conservative judges: see, for example, *Breen v. Williams* (1996), 186 C.L.R. 71 (Australia H.C.).

152 Loyalty, understood in this way, can even have the effect that an omission which would otherwise constitute murder is instead a lawful act: *Airedale NHS Trust v. Bland*, [1993] A.C. 789 (U.K. H.L.).

153 *McInerney v. MacDonald*, *supra*, note 150.

154 Issues could clearly arise relating to trials of new treatments, in which a doctor has or had a financial interest. More prosaically, should doctors accept perquisites from pharmaceutical companies? See M.A. Rodwin, "Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System" (1995) 21 Am. J. L. and Med. 241.

155 *M. (K.) v. M. (H.)*, (sub nom. *M. c. M.*) [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 (S.C.C.); see R. Flannigan, "Fiduciary Regulation of Sexual Exploitation" (2000) 79 Can. Bar Rev. 301. This idea, of better capturing the nature of the wrong done, also animates the minority judgment of McLachlin and L'Heureux-Dubé JJ. in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449 (S.C.C.), additional reasons at [1992] 2 S.C.R. 318 (S.C.C.). And there is nothing new in this approach of multiple characterizations of a liability: for example, the taking of a secret commission by an agent has always been actionable both at common law and as a breach of fiduciary duty.

156 See *M. (K.) v. M. (H.)*, *ibid.* As limitation statutes are reformed, however, this may become less significant. See chapter 25, Part IV C.

157 See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 (S.C.C.), noted L. Smith (1995) 74 Can. Bar Rev. 714.

158 Above, Part II B. In particular, the plaintiff may seek an award measured by the defendant's gain, rather than by the plaintiff's loss; and the plaintiff may ask that the gain be disgorged by way of a constructive trust. It is important to note, however, that disgorgement and constructive trusts are available in many cases where there is no fiduciary relationship. See chapter 11.

159 See chapter 25, Part II. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 (S.C.C.), however, the majority, who found a fiduciary obligation, would in any event have held the defendant liable to the same extent for breach of contract.

160 *International Corona Resources Ltd. v. Lac Minerals Ltd.*, *supra*, note 146; *Hodgkinson v. Simms*, *ibid.*

161 In the case of relationships which are *per se* fiduciary, the person who owes the obligation enters the relationship voluntarily, although he or she need not have a full understanding of the obligations which the law attaches. An analogy is to the sale of goods: the contract is voluntary, but the law may attach quality guarantees and other obligations.

162 *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.) at 384 [S.C.R.], at 341 [D.L.R.], citing E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1.

163 *Frame v. Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 (S.C.C.) at 136 [S.C.R.].

164 A. Scott, "The Fiduciary Principle" (1949) 37 Cal. L. Rev. 539, 540. Wilson J. relied on the judgments of Gibbs C.J. and Mason J. in *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 156 C.L.R. 41 (Australia H.C.), but both extracts refer to the undertaking to act in another's interests, which usually founds the *ad hoc* fiduciary obligation.

165 Wilson J. referred to s. 16(10) of the *Divorce Act, 1985*, R.S.C. 1985, c. 3 (2nd Supp.). See also *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2003), (sub nom. *Authorson v. Canada (Attorney General)*) 227 D.L.R. (4th) 385 (S.C.C.): in the Supreme Court, the Crown conceded that it owed a fiduciary obligation to veterans whose property it managed.

166 *International Corona Resources Ltd. v. Lac Minerals Ltd.*, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.), discussed in depth in D.W.M. Waters, "Lac Minerals Ltd. v. International Corona Resources Ltd." (1990) 69 Can. Bar Rev. 455.

167 Similarly, see *Attorney General v. Guardian Newspaper Ltd. (No. 2)* (1988), [1990] 1 A.C. 109 (U.K. H.L.); *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 (S.C.C.); *Attorney General v. Blake* (2000), [2001] 1 A.C. 268 (U.K. H.L.).

168 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 (S.C.C.).

169 See *Chitel v. Bank of Montreal* (2002), 45 E.T.R. (2d) 167 (Ont. S.C.J.).

170 Which it does not: *Royal Bank v. Melnick* (1995), 140 Sask. R. 137, [1996] 3 W.W.R. 752 (Sask. Q.B.). For a more thorough discussion, see Smith, *supra*, note 134. On the difficulty of reconciling *Lac Minerals* with *Hodgkinson*, see also *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.J.), varied (2004), 44 B.L.R. (3d) 165 (Ont. C.A.) at para. 1222-9 [(S.C.J.)].

171 *Supra*, note 159, at 409-410 [S.C.R.].

172 See T.G. Youdan, "Liability for Breach of Fiduciary Obligation" in *Special Lectures of the Law Society of Upper Canada, 1996*, at 1-5; J. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 C.B.L.J. 107, at 118-122.

173 *Perez v. Galambos*, 2009 SCC 48, 2009 CarswellBC 2787, 2009 CarswellBC 2788, (sub nom. *Galambos v. Perez*) [2009] 3 S.C.R. 247 (S.C.C.). See P. Miller, "A Theory of Fiduciary Liability" (2010) 56 McGill L.J. 235, and *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, 2011 CarswellAlta 763, 2011 CarswellAlta 764, EYB 2011-190431, (sub nom. *Alberta v. Elder Advocates of Alberta Society*) [2011] 2 S.C.R. 261, 499 A.R. 345, 41 Alta. L.R. (5th) 1, 81 C.C.L.T. (3d) 1, 2 C.P.C. (7th) 1, 331 D.L.R. (4th) 257, [2011] 6 W.W.R. 191, 416 N.R. 198, 514 W.A.C. 345, [2011] A.C.S. No. 24, [2011] S.C.J. No. 24 (S.C.C.).

174 *Ibid.*, at paras. 67-74.

175 At para. 83 (emphasis added). See also at para. 70. The presence of such a power itself creates a kind of vulnerability in the beneficiary; but vulnerability on its own is not sufficient: *Elder Advocates of Alberta Society, supra,* note 173, at paras. 28, 33. Thus, the relevance of vulnerability is as another way of describing the discretionary power held by the fiduciary.

176 At para. 76.

177 In many fiduciary relationships, the fiduciary has a juridical power over the beneficiary, such as the trustee's legal authority over the trust property or the director's power to control the corporation. Some fiduciary relationships, however, are advisory, such as the *ad hoc* relationship in *Hodgkinson v. Simms* or the *per se* relationship of a lawyer advising his or her client. For discussion of to how advice can properly be assimilated to a legal power, see L. Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014), 130 Law Q. Rev. 608, at 612-19.

178 Of course, charitable trustees are also fiduciaries, although they hold their powers not for a person but for a public purpose. The most general formulation, therefore, is that a fiduciary holds their powers not selfishly but in an other-regarding capacity.

179 *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (U.K. H.L.).

180 No ratification of their acts, or holding-out, could be established since one of the trustees was incapacitated and therefore unable to join in a ratification or to hold them out in such a way as to create ostensible authority.

181 *Phipps v. Boardman*, [1964] 1 W.L.R. 993, [1964] 2 All E.R. 187 (Eng. Ch. Div.), affirmed [1965] 1 All E.R. 849 (Eng. C.A.), affirmed (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (U.K. H.L.).

182 *Phipps v. Boardman*, [1965] Ch. 992, [1965] 1 All E.R. 849 (Eng. C.A.), affirmed (sub nom. *Boardman v. Phipps*) [1966] 3 All E.R. 721 (U.K. H.L.).

183 See also *Field v. Banfield*, [1933] O.W.N. 39 (Ont. H.C.); *English v. Dedham Vale Properties Ltd.* (1977), [1978] 1 W.L.R. 93, [1978] 1 All E.R. 382 (Eng. Ch. Div.); contrast *William B. Sweet & Associates Ltd. v. Copper Beach Estates Ltd.* (1993), 86 B.C.L.R. (2d) 19, 108 D.L.R. (4th) 85 (B.C. C.A.). For a careful analysis of *Boardman* itself, see M. Bryan, "*Boardman v Phipps*" in C. Mitchell & P. Mitchell, eds., *Landmark Cases in Equity* (2012) at 581.

184 See *Dubai Aluminium Co. v. Salaam* (2002), [2003] 2 A.C. 366 (Eng. H.L.) at para. 138, and chapter 11, Part III A.

185 *Munden Acres Ltd. v. Lincoln Trust & Savings Co.* (1975), 10 O.R. (2d) 492, 63 D.L.R. (3d) 604 (Ont. H.C.) at 504 [O.R.]; *Kelly v. Cooper* (1992), [1993] A.C. 205 (Bermuda P.C.).

186 For a statement of the nature of disclosure required, see *Gray v. New Augarita Porcupine Mines Ltd.*, 1952 CarswellOnt 412, [1952] 3 D.L.R. 1 (Jud. Com. of Privy Coun.) at pp. 14-15.

187 As *Boardman* itself shows, this route will be closed where there are any beneficiaries of the duty of loyalty who are incapacitated (see also *Re Gordon Import Autos Ltd.* (1994), 12 B.L.R. (2d) 266 (B.C. S.C.)); the same would be true if any were unborn or otherwise unascertained. In the case of fiduciaries who are company directors, knowledge and consent by the co-directors, or even by the shareholders, may not be enough; the duty is owed to the corporate person. This is a field which is fraught with debate in corporate law. See B. Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (2006) at 420-29; M.A. Jacobson, "Interested Director Transactions and the (Equivocal) Effects of Shareholder Ratification" (1996) 21 Delaware J. Corp. L. 981; J. Payne, "A Re-Examination of Ratification," [1999] C.L.J. 604; S. Worthington, "Corporate Governance: Remedying and Ratifying Directors' Breaches" (2000), 116 L.Q.R. 638. There are statutory interventions in Canada: see, e.g., *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 120, 242(1). See also *Hawrelak v. Edmonton (City)* (1975), [1976] 1 S.C.R. 387, 54 D.L.R. (3d) 45 (S.C.C.), where the dissent took the view that a city mayor or councillor should look to the city residents for knowledge and consent; and *Toronto Party for a Better City v. Toronto (City)*, 2011 ONSC 3233, 2011 CarswellOnt 6092, 84 M.P.L.R. (4th) 335 (Ont. S.C.J.), additional reasons 2011 ONSC 5300, 2011 CarswellOnt 10608 (Ont. S.C.J.), affirmed 2013 ONCA 327, 2013 CarswellOnt 6276, 115 O.R. (3d) 694, 362 D.L.R. (4th) 370, 11 M.P.L.R. (5th) 1, 307 O.A.C. 201 (Ont. C.A.), in which it was held (at para. 15) that "City Councillors owe a fiduciary duty to the electorate of the City of Toronto…". See the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50; applied in *Sacks v. Campbell* (1991), 87 D.L.R. (4th) 342 (Ont. Div. Ct.).

188 Court approval is one basis of the majority judgment in *Molchan v. Omega Oil & Gas Ltd.*, [1988] 1 S.C.R. 348, 47 D.L.R. (4th) 481 (S.C.C.), reconsideration refused (1988), 49 D.L.R. (4th) vii (note) (S.C.C.). Wilson J. in dissent was of the view that the transaction had already occurred and approval was impossible. In Saskatchewan and New Brunswick, the court's power to approve is codified: S.S. 2009, c. T-23.01, s. 10; S.N.B. 2015, c. 21, s. 31(2). In both cases the court may approve in the face of disapproval of one or more beneficiaries. The New Brunswick statute requires that the course of action proposed "is in the best interests of the beneficiaries or purposes of the trust"; the Saskatchewan statute requires "that it would not be detrimental to the trust or its beneficiaries". This is a curiously low threshold in light of Equity's traditional approach.

189 As to the onus of proof in conflict of interest cases, though the emphases between the majority and dissenting judgments differ in *Hawrelak v. Edmonton (City)*, *supra*, note 187, the established position is that if A claims that gain made by B should be surrendered to the claimant, A must show (1) that B is a fiduciary, (2) that it was B's act which brought B the gain, and (3) that B so acted while engaged in B's task on behalf of A, or where the scope of B's duties to A required B to act on behalf of A. If these three points can be established, A has discharged A's burden of proof, and the onus is now on B to show that when the benefit was acquired, A was fully and completely apprised of all the facts concerning A's personal position and B's personal interest. It is not correct to say that, once B has been established to have been a fiduciary, and to have acquired the gain through B's own act, the onus of proof then passes to B to prove B did not abuse B's position of trust. Item 3 must be proved by A, the claimant.

190 *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 1994 CarswellOnt 231, 13 B.L.R. (2d) 1, 54 C.P.R. (3d) 161, [1994] O.J. No. 650 (Ont. Gen. Div.), at paras. 605-626, additional reasons 1994 CarswellOnt 4805, 13 B.L.R. (2d) 1 at 233, 54 C.P.R. (3d) 161 at 390, [1994] O.J. No. 1138 (Ont. Gen. Div.); *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 2002 CarswellOnt 2096, 27 B.L.R. (3d) 53, 19 C.C.E.L. (3d) 203, 32 C.C.P.B. 120, 214 D.L.R. (4th) 496, [2002] O.J. No. 2412 (Ont. S.C.J.), at paras. 116-126, additional reasons 2002 CarswellOnt 3579, [2002] O.T.C. 798, [2002] O.J. No. 4137 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2004 CarswellOnt 691, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 250 D.L.R. (4th) 526, (sub nom. *UPM-Kymmene Corp. v. Repap Enterprises Inc.*) 183 O.A.C. 310, [2004] O.J. No. 636 (Ont. C.A.), affirmed (2004), 2004 CarswellOnt 691, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 250 D.L.R. (4th) 526, 183 O.A.C. 310, [2004] O.J. No. 636 (Ont. C.A.).

191 Below, Part II F 1. Self-dealing transactions by corporate fiduciaries are also governed by legislation (*supra,* note 187). In *Re Indalex Ltd.*, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, 2 C.C.P.B. (2nd) 1, 354 D.L.R. (4th) 581, D.T.E. 2013T-97, 439 N.R. 235, 301 O.A.C. 1, 20 P.P.S.A.C. (3d) 1, [2013] S.C.J. No. 6 (S.C.C.) at paras. 198-99, 215 there is a discussion of a statutory authorization for acting in a conflict of duty and duty. That case, and the corporate law decisions, *ibid.,* make clear that beyond the statutory authorization, the strict general rules apply, just as in a case of informed consent they continue to apply beyond the scope of the consent.

192 In Saskatchewan and New Brunswick, the rule against unauthorized profits is codified: S.S. 2009, c. T-23.01, s. 9(b); S.N.B. 2015, c. 21, s. 31(1)(b).

193 In Saskatchewan and New Brunswick, the court's power to approve a profit is codified: *supra,* note 188.

194 *Meighen v. Buell* (1878), 25 Gr. 604 (Ont. Ch.).

195 *Cradock v. Piper* (1850), 1 Mac. & G. 664, 41 E.R. 1422.

196 For the power of the court under the inherent jurisdiction to allow remuneration, see *Re Masters*, [1953] 1 W.L.R. 81, [1953] 1 All E.R. 19; *Re Duke of Norfolk's Settlement Trusts* (1981), [1982] Ch. 61, [1981] 3 All E.R. 220 (C.A.), commented upon [1978] The Conveyancer 150.

197 *Trustee Act*, 1925, s. 42, still in force.

198 Sections 29-30.

199 However, if a Canadian trustee/solicitor is contemplating instructing a member of his or her own firm to carry out trust work, the words of Galliher J.A. in *Stephen v. Miller*, [1918] 2 W.W.R. 1042, 40 D.L.R. 418 (B.C. C.A.) at 420 [D.L.R.], affirmed (1919), 59 S.C.R. 690, 49 D.L.R. 698 (S.C.C.) should be remembered: "Trustees cannot so contract with themselves or their firms without full disclosure and acquiescence by the beneficiaries." See also chapter 22, note 90 and accompanying text.

200 For the statutory references, see Appendix C. See further on trustees' remuneration, chapter 22, Part II.

201 *Brown v. Gentleman*, [1971] S.C.R. 501, 18 D.L.R. (3d) 161 (S.C.C.).

202 Contrast *Guinness plc v. Saunders*, [1990] 2 A.C. 663, in which the House of Lords applied the trustee rule to a company director: in the absence of some clear authority, in contract, or the corporate constitution, or an order of the court, a company director was entitled to nothing for services rendered.

203 G.H. Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 L.Q.R. 472; P. Millett, "Bribes and Secret Commissions", [1993] Restitution L. Rev. 7; L. Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014), 130 Law Q. Rev. 608.

204 The acquisition of any right through the fiduciary role attracts the rule, even if the right is worth less at the time of the claim than at the time of acquisition, so that there is no pecuniary gain in a strict sense: *Soulos v. Korkontzilas*, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, [1997] 2 S.C.R. 217, 32 O.R. (3d) 716 (note), 46 C.B.R. (3d) 1, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89, 9 R.P.R. (3d) 1, 212 N.R. 1, 100 O.A.C. 241, [1997] S.C.J. No. 52 (S.C.C.), discussed in chapter 11, Part II B in relation to the constructive trust remedy.

205 In *Ackland v. Yonge-Esplanade Enterprises Ltd.* (1992), 1992 CarswellOnt 612, 10 O.R. (3d) 97, 95 D.L.R. (4th) 560, 27 R.P.R. (2d) 1, 58 O.A.C. 206, [1992] O.J. No. 2093 (Ont. C.A.), leave to appeal refused (1993), 13 O.R. (3d) xvi (note), 101 D.L.R. (4th) vii (note), 154 N.R. 320 (note), 63 O.A.C. 397 (note) (S.C.C.), a condominium developer was required to hold deposits on statutory trust and pay interest; the Court held that the requirement, when ambiguous as to the rate, must be interpreted in favour of the beneficiary, partly to avoid a personal benefit accruing to the developer.

206 *Thorne Riddell Inc. v. Rolfe (1984)*, 1984 CarswellBC 368, 58 B.C.L.R. 71, [1984] 6 W.W.R. 240 (B.C. S.C.). For additional remedies in the case of a bribed agent, see *supra,* note 110.

207 Whether or not that person had a previous title claim to that asset: *Thompson v. Northern Trust Co.*, 1924 CarswellSask 57, [1924] 2 W.W.R. 237, [1924] 1 D.L.R. 1135 (Sask. K.B.), varied on other grounds 1925 CarswellSask 182, [1925] 4 D.L.R. 184 (Sask. C.A.) at 241 [W.W.R. (K.B.)].

208 "Side benefits" conferred by companies upon their directors and senior executives may take many forms: interest-free loans, consulting fees, yearly car rentals, use of credit cards, paid vacations, and country club dues, are the most widely known. Obtained from third parties, with whom the company is trading, these benefits would obviously be in violation of the conflict rule. But if they are conferred by the company itself, as a form of remuneration for services rendered, this may not be the case. There is, however, an inherent conflict of interest and duty when a board of directors sets its own level of directors' fees (*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 125). There may be a more obvious conflict where the board negotiates the terms of the renewal of an officer's contract of employment, exacerbated if that officer is a director. Under modern norms of corporate governance, the board of directors may have a compensation committee, composed entirely of independent directors. If it exists, this may lessen the severity of the conflict. See further D.W.M. Waters, "Corporate Behaviour and Equity's Standards of Conduct" (2004) 36 C.L.R. (3d) 248.

209 *Reading v. R.*, [1951] A.C. 507, [1951] 1 All E.R. 617 (Eng. H.L.), followed in *Mid-Western News Agency Ltd. v. Vanpinxteren* (1975), 1975 CarswellSask 77, 24 C.P.R. (2d) 47, [1976] 1 W.W.R. 299, 62 D.L.R. (3d) 555 (Sask. Q.B.).

210 See especially *Attorney General v. Blake* (2000), [2000] UKHL 45, [2001] 1 A.C. 268, [2000] 4 All E.R. 385, [2000] E.M.L.R. 949, [2000] H.L.J. No. 47 (U.K. H.L.); *Bank of America Canada v. Mutual Trust Co.*, 2002 CSC 43, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, REJB 2002-30907, [2002] 2 S.C.R. 601, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 287 N.R. 171, 159 O.A.C. 1, [2002] S.C.J. No. 44 (S.C.C.) at paras. 30-33; *Amertek Inc. v. Canadian Commercial Corp.*, 2003 CarswellOnt 3100, 39 B.L.R. (3d) 287, 39 B.L.R. (3d) 163, 229 D.L.R. (4th) 419, [2003] O.T.C. 742, [2003] O.J. No. 3177 (Ont. S.C.J.), additional reasons at 2003 CarswellOnt 5142, 39 B.L.R. (3d) 287, 229 D.L.R. (4th) 419 at 554 (Ont. S.C.J.), additional reasons at 2003 CarswellOnt 5143, 39 B.L.R. (3d) 290, [2003] O.J. No. 5246 (Ont. S.C.J.), reversed 2005 CarswellOnt 2784, 76 O.R. (3d) 241, 5 B.L.R. (4th) 199, 31 C.C.L.T. (3d) 238, 256 D.L.R. (4th) 287, 200 O.A.C. 38, [2005] O.J. No. 2789 (Ont. C.A.), leave to appeal refused 2006 CarswellOnt 922, 2006 CarswellOnt 923, 352 N.R. 193 (note), 219 O.A.C. 400 (note), [2005] S.C.C.A. No. 439 (S.C.C.). One who commits a tort may well be required to disgorge any gain derived from it: see J. Berryman, "The Case for Restitutionary Damages over Punitive

Damages: Teaching the Wrongdoer that Tort Does Not Pay" (1994) 73 Can. Bar Rev. 320; and so too a crime: *Brissette v. Westbury Life Insurance Co.*, 1992 CarswellOnt 999, 1992 CarswellOnt 544, EYB 1992-67552, (sub nom. *Brissette Estate v. Westbury Life Insurance Co.*) [1992] 3 S.C.R. 87, 13 C.C.L.I. (2d) 1, 96 D.L.R. (4th) 609, 47 E.T.R. 109, [1992] I.L.R. 1-2888, 142 N.R. 104, 58 O.A.C. 10, [1992] S.C.J. No. 86 (S.C.C.). It is also established that a defendant may be required to disgorge any gain obtained by a breach of confidence which does not amount to a breach of fiduciary duty: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CarswellOnt 126, 1989 CarswellOnt 965, EYB 1989-67469, [1989] 2 S.C.R. 574, 69 O.R. (2d) 287 (note), 44 B.L.R. 1, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 35 E.T.R. 1, 6 R.P.R. (2d) 1, 101 N.R. 239, 36 O.A.C. 57, [1989] S.C.J. No. 83 (S.C.C.).

211 See chapter 11, Part II B.

212 *Hope v. Beard* (1860), 1860 CarswellOnt 58, 8 Gr. 380 (U.C. Ch.).

213 *Hewson v. Smith* (1870), 1870 CarswellOnt 72, 17 Gr. 407 (Ont. Ch.).

214 *Peso Silver Mines Ltd. v. Cropper* (1965), 1965 CarswellBC 144, 54 W.W.R. 329, 56 D.L.R. (2d) 117 (B.C. C.A.). The majority decision of the B.C.C.A. was upheld on appeal: *Peso Silver Mines Ltd. v. Cropper*, 1966 CarswellBC 90, [1966] S.C.R. 673, 58 D.L.R. (2d) 1, 56 W.W.R. 641 (S.C.C.). For an older example, see *Bank of Upper Canada v. Bradshaw* (1867), L.R. 1 P.C. 479, 4 Moo. P.C. 406 (Jud. Com. of Privy Coun.). For criticism of *Peso Silver Mines*, see S.M. Beck, "The Saga of Peso Silver Mines" (1971) 49 Can. Bar Rev. 80, reproduced with slight changes in J. Ziegel, ed., *Studies in Canadian Company Law*, Vol. 2, (1973); D.D. Prentice (1967) 30 M.L.R. 450; G.H. Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 L.Q.R. 472 at (492-93); L. Smith, "The Motive, Not the Deed" in *Getzler* at 78-80.

215 *Regal (Hastings) Ltd. v. Gulliver* (1942), [1967] 2 A.C. 134, [1942] 1 All E.R. 378 (U.K. H.L.).

216 The accountable fiduciary is entitled to be reimbursed for what he or she paid for the property, leaving the beneficiary with the net gain: *Soulos v. Korkontzilas*, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, [1997] 2 S.C.R. 217, 32 O.R. (3d) 716 (note), 46 C.B.R. (3d) 1, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89, 9 R.P.R. (3d) 1, 212 N.R. 1, 100 O.A.C. 241, [1997] S.C.J. No. 52 (S.C.C.). In that case, unusually, there was a net loss, but the beneficiary still wished to have the property.

217 *Tylee v. R.* (1877), 1877 CarswellNat 7, 7 S.C.R. 651 (S.C.C.).

218 *Toronto (City) v. Bowes* (1854), 1854 CarswellOnt 26, C.R. [3] A.C. 10 at 17, 4 Gr. 489 (U.C. Ch.), affirmed (1856), 1856 CarswellOnt 42, C.R. [3] A.C. 10 at 62, 6 Gr. 1 (U.C. C.A.), affirmed (1858), C.R. [3] A.C. 10 at 179, 14 E.R. 770, 11 Moo. P.C. 463 (Jud. Com. of Privy Coun.).

219 *Re Francis* (1905), 92 L.T. 77; *Re Dover Coalfield Extension Ltd.*, [1908] 1 Ch. 65 (C.A.); *Re Macadam* (1945), (sub nom. *Dallow v. Coda*) [1946] Ch. 73, [1945] 2 All E.R. 664 (Eng. Ch. Div.); *Re Gee*, [1948] Ch. 284, [1948] 1 All E.R. 498 (Eng. Ch. Div.).

220 For a related problem among partners, regulated however by legislation, see *Rochwerg v. Truster* (2002), 2002 CarswellOnt 990, 58 O.R. (3d) 687, 23 B.L.R. (3d) 107, 158 O.A.C. 41, [2002] O.J. No. 1230 (Ont. C.A.), additional reasons at (2002), 2002 CarswellOnt 1456, 212 D.L.R. (4th) 498, [2002] O.J. No. 1230 (Ont. C.A.).

221 *Keech v. Sandford* (1726), 22 E.R. 629, 2 Eq. Ca. Abr. 741, 25 E.R. 223, Sel. Cas. Ch. 61 (Eng. Ch. Div.).

222 *Re Biss*, [1903] 2 Ch. 40 (Eng. Ch. Div.).

223 *Seaton v. Lunney* (1878), 1878 CarswellOnt 81, 27 Gr. 169 (Ont. Ch.).

224 All courts examine the facts, of course. But the strict view of Lord Eldon requires an examination of the facts to see whether there was a conflict between self-interest and fiduciary duty; if there was, then the case is over, barring informed consent. The other approach involves an examination of the facts beyond the finding of the conflict, to see whether the conflict actually led to any harm, or whether the fiduciary actually acted in bad faith or took advantage of the situation. It is that further inquiry which Lord Eldon's approach rejects.

225 *Tornroos v. Crocker*, 1957 CarswellBC 193, [1957] S.C.R. 151, 7 D.L.R. (2d) 104 (S.C.C.).

226 *Tornroos v. Crocker* (1956), 1956 CarswellBC 258, 3 D.L.R. (2d) 9 (B.C. C.A.), reversing (1955), 1955 CarswellBC 7, 14 W.W.R. 344, [1955] 2 D.L.R. 815 (B.C. S.C.), reversed 1957 CarswellBC 193, [1957] S.C.R. 151, 7 D.L.R. (2d) 104 (S.C.C.).

227 The judgment of the Court was given by Kellock J.

228 Kellock J. quoted the principle that a trustee may not place him- or herself in a situation where his or her interest and his or her duty conflict, but effectively approached the case from the angle of whether in acquiring his or her profit the trustee was in *actual* conflict with his or her duties. This is the flexible approach that looks to the particular facts.

229 *Peso Silver Mines Ltd. v. Cropper*, 1966 CarswellBC 90, [1966] S.C.R. 673, 58 D.L.R. (2d) 1, 56 W.W.R. 641 (S.C.C.), criticized in Smith, *supra*, note 214.

230 *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, [1966] 3 All E.R. 721, [1966] 3 W.L.R. 1009 (U.K. H.L.).

231 Above, Part II D, *supra*, note 179 and accompanying text.

232 *Supra*, note 230, at 128 [A.C.], *per* Lord Upjohn. See also B.H. McPherson, "Information as Property in Equity" in M. Cope, ed., *Equity: Issues and Trends* (1995) at 234. Again, the obligation of confidentiality is now recognized as something which is protected separately from the duty of loyalty, although in many cases both obligations may be present; and a breach of the obligation of confidence may, on its own, lead to the imposition of a constructive trust on any gain made by the breach; *supra*, note 167.

233 This case, and in particular Lord Upjohn's view of the rule, bears an interesting comparison with the older Ontario case of *Rose v. Rose* (1915), 1915 CarswellOnt 110, 32 O.L.R. 481, 22 D.L.R. 572, 9 O.W.N. 189, [1914] O.J. No. 157 (Ont. C.A.). The Court there, focusing on the trustee's good faith and the lack of harm to the trust, allowed a trustee to retain shares which he acquired personally. The Court held that it could not be determined whether there was a conflict of interest and duty until another action was resolved, which would clarify what were the terms of the trust on which the trustee held.

234 *Regal (Hastings) Ltd. v. Gulliver* (1942), [1942] 1 All E.R. 378, [1967] 2 A.C. 134 (U.K. H.L.).

235 *Canadian Aero Service Ltd. v. O'Malley* (1973), 1973 CarswellOnt 236, 1973 CarswellOnt 236F, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371, [1973] S.C.J. No. 97 (S.C.C.).

236 The principle that officers, as well as directors, are fiduciaries, is now codified in most corporate law statutes, e.g., *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122.

237 *Supra*, note 235, at 619 [S.C.R.].

238 *Supra*, note 235, at 607 [S.C.R.].

239 Laskin J. did not consider that "conflict of personal interest and duty", "accountability for gain acquired by reason only, and in the course, of the fiduciary position", or other such judicial formulae were "a rigid measure whose literal terms would be met in assessing succeeding cases". They were not "the exclusive touchstones of liability".

240 *Jiffy People Sales (1966) Ltd. v. Eliason* (1975), 1975 CarswellBC 313, 21 C.P.R. (2d) 209, 58 D.L.R. (3d) 439 (B.C. S.C.); *Redekop v. Robco Construction Ltd.* (1978), 1978 CarswellBC 127, 7 B.C.L.R. 268, 5 B.L.R. 58, 89 D.L.R. (3d) 507, [1978] B.C.J. No. 46 (B.C. S.C.); *Edgar T. Alberts Ltd. v. Mountjoy* (1977), 1977 CarswellOnt 48, 16 O.R. (2d) 682, 2 B.L.R. 178, 36 C.P.R. (2d) 97, 79 D.L.R. (3d) 108, [1977] O.J. No. 2334 (Ont. H.C.); *Abbey Glen Property Corp. v. Stumborg*, 1978 CarswellAlta 236, 9 A.R. 234, 4 B.L.R. 113, [1978] 4 W.W.R. 28, 85 D.L.R. (3d) 35, [1978] A.J. No. 712 (Alta. C.A.), leave to appeal refused (1978), 11 A.R. 270 (note) (S.C.C.); *Bendix Home Systems Ltd. v. Clayton*, 1977 CarswellBC 389, [1977] 5 W.W.R. 10, 33 C.P.R. (2d) 230, [1977] B.C.J. No. 33 (B.C. S.C.) (*Canadian Aero* distinguished); *Sheather v. Associates Financial Services Ltd.* (1979), 1979 CarswellBC 307, 15 B.C.L.R. 265 (B.C. S.C.); *Weber Feeds Ltd. (Trustee of) v. Weber* (1979), 1979 CarswellOnt 192, 24 O.R. (2d) 754, 8 B.L.R. 71, 30 C.B.R. (N.S.) 97, 99 D.L.R. (3d) 176 (Ont. C.A.); *W.J. Christie & Co. v. Greer* (1981), 1981 CarswellMan 83, 14 B.L.R. 146, 59

C.P.R. (2d) 127, 9 Man. R. (2d) 269, 121 D.L.R. (3d) 472, [1981] 4 W.W.R. 34, [1981] M.J. No. 77 (Man. C.A.); *309925 Ontario Ltd. v. Tyrrell* (1981), 1981 CarswellOnt 773, 127 D.L.R. (3d) 99 (Ont. H.C.).

241 Earlier judgments in this field include *Hawrelak v. Edmonton (City)*, 1975 CarswellAlta 38, 1975 CarswellAlta 136, [1976] 1 S.C.R. 387, 54 D.L.R. (3d) 45, [1975] 4 W.W.R. 561, 4 N.R. 197 (S.C.C.), in which the public character of the fiduciary office (mayor of a city) adds a complicating factor, and *Evans v. Anderson*, 1977 CarswellAlta 195, 3 A.R. 361, 76 D.L.R. (3d) 482, [1977] 2 W.W.R. 385 (Alta. C.A.).

242 *3464920 Canada Inc. v. Strother*, [2007] 2 S.C.R. 177, 2007 SCC 24, 2007 CarswellBC 1201, 2007 CarswellBC 1202, 67 B.C.L.R. (4th) 1, 29 B.L.R. (4th) 175, 48 C.C.L.T. (3d) 1, [2007] 4 C.T.C. 172, 281 D.L.R. (4th) 640, [2007] 7 W.W.R. 381, 241 B.C.A.C. 108, (sub nom. *Strother v. 3464920 Canada Inc.*) 2007 D.T.C. 5273, 2007 D.T.C. 5301, 363 N.R. 123, 399 W.A.C. 108, [2007] S.C.J. No. 24 (S.C.C.), noted L. Smith & R. Valsan (2008) 87 Can. Bar Rev. 247.

243 At para. 132 (emphasis added).

244 At para. 43.

245 At para. 69 (emphasis added). The majority cited the definition of "conflict of interest" that had been adopted in *R. v. Neil*, 2002 SCC 70, 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, REJB 2002-35135, [2002] 3 S.C.R. 631, 317 A.R. 73, 6 Alta. L.R. (4th) 1, 168 C.C.C. (3d) 321, 6 C.R. (6th) 1, (sub nom. *Neil v. R.*) 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591, 294 N.R. 201, 284 W.A.C. 73, [2002] S.C.J. No. 72 (S.C.C.) at para. 31, as an interest giving rise to a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person". This again shows an understanding that conflicts affect judgment, whether consciously or not.

246 Below, Part II G.

247 In Saskatchewan and New Brunswick, the rule against exercising powers while in a conflict is codified: S.S. 2009, c. T-23.01, s. 9(a); S.N.B. 2015, c. 21, s. 31(1)(a). One issue is that these provisions only mention conflicts of self-interest and duty, and not conflicts of one fiduciary duty with another fiduciary duty.

248 In *Tito v. Waddell*, [1977] 3 All E.R. 129, [1977] Ch. 106 (Eng. Ch. Div.) at 240-241, this is called the "self-dealing rule".

249 For a modern analysis in terms of unjust enrichment, see R. Nolan, "Conflicts of Interest, Unjust Enrichment and Wrongdoing" in W. Cornish *et al.*, eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998) at 87; questioned in L. Smith, "The Motive, Not the Deed" in *Getzler* at 53, footnote 12.

250 *Ex parte Lacey* (1802), 6 Ves. Jun. 625, 31 E.R. 1228 (Eng. Ch. Div.).

251 *Re James* (1803), 8 Ves. Jun. 337, 32 E.R. 385 (Eng. Ch. Div.).

252 *Ibid.*, at 345 [Ves. Jun.].

253 *Re Mitchell* (1970), 1 N.S.R. (2d) 922, 12 D.L.R. (3d) 66 (N.S. C.A.) at 941 [N.S.R.].

254 See the general statement of the law, in a context of agency, in *Kessler Estate v. Kessler*, 2015 SKQB 369, 2015 CarswellSask 740, 15 E.T.R. (4th) 82 (Sask. Q.B.) at paras. 74-75.

255 See also *First Madison Corp. v. Shabinsky* (1992), 95 D.L.R. (4th) 412 (Ont. C.A.), in which the defendant was a fiduciary as a joint venturer and as an executor.

256 *Ballard Estate v. Ballard Estate* (1991), 3 O.R. (3d) 65, 79 D.L.R. (4th) 142 (Ont. C.A.), leave to appeal to S.C.C. refused (1991) 5 O.R. (3d) xii (S.C.C.).

257 *Rountree v. Sydney Land & Loan Co.* (1907), 39 S.C.R. 614 (S.C.C.).

258 *Molchan v. Omega Oil & Gas Ltd.*, [1988] 1 S.C.R. 348, 47 D.L.R. (4th) 481 (S.C.C.), reconsideration refused (1988), 49 D.L.R. (4th) vii (note) (S.C.C.). The majority also thought that the sale had been approved by the Alberta Court of Appeal. Wilson J. dissented on both grounds, on the view that the agreement did not authorize the transaction, and that court approval could not be obtained after the fact.

259 *Weagle v. Weagle*, *supra*, note 265; *Hollinger v. Heichel*, *supra*, note 265.

260 E.g., *Fish v. Fraser* (1875), 9 N.S.R. 514 (N.S. C.A.); *Morrison v. Watts* (1892), 19 O.A.R. 622 (Ont. C.A.).

261 *Re Mitchell* (1970), 1970 CarswellNS 86, 1 N.S.R. (2d) 922, 12 D.L.R. (3d) 66 (N.S. C.A.). In Saskatchewan and New Brunswick, the court's power to approve a profit is codified: *supra,* note 188. The court will not give its approval on inadequate materials: *Eckland v. Kerr* (1926), 31 O.W.N. 187 (Ont. H.C.).

262 *Hutton v. Justin* (1901), 2 O.L.R. 713 (Ont. C.A.).

263 *Re Nathanson Estate* (1971), 1971 CarswellNS 95, 4 N.S.R. (2d) 113, 18 D.L.R. (3d) 495, [1971] N.S.J. No. 155 (N.S. T.D.).

264 *Campbell v. Walker* (1800), 5 Ves. Jr. 678, 31 E.R. 801 (Eng. Ch. Div.).

265 *Parker v. Thomas* (1893), 1893 CarswellNS 37, 25 N.S.R. 398 (N.S. C.A.); *McLennan v. Newton* (1927), 1927 CarswellMan 105, [1927] 3 W.W.R. 684, [1928] 1 D.L.R. 189, 37 Man. R. 201 (Man. C.A.); *Hollinger v. Heichel*, 1941 CarswellAlta 5, [1941] 1 D.L.R. 784 (note), [1941] 1 W.W.R. 97 (Alta. T.D.); *Weagle v. Weagle (1955)*, 1955 CarswellNS 18, 36 M.P.R. 221, [1955] 3 D.L.R. 58 (N.S. C.A.); *Molchan v. Omega Oil & Gas Ltd.*, 1988 CarswellAlta 17, 1988 CarswellAlta 549, EYB 1988-66878, [1988] 1 S.C.R. 348, 87 A.R. 81, 57 Alta. L.R. (2d) 193, 47 D.L.R. (4th) 481, [1988] 3 W.W.R. 1, 83 N.R. 25, [1988] S.C.J. No. 12 (S.C.C.), reconsideration / rehearing refused (1988), 49 D.L.R. (4th) vii (note) (S.C.C.).

266 Below, Part II F 6.

267 *Wright v. Morgan*, [1926] A.C. 788, [1926] 3 W.W.R. 109 (New Zealand P.C.).

268 *Johnston v. Johnston* (1872), 19 Gr. 133 (Ont. Ch.).

269 *Ibid.*, at 134.

270 The trustee may talk of an undisclosed purchaser, and it then becomes clear that the mysterious purchaser is the trustee himself: *Krendel v. Frontwell Investments Ltd.*, [1967] 2 O.R. 579, 64 D.L.R. (2d) 471 (Ont. H.C.).

271 *Kilbourn v. Coulter* (1874), 6 P.R. 160 (Ont. Ch. [In Chambers]). But a person who bids at an auction of the trust assets on behalf of the trustee, whose aim is merely to protect the assets from going at too low a price, does not commit the trustee to buy if the bid is successful. The trust beneficiary normally has the choice of having the contract set aside, or of holding the trustee to it. In this case he does not have that choice: *Heron v. Moffatt* (1875), 22 Gr. 370 (Ont. Ch.); (1876), 23 Gr. 196 (Ont. Ch.).

272 *Campbell v. Walker* (1800), 5 Ves. Jr. 678, 31 E.R. 801 (Eng. Ch. Div.) at 681 [Ves. Jun.], quoted by Cowan C.J.T.D. in *Re Nathanson Estate* (1971), 1971 CarswellNS 95, 4 N.S.R. (2d) 113, 18 D.L.R. (3d) 495, [1971] N.S.J. No. 155 (N.S. T.D.).

273 *Re International Equities Ltd.*, 1943 CarswellOnt 248, [1943] O.W.N. 514, [1943] 4 D.L.R. 635 (Ont. H.C.), varied 1943 CarswellOnt 327, [1943] O.W.N. 735, [1943] 4 D.L.R. 806 (Ont. C.A.).

274 *Parker v. Thomas* (1893), 25 N.S.R. 398 (N.S. C.A.).

275 *Ricker v. Ricker* (1880), 7 O.A.R. 282.

276 See also *Logicrose Ltd. v. Southend United Football Club*, [1988] 1 W.L.R. 1256; *Criterion Properties plc v. Stratford UK Properties LLC*, [2004] UKHL 28 (U.K. H.L.) 129 (C.A.).

277 These are discussed in chapter 11, Part II A.

278 *Gordon v. Holland* (1913), 4 W.W.R. 419, 10 D.L.R. 734 (British Columbia P.C.). This rule applies to any fraudulent fiduciary who has subsequently re-acquired the trust property.

279 Chapter 26.

280 This follows from the trustee's accountability; once the sale is set aside, the trustee has no valid discharge in relation to the sold property, and if it cannot be restored to the trust then its value must be.

281 In such a situation, there is a principle that difficulties of valuation should be resolved against the one who wrongfully created them. See chapter 25, Part II B 4. This principle could easily apply here, unless perhaps the trustee's sale in the conflict situation was considered entirely innocent. See also *Estate of Rothko*, 372 N.E.2d 291 (N.Y., 1977), discussed in *Scott and Ascher,* §24.10.

282 For application of this rule to others than trustees, see *Alexandra Oil & Development Co. v. Cook* (1908), 11 O.W.R. 1054 (Ont. C.A.), and *Bennett v. Havelock Electric Light & Power Co.* (1910), 21 O.L.R. 120 (Ont. Div. Ct.), reversed (1911), 25 O.L.R. 200 (Ont. C.A.), set aside/quashed (1912), 46 S.C.R. 640, 8 D.L.R. 954 (S.C.C.) (company promoters). See also *Gray v. New Augarita Porcupine Mines Ltd.*, [1952] 3 D.L.R. 1 (Ontario P.C.): director buying shares in his own company at an 80% discount in return for the transfer to the company of mining claims owned by himself. Director then sells the shares at a considerable profit.

283 *Harrison v. Harrison* (1868), 14 Gr. 586 (U.C. Ch.).

284 The Court also ordered new trustees to be appointed.

285 *Osadchuk v. National Trust Co.*, [1943] S.C.R. 89, [1943] 1 D.L.R. 689 (S.C.C.).

286 *Laing v. Trusts & Guarantee Co.*, [1944] 3 W.W.R. 401, [1944] 4 D.L.R. 419 (Man. C.A.).

287 *Scott and Ascher* at para. 17.2.14.2. See also para. 17.11.3 *in fine.*

288 *Higgins v. Higgins* (1932), 4 M.P.R. 365 (N.B. Ch.).

289 *Re Lerner*, 6 W.W.R. (N.S.) 187, [1952] 4 D.L.R. 605 (Man. Q.B.). The age of majority was at this time twenty-one.

290 He cited *Aberdeen Railway v. Blaikie Brothers* (1854), 1 Macq. 461 (U.K. H.L.).

291 *Supra*, note 289, at 190 [W.W.R.].

292 *Trustee Act*, R.S.M. 1940, c. 221, s. 54 (now C.C.S.M., c. T160, s. 58).

293 In *Woods v. Toronto General Trusts Corp.* (1921), 20 O.W.N. 431, Middleton J. decided that where a trustee participated, as executor owning considerable shares, in the administration of a company, the company's funds could be deposited with the trust company since the moneys were the property of the company, not the estate. It is also true that the prohibition may be lifted by the trust deed: see *Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co.*, [1986] 1 W.L.R. 1072 (Bahamas P.C.), and *cf. Waterman's Will Trusts v. Sutton*, [1952] 2 All E.R. 1054.

294 *Re Pick* (1965), 52 W.W.R. 136 (Sask. Surr. Ct.). See *Humane Soc. of Austin and Travis County v. Austin Nat. Bank*, 517 S.W.2d 323 (1974): investment by a corporate trustee in its own certificates of deposit sanctioned by the Court.

295 *Ibid.*, at 145. For "common trust funds" operated by trust companies, see chapter 19, Part II F.

296 R.S.B.C. 1996, c. 464.

297 *Ferrier v. Reid* (1966), 55 W.W.R. 299 (B.C. S.C.). The relevant provision at that time was R.S.B.C. 1960, c. 390, s. 16(2).

298 This provision has now been repealed in the light of the adoption of the prudent investor standard.

299 *Supra*, note 290.

300 *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 31.

301 *Trustees Act,* S.N.B. 2015, c. 21, s. 36(2)(b).

302 In *Tito v. Waddell*, [1977] 3 All E.R. 129, [1977] Ch. 106 (Eng. Ch. Div.) at 240-241, this is called the "fair dealing rule", as distinct from the "self-dealing" rule that applies where the trustee is using fiduciary powers and dealing with trust property as trustee.

303 There is likely also to be a presumption of undue influence: see *Goodman Estate v. Geffen*, 1991 CarswellAlta 557, 1991 CarswellAlta 91, EYB 1991-85679, (sub nom. *Geffen v. Goodman Estate*) [1991] 2 S.C.R. 353, 125 A.R. 81, 80 Alta. L.R. (2d) 293, 81 D.L.R. (4th) 211, 42 E.T.R. 97, [1991] 5 W.W.R. 389, 127 N.R. 241, 14 W.A.C. 81, [1991] S.C.J. No. 53 (S.C.C.).

304 The same recourse is available if undue influence is established.

305 *Coles v. Trecothick* (1804), 9 Ves. Jun. 234, 32 E.R. 592 (Eng. Ch. Div.).

306 If there is relevant information known to neither the trustee nor the beneficiary, presumably this is of no significance.

307 *Lamb v. Franklin* (1910), 16 O.W.R. 588, 1 O.W.N. 1010 (Ont. C.A.) at 592 [O.W.R.]. However, the courts have not always insisted upon separate advice if it is otherwise clear that all was fair, reasonable, and known to the beneficiary.

308 Quite apart from the fiduciary duty of full disclosure, there is also a presumption of undue influence between a trustee and beneficiary, as in every fiduciary relationship and indeed in some other relationships. See *Wright v. Carter*, [1903] 1 Ch. 27 (C.A.); *Goodman Estate v. Geffen*, (sub nom. *Geffen v. Goodman Estate*) [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211 (S.C.C.) at 370 [S.C.R.], at 221 [D.L.R.].

309 *Field v. Banfield*, [1933] O.W.N. 39 (Ont. H.C.). See also *Crighton v. Roman* (1960), 25 D.L.R. (2d) 609 (S.C.C.).

310 *Re Hutton*, [1926] 3 W.W.R. 609, [1926] 4 D.L.R. 1080 (Alta. T.D.).

311 *Keech v. Sandford* (1726), 2 Eq. Ca. Abr. 741, 25 E.R. 223 (Eng. Ch. Div.).

312 *McDonnell v. Smyth* (1894), 26 N.S.R. 259 (N.S. C.A.).

313 *Ibid.*, at 262.

314 *Ibid.*

315 *Field v. Banfield*, [1933] O.W.N. 39 (Ont. H.C.) at 42.

316 *Coles, supra,* note 305.

317 *Blain v. Terryberry* (1865), 11 Gr. 286 (U.C. Ch.).

318 In the case where there are multiple fiduciaries (a board, or several trustees), it is possible to contemplate a half-way house in the form of recusal by the conflicted fiduciary from the relevant decision. This would have to be considered, not as a substitute for informed consent, but in addition to it. This solution is contemplated in the legislation for corporations (e.g., *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 120). A similar solution could be incorporated in a trust instrument; this is contemplated by Clause 9 of the Standard Provisions of the Society of Trust and Estate Practitioners <www.step.org>.

319 Above, Part II A.

320 Deane J. in *Chan v. Zacharia* (1984), 154 C.L.R. 178, 58 A.L.J. 660, 58 A.L.J.R. 353, 53 A.L.R. 417 (Australia H.C.) at 198. See also the cases cited, *supra,* note 135, and in Part II F 1-2.

321 Part II F 2.

322 *Industrial Development Consultants Ltd. v. Cooley*, [1972] 1 W.L.R. 443, [1972] 2 All E.R. 162 (C.A.).

323 In *In Plus Group Ltd. v. Pyke*, [2002] 2 B.C.L.C. 201 (Eng. C.A.), Sedley L.J. said, "The fiduciary duty of a director to his company is uniform and universal. What vary infinitely are the elements of fact and degree which determine whether the duty has been breached."

324 B. Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (2006) at 406-11.

325 But it will still cover information which they acquire "in the boardroom", as in *Regal (Hastings) Ltd. v. Gulliver* (1942), [1942] 1 All E.R. 378, [1967] 2 A.C. 134 (U.K. H.L.).

326 *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177, 2007 SCC 24, 2007 CarswellBC 1201, 2007 CarswellBC 1202 (S.C.C.), noted L. Smith and R. Valsan (2008) 87 Can. Bar Rev. 247.

327 *Canadian Aero Service Ltd. v. O'Malley* (1973), 1973 CarswellOnt 236, 1973 CarswellOnt 236F, [1974] S.C.R. 592, 40 D.L.R. (3d) 371 (S.C.C.). This is not a case of fiduciary obligations persisting after resignation, but rather that resignation cannot shake off obligations that accrued before the resignation. Compare *Sumitomo Corp. v. Credit Lyonnais Rouse Ltd.* (2001), [2002] 1 W.L.R. 479. As Laskin C.J. noted, the case would be different if a fiduciary resigned for independent reasons and only later learned of the opportunity. In that case, there is no duty of loyalty encumbering the later acquisition of the information or opportunity. See *Island Export Finance Ltd. v. Umunna*, [1986] B.C.L.C. 460 (Eng.); *Trophy Foods Inc. v. Scott*, 1995 CarswellNS 218, 140 N.S.R. (2d) 92, 123 D.L.R. (4th) 509 (N.S. C.A.).

328 This is the argument in Smith, *supra*, note 133.

329 *Regal (Hastings) Ltd. v. Gulliver* (1942), [1967] 2 A.C. 134, [1942] 1 All E.R. 378 (U.K. H.L.); *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46, (sub nom. *Boardman v. Phipps*) [1966] 3 All E.R. 721, [1966] 3 W.L.R. 1009 (U.K. H.L); *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371 (S.C.C.); *Industrial Development Consultants Ltd. v. Cooley*, [1972] 1 W.L.R. 443, [1972] 2 All E.R. 162 (Eng. C.A.).

330 *Guinness plc v. Saunders*, [1990] 2 A.C. 663.

331 *Tornroos v. Crocker*, 1957 CarswellBC 193, [1957] S.C.R. 151, 7 D.L.R. (2d) 104 (S.C.C.); *Peso Silver Mines Ltd. v. Cropper*, 1966 CarswellBC 90, [1966] S.C.R. 673, 58 D.L.R. (2d) 1, 56 W.W.R. 641 (S.C.C.); *Hawrelak v. Edmonton (City)* (1975), 1975 CarswellAlta 38, 1975 CarswellAlta 136, [1976] 1 S.C.R. 387, 54 D.L.R. (3d) 45, [1975] 4 W.W.R. 561, 4 N.R. 197 (S.C.C.); *Molchan v. Omega Oil & Gas Ltd.*, 1988 CarswellAlta 17, 1988 CarswellAlta 549, EYB 1988-66878, [1988] 1 S.C.R. 348, 87 A.R. 81, 57 Alta. L.R. (2d) 193, 47 D.L.R. (4th) 481, [1988] 3 W.W.R. 1, 83 N.R. 25, [1988] S.C.J. No. 12 (S.C.C.), reconsideration / rehearing refused (1988), 49 D.L.R. (4th) vii (note) (S.C.C.). See also *Holder v. Holder*, [1968] Ch. 353, [1968] 1 All E.R. 665 (C.A.).

332 *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46 (U.K. H.L.) at 123.

333 As Lord Upjohn put it (*ibid.*, at 134). He also said of the appellants in *Phipps v. Boardman* (at 123) that, if they were accountable, "it is because of the operation of some harsh doctrine of equity upon consciences completely innocent in every way". But many doctrines of Equity operate on innocent consciences, as for example where estate property is mistakenly but improperly given to innocent charities (*Re Diplock*, [1948] Ch. 548 (C.A.)).

334 *3464920 Canada Inc. v. Strother*, *supra*, note 326.

335 *North-West Transportation Co. v. Beatty* (1887), (1887) L.R. 12 App. Cas. 589 (Ontario P.C.); for discussion, L. Smith, "*North-West Transportation Co. v. Beatty*" in C. Mitchell & P. Mitchell, eds., *Landmark Cases in Equity* (2012) 393. *Business Corporations Acts* may make specific provision regarding self-dealing transactions but generally leave the broader problem of "corporate opportunities"

to the case law. See, e.g., *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 120. The general fiduciary obligation is in s. 122(1)(a)-122(1.1).

336 See the discussion in *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 1994 CarswellOnt 231, 13 B.L.R. (2d) 1, 54 C.P.R. (3d) 161, [1994] O.J. No. 650 (Ont. Gen. Div.), additional reasons 1994 CarswellOnt 4805, 13 B.L.R. (2d) 1 at 233, 54 C.P.R. (3d) 161 at 390, [1994] O.J. No. 1138 (Ont. Gen. Div.) at paras. 605-626 [(54 C.P.R. (3d) 161)]; but note *In Plus Group Ltd. v. Pyke*, [2002] 2 B.C.L.C. 201 (Eng. C.A.).

337 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 120, for example, answers this question in the case of self-dealing contracts, but the matter is more difficult in other kinds of conflict (e.g., where a director comes across a business opportunity): *supra*, note 187.

338 *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50; *Sacks v. Campbell* (1991), 87 D.L.R. (4th) 342 (Ont. Div. Ct.).

339 *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 22(4); *Re Indalex Ltd.*, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, 2 C.C.P.B. (2nd) 1, 354 D.L.R. (4th) 581, D.T.E. 2013T-97, 439 N.R. 235, 301 O.A.C. 1, 20 P.P.S.A.C. (3d) 1, [2013] S.C.J. No. 6 (S.C.C.).

340 Another problem that calls for attention is the one that arises where the trustee's personal interest is not in question, but a different form of conflict arises because the trustee also holds the office of company director (is it a conflict of duty and duty?). Modern estate planning often involves the interlocking of trusts and corporations. The trust property consists of the majority, or all, of the issued shares, and the trustees have assumed the directorship of the company. It is settled law that directors must act in the best interests of the company. For a discussion of some of the resultant difficulties, see R.E. Scane (1974) 1 E.T.Q. 105; W.D. Goodman, "Trusts that Control Corporation" (1976) 3 E.T.Q. 115; D. Hughes, "Trust Principles and the Operation of a Trust-Controlled Corporation" (1980) 30 U. of T. L.J. 151; S.M. Crummey, "Estates and Trusts Holding Shares of Private Corporations: Selected Issues" (2007) 26 E.T.P.J. 302; *Walker v. Willis*, [1969] V.R. 778, noted 44 Aust. L.J. 334; *Shaker v. Al-Bedrawi*, [2003] Ch. 350 (Eng. C.A.); and note *Kordyban v. Kordyban* (2003), 2003 BCCA 216, 2003 CarswellBC 803, 13 B.C.L.R. (4th) 50, 50 E.T.R. (2d) 116, [2003] 6 W.W.R. 606, 181 B.C.A.C. 75, 298 W.A.C. 75, [2003] B.C.J. No. 793 (B.C. C.A.), additional reasons 2003 BCCA 455, 2003 CarswellBC 2019, 19 B.C.L.R. (4th) 19, 186 B.C.A.C. 77, 306 W.A.C. 77, [2003] B.C.J. No. 1923 (B.C. C.A.) at paras. 81-87 [13 B.C.L.R. (4th) 50]. See further chapter 19, Part III C 2 (c) and Part IV C 2.

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WatersTrusts 18.III

Waters' Law of Trusts in Canada, 5th Ed.

18 — Duties Underlying the Office of Trustee
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

18.III — DUTY OF CARE AND SKILL

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A. — The General Law

1. — Introduction

What is expected of a trustee? Does the law expect only that he or she will be a person of integrity, or must the trustee also demonstrate an ability in the several tasks which as trustee he or she is required to undertake? If the trustee is expected merely to be honest, at what point does inability pale into dishonesty? On the other hand, if the trustee must show both honesty and ability, what is to be the measuring stick of ability? Does the law expect the same of the settlor's elderly widow as of a trust company, or, to put it round the other way, does it expect from a trust company only what it could expect of the elderly widow? Such a question prompts another. If, as in the field of negligence, the law were to adopt the standard of the average person, is it meaningful to think in terms of an "average" when the span of competence is so great as between an elderly lay person anxious to do his or her best but having no business experience, and a professional trustee with a panoply of technical services at hand? Does it, or should it, make any difference that one trustee is undertaking the role on a gratuitous basis, motivated by an affection for the settlor or the beneficiaries, while another trustee charges for his or her professional services, having possibly advertised his or her skills? Is there a clearly marked-out legal test, so that it is an equally clear question of fact as to whether the trustee has satisfied the legal test in any given set of facts?

Trustees, like all fiduciaries, presumptively owe a duty of care and skill in the performance of their fiduciary role. The law on this duty, and on the standard of care that it demands, was clarified in the second half of the nineteenth century, and in particular in the case of *Learoyd v. Whiteley*.[341] There it was established that the trustee must be more than honest in the discharge of his or her duties; the trustee must give his or her mind to his or her various tasks and show a degree of care, skill and diligence. But "as a general rule", said Lord Watson,[342] "the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own affairs".[343] This rule has been expressed in the following way: the trustee must show ordinary care, skill, and prudence; he or she must act as the prudent person of discretion and intelligence would act in his or her own affairs. Evidently this does not mean that, if the trustee is careless and inefficient in his or her own affairs, he or she needs do no more in the conduct of the trust affairs. A person may speculate with his or her own funds and be negligent in the administration of his or her own affairs, but as a trustee he or she is exercising the powers and discretion of an owner in favour of another or others. It follows that the beneficiary should be able to expect an objective test of what is careful, skilful, and prudent. A trustee must show "vigilance, prudence and sagacity", said Dickson J. in *Fales v. Canada Permanent Trust Co.*[344]

This general standard of care originally applied to all trustee functions, including investment decisions and delegation decisions. The care required in investment functions has, to some extent, now been regulated by statute law, and this is discussed later.[345] Newer *Trustee Acts* have codified not only the standard of care required in investment functions, but the general standard that regulates all trustee functions.[346]

Though the standard of care is well established, some dicta do suggest that the test is something less than objective. In *Speight v. Gaunt*,[347] Jessel M.R. suggested that an honest trustee who had attempted to do his or her best should not be harried with the yardstick of what another who is more percipient and skilful might have done in the trustee's place. If that were the test, said the Master of the Rolls, no one would undertake the thankless task of trusteeship. And in a leading Ontario authority Middleton J.A. said,[348] "A trustee is not called upon to be omniscient. All that he is called upon to do is to honestly exercise his best judgment, to take the same care of the property as he would have taken if it had been his own." However, Jessel M.R.'s words were not supported in the judgments of the House of Lords on appeal,[349] and in the Ontario case Middleton J.A. himself said that the test fashioned in *Learoyd v. Whiteley* had been consistently followed in Canada. Middleton J.A. must have been adopting a loose paraphrase of Lord Watson's words.

Davies v. Nelson provides a useful example of how the test of *Learoyd v. Whiteley* works. Estate beneficiaries complained that the executors (who are held to the same standard of care as trustees) had sold a house belonging to the estate at a price well below its value. They sought compensation from the executors. The Ontario Court of Appeal refused to find the executors liable, though it was possible that they may have come to "an erroneous decision".[350] A valuer had put a price on the house at which figure it had in fact sold, but, though the executors could have held on to the property in the hope that the value would have risen, there were distinct risks in this. The property was in a bad state of repair, the executors had no funds with which they could carry out repairs, and the beneficiaries were not willing to come forward with their own funds or funds borrowed for the purpose. It may have been the case that the purchaser negotiated a mortgage on the property shortly after the purchase and that the mortgage was substantially larger than the sale price, but that did not show that the executors had not exercised ordinary care, skill, and prudence.

An interesting question raised by *Davies v. Nelson*, despite this objective test of the ordinary person of prudence and intelligence, is how far complaining beneficiaries can be met with the argument that, if the trustee was chosen by and therefore was agreeable to the settlor, the beneficiaries must accept the trustee's skill and intelligence, such as it is, and direct their complaints to the settlor. Despite the fact that this argument could only apply to original or named substitute trustees, it has a certain appeal which was perhaps in the mind of Middleton J.A. "When a trustee is appointed", he said,[351] "he is chosen by the appointor with all his faults, for better or for worse. He contracts impliedly to exercise his best skill, but he does not guarantee results satisfactory to expert critics. If he honestly does his best and acts with common intelligence, he is not liable for an error of judgment." This remark may have been a further example of Middleton J.A.'s lack of clarity in stating the objective test, and not intended as support for the "settlor's-choice" argument, but in *Dover v. Denne*[352] a quarter of a century earlier Armour C.J. was of the view that a co-trustee could not be made liable for a trustee-solicitor's theft of trust funds if it was really the fault of the settlor. The beneficiaries had suffered a loss, he said, but they should remember that the author of their benefits was also the author of the loss because of a misplaced confidence in the solicitor.[353]

However, whatever the dicta, it is unlikely today that this argument would be given any significant weight.[354] The courts would take the view that, if a trustee is to be exonerated from any liability that would otherwise attach, the trust must carry an express term to that effect. Similarly, it is not open to the trustee to argue that he or she has managed the property as the settlor had managed it prior to the creation of the trust. Whatever skill the settlor may have possessed, or care they may have shown, that is irrelevant unless the settlor has expressly provided to the contrary.[355] It is beyond question that no distinction can be drawn between active and passive trustees; each bears responsibility for what happens,[356] subject to any express or statutory exoneration of a trustee for the co-trustee's acts and the statutory power of the court to relieve a trustee of liability where in the court's view he or she ought to have that relief.[357]

In applying the test of the "person of ordinary prudence", the court is concerned with the trustee's conduct at the time when the events in question occurred. No trustee is expected to defend his or her actions or omissions against a complainant whose charges are based upon the advantage of hindsight, and therefore the only question can be as to what a prudent person would have done had he stood in the trustee's shoes when the disputed events took place. Of the authorities concerned with the actual

application of the test, little can usefully be said; the great majority of them merely involve questions of fact. It is established as a matter of law that a trustee does not necessarily satisfy the test by taking advice, since the question remains as to whether the prudent person would have been satisfied with the source or nature of the advice given. [358] It can also be said that, though the prudent person would not regard an action or omission as wise solely because he or she had kept the beneficiaries informed and gained their consent, nevertheless such conduct may well show that the trustee acted properly. [359] If the trustee has a discretionary power or trust to perform, they should not only consider whether or how they should exercise it, but in the first place inform the potential beneficiary of his or her (the beneficiary's) interest, and outline the terms of the trust. [360] It was said in *Re Bangham* [361] that a trustee is not at fault if, being out of the jurisdiction on a permanent basis, he or she leaves the conduct of the trust business to a co-trustee but at regular intervals gives his or her approval to contemplated transactions. [362] And, as we have seen, a prudent person can make "an erroneous decision" [363] or a "mistake". [364] But beyond these propositions, fact is so preponderant over law in the authorities that no categorical statement can be made.

2. — Professional Trustees

As Canadian common law stands, no distinction can be drawn between the lay trustee and the professional trustee. Both are required to act as the prudent person, or, as it is sometimes put, the prudent business person, would act. [365] This matter came before the Supreme Court in *Fales v. Canada Permanent Trust Co.* [366] in 1976, and the Court agreed with the British Columbia Court of Appeal, which had reversed the trial judge on the point, that the professional trustee is subject to no higher standard of care. The trust company and the testator's widow were the trustees of a trust set up by the testator's will, and they had retained a substantial unauthorized investment, pending sale and conversion into authorized investments. The retention lasted two and a half years, and ultimately the company whose shares were so held went into bankruptcy, leaving the trust with a substantial loss. The widow was found by the Court to have little business experience, and over the period of retention to have relied upon the corporate trustee for information about the "health" of the investment and for informed advice. She received neither, due to the negligence of the corporate trustee in adequately informing itself. The corporate trustee was consequently not in a position to advise her of the true state of affairs. The trust company being sued for breach of trust by the beneficiaries, it joined the widow as co-defendant. However, in accepting for the Court that there is no higher standard of care upon the trustee which charges fees and advertises its skills, Dickson J. expressed an obvious note of reservation that this should be the state of the law. That, subject to what the trust instrument may provide, "every trustee has been expected to act as the person of ordinary prudence would act" is the effect, he said, of "the weight of the authority to the present". On the other hand, although both the trust company and the widow were found to have breached the standard of care, the widow was excused, while the company was not. [367] A differing availability of the power to excuse has arguably the same effect as imposing a differing standard of care. [368]

On the other hand, the courts have to be satisfied as a matter of fact that the conduct of the particular trustee was lacking in "ordinary care and prudence", and in that process it is possible for the court to expect more of the professional trustee than of lay trustees, just as a general standard of "reasonableness" in the law of negligence may be more demanding in the case of a professional than in the case of a lay person. In *Dover v. Denne*, [369] for example, the solicitor-trustee had conducted all the testator's affairs in the latter's lifetime, and there was evidence that the testator wished him to continue doing so after the testator's death. The testator had actually told Mr. Denne, the co-trustee, that he was to leave the management of the estate to the solicitor. The third trustee was living in England, as the testator knew when the testator, in making the will, appointed him. When the testator died, neither Mr. Denne nor his English colleague took steps to have the outstanding mortgages transferred into the names of all the trustees, and it was this which facilitated the solicitor's absconding with the funds so lent when ultimately they were repaid. *Prima facie* one would have thought that the two co-trustees had clearly acted imprudently, but this was not the view of the Court of Appeal. Armour C.J. said that, as the testator had said the management of the estate was to be left to the solicitor and the mortgages had been made in the testator's lifetime, an ordinary business man could hardly have been expected to take the precaution of transfer into the joint names. At the same time, foreshadowing the approach in *Fales*, he seemed also to base his judgment on the statutory jurisdiction to relieve a trustee from liability, which at that time was relatively new. [370] Osler J.A. was emphatic that no statement by the testator outside the will excused the co-trustees from their clear duty, [371] but he

nevertheless thought this was a case of "special hardship" [372] and agreed with Armour C.J. For his part, MacLennan J.A. agreed with Osler J.A. about the verbal instructions of the testator but he, like the Chief Justice, considered that the co-trustees had shown ordinary care and caution. He said that had there been a breach, it would have been a case for statutory relief from liability.

Newer *Trustee Acts* that have codified the standard of care required of trustees have explicitly ordained that professional trustees must meet a higher, professional standard of care and skill. [373] This, presumably, would be borne in mind by any court that was asked to exercise the excusing jurisdiction.

3. — Trustees Controlling Corporations

English courts have also been concerned with the trust whose investments include a majority holding of shares in a corporation, a concern which has also been expressed by Canadian commentators. [374] Does the duty to be vigilant mean that the trustees should ensure that at least one of their number is elected to the board? [375] Even if the trust holds only a minority position, should the trustees not at least seek election? It is familiar in Canada for holders of a significant minority position to seek representation on the board, and this can only increase the pressure on trustees to do the same. The courts in England have taken the position that the trustees as majority shareholders do not have a duty to be on the board, but that this is one of the courses they may take. [376] The trustees' duty is to be constantly in a position to protect the trust's shareholding interest, and in order that they can do this they must ensure that they are as fully informed of company affairs, of board policies and plans, as any member of the board. Whether they put themselves or one of their number on the board, or the trust has a nominee there, or the trustees merely arrange for all board reports, papers and minutes to be sent to them, is a question that they must answer, given the circumstances. There are numerous ways in which they might act, and, the English courts have added, it would not help for the courts to lay down a general rule. But, whatever course they take, it must result in them being fully informed so that, before any corporate move is made, they can use their majority position to safeguard the interest of the trust.

Just as many trusts have exculpatory clauses to protect trustees, many also have a clause that aims to eliminate any duty that the trustees might otherwise have to intervene in the governance of corporations in which the trustees hold shares. [377] Such clauses can surely be effective, but only subject to the same limits that apply to more general exculpatory clauses, to which we now turn.

B. — Indemnity or Exculpatory Clauses

1. — Introduction and Interpretation

Before the First World War indemnity clauses began to become familiar in English trusts and settlements, as we have seen. Although the discussion that follows falls within a larger section on the trustee's duty of care and skill, it should be remembered that indemnity or exculpatory clauses—sometimes also called exoneration clauses—may have a wider scope, protecting a trustee in relation to any kind of breach. For example, if a trustee pays trust property to a non-beneficiary, the trustee is strictly liable because this is an unauthorized disposition of trust property. [378] In such a case, it is not in principle necessary to show that the trustee was careless, only that the trust did not authorize the disposition that was made.

One such indemnity clause was intended to protect the trustee from liability for the conduct of agents, a statutory form of which was incorporated in the English *Trustee Acts*, and in almost every Canadian Act as well. [379] Another such clause exonerated the trustee from any liability which would attach to the trustee for his or her own conduct, except in those circumstances where he or she had not acted in good faith. The latter type of clause is also commonly found in Canadian trust instruments. It is not unfamiliar to find executors and trustees exonerated from liability for any losses that occur through the exercise of their power of investment, provided the exercise is made in good faith. [380] Similarly, they are sometimes exonerated when loss occurs through the exercise of a power of postponement of conversion. [381] In *Re Wilson*, [382] the case involving the trust company whose general manager turned down an offer to buy part of the estate when, because of the high carrying charges of the land in question, the beneficiaries were deriving no income from the trust, a clause of this kind was to be found in the trust terms:

"I hereby exonerate my said Trustees from any responsibility for any loss or damage which may be occasioned through the exercising by them in good faith of the rights and powers hereby conferred upon them."

"Good faith" in this context obviously excludes dishonesty. Courts have tended to avoid defining this phrase, but it appears that a trustee can be said to be in good faith as long as he or she acted in what he or she honestly believed to be the best interests of the beneficiary.[383] Conversely, a trustee who disregarded those interests would be in bad faith and unprotected. Some clauses may protect a trustee except in cases of "wilful default" or "wilful wrongdoing". This has been interpreted to protect the trustee except in cases of conscious misconduct.[384]

Such a clause will not protect the trustee when it is found that he or she improperly delegated the power or discretion in question, and, as we have seen,[385] this was the case in *Re Wilson*, where it was held as a consequence of delegation without statutory or case law authority that the trustee had not exercised at all its power or discretion to postpone. The trustee was therefore liable. More recently, the same principle was applied to deny a trustee the protection of a widely drafted clause, when she had allowed her co-trustees to pillage the trust.[386] The Court held that she could not benefit from the clause when she was not even functioning as a trustee. This can be seen as an example of the strict construction that such clauses will always attract.

It is a nice question whether the settlor should be advised to appoint a trustee for whom this kind of protection is thought necessary or desirable, particularly in the case of a professional trustee. If the object of such a clause is to prevent the trustee from being harassed by over-anxious beneficiaries, the answer surely lies in the consideration that the discretion belongs to the trustee alone.

2. — Validity and Limits

There is some question as to how far such clauses are valid. In the U.S., they have received a good deal of judicial criticism on the ground that they are often dictated by trustees, usually corporate trustees, who hold themselves out as having all the requisite skills and thus inferentially promise to put those skills at the service of the client settlor. Under the Uniform Trust Code, any exculpatory clause is invalid if inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.[387]. This must be the case without statute, since it is a case of undue influence; but the Code goes on to reverse the burden of proof, providing that an "exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor".[388] More importantly perhaps, such clauses are unenforceable if they relieve the trustee of liability for a breach that is committed "in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries".[389]

In the absence of legislative intervention in England and Canada they are valid, almost without doubt, at least if they do not attempt to go too far.[390] The matter was reviewed by the English Court of Appeal in *Armitage v. Nurse*.[391] It was held that a clause excluding liability except for "actual fraud" was valid, and meant that liability was excluded for any degree of carelessness; only dishonesty was unprotected.[392] There is, however, one Canadian authority to the contrary. In *Poche v. Pihera*,[393] Hetherington J. (as she then was) was faced with a clause which said that the trustee should not be liable for any loss unless it was attributable to her dishonesty, or to an act that she knew was a breach of trust. The judge held that this clause was not apt to relieve the trustee from liability for gross negligence.[394]

There is, therefore, some uncertainty in Canadian law, and moreover, there is clearly some force in the argument that, at least in the case of a professional trustee, it should not be possible to exclude liability for negligent conduct.[395]

There have been calls for general legislative reform.[396] The Saskatchewan *Trustee Act, 2009* provides:[397]

> 8. If a trustee receives remuneration to administer the trust and holds out that he or she possesses special skills or knowledge relevant to the administration of the trust, any clause in a trust that relieves that trustee from the obligation to exercise the duty of care set out in this Act is invalid.

The professional trustee, therefore, may not exclude the normal standard for the duty of care, skill and diligence. In New Brunswick, following the UTA, there is a provision that validates exemption clauses, widely defined, but it then goes on to say that where a trustee is in breach, the court may hold the trustee liable if in its opinion the trustee's conduct "has been so unreasonable, irresponsible or incompetent that the trustee ought not to be relieved by the exemption clause from liability". [398]

Even in the absence of legislation, should the settlor go further and attempt to exonerate the trustee from liability for loss or damage *howsoever occurring*, even for dishonesty or bad faith, this must surely be held invalid. [399] Though a settlor is enabled to insert whatever provisions he or she may wish, and the *Trustee Acts* generally take effect subject to express provisions in the instrument, the fact remains that a total exoneration of liability, including for actions not in good faith, must be inconsistent with the nature of a trust. Not only is a trustee a fiduciary, a person whose essential character cannot be taken away even by the creator of the trust, but the essence of a trust is a beneficiary's right of recourse against the trustee for proper administration, and if the beneficiary is altogether denied that recourse it is highly questionable whether the settlor has created a trust at all. [400] Conversely and by the same token, an intention to create a trust excludes an intention to allow the trustee to do whatever he or she wishes with the trust property. [401]

Exculpation clauses which seek in express terms to exclude the liability of the trustee for fraud or bad faith are hardly likely to occur, because it is improbable that any capacitated settlor or testator would desire any such thing. For a similar reason, the courts are inclined to take a strict view of clauses which exclude the liability of the trustee for negligence. As suggested in *Poche v. Pihera*, it may be that trustees cannot be protected against liability for extreme negligence, at least if it rises to subjective recklessness; this may be considered comparable to bad faith, to the extent that it involves consciously disregarding the interests of the beneficiaries. [402] Moreover, the more general the exculpation provision, the more likely it is that the courts will reach the conclusion that the settlor or testator did not intend to relieve the trustee of liability — to throw upon the beneficiaries the risk of trustee idleness, imprudence or carelessness — in the particular circumstances which have occurred. The court may reason: "whatever the settlor had in mind, it could not have been *this* situation. It is unreasonable to suppose the settlor would have had any such intent." Exculpation clauses, therefore, may prove, when invoked, to be of very little assistance to the trustee.

However, provided the settlor leaves the trustee with his or her essential fiduciary character, it is for the creator of the trust to determine the level of prudence that the trustee shall exhibit, just as the settlor is free to permit the trustee to be in a position of conflict of interest and duty, and to favour some beneficiaries more than others. To achieve this result the trust creator should make his or her intention absolutely clear, and he or she will do so if he or she gives specific instructions for specific situations. For instance, while a trustee who loans trust moneys without adequate security would breach the prudent person standard, the trust instrument can authorize the trustees to make loans on personal security only. Indeed, this is a very familiar clause. [403] But if the instrument intends to permit imprudence in any specific situation, it must spell out the conduct it is permitting. The standard of vigilance and prudence is so dominant that it will emerge wherever the instrument is silent or vague. For instance, a power to retain indefinitely or at discretion, even "absolute and uncontrolled" discretion, any original unauthorized investment, as if it were an authorized investment, does not exclude the standard of prudence the business person would follow if that original asset is speculative and goes into a steady decline in value. [404]

Footnotes

341 *Learoyd v. Whiteley* (1887), L.R. 12 App. Cas. 727 (U.K. H.L.).

342 *Ibid.*, at 733.

343 In the Court of Appeal (*Re Whiteley* (1886), 33 Ch. D. 347 (Eng. C.A.) at 355), Lindley L.J. said it was not just the standard of the prudent person of business, but of such a person who is mindful of the fact that he or she is acting in the pecuniary interests of others who have legal and moral claims against him.

344 *Fales v. Canada Permanent Trust Co.* (1976), [1977] 2 S.C.R. 302, (sub nom. *Wohlleben v. Canada Permanent Trust Co.*) 70 D.L.R. (3d) 257 (S.C.C.) at 318 [S.C.R.]. But "a trustee is not expected to be infallible nor is a trustee the guarantor of the safety of estate assets" (at 319 [S.C.R.]). See *Re Mitchell Estate*, 2017 YKSC 25, 2017 CarswellYukon 40 (Y.T. S.C.).

345 Chapter 19.

346 *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 7; *Trustees Act,* S.N.B. 2015, c. 21, s. 30.

347 *Speight v. Gaunt* (1883), 22 Ch. D. 727 (Ch. Div.), affirmed (1883), L.R. 9 App. Cas. 1 (U.K. H.L.).

348 *Davies v. Nelson* (1927), 61 O.L.R. 457, [1928] 1 D.L.R. 254 (Ont. C.A.) at 463 [O.L.R.].

349 *Speight v. Gaunt* (1883), L.R. 9 App. Cas. 1 (U.K. H.L.).

350 *Davies v. Nelson* (1927), 61 O.L.R. 457 (Ont. C.A.) at 463.

351 *Ibid.*, at 464.

352 *Dover v. Denne* (1902), 3 O.L.R. 664 (Ont. C.A.).

353 The mortgage debts owed to the trust were created by the solicitor in the testator's lifetime. It was these mortgages that were not put in the name of all the trustees on the testator's death. Armour C.J. had already decided that this failure might have occurred to "an ordinary business man".

354 However, a similar thought may find expression to the extent that courts apply a different standard of care as between lay and professional trustees, on which see *infra*, notes 365 and 366 and accompanying text.

355 Nevertheless, though it is irrelevant in law, there remains a certain homely wisdom in Middleton J.'s remarks, especially when they are directed to the private individual who for affection's sake accepts the position of trustee.

356 Every trustee has a duty to be active in informing him- or herself and in acting for the good of the trust, but this does not mean that an active trustee has no duty to keep a less involved trustee informed, particularly, one suspects, when the former is a professional trustee, and the latter, an individual who has little business experience. Part of a trustee's duty to be vigilant, prudent and sagacious is to ensure that every step is taken that reasonably can be taken for the good of the trust. Such a trustee ensures that the information he or she possesses is passed on and, so far as he or she can bring this about, that the trustees as a body take appropriate action. See *Fales v. Canada Permanent Trust Co.*, *supra*, note 344; D.W.M. Waters, (1977) 55 Can. Bar Rev. 342 at 361-63.

357 See further chapter, 25 Part IV E.

358 *Patchell v. Raikes* (1904), 7 O.L.R. 470 (Ont. C.A.).

359 Such facts may support an argument based on the Equitable idea of acquiescence; see chapter 25, Part IV D.

360 *Re Short*, [1941] 1 W.W.R. 593 (B.C. S.C.). I.e., the beneficiary is entitled to know about the trust, though he or she is not entitled to interfere in the trustee's exercise of their discretion: *Re Londonderry's Settlement* (1964), [1965] Ch. 918, [1964] 3 All E.R. 855 (Eng. C.A.); *Valard Construction Ltd. v. Bird Construction Co.*, 2018 CSC 8, 2018 SCC 8, 2018 CarswellAlta 261, 2018 CarswellAlta 262, [2018] 1 S.C.R. 224, 65 Alta. L.R. (6th) 1, 73 C.L.R. (4th) 1, 418 D.L.R. (4th) 1, [2018] 4 W.W.R. 217 (S.C.C.). On the duty to inform beneficiaries, see further chapter 19, Part IV A.

361 *Re Bangham*, [1933] O.W.N. 785 (Ont. C.A.).

362 Some *Trustee Acts* make specific provision for the delegation by a trustee of all of his or her duties, when he or she is to be absent, but in general these provisions stipulate that the trustee remains liable for any default of his or her delegate. See above, Part I B; chapter 20, Part II K.

363 *Davies v. Nelson* (1927), 61 O.L.R. 457, [1928] 1 D.L.R. 254 (Ont. C.A.) at 463 [O.L.R.].

364 *Re Bangham*, [1933] O.W.N. 785 (Ont. C.A.) at 788.

365 Nor have Canadian *Trustee Acts* drawn such a distinction in respect of the standard of care required in investment decisions, although many other jurisdictions do: chapter 19, Part II E. See, however, the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 32(7)-(9), which does draw this distinction in relation to guardians of the property of an incapable person.

366 *Supra*, note 344. For the lower courts, see *Fales v. Canada Permanent Trust Co.*, [1974] 3 W.W.R. 83, 44 D.L.R. (3d) 242 (B.C. S.C.), varied (1974), [1975] 3 W.W.R. 400, 55 D.L.R. (3d) 239 (B.C. C.A.).

367 Under what is now the *Trustee Act*, R.S.B.C. 1996, c. 464, s. 96. On this provision generally, see chapter 25, Part IV E.

368 Since the corporate trustee was found not to have shown ordinary prudence, the Court had no need to carry further the issue of a higher standard for professional trustees. See, on this issue, D.W.M. Waters, (1977) 55 Can. Bar Rev. 342 at 356-61. As Dickson J. observed, English courts on several occasions have taken the professional status of the trustee into account when asked by the trustee to excuse it for breach (see, *ibid.*, for this judicial power). But at the time of *Fales*, none had said that liability for breach is governed by a higher standard (excepting perhaps an *obiter dictum* of Harman J. in *Waterman's Will Trusts v. Sutton*, [1952] 2 All E.R. 1054). This was, however, said to be the case in *Bartlett v. Barclays Bank Trust Co.*, [1980] Ch. 515, [1980] 1 All E.R. 139 (Eng. Ch. Div.). Though he found the corporate trustee failed also to meet the test of the prudent person of business, Brightman J. (at 534-35 [Ch.] and 152-53 [All E.R.]) alternatively based his findings of liability for breach of trust on "the higher duty of care" that attaches to "the skilled trust corporation". Moreover, he said, "I should add that the bank's counsel did not dispute the proposition" of such a higher duty.

369 *Dover v. Denne* (1902), 3 O.L.R. 664 (Ont. C.A.). And the courts may take it into account when the trustee is remunerated for his services: *Waterman's Will Trusts v. Sutton*, [1952] 2 All E.R. 1054 at 1055; *Krendel v. Frontwell Investments Ltd.*, [1967] 2 O.R. 579, 64 D.L.R. (2d) 471 (Ont. H.C.) at 585[O.R.].

370 It was enacted in Ontario in 1898.

371 This is a very valid point which was not met by Armour C.J.: see *Re Smith*, [1971] 2 O.R. 541, 18 D.L.R. (3d) 405 (Ont. C.A.), and at first instance *Re Smith* (1970), [1971] 1 O.R. 584, 16 D.L.R. (3d) 130 (Ont. H.C.) at 589 [O.R.].

372 *Dover v. Denne* (1902), 3 O.L.R. 664 (Ont. C.A.) at 681.

373 *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 7(2); *Trustees Act,* S.N.B. 2015, c. 21, s. 30(2). A higher standard has also been adopted in the U.K. (*Trustee Act*, 2000, s. 1), as well as in New Zealand and the states of Australia, and in the U.S. (Uniform Trust Code, 2010 revision, §807). This model law does not itself have the force of law, but it has been enacted into law by 34 states and the District of Columbia.

374 See, *supra*, note 340.

375 If the trust owns all the issued shares, it is difficult to see what answer they could have to their not being on the board, unless this lies in a clause in the instrument that deals with the matter.

376 *Renwick v. Lucking* (1967), [1968] 1 W.L.R. 866, (sub nom. *Re Lucking's Will Trusts*) [1967] 3 All E.R. 726 (Eng. Ch. Div.); *Re Miller's Deed Trusts*, [1978] Law Soc. Gaz. 454; *Bartlett v. Barclays Bank Trust Co.*, *supra*, note 368; see also *Kordyban v. Kordyban* (2003), 2003 BCCA 216, 2003 CarswellBC 803, 13 B.C.L.R. (4th) 50, 50 E.T.R. (2d) 116, [2003] 6 W.W.R. 606, 181 B.C.A.C. 75, 298 W.A.C. 75, [2003] B.C.J. No. 793 (B.C. C.A.), additional reasons 2003 BCCA 455, 2003 CarswellBC 2019, 19 B.C.L.R. (4th) 19, 186 B.C.A.C. 77, 306 W.A.C. 77, [2003] B.C.J. No. 1923 (B.C. C.A.) at paras. 77-80 [13 B.C.L.R. (4th) 50].

377 In English practice, such a clause is often called an "anti-Bartlett" clause (*ibid.)*. In *Zhang Hong Li v. DBS Bank (Hong Kong) Ltd.*, [2019] HKCFA 45, the instrument had a clause that forbade the trustees from being involved in company administration, and relieved the trustees of any duty to supervise the affairs of the company. The trust was governed by Jersey law. The Hong Kong Court of Final Appeal held that the clause was effective under that legal system. For a more sceptical view of the effectiveness of such clauses, see E. Buckland, "Are We Living in a Post Anti-Bartlett Clause Age?" (2018) 24 Trusts & Trustees 260.

378 For example, in *Eaves v. Hickson* (1861), 30 Beav. 136, 54 E.R. 840 (Eng. M.R.), the trustees were duped by a forgery and paid money to recipients who were not beneficiaries. The trustees were liable to restore the trust fund (although the recipients were primarily liable).

379 See *supra*, Part I B 4 for a full discussion.

380 E.g., "my Trustee shall not be liable for any loss that may happen to my estate in connection with any such investment made by him in good faith". *Sheard, Hull and Fitzpatrick* at 20.

381 A power to postpone for as long as the trustees in their discretion deem advisable, "and my Trustee shall not be held responsible for any loss that may happen to my estate by reason of so doing". *Ibid.*, at 24. See also, *ibid.*, at 49.

382 *Re Wilson*, [1937] O.R. 769, [1937] 3 D.L.R. 178 (Ont. C.A.).

383 In *Armitage v. Nurse*, [1997] 2 All E.R. 705, [1998] Ch. 241, [1997] N.L.O.R. No. 229 (C.A.) at 252, application for leave to appeal refused, [1998] 1 W.L.R. 270 (U.K. H.L.), Millett L.J. (for the Court) discussed the case of a clause that exempted liability except for actual fraud. He expressed the view that a trustee will be protected by such a clause even for a deliberate breach of trust, if the trustee took a risk of causing loss but was acting in what he or she honestly believed were the best interests of the beneficiary. The implication is that a trustee is not protected if he or she was not acting in what he or she honestly believed were the best interests of the beneficiary. This corresponds to a definition of bad faith as trustee conduct that consciously disregards the interests of the beneficiary. See *Bronson v. Hewitt*, 2013 BCCA 367, 2013 CarswellBC 2452, 50 B.C.L.R. (5th) 303, 41 C.P.C. (7th) 10, 90 E.T.R. (3d) 1, [2013] 10 W.W.R. 654, 343 B.C.A.C. 160, 586 W.A.C. 160 (B.C. C.A.) at para. 83, additional reasons 2013 BCCA 488, 2013 CarswellBC 3448, 50 B.C.L.R. (5th) 368, 56 C.P.C. (7th) 196, 92 E.T.R. (3d) 1, [2014] 2 W.W.R. 70 (B.C. C.A.), additional reasons 2014 BCCA 514, 2014 CarswellBC 3896, 68 B.C.L.R. (5th) 211, 62 C.P.C. (7th) 39, 2 E.T.R. (4th) 191, [2015] 1 W.W.R. 635, 365 B.C.A.C. 200, 627 W.A.C. 200 (B.C. C.A.), and *Ernst & Young Inc. v. Chartis Insurance Co. of Canada*, 2014 ONCA 78, 2014 CarswellOnt 891, 118 O.R. (3d) 740, 9 C.B.R. (6th) 242, 29 C.C.L.I. (5th) 96, 93 E.T.R. (3d) 175, 314 O.A.C. 262, [2014] O.J. No. 416 (Ont. C.A.) at paras. 60-61, adopting *Armitage* on the definition of "dishonesty" for the purpose of interpreting an exclusion in a trustee's insurance policy.

384 *Re City Equitable Fire Insurance Co.* (1924), [1924] All E.R. Rep. 485, [1925] 1 Ch. 407, 40 T.L.R. 664 (Eng. Ch. Div.), at 517, 521-5 and 528-9, affirmed [1924] 1 Ch. 407 (C.A.) at 500; *Caponi v. Canada Life Assurance Company*, 2009 CarswellOnt 113, 70 C.C.L.I. (4th) 148, 74 C.C.P.B. 89, 72 C.P.C. (6th) 331, 2009 C.E.B. & P.G.R. 8326 (headnote only), [2009] O.J. No. 114 (Ont. S.C.J.) at paras. 23-24; and see the discussion of the interpretation of this phrase in the statutory exoneration clause that exists in most provinces, above, Part I B 4. In *Armitage v. Nurse, ibid.,* Millett L.J. expressed the view that even a trustee who deliberately breaches the trust is not guilty of "wilful default" if he or she was acting in what he or she honestly believed were the best interests of the beneficiary. This interpretation appears to equate wilful default with bad faith or fraud. One could argue that such a trustee commits a wilful default within the meaning of *Re City Equitable Fire Insurance Co.*, even if he or she is in good faith.

385 Above, Part I A, *supra*, note 18 and accompanying text. See note 20 for subsequent legislative amendments to permit this type of corporate in-house delegation.

386 *Penman (Litigation guardian of) v. Penman*, 2014 ONCA 83, 2014 CarswellOnt 960, 119 O.R. (3d) 128 (Ont. C.A.).

387 Uniform Trust Code, 2010 revision, §1008(a)(2). This model law does not itself have the force of law, but it has been enacted into law by 34 states and the District of Columbia

388 §1008(b).

389 §1008(a)(1).

390 For analyses of the law, see P. Matthews, "The Efficacy of Trustee Exemption Clauses in English Law," [1989] Conv. 42; D.A. Steele, "Exculpatory Clauses in Trust Instruments" (1995) 14 E.T.J. 216; J. Penner, "Exemptions" in *Birks and Pretto* at 241; B.C. Law Institute, *Exculpation Clauses in Trust Instruments*, Report No. 17 (2002), also at (2002) 22 E.T.P.J. 55; Law Commission of England and Wales, *Trustee Exemption Clauses*, Consultation Paper No. 171 (2002); A.J. Rabinowitz, "Trustee Exemption Clauses" (2007) 26 E.T.P.J. 163; C. Figliomeni, "The Effectiveness of Exculpatory Clauses" (2019) 38 E.T.P.J. 271.

391 *Armitage v. Nurse* (1997), [1998] Ch. 241, [1997] 2 All E.R. 705, [1997] N.L.O.R. No. 229 (C.A.), application for leave to appeal refused, [1998] 1 W.L.R. 270 (U.K. H.L.). *Armitage* was said in *Spread Trustee Co. Ltd. v. Hutcheson*, [2011] UKPC 13, to represent also the law of Guernsey, before it was amended by legislation to eliminate the possibility of excluding liability for gross negligence.

392 See note 383.

393 *Poche v. Pihera* (1983), 6 D.L.R. (4th) 40, 16 E.T.R. 68 (Alta. Surr. Ct.); distinguished in *Adam v. Adam Estate*, 2003 MBQB 271 (Man. Master). Hetherington J. referred to several decisions of the House of Lords on appeal from Scotland; Scots law may be different on this point.

394 As a comparative note, in *Bell c. Molson*, 2015 QCCA 583, 2015 CarswellQue 2695, EYB 2015-250275 (C.A. Que.), the trustees (one of whom was a trust corporation) were liable for a loss to the trust investments caused by the trustees' breach of the duty of prudence and diligence, which corresponds to the duty of care and skill in the common law. The clause containing the investment power stated that the trustees should be "without any responsibility for any loss which may be involved by reasons of such investments". Following the writings of commentators, the Court of Appeal simply held that no such clause could exclude the fundamental obligations of trustees, being the duties of honesty and loyalty, and of prudence and diligence.

395 In some situations, where a professional trustee will always be employed, statute law may prohibit exculpation clauses. Regarding trusts for bondholders, see "Business Trusts", chapter 12, Part III C 3 (a).

396 The B.C. Law Institute's report, *A Modern Trustee Act for British Columbia*, 2004, recommended a modification in line with what now appears in the UTA and in New Brunswick, discussed immediately below. In England and Wales, following consultation, the Law Commission recommended not legislation, but rather the adoption by the law profession of a rule of practice requiring trust drafters and professional trustees to make settlors and testators aware not only of the presence but of the effect of such clauses.

397 S.S. 2009, c. T-23.01, s. 8.

398 S.N.B. 2015, c. 21, s. 78(3)(b). Note also that s. 30(2) requires that professional trustees meet a professional standard of care.

399 See *Sproule v. Montreal Trust Co.*, [1979] 4 W.W.R. 670, 95 D.L.R. (3d) 458 (Alta. C.A.) at 469-70 [D.L.R.]. Again, bad faith on the part of a trustee can be understood as conduct that consciously disregards the interests of the beneficiary.

400 Arguably the settlor has given the property to the "trustee" and imposed merely a moral obligation. *Cf. Re Hlady* (1982), 37 O.R. (2d) 652, 137 D.L.R. (3d) 361 (Ont. H.C.), additional reasons at (1984), 46 O.R. (2d) 799 (Ont. H.C.), where moneys are given outright, but the creator of the trust attempts to impose a discretion as to the time and manner of payment. In *Hayim v. Citibank NA*, [1987] A.C. 730, [1987] 3 W.L.R. 83 (Hong Kong P.C.), the specification that a trustee was under no obligation with respect to a particular asset led to the conclusion that there was no trust of that asset. Most exemption clauses do not purport to eliminate the duty, but rather liability or responsibility for breach of duty; ultimately, however, this too is inconsistent with the nature of a trust.

401 See, for example, the discussion of "illusory trusts" in *Clayton v. Clayton*, [2016] NZSC 29 [118]-[130] and note *Webb v. Webb*, 2020 UKPC 22 (Cook Is. P.C.) at para. 89; compare *Larochelle v. Soucie Estate*, 2019 BCSC 1329, 2019 CarswellBC 2342, 50 E.T.R. (4th) 260 (B.C. S.C.).

402 Similarly, it is arguable that a trustee who consciously relies on the exoneration clause when exercising his or her powers and duties is consciously disregarding the interests of the beneficiaries.

403 The instrument can even authorize the trustee him- or herself to borrow the funds: *Waterman's Will Trusts v. Sutton*, [1952] 2 All E.R. 1054; *Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co.*, [1986] 1 W.L.R. 1072 (Bahamas P.C.).

404 *Cf. Fales v. Canada Permanent Trust Co.* (1976), (sub nom. *Wohlleben v. Canada Permanent Trust Co.*) [1977] 2 S.C.R. 302, 70 D.L.R. (3d) 257 (S.C.C.). What are trustees to do when instructed by the instrument to retain the testator's XYZ Co. common shares, which are not to be subject to any power of sale, and to transfer them to A (now ten years of age) on his attaining his twenty-fifth birthday? The stock is not reliable, and a prudent person would sell and reinvest for the boy. Apart from any power of advancement, the trustees could (where the statute permits) apply to the court for an enlargement of their investment powers; this might be more likely to succeed if there had been some change in the fortunes of XYZ Co. since the testator's death. Otherwise, an application for a variation of the trust might be in order.

End of Document

Martin v. Banting

Ontario Judgments

Ontario Superior Court of Justice

Low J.

Heard: February 2, 2001.

Judgment: February 14, 2001.

Court File No. 98-CV-147329

[2001] O.J. No. 510 | 37 E.T.R. (2d) 270 | 103 A.C.W.S. (3d) 238

Between David Grant Martin, plaintiff/responding party, and Robert F. Banting, Barbara Ann Martin, Kenneth Michael Martin, Thomas James Weisz, CIBC Wood Gundy Securities Inc. and The Freeburne Banting Foundation and Fenwood Developments Limited, defendants/moving parties

(37 paras.)

Case Summary

Trusts — Administration — Powers of trustee — Discretionary power re payment out of trust funds — Remedies of beneficiaries and others — Practice — Judgments and orders — Summary judgments — To dismiss action.

Application by the defendants, Martin and Banting, for summary judgment to dismiss the action of the plaintiff, David Martin. Martin was David's mother and Banting was his uncle. Martin and Banting each established trusts. The beneficiaries were David and his brother. The defendants reserved substantial discretion to themselves to determine which beneficiary would receive money from the trust. David commenced this action because he was unhappy with the distribution. The value of the Banting trust was $6 million. The Martin trust was worth $1.5 million. Banting gave David nothing. Martin gave her son only $1. The defendants decided that David did not deserve any funds because of his character and conduct. David argued that the defendants acted with mala fides when they made the distributions because they relied on irrelevant considerations.
HELD: Application allowed.

The action was dismissed. There was no triable issue regarding the defendants' reasons when they distributed the funds. The court only had to consider the trust deed to determine whether the defendants' reasons were relevant. These considerations were relevant since the trust deed conferred unlimited discretion upon the defendants. The validity of the defendants' opinions about David's fitness was not a triable issue. The court would not interfere since mala fides was not shown. David raised allegations that had no basis in reality.

Counsel

Kenneth Hood, for David Martin, plaintiff/responding party. Sean Dunphy and Christopher Cosgriffe, for Robert Banting, Freeburne Banting Foundation and Fenwood Developments Limited, moving parties. Hendrik Keesmaat, for Barbara Martin, moving party.

LOW J.

1 This is a motion for summary dismissal of the plaintiff's claim.

2 The plaintiff, David Martin, is the son of the defendant Barbara Martin, the nephew of the defendant Robert Banting, and the brother of the defendant Kenneth Martin.

3 This action concerns two trusts, the Barbara Martin Trust (the Martin trust), created by Barbara Martin in 1971 and the R.F. Banting (1975) Trust (the Banting trust), created by Robert Banting in 1975. The language of the trust documents is the same except as to the names and number of trustees, the beneficiaries and vesting date.

4 Barbara Martin is the settlor and the surviving trustee (the other being her late husband) of the Martin trust. Robert Banting is the settlor and the trustee of the Banting trust.

5 Both trusts had a vesting date of the earlier of 60 years following execution of the trust deed or 21 years following the death of the survivor of the descendants of King George V, or such earlier day as the trustee may appoint not earlier than 21 years following the execution of the trust deed.

6 The beneficiaries under the Martin trust were the plaintiff and his brother Kenneth and the appointed class in that trust comprised the two brothers and their issue.

7 The beneficiaries under the Banting trust were Barbara and her husband Kenneth Martin and their sons, the plaintiff and Kenneth Martin. The appointed class under this trust comprised the beneficiaries and the issue of David and Kenneth Martin.

8 The purpose for which both trusts were created was to do an estate freeze and thus to avoid taxation of capital growth of certain assets in the hands of the settlors and to delay taxation thereon in the hands of beneficiaries. Barbara Martin and Robert Banting in their affidavits on this motion deposed that this was their purpose and there is no other evidence on the point.

9 Both deposed that it was their intention to reserve to themselves in the trust document as wide and complete a discretion as possible in the matter of determining who among the members of the appointed class was eventually to receive money from the trust and in what proportions. The trust document therefore conferred on the trustee in each case a discretionary power of appointment. The relevant portions of the document are as follows:

> Article VIII
>
> 2. The Trustee shall stand possessed of the Trust Estate and the income thereof upon such trusts for the benefit of the members of the Appointed Class or any one or more of them exclusive of the other or others in such shares and proportions and subject to such terms and limitations and with and subject to such provisions for maintenance, education or advancement or for accumulation of income during minority or for forfeiture in the event of bankruptcy or otherwise and with such discretionary trusts and powers exercisable by such person as the Trustee shall from time to time by Deed or Deeds revocable or irrevocable executed before the Vesting Day and without infringing the rule against perpetuities appoint.
> 3. In default of and subject to any such appointment as aforesaid, the Trustee shall until the Vesting Day pay or apply the whole or such part if any as he shall think fit of the income of the Trust Estate as it arises to or for the benefit of all or such one or more exclusive of the others or other of the Beneficiaries in such proportions and manner as the Trustee in his absolute discretion shall think fit and subject as aforesaid the Trustee shall until the Vesting Day accumulate the income of the Trust Estate or so much thereof as shall not be paid or applied as aforesaid and from time to time add it to the capital of the Trust Estate.
>
> Provided that notwithstanding the foregoing upon the expiration of the longest period permitted under the Accumulations Act, Revised Statutes of Ontario, 1960, Chap. IV, thereafter the Trustee will distribute the

annual income of the trust estate among any one or more of the beneficiaries as the trustee shall in his absolute discretion think fit.

4. The Trustee shall stand possessed of the Trust Estate on the Vesting Day (subject to any appointment made in exercise of such powers as aforesaid) in trust as to income and capital for such members of the Appointed Class as shall then be living or any one or more of them and in such shares as the Trustee shall determine and in default of such determination, in trust for such of the Beneficiaries as shall then be living in equal shares absolutely and if there are no Beneficiaries then living, the Trustee shall stand possessed of the Trust Estate and the income thereof in trust for such charitable purposes as the Trustee shall determine.

10 This lawsuit arises out of the exercise by Barbara Martin and Robert Banting of their powers and discretions under their respective trusts to distribute the trust assets and wind up the trusts. The plaintiff claims damages for breach of trust, but in the amended statement of claim particularizes his claim as one seeking payment to him of half the Martin trust estate and one third of the Banting trust estate. It is not suggested by the plaintiff that the trustees lacked the power to distribute the trust assets. The issue is whether or not Barbara Martin had a legal obligation to distribute, in the case of the Martin trust, one half of the trust estate to the plaintiff, and whether Robert Banting, in the case of the Banting trust, had a legal obligation to distribute one third of the trust estate to him.

11 With respect to the Banting trust, the plaintiff also alleges that the trustee Robert Banting made a number of investments that he ought not to have made with the trust assets and the plaintiff contends that the trust assets at date of distribution ought to have been in the magnitude of $10 million rather than approximately $6 million.

12 The facts material to the determination of the central issue raised in the action are not in dispute. On December 9, 1975, Robert Banting created the Banting trust. He settled the sum of $6,592.24 on the trust. He subsequently lent assets to the trust without taking interest and he grew the estate to some $6 million by 1995 net of repayment of borrowings. In September 1995, Robert Banting decided to distribute the assets of the trust to avoid the effect of the deemed distribution that was to take place in 1996 under the Income Tax Act, an event which would have triggered a large capital gains tax.

13 The evidence is uncontroverted that Robert Banting had given many years' consideration to how he would exercise his discretion when the time came that he would have to cause the trust estate to be distributed. The evidence is also uncontroverted that his original intention had been to benefit his sister Barbara and her husband Kenneth (Robert's only child having died in 1972) and that it had been on legal advice that he had added his two nephews to the list of named beneficiaries in the trust. In the affidavit filed on this motion, Robert Banting deposed that he had had reservations about the plaintiff when he created the trust and that those reservations had grown with the passage of time. In coming to a determination whether or not to make a distribution to the plaintiff out of the trust estate, Robert Banting considered the plaintiff's character and conduct. He found the plaintiff wanting in both areas and he therefore determined that no distribution would be made to the plaintiff. A distribution of $1 million was made to his nephew Kenneth Martin and the balance of the trust estate, about $5 million, was distributed to his sister Barbara.

14 Mr. Banting's affidavit sets out at length the facts and factors he considered in the exercise of the discretion to distribute funds to his sister and his nephew Kenneth but not to the plaintiff. I will not reproduce them here as they can be summarized as follows: a concern about the plaintiff's ability to handle money; knowledge that his sister Barbara had already given to the plaintiff significant assets, both real and personal, and including a corporation having assets worth, in his opinion, over $1 million; a belief that the plaintiff did not share his work ethic and that since 1991 he had not really worked but lived off his investment portfolio; and the estrangement by the plaintiff from the rest of the family. Robert Banting also deposed that in his view, the plaintiff lacked integrity, principles, good business practices and morals. There is no evidence to contradict Robert Banting's evidence that he in fact had these concerns, beliefs and opinions about the plaintiff and the plaintiff did not cross-examine Mr. Banting on his affidavit.

15 The Martin trust was created on June 3, 1971 by Barbara Martin who transferred to the trust securities worth $143,016. On April 9, 1998, she appointed a vesting date under the Martin trust. She appointed April 9, 1998 as the vesting date and she distributed the trust estate. She distributed the sum of $1 to the plaintiff and the balance to her other son, Kenneth Martin. By that time, the trust estate had grown to approximately $1.5 million.

16 The process by which Barbara Martin came to make her determination as to the allocation of the Martin trust estate was less straightforward than that of Mr. Banting. The mother of two children, she had a predisposition to treat them equally and continued to have a predisposition to treat them equally until as late as 1996. This was so despite concerns, beliefs and opinions which she had concerning the plaintiff's character, attitude and conduct and her stress at their deteriorating relationship. Barbara Martin's concerns and assessment of the plaintiff are set out in detail in her affidavit and may be summarized as: a belief that the plaintiff had an attitude that he was owed things and entitled to make demands as of right without having to work or achieve on his own; a belief that the plaintiff had acted less than honestly in the matter of arranging for transfer of her matrimonial home by causing the transfer to be made to him as trustee instead of to him and his brother Kenneth equally as had been her wish and intention; a belief, based on he way he had handled several real estate matters, that the plaintiff lacked judgment and responsibility; a perception that the plaintiff's attitude was cold and hostile toward her and that he did not appreciate gifts that she had given him. Barbara Martin was not cross-examined on her evidence and there is no evidence to suggest that she did not in fact hold the beliefs and opinions or have the concerns about the plaintiff to which she deposed.

17 By 1997, Barbara's reflections on the plaintiff's character and his conduct had persuaded her that giving more money to the plaintiff would not benefit him or anyone, and she considered distributing 1/2 of the trust estate by way of creation of new trusts for the plaintiff's two children, one of whom is autistic and the other of whom is epileptic. She had determined that she would not distribute any of the estate to the plaintiff directly. The discussions which ensued between Barbara and the plaintiff concerning who was to be appointed as the trustees of these new trusts for the plaintiff's children led Barbara to believe that the plaintiff would attempt to interfere with them and she postponed action in the matter.

18 In June 1997 the plaintiff, impatient with Barbara's slowness in distributing money from the Martin trust, launched legal action against his mother to compel a wind up of the Martin trust and a division of the assets equally between him and his brother and, alternatively, a variation of the Martin trust such that he would receive a 50% share of the assets of the trust in specie.

19 Around the same period of time, the plaintiff opposed a development plan being put before the OMB by Robert Banting concerning a parcel of land in Ancaster adjacent to property owned by the plaintiff. The result of the plaintiff's opposition was that Robert Banting was required to deed a reserve to the Town of Ancaster to accommodate services in favour of surrounding lands including the plaintiff's should he develop in the future. Barbara viewed this action on the plaintiff's part as demonstration of a lack of family loyalty and a sign of ingratitude toward his uncle who had always treated him well. As a result, Barbara determined that she would exercise her discretion to distribute $1 of the trust estate to the plaintiff and the balance to her other son, the defendant Kenneth.

20 The plaintiff's position as disclosed in the factum and affidavit filed in response to the motion is that the trustees' reasons were ludicrous, irrational and wrong and that they acted out of spite to break him. In argument, Mr. Hood, counsel for the plaintiff expanded on the plaintiff's position and argued that not only were the trustees wrong in their reasons for exercising their discretion in the way that they did, the matters that they considered were all irrelevant. It was urged upon me that the relevant consideration, and the only relevant consideration, was the fact that the plaintiff's two children had disabilities. It was argued also that the trustees acted dishonestly and that they did not in fact hold the opinions, beliefs and perceptions of the plaintiff's character and conduct to which they deposed.

21 As to whether the trustees in fact exercised their discretion for the reasons set out in the material, it was argued on behalf of the plaintiff that the Court on a summary judgment motion may not accept the uncontradicted evidence

of the trustees and that the matter must be sent to trial so that a Trial Judge may assess on viva voce evidence whether the trustees are believable.

22 The principle governing review of an exercise of a discretion by a trustee under a discretionary trust is that the Court will not interfere with the exercise of the discretion in the absence of mala fides. In the leading case of Gisborne v. Gisborne (1877), 2 App. Cas. 300 (H.L.), the testator gave his estate to his executors and trustees to invest and:

> "... in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income ... as they shall think expedient, to or for the clothing, board, lodging, maintenance, ease, and support, or otherwise for the personal and peculiar benefit and comfort of my dear wife ..."

The testator made certain specific legacies and bequeathed the residue of the estate to other persons. One of the trustees was also a residuary legatee. The wife had been adjudged a lunatic and had in her own right property out of which she could be maintained. By her next friend, she sought a declaration that she was entitled to have provision made for her maintenance out of the income of the testator's estate.

23 Lord Cairns, the Lord Chancellor, wrote:

> "The question, however much it may be discussed, must really come back to and turn upon the construction of the will ...
>
> My Lords, larger words than those, it appears to me, it would be impossible to introduce into a will. The trustees are not merely to have discretion, but they are to have "uncontrollable," that is, uncontrolled, "authority." Their discretion and authority, always supposing that there is no mala fides with regard to its exercise, is to be without any check or control from any superior tribunal. What is the subject-matter with regard to which they are to exercise this discretion and this authority? The subject-matter is the payment, or the application, not merely of the whole of the income of his real and personal estate, but of such portion only as they deem it proper to expend. It is for them to say whether they will apply the whole, or only a part, and if so what part. And how are they to decide, if they do not apply the whole; what is the part which they are to apply? They are to decide upon this principle, that it is to be such part as they shall think expedient, not such part as shall be sufficient, not such part as shall be demanded by or for the person to be benefited, but such part as they shall think expedient; and upon the question of what is expedient it is their discretion which is to decide, and that discretion according to which they are to decide is to be uncontrolled."

24 The Lord Chancellor went on to remark that were the Court to have management of two such funds as those of the testator and of the lunatic widow, it would, under the rule in chancery, save the estate which was the property of the lunatic and deplete the estate of the testator, but as the discretion under the will was that of the trustees and not that of the Court, it would not reverse the discretion of the trustees for to do so would be to reverse the words of the testator.

25 The question then turns on whether the plaintiff can show the presence of mala fides. The term mala fides is somewhat elastic and must turn on the nature of the task presented to the trustees. As Professor Waters points out in THE LAW OF TRUSTS IN CANADA, Second Edition, the Carswell Company Limited, 1984 at 760,

> ... the conferment of discretion appears to make the trustees their own judge of what is reasonable. In attempting to uphold the court's necessary jurisdiction on the one hand, and the trust creator's intention on the other, different courts have described the extent of the court's power of intervention in different ways. Some have spoken only of the requirement of "good faith," while others have said the courts will not permit a "wrongful," "improper," or "unfair" exercise of the power, or refusal to exercise it. Essentially, however, all courts are attempting to discover and formulate in language the elusive mid-way position between imposing the reasonable man test as if there were a duty, and conceding a sheer licence to the trustee to do what he likes.
>
> Nor is this process helped by the ambiguity of such terms as "good faith," "improper" and "unfair." For instance, what exactly does "good faith" mean? A trustee is in bad faith if he intentionally exercises a

> discretionary power for his own wrongful benefit; but could it be argued, and have courts so intended, that bad faith includes the situation where the trustee abuses his discretion by exercising it in a manner, or not exercising it for a reason, which lies outside the purpose or scope of the discretion?
>
> However, whatever their formulation of the basis upon which the courts may intervene, courts in England have set aside discretionary decisions which were dishonest or reached by the consideration of factors outside the scope or purpose of the power, and they have intervened when trustees have done nothing about the exercise of the discretion. In other words, the criteria to be applied to the trustee are these: he must be honest; beyond that, if honesty has narrow meaning, he must act within the confines of the authority that was given to him; and he must perform the duty, fundamental to the trustee's office, that he give his mind to whether and, if so, how he ought to exercise the discretion ...
>
> ...
>
> ... First, it must be ascertained as a matter of construction to what task the discretion is attached. For instance, a discretionary trust may impose the duty upon the trustees to distribute the whole of the trust fund, but confer upon them a discretion as to the members of the class of beneficiaries who are to receive payments, and how much each is to receive. Again, a trustee may have a duty to maintain, and this requires him to act as the law defines maintenance, but at the same time he may have a discretion as to the times at which, and the manner in which, he makes payments for this purpose. Sometimes the line between duty and discretion is not easy to discover, but a trustee who interprets himself to have discretion when in fact he has a duty does so at his peril. Secondly, the court will not intervene simply because the beneficiaries or any other complainants do not agree with the decision of the trustees in the exercise of their discretion. Nor will it intervene merely because it would not have come to the same decision itself. The court will intervene, however, if (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.
>
> Trustees may be subject to court intervention under (1), above, and their decision be set aside if there has been an improper preference of one class of beneficiaries over another. For instance, a trustee is not in good faith or has not dealt properly between the objects of his discretion if his decision obviously prejudices the income beneficiary to the gain of the capital beneficiary. But in this instance the trustee who so exercises his fiduciary powers has also broken the separate and distinct rule of equity that as a trustee he must act impartially as between the income and capital beneficiaries. The conferment of a discretion does not waive the application of this rule. If he wishes that rule not to apply, the settlor or testator must go on to say so. Consequently, it cannot categorically be said that an unimpartial act or omission constitutes bad faith or lack of fair dealing as required by criterion (1). It all depends on the total language of the instrument.

26 Counsel for the plaintiff argued that the trustees had breached their obligations of impartiality and that in particular with respect to the Martin trust, the obligation of impartiality required an equal distribution of the trust estate as between the plaintiff and his sibling. The duty of impartiality or of evenhandedness, being an investment rule having application where there is more than one class of beneficiaries, is not applicable here and I will not deal with it further.

27 In turning to the allegation of mala fides I will deal first with the question of whether the trustees in fact held the views of the plaintiff to which they have deposed. It is no novel proposition that on a motion for summary judgment, the responding party must put forward his best case. Bald allegations will not suffice. As stated in Guarantee Co. of North American v. Gordon Capital Corp. (1999), 3 S.C.R. 423 at 436, "a self serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence." The responding party may not say that he has no evidence now but hopes to crack the moving parties on the witness stand at trial.

28 Although the plaintiff has set out a great many matters in his responding affidavit to contest the objective validity of the trustees' opinions of him and his conduct, he has adduced no evidence to indicate that the trustees did not

hold those opinions and beliefs. In my view, the Court on a summary judgment motion is clearly entitled to accept uncontradicted evidence on a matter that is entirely within the knowledge of those parties giving the evidence, and I do not accept the proposition that such uncontradicted evidence must be deferred to a trial. Had the trustees been cross-examined and some doubt had been raised as to the truth of their assertions as to their state of the mind at the relevant times, there would have been an issue for trial. That did not happen here, and there is, in my view, no issue for trial as to what the trustees' reasons were at the time they exercised their discretion under the two trusts.

29 I turn next to the plaintiff's contention that the trustees' reasons were all irrelevant and thus that the discretion was exercised mala fide. It is urged upon me that this is a matter which must go to trial. I am not able to accept that argument. What is or is not a relevant consideration is governed by the language of the trust deed and in looking to the trust deed to ascertain the intention of the settlor and therefore what may or may not be relevant considerations, the Motions Judge is in no different position than a Trial Judge to do so. In the typical case that is litigated in the Courts and results in a reported decision, the trust is a testamentary one and the creator of the trust is no longer available to tell the Court what his intentions were. The intentions must be gleaned from the text. The parties have not been able to refer me to a decision concerning an inter vivos discretionary trust where the settlor is alive and himself carries out his intentions as trustee only to be met with a challenge that he intended something else. This is perhaps not surprising.

30 While an inter vivos trust may be created upon terms that constrain or give guidance as to the manner in which a discretion conferred in the trust is to be exercised, that is not the nature of the trust document here. No limiting criteria (for example, need) are set out and it is neither the duty nor the prerogative of the Court to interpolate criteria where none exist. In any case, there is no evidence that either the plaintiff or his children are in present need nor that they will have need in the future, and that is not an issue. To the contrary, the evidence is that the plaintiff has very substantial assets and the plaintiff's claim is that it is he, not his children, who is entitled to a distribution out of the two trust estates. Where the discretion is not limited and no purpose or criteria are set out in the deed, what is a proper consideration for the exercise of the discretion would therefore appear to be unlimited subject to the residual jurisdiction of the Court to interfere where the trustee has acted with mala fides or for reasons which are contrary to public policy as in Fox. v. Fox Estate et al (1996), 28 O.R. (3d) 496 (C.A.) where the trustee's discretion was motivated by racial discrimination. There is no suggestion of that here.

31 Boiled down to its essence, the trustees held the view that the plaintiff had a bad attitude, that he was ungrateful, that he lacked industry and loyalty to the family, and that his conduct lacked integrity. These views and the fact that the plaintiff had already received substantial assets from the family were the basis for their exercise of discretion not to give him money from the trusts. Given the unlimited discretion conferred upon the trustee in the trust deeds, I am not able to say that such considerations are irrelevant.

32 What then, of the plaintiff's contention that these reasons were ludicrous and concocted after the fact to justify their decisions? To challenge the validity of the trustees' opinions, the plaintiff in his affidavit details his successes in the securities industry, including managing the Martin trust portfolio from 1991; he states that it was he who cleaned up real estate problems left by his late father; he explains why real estate matters he managed for his mother did not turn out felicitously; and he levels an accusation of hypocrisy against his uncle. The plaintiff also airs a great deal of the dirty laundry that is endemic to families whose members have not learned to live in harmony.

33 Whether the trustees' opinions of the plaintiff's character and conduct were objectively well founded or not is not the issue in the action and is not an issue to be tried. The trustees, in exercising their discretion do not do so in a quasi judicial capacity and the Court does not sit as a Court of Appeal upon the trustees' reasons for exercising their discretion the way that they did. The trustees have no obligation to give reasons in the first instance, and where no mala fides is shown, the Court will not interfere. Here, where the evidence is uncontradicted that the trustees held opinions as to matters which are not irrelevant to the discretion given its scope under the terms of the trust, it matters not whether the opinions were objectively accurate.

34 The plaintiff also alleges that his uncle and mother acted out of spite and a desire for revenge arising from his

opposition to his uncle's development plan. There is no air of reality to the allegation and it does not raise an issue for trial. The evidence discloses no motive for action out of pure spite. As far as a motive of revenge is concerned, Robert Banting distributed the Banting trust estate in 1995, some two years before the development issue arose. His discretion could not therefore have been rooted in a desire for revenge. Insofar as the mother's outlook on the development issue is concerned, Barbara Martin herself places the plaintiff's conduct in the matter among her reasons for exercising her discretion as she did, and she saw it as a matter of lack of family loyalty and thus going to the plaintiff's character. If a motive to punish was present and if such a motive was not a proper consideration in the exercise of the trustee's discretion (and I make no finding on either point as it is not necessary to the determination of the motion), the presence of such a motive would not render unlawful or invalid the exercise of the trustee's discretion where proper and relevant considerations existed to support the exercise of the discretion. (See the dicta of Catzman J.A. in Fox v. Fox Estate et al. (1996), 28 O.R. (3d) 496 at 517 where he commented "... In absence of authority, I have difficulty in accepting that the exercise of discretion by an executrix on an appropriate basis must necessarily fail because of a concomitant inappropriate basis.")

35 The foregoing is sufficient to deal with the motion, but as there was some argument on the point, I will touch briefly on the plaintiff's claim of breach of trust by Robert Banting by reason of certain investments and transactions he made with assets of the Banting trust. The main thrust of the claim is that Banting made improper investments as trustee and that because of them, the trust corpus was only $6 million in 1995 (having grown almost a thousandfold from $6,592) at the end of 20 years instead of $10 million which the plaintiff opines it ought to have been had the assets been properly invested. A second aspect of this branch of the claim is that Robert Banting caused funds to be paid out directly to third parties at the time of the distribution of the Banting trust estate to Kenneth Martin and Barbara Martin, this latter charge being answered with evidence that the payments to third parties were on the direction of the recipients of the distributions.

36 This branch of the claim has no life if Robert Banting validly exercised his discretion to distribute the trust assets as he did. As the plaintiff has not raised a genuine issue for trial that the discretion was not validly exercised, it is unnecessary to decide whether there is a genuine issue for trial on this branch of the claim.

37 The motion is therefore granted and the action is dismissed as against the moving parties. I may be spoken to as to costs.

LOW J.

End of Document

Martin v. Banting

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Carthy, Abella and Sharpe JJ.A.

Heard: December 17, 2001.

Judgment: February 6, 2002.

Docket No. C35932

[2002] O.J. No. 381 | 46 E.T.R. (2d) 93 | 111 A.C.W.S. (3d) 651

Between David Grant Martin, (appellant), and Robert F. Banting, Barbara Ann Martin, Kenneth Michael Martin, Thomas James Weisz, CIBC Wood Gundy Securities Inc. and the Freeburne Banting Foundation and Fenwood Developments Limited, (respondents)

(8 paras.)

Case Summary

Trusts — Administration — Powers of trustee — Discretionary power re payment out of trust funds — Remedies of beneficiaries and others.

Appeals by the plaintiff Martin from the distribution of the proceeds of two estate-freeze trusts. Martin was named as one of the potential beneficiaries of both trusts. The trusts conferred broad discretion on the respondent settlor/trustees to divide the proceeds among the named beneficiaries. Both trustees had exercised their discretion when distributing the proceeds of the trust to deny Martin any benefit. Martin and the settlor/trustees had fallen out. HELD: Appeals dismissed.

In view of the terms of the trusts and the broad discretion they conferred upon the trustees, the motions judge was correct in finding there was no triable issue that the trustees had committed a breach of trust. Given the nature and objects of the trust, there was no serious prospect that a trial judge might accept Martin's request for the appointment of a replacement trustee who might exercise the trustee's discretion in his favour. Even if Martin's submission that the distribution of the proceeds of the trust should be set aside was accepted, Martin could not escape the discretion of the trustee, who had made it clear that he would not exercise his discretion in favour of Martin.

On appeal from the Judgment of Justice Wailan Low dated February 14, 2001 dismissing the appellant's claims.

Counsel

Timothy Youdan and Brian Smith, for the appellant. Sean F. Dunphy and Chris Cosgriffe, for the respondents, Robert F. Banting and Freeburne Banting Foundation and Fenwood Developments Limited. Hank Keesmatt, for the respondent, Barbara Ann Martin.

The following judgment was delivered by

THE COURT (endorsement)

1 These appeals arise from the distribution of the proceeds of two estate-freeze trusts. The plaintiff was named as one of the potential beneficiaries in both trusts. The terms of both trusts conferred on the settlor/trustee broad discretion to divide the proceeds among the named beneficiaries. Both trustees exercised their discretion when distributing the proceeds of the trust to deny the appellant any benefit.

2 In the case of both trusts, it is clear from the record that there has been a serious falling out between the respondent settlor/trustees and the appellant. In view of the terms of the trusts and the broad discretion they confer upon the trustees, we agree with the motions court judge that there was no triable issue that the respondents had committed a breach of trust in denying the appellant any benefits from the trusts.

3 With respect to the Robert Banting Trust, the appellant submits that there is a triable issue that the trustee committed a fraud on a power by exercising his discretion as trustee so as to confer benefits upon himself and another non-beneficiary, namely the Freeburne Banting Foundation. It is argued that it would be open to a trial judge to draw this inference from the fact that on the same day Barbara Martin received her distribution, she immediately gave a portion of the proceeds to the trustee and another portion to the Freeburne Banting Foundation. This argument was pressed with considerable force before us. However, the underlying facts are not clearly pleaded in the statement of claim and the point was not pressed to the same degree before the motions court judge. We reject it for the following reasons.

4 Assuming (without deciding) that there is a triable issue that the distribution of the proceeds of the trust should be set aside on grounds of fraud on a trust power, it does not follow that the appellant has an arguable claim. The terms of the instrument exercising the power clearly state that the termination of the trust is to take effect following the distribution of all of the assets of the trust. If, as the appellant submits, the distribution of the trust assets is void, and if, as a consequence, it were to be set aside, the termination of the trust would also be set aside and the trustee would retain the discretion to distribute the trust proceeds as he deems fit. In view of the unequivocal position taken by the trustee throughout, there is simply no prospect that the appellant would stand to gain.

5 Given the nature and objects of the trust, there is no serious prospect that a trial judge might accept the appellant's request for the appointment of a replacement trustee who might exercise the trustee's discretion in favour of the appellant.

6 The appellant relies on the default distribution that is to take place on the "vesting day" as defined by Article VIII(1)(2) of the Trust Deed. However, we are unable to accept the submission that the actions of the trustee have brought about the "vesting day" that would result in the default distribution to the appellant. The trustee's termination resolution made no reference to the vesting day. We also note that the Trust Deed clearly stipulates that the "vesting day" cannot occur earlier than 21 years after its execution which is December 9, 1996. The termination resolution was made on November 24, 1995. While we see nothing in the Trust Deed that authorizes the trustee to terminate the trust, we are unable to accept the appellant's contention that the purported termination had the effect of invoking the "vesting day" given these explicit terms of the Trust Deed.

7 It follows, in our view, that the even if we were to accept the appellant's submission that the distribution of the proceeds of the trust should be set aside, the appellant cannot escape the discretion of the trustee who has made it clear that he will not exercise his discretion in favour of the appellant.

8 Accordingly, we would dismiss both appeals with costs.

CARTHY J.A.
ABELLA J.A.
SHARPE J.A.

End of Document

Province of Alberta

TRUSTEE ACT

Statutes of Alberta, 2022
Chapter T-8.1

Current as of December 7, 2023

Office Consolidation

Alberta King's Printer
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10611 - 98 Avenue
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Shop on-line at kings-printer.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

TRUSTEE ACT

Chapter T-8.1

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Part 7
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Part 8
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Part 9
General

Part 10
Consequential Amendments, Repeal and Coming into Force

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Part 1
Interpretation and Application

Definitions

1 In this Act,

(a) "additional trustee" means a person appointed as an additional trustee under section 16;

(b) "alter ego trust" has the same meaning as in the *Income Tax Act* (Canada);

(c) "continuing trustee" means a person who continues to be a trustee after another trustee ceases to be a trustee;

(d) "court", except in clause (s), means

(i) in respect of Alberta, the Court of King's Bench;

(ii) in respect of a jurisdiction other than Alberta, a court of competent jurisdiction;

(e) "fiscal period", in respect of a trust, means

(i) the period identified in the trust instrument as the period adopted for accounting purposes,

(ii) if subclause (i) does not apply, the period specified by the trustee as the period adopted for accounting purposes, or

(iii) if subclauses (i) and (ii) do not apply, the calendar year;

(f) "incapacitated person" means

(i) a represented adult under the *Adult Guardianship and Trusteeship Act*,

(ii) an incapacitated person under the *Public Trustee Act*, or

(iii) a person who is unable to make decisions about financial matters by reason of mental disability and has an attorney acting under the *Powers of Attorney Act*;

(g) "joint spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada);

(h) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(i) "objects", in respect of the objects of a trust, means beneficiaries or purposes;

(j) "post-1971 spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada);

(k) "pre-1972 spousal trust" has the same meaning as in the *Income Tax Act* (Canada);

(l) "qualified beneficiary", in respect of a trust, means a beneficiary who

(i) has a vested beneficial interest in the trust property, or

(ii) has delivered written notice to a trustee that the beneficiary wants to be a qualified beneficiary and has not delivered a written withdrawal of notice;

(m) "replacement trustee" means a person appointed as a replacement trustee under section 15 or 16;

(n) "secured party", in respect of a trust, means a person who has a security interest in property of the trust;

(o) "security interest" means an interest in property that secures payment or performance of an obligation;

(p) "settlor", in respect of a trust created by a will, includes a testator;

(q) "temporary trustee" means a person appointed as a temporary trustee under section 11;

(r) "transfer", in respect of property, means to transfer by any method, including

(i) to assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest or release, or

(ii) to agree to do any of the things referred to in subclause (i);

(s) "trust instrument" means any of the following that create or vary a trust:

(i) deed, will or other legal instrument;

(ii) an enactment, other than this Act;

(iii) an oral declaration,

but does not include a judgment or an order of any court;

(t) "trustee", except where this Act provides otherwise, includes an additional trustee, a replacement trustee and a temporary trustee;

(u) "vest" includes to vest by means of

(i) an order of a court,

(ii) the terms of a trust instrument or other legal instrument, or

(iii) the operation of section 26.

2022 cT-8.1 s1;AR 217/2022;2023 c8 s6

Application to existing trusts

2 This Act applies in respect of a trust created before, on or after the date this section comes into force, except to the extent this Act provides otherwise.

Trust instrument prevails

3 A trust instrument prevails over any contrary provision of this Act except to the extent this Act provides otherwise.

Application to trusts arising outside of this Act

4 This Act does not apply in respect of

(a) an implied trust,

(b) a resulting trust,

(c) a constructive trust,

(d) any other trust that arises by operation of law, or

(e) a trust that arises by operation of an enactment other than this Act, except as provided in that enactment.

Application to personal representatives

5 If a person is both a personal representative and a trustee with respect to all or part of the same estate, this Act does not apply in respect of a matter relating to the person in the person's capacity as personal representative, but this Act does apply in respect of a matter relating to the person in the person's capacity as trustee.

Secured party in possession

6 The fact that a secured party is in possession of trust property that is the subject of a security interest does not make the secured party a trustee for the purposes of this Act.

Continuation of existing rules

7 The rules of common law and equity continue to apply except to the extent they are inconsistent with this Act.

Trust is not a person

8 For greater certainty, nothing in this Act makes a trust a person.

Part 2
Appointment and Removal of Trustee

Division 1
Appointment of Trustee

Designated person

9(1) In this Division, "designated person", in respect of a trust, means the person determined under subsection (2) or (3).

(2) For a trust with a sole trustee, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:

(a) the person nominated by the trust instrument for the purpose of appointing a replacement trustee;

(b) the person appointed in writing by the sole trustee to be a replacement trustee after the sole trustee's death or retirement;

(c) the personal representative of the sole trustee.

(3) For a trust with more than one trustee, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:

(a) the person nominated by the trust instrument for the purpose of appointing a replacement trustee;

(b) the continuing trustees, excluding any continuing trustee who has been appointed as a temporary trustee;

(c) the person appointed in writing by the last remaining trustee to be a replacement trustee after the last remaining trustee's death or retirement;

(d) the personal representative of the last remaining trustee.

(4) If the designated person determined under subsection (2) or (3) is a class of persons, they must act by majority to appoint a replacement trustee.

Person not qualified to be appointed trustee

10 A person is not qualified to be appointed as a trustee if

(a) the person is an incapacitated person,

(b) the person has been convicted of an offence involving dishonest conduct under an Act of Canada or any province or territory of Canada,

(c) the person is an undischarged bankrupt, or

(d) the person is a corporation that is in liquidation or otherwise disqualified by law or by the terms of the trust.

Temporary absence or incapacity of trustee

11(1) This section applies only where a trustee is temporarily unable to participate in the administration of the trust by reason of an absence or incapacity that does not result in the trustee ceasing to be qualified to hold office under section 20.

(2) If the trust instrument does not name an alternate trustee, a trustee referred to in subsection (1) may appoint another person as a temporary trustee for a specified period to exercise any or all powers, including distributive powers, and to perform any or all duties of the trustee.

(3) If a trustee referred to in subsection (1) is unable or unwilling to appoint a temporary trustee, a designated person may appoint a temporary trustee to

(a) administer all or part of the trust, or

(b) exercise the powers or perform the duties authorized by the designated person

during the period that the trustee is absent or incapacitated.

(4) A person who is a co-trustee with a trustee referred to in subsection (1) is eligible for appointment as a temporary trustee under subsection (2) or (3) only if the appointment

(a) would be reasonable and prudent if the co-trustee were not a co-trustee, and

(b) would not result in the number of trustees being inconsistent with any express term of the trust.

(5) A trustee referred to in subsection (1) must not exercise trustee powers or perform trustee duties during any period in which a temporary trustee is appointed under subsection (2) or (3).

(6) Despite the period specified in an appointment under subsection (2) or (3), the trustee or designated person may revoke the appointment before the end of that period.

(7) The administration of the trust, exercise of powers or performance of duties by the temporary trustee is deemed to be as valid as if the absent or incapacitated trustee were not absent or incapacitated and had participated in the administration of the trust, exercise of powers or performance of duties.

Notice of temporary trustee

12(1) Where a temporary trustee is appointed or the appointment of a temporary trustee is revoked, a written notice must be delivered to the following within 15 days of the appointment or revocation:

(a) all trustees;

(b) all qualified beneficiaries;

(c) in the case of an appointment under section 11(2), the designated person as defined in section 9(1);

(d) in the case of an appointment under section 11(3), the absent or incapacitated trustee.

(2) A notice under subsection (1) must include the following information:

(a) the name of the absent or incapacitated trustee;

(b) the name of the temporary trustee;

(c) contact information for the temporary trustee, including one or more of the following:

(i) a mailing address;

(ii) an electronic mailing address;

(iii) a telephone number;

(d) the reason for the appointment or revocation;

(e) the date or event on which the appointment or revocation takes effect;

(f) in the case of an appointment, the date or event on which the appointment ends.

(3) The failure by a trustee or designated person to provide a notice under this section does not, by itself, invalidate any act of the temporary trustee, including the execution of any document.

Temporary trustee liability

13 A temporary trustee is a trustee for the purposes of this Act and may be liable for any loss to trust property arising from the temporary trustee's acts or omissions when exercising trustee powers or performing trustee duties.

Power to delegate by power of attorney

14(1) A trustee may, by power of attorney, appoint an attorney for a specified period to exercise any powers and perform any duties of the trustee.

(2) Subject to subsection (3), a trustee may appoint a co-trustee as attorney only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.

(3) If there are only 2 trustees of a trust and the terms of the trust specify that there must be a minimum of 2 trustees, neither trustee may appoint the other trustee as attorney.

(4) A trustee who appoints an attorney under subsection (1) is liable for a loss arising from the acts or omissions of the attorney as if those acts or omissions were the acts or omissions of the trustee.

(5) Where an attorney is appointed, a written notice must be delivered to the following within 7 days of the execution of the power of attorney under subsection (1):

(a) any other trustee of the trust;

(b) a person who has the power under the trust instrument, whether alone or jointly, to appoint a new trustee;

(c) if there is no person to whom notice can be delivered under clause (a) or (b), the qualified beneficiaries.

(6) A notice under subsection (5) must include the following:

(a) the name of the trustee who appointed the attorney;

(b) the name of the attorney;

(c) contact information for the attorney, including one or more of the following:

(i) the mailing address for the attorney;

(ii) the electronic mail address for the attorney;

(iii) the telephone number for the attorney;

(d) a description of the powers and duties delegated to the attorney;

(e) the reason for the appointment;

(f) the date or event on which the appointment takes effect;

(g) the date or event on which the appointment ends.

(7) The failure by a trustee to provide a notice under this section does not, by itself, invalidate any act of the attorney, including the execution of any document.

(8) The *Powers of Attorney Act* does not apply in respect of an attorney appointed under this section.

Appointment of replacement trustee

15(1) A designated person may appoint in writing a replacement trustee in any of the following circumstances:

(a) a person who was trustee is deceased or a person appointed as trustee dies before taking office;

(b) the trustee is a corporation that is dissolved;

(c) a person disclaims the office of trustee;

(d) a person ceases to hold the office of trustee under section 18.

(2) A designated person, other than a temporary trustee,

(a) may be self-appointed as a replacement trustee under subsection (1), and

(b) may be appointed as a replacement trustee under subsection (1).

Court appointment of replacement or additional trustee

16(1) On application, the court may appoint a replacement trustee or an additional trustee if

(a) the court removes a trustee under section 22, or

(b) the court is of the opinion that

(i) the appointment of the replacement trustee or additional trustee is in the best interests of the objects of the trust, and

(ii) the appointment of a trustee would otherwise be inexpedient, difficult or impracticable.

(2) An application under subsection (1) may be made by

(a) a trustee,

(b) a beneficiary, or

(c) a secured party.

(3) This section prevails over any contrary provisions in a trust instrument.

Powers and duties of replacement or additional trustee

17 A replacement trustee or an additional trustee appointed in accordance with this Act has the same powers and duties and may in all respects act as if they had been appointed as a trustee by the trust instrument.

Division 2
Trustee Ceases to Hold Office

Ceasing to be trustee

18 A person ceases to hold the office of trustee if

(a) the person resigns the office in accordance with section 19,

(b) the person ceases to be qualified to hold the office under section 20,

(c) the person is removed as a trustee under this Act or under a power conferred by the trust instrument, or

(d) the person dies.

Resignation by trustee

19(1) A person resigning the office of trustee

(a) must give written notice of the resignation to

(i) the person nominated by the trust instrument for the purpose of appointing a replacement trustee, or

(ii) if the trust instrument does not nominate a person referred to in subclause (i), the continuing trustees, if any,

and

(b) where such notice is given, must be able to provide proof that the notice was given.

(2) If no person referred to in subsection (1)(a) exists, written notice of the resignation must be given to all qualified beneficiaries.

(3) A person resigning the office of trustee must provide a report under section 29 to all qualified beneficiaries and must be able to prove that the report was provided.

(4) A person resigning the office of trustee may apply to the court for an order discharging the trustee.

(5) A trustee's resignation is effective when a replacement trustee is appointed or the court discharges the trustee, whichever occurs first.

(6) This section prevails over any contrary provision in a trust instrument.

Disqualification of trustee

20(1) A person ceases to be qualified to hold the office of trustee if the person

(a) is an incapacitated person,

(b) is convicted of an offence involving dishonest conduct under an Act of Canada or any province or territory of Canada,

(c) is an undischarged bankrupt, or

(d) is a corporation that is in liquidation or is otherwise disqualified by law or by the terms of the trust.

(2) On application, the court may make an order disqualifying a trustee and establishing the date on which the disqualification takes effect.

(3) An application under subsection (2) may be made by a trustee or a beneficiary.

Removal by other trustees

21(1) A person may be removed as a trustee if

(a) the person

(i) fails to demonstrate the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person,

(ii) consistently fails to respond to communications from a beneficiary or another trustee, or

(iii) is otherwise unwilling or unable, or unreasonably refuses, to act cooperatively with other trustees,

and

(b) the person's conduct is detrimental to the efficient or proper administration of the trust.

(2) If there are 3 or more trustees, a trustee may be removed under subsection (1) if a majority of the other trustees provide a written resolution setting out the reasons for the removal.

(3) A resolution under subsection (2) is effective

(a) if the trustee that is the subject of the written resolution does not request a meeting under subsection (4), 15 days after a copy of the written resolution is delivered to that trustee, or

(b) if the trustee that is the subject of the written resolution requests a meeting under subsection (4), at the conclusion of the meeting, unless the written resolution is rescinded.

(4) Within the 15-day period after a copy of the written resolution is delivered to the trustee that is the subject of the written resolution, that trustee, by delivering a written request to another

trustee, may request a meeting with the other trustees to respond to the reasons set out in the written resolution.

(5) A meeting requested under subsection (4) must take place as soon as practicable.

(6) After the trustee responds to the reasons set out in the resolution, the other trustees may rescind the written resolution.

Power of court to remove trustee

22(1) On application, the court may remove a person from the office of trustee if

(a) the person cannot be removed under section 21 because there are fewer than 3 trustees,

(b) the court is of the opinion that

(i) the removal of the person is in the best interests of the objects of the trust, and

(ii) the removal of the person under section 21 or under a power conferred by a trust instrument would be inexpedient, difficult or impracticable,

or

(c) the trustee has refused or failed to perform or exercise duties or powers in accordance with an order of the court under section 81(2).

(2) If the court considers a reduction in the number of trustees to be in the best interests of the objects of a trust, the court may

(a) reduce the number of trustees, and

(b) to give effect to the decision under clause (a), remove a person as trustee.

(3) An application under this section may be made by

(a) a trustee,

(b) a beneficiary, or

(c) a secured party.

(4) This section prevails over any contrary provisions in a trust instrument.

Power of court to reinstate trustee

23(1) A person removed as trustee, except a person removed under section 22 or 81, may apply to the court for an order under subsection (3) of this section,

(a) in the case of a person removed as trustee under section 21, within 2 months after the date the written resolution becomes effective, or

(b) in any other case, within 2 months after the earlier of

(i) the date of the appointment of a replacement trustee under section 15, and

(ii) the date that the removal as trustee comes to the attention of the person removed.

(2) On an application under subsection (1), the court may make an order under subsection (3) if

(a) the court is satisfied that the person was removed as trustee based on a mistake of fact or law, and

(b) the court considers making the order to be in the best interests of the objects of the trust.

(3) Subject to subsection (2), the court may

(a) reinstate the person as trustee on a specified date,

(b) declare that the person did not cease to hold the office of trustee during the period following the purported removal, or

(c) dismiss the application.

(4) If the court makes an order under subsection (3), the court may also give directions or make a declaration regarding the person's status as trustee or the liability of

(a) a replacement trustee appointed under section 15,

(b) a person who is the subject of the order, or

(c) any other person who was a trustee after the person making the application was removed as trustee.

(5) This section prevails over any contrary provisions in a trust instrument.

Liability of former trustee

24 Unless the court orders otherwise, if a person ceases to be a trustee, any consequential vesting of trust property in or transfer of trust property to a replacement trustee does not relieve the former trustee from liability from a breach of trust occurring while that person was a trustee.

Part 3
Vesting

Joint tenants

25(1) If trust property vests in more than one trustee, the trust property vests in the trustees as joint tenants.

(2) This section prevails over any contrary provisions in a trust instrument.

Vesting

26(1) If a person is appointed as an additional trustee, a replacement trustee or a temporary trustee, the trust property vests in that person at the time the appointment is effective.

(2) If a person ceases to be a trustee of a trust, the trust property ceases to be vested in that person and remains vested in each continuing trustee.

(3) If a person who is a sole trustee or the last remaining trustee of a trust ceases to be a trustee and a new trustee has not been appointed or there is otherwise no trustee of a trust, the trust does not fail because of the absence of a trustee.

(4) A vesting under this section has the same effect as if the property had been actually transferred to the person in whom the property is vested.

(5) No further declaration or order is required in respect of trust property that vests or ceases to be vested under this section.

(6) Without limiting subsections (4) and (5), a person in whom property vests under this section is entitled to perfect the transfer of the property in accordance with the *Land Titles Act* to the extent that the *Land Titles Act* is applicable.

(7) This section applies whether a person ceases to be a trustee, or is appointed as a trustee, in accordance with the terms of the trust or this Act.

(8) This section prevails over any contrary provisions in a trust instrument.

2022 cT-8.1 s26;2022 c20 s6

Part 4
Powers and Duties of Trustee

Division 1
Duties of Trustee

Duty of care

27(1) In the administration of a trust, a trustee must act in good faith and in accordance with the following:

(a) the terms of the trust;

(b) the best interests of the objects of the trust;

(c) this Act.

(2) Subject to section 35, in the performance of a duty or the exercise of a power, whether the duty or power arises by operation of law or the trust instrument, a trustee must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

(3) Despite subsection (2) but subject to section 35, if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of skill that is relevant to the administration of the trust and is greater than that which a person of ordinary prudence would exercise in dealing with the property of another person, the trustee must exercise that greater degree of skill in the administration of the trust.

Conflict of interest

28(1) A trustee must exercise the powers and perform the duties of the office of trustee solely in the interests of the objects of the trust.

(2) Without limiting subsection (1), a trustee must not knowingly permit a situation to arise

(a) in which the trustee's personal interest conflicts in any way with the trustee's exercise of the powers or performance of the duties of the office of trustee, or

(b) in which the trustee may derive any personal benefit or a benefit for any other person,

except so far as the law or the trust instrument expressly permits.

(3) On application by a trustee or qualified beneficiary who shows that acting or declining to act is in the best interests of the objects of the trust, whether or not the beneficiaries consent, the court may

make an order, on terms and conditions the court considers appropriate,

(a) allowing the trustee to act or decline to act, whether or not the trustee may be in a situation that contravenes subsection (1) or (2), or

(b) excusing a trustee from liability for contravening subsection (1) or (2).

(4) An order under subsection (3)(b) may be made any time after the contravention of subsection (1) or (2).

(5) A trustee or qualified beneficiary must serve notice of an application under this section as follows:

(a) on all qualified beneficiaries of the trust, unless otherwise ordered by the court;

(b) if a beneficiary of the trust is a minor and has a vested beneficial interest, on the Public Trustee at least one month before the date set for the hearing of the application;

(c) if the trust is a charitable trust, on the Minister at least one month before the date set for the hearing of the application.

(6) On application by the trustee, a qualified beneficiary, the Public Trustee or the Minister, the court may vary an order under this section if

(a) additional information becomes available after the order is made, or

(b) the circumstances under which the order was made change.

(7) Nothing in this section limits the jurisdiction of the court under section 67, 68 or 84.

Duty to report to qualified beneficiaries

29(1) For each fiscal period of a trust, the trustee must deliver to the qualified beneficiaries a report in respect of the trust that includes the following:

(a) for the fiscal period in which the trust is created, a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the time the trust is created;

(b) a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the beginning and end of the fiscal period;

(c) the basis for the valuations of the assets of the trust, if the trustee considers it practicable;

(d) a statement of receipts and their sources for the fiscal period;

(e) a statement of disbursements and their recipients for the fiscal period.

(2) A report under subsection (1) in respect of a fiscal period must be delivered within 2 months after the end of the fiscal period.

(3) On the written request of a qualified beneficiary, the trustee must allow the beneficiary to inspect the source documents for the statements referred to in subsection (1).

(4) Subject to an order of the court under section 30(2), a trustee is not required to disclose information under this section if, in the opinion of the trustee, the disclosure would

(a) be detrimental to the best interests of any beneficiary or otherwise be prejudicial to the trust property or the administration of the trust,

(b) conflict with any duty owed by a trustee as a director of a corporation in which the trust has an ownership interest,

(c) reveal the reasons why a trustee did or did not exercise a power conferred by the trust instrument or an enactment,

(d) place an unreasonable administrative burden on the trustee, or

(e) place the trustee in breach of obligation, properly assumed by the trustee, to maintain confidence.

(5) A qualified beneficiary may waive, by delivering written notice to the trustee, the right to a report or to specific information in the report that is required to be given under this section.

(6) A qualified beneficiary may revoke a waiver by delivering written notice to the trustee.

Duty to provide information

30(1) Section 29 does not limit the duty under general trust law of a trustee to provide to a beneficiary, on request, accounts or trust information within a reasonable period of time.

(2) On application by a qualified beneficiary or a beneficiary who has requested information that has not been provided by the trustee,

the court may order, on terms and conditions the court considers appropriate, the disclosure of any information regarding any of the following:

(a) the terms of the trust;

(b) the administration of the trust;

(c) the assets and liabilities of the trust.

Division 2
General Administrative Powers

Powers of trustee

31(1) Subject to this Act and the trustee's fiduciary obligations, a trustee has, in respect of trust property vested in the trustee, all the powers and capacity that an individual of full legal capacity would have if the property were vested in the individual absolutely and for the individual's own use.

(2) Without limiting the generality of subsection (1), a trustee may do any of the following:

(a) sell or lease trust property;

(b) borrow money for the purpose of carrying out the trust;

(c) grant a security interest in trust property.

(3) A trustee may do one or both of the following:

(a) with the consent of, and for the purpose of providing a residence for, a beneficiary, use income or capital to which the beneficiary is entitled

(i) to purchase or rent living accommodation, or

(ii) to construct a residence on land that is part of the trust property or purchased for the construction of the residence;

(b) with the consent of a beneficiary, effect a distribution in kind of specific trust property to satisfy, wholly or in part, the share or interest of the beneficiary.

Court may confer further powers on trustee

32(1) If a trustee lacks the power to make a transfer of trust property that the court is satisfied would be expedient and in the best interests of the objects of the trust, the court may, on application, confer the necessary power on the trustee, either

generally or in relation to a specified instance and on any terms and conditions the court considers appropriate.

(2) An application under subsection (1) may be made by

(a) a trustee,

(b) a beneficiary, or

(c) a secured party.

(3) This section prevails over any contrary provisions in a trust instrument.

Division 3
Investment Power of Trustee

Power to invest

33(1) A trustee must invest trust funds prudently with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.

(2) A trustee may invest trust property in any form of property in which a prudent investor may invest, including a security issued by a mutual fund as defined in the *Securities Act*.

(3) A trustee must review the trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the trust.

(4) Without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, to the extent that they are relevant to the circumstances of the trust:

(a) the purposes and probable duration of the trust, the total value of the trust's assets and the needs and circumstances of the beneficiaries;

(b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;

(c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;

(d) the need to maintain the real value of the capital or income of the trust;

(e) the need to maintain a balance that is appropriate to the circumstances of the trust between

(i) risk,

(ii) expected total return from income and the appreciation of capital,

(iii) liquidity, and

(iv) regularity of income;

(f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;

(g) the role of different investments or courses of action in the trust portfolio;

(h) the costs, such as commissions and fees, of investment decisions or strategies;

(i) the expected tax consequences of investment decisions or strategies.

Investment powers of corporate trustee or agent

34(1) Without limiting section 33, a corporation that is a trustee may invest trust money in its own securities.

(2) Without limiting section 33, if the trustee is a trust corporation or the trustee's agent is a trust corporation as defined by the *Loan and Trust Corporations Act*, the trustee may invest trust property in a common trust fund managed by the trust corporation.

Standard of care in investing

35(1) In investing trust property, a trustee must exercise the care, diligence and skill that a prudent investor would exercise in making investments.

(2) Despite subsection (1), if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of skill that is relevant to the investment of trust property and is greater than that which a prudent investor would exercise in making investments, the trustee must exercise that greater degree of skill in investing trust property.

Trustee not liable if overall investment strategy prudent

36(1) A trustee is not liable for a loss in connection with the investment of trust funds that arises from a decision or course of action that a trustee exercising reasonable skill and prudence and complying with section 35 could reasonably have made or adopted.

(2) Despite subsection (1), a trustee is liable for a loss arising from the investment of trust property if

(a) the trustee is a trustee referred to in section 35(2), and

(b) the conduct of the trustee that led to the loss did not conform to a plan or strategy for the investment of the trust property that

(i) comprised reasonable assessments of risk and return, and

(ii) would be adopted under comparable circumstances by a trustee.

(3) A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust funds may take into account the overall performance of the investments.

Abolition of common law rules — anti-netting rules

37(1) The rule of law that requires the assessment of a trustee's decisions on an investment-by-investment basis is abolished.

(2) The rule of law for the assessment of damages for breach of trust that prohibits losses from being offset by gains is abolished.

Interpretation of older trust instruments

38(1) If the trust instrument expresses the powers of the trustee as powers to invest trust property in investments permitted under a former *Trustee Act*, the trust instrument is to be interpreted as authorizing the investments permitted under this Division and section 53.

(2) Despite subsection (1), if an investment is expressly prohibited by the trust instrument, the trust instrument is not to be interpreted as authorizing the investment.

(3) Subsection (1) does not affect a power of the trustee to invest trust property in an investment expressly permitted by the trust instrument.

Division 4
Allocation of Income and Capital by Trustee

Definition

39 In this Division, "outgoing" means an expenditure paid or incurred in administering a trust, including, without limitation, an expenditure arising from or made with respect to repairs, maintenance, insurance, taxes, security interests, debts, calls on shares, annuities and losses.

Duty to act impartially and prudently

40 Nothing in this Division affects the duty of a trustee

(a) to act impartially as between different classes of beneficiaries in the administration of a trust, or

(b) to comply with section 35 in respect of investments.

Abolition of common law rules of apportionment

41(1) The first branch of the rule in *Howe v Lord Dartmouth*, which states that a trustee must convert wasting, hazardous or speculative assets to authorized trustee investments if a will contains a residuary gift of personal property or a future or reversionary property interest for persons in succession, is abolished.

(2) The 2nd branch of the rule in *Howe v Lord Dartmouth*, which states that, if an estate's original assets other than authorized investments are to be converted under a trust for sale, a trustee must apportion the income from those assets between the income and capital beneficiaries until conversion takes place, is abolished.

(3) The rule in *Re Earl of Chesterfield's Trusts*, which states that, if future or reversionary property is included in a residuary gift under a will and is not yielding income before it is sold, the trustee must apportion the proceeds of sale, after it comes into possession, between the income and capital beneficiaries in a particular way, is abolished.

Apportionment of outgoings between income and capital

42(1) This section does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:

(a) an alter ego trust;

(b) a joint spousal or common-law partner trust;

(c) a post-1971 spousal or common-law partner trust;

(d) a pre-1972 spousal trust.

(2) A trustee may charge all or part of an outgoing to the income or capital of the trust as the trustee considers is

(a) just and equitable in the circumstances,

(b) in accordance with ordinary business practice, and

(c) in the best interests of the objects of the trust.

(3) If the amount of an outgoing charged under subsection (2) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.

(4) If trust property is subject to depreciation, a trustee may

(a) deduct from the income earned from the trust property an amount that the trustee considers is

(i) just and equitable in the circumstances,

(ii) in accordance with ordinary business practice, and

(iii) in the best interests of the objects of the trust,

and

(b) add the amount deducted under clause (a) to the capital of the trust.

Discretionary allocation trusts of receipts and outgoings

43(1) If a trustee is expressly directed by the trust instrument to hold trust property on discretionary allocation trusts, the trustee may allocate receipts and charge outgoings to the income and capital of the trust as the trustee considers is just and equitable in the circumstances.

(2) If the amount of an outgoing charged under subsection (1) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.

Total return investment

44(1) In this section,

(a) "assets" means trust property that is subject to a total return investment policy;

(b) "net value of the assets" means the amount equal to the fair market value of the assets less any liabilities in respect of those assets;

(c) "specified percentage" means

(i) a percentage specified in the trust instrument for the purpose of this section, or

(ii) if no percentage is specified in the trust instrument, the percentage specified by regulation;

(d) "total return investment policy" means a policy of investing property so as to obtain the optimal return without regard to whether the return is characterized as income or capital;

(e) "valuation period" means the valuation period determined under subsection (9) or varied by regulation.

(2) For the purposes of this section, in a trust instrument the following words constitute a reference to a total return investment policy:

(a) "on percentage trusts";

(b) "total return", when used with reference to investments.

(3) A settlor may direct, in a trust instrument, the trustee to adopt a total return investment policy with respect to all or part of the trust property.

(4) Subject to subsection (5), the trustee of a charitable trust, with respect to trust property, may adopt a total return investment policy with respect to that property, whether or not the terms of the trust contain a direction to that effect.

(5) A total return investment policy may not be adopted under subsection (4) if in the trust instrument the settlor expressly directs the trustee not to adopt a total return investment policy with respect to that trust property.

(6) If a total return investment policy is adopted, the trustee must determine the net value of the assets at the beginning of each valuation period.

(7) If a total return investment policy is adopted, the trustee must, in each fiscal period,

(a) pay to the persons who would otherwise be the income beneficiaries, or

(b) apply to the other objects

an amount equal to the specified percentage of the net value of the assets at the beginning of the valuation period.

(8) The trustee must

(a) pay or apply an amount required under subsection (7) from income earned during the fiscal period from the investment of the assets,

(b) if the income referred to in clause (a) is insufficient to pay or apply the amount required under subsection (7), pay or apply an amount from capital, and

(c) if the income earned during the fiscal period from the investment of the assets exceeds the amount paid or applied under subsection (7), add the amount of the excess to the assets.

(9) The valuation period for assets that are invested in accordance with a total return investment policy is determined as follows:

(a) the first valuation period begins

(i) one year after the date of the testator's death, in the case of a testamentary trust made in a will, or

(ii) in any other case, on the date of the settlement;

(b) the 2nd and subsequent valuation periods begin immediately after the end of the previous valuation period;

(c) a valuation period is the shortest of the following:

(i) subject to a period specified by regulation, 3 years;

(ii) the period specified in the trust instrument;

(iii) the period selected by the trustee.

Application of sections 43 and 44

45 Sections 43 and 44 do not limit any other power of a trustee to encroach on capital in favour of a beneficiary.

Division 5
Distributive Powers of Trustee

Interpretation and application

46(1) This Division does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:

(a) an alter ego trust;

(b) a joint spousal or common-law partner trust;

(c) a post-1971 spousal or common-law partner trust;

(d) a pre-1972 spousal trust.

(2) A direction in a provision of a trust instrument to accumulate income is not in itself evidence of a contrary intention sufficient to have the provision of the trust instrument prevail over a provision in this Division.

Power to pay income to or for benefit of individual

47(1) Subject to any interest or charge affecting the trust property, if property is held by a trustee in trust for an individual the trustee may do any of the following, as the trustee considers reasonable in the circumstances:

(a) if the individual is a minor, pay all or part of the income earned from the property towards the individual's past, present or future maintenance, education, benefit or advancement in life;

(b) if the individual has reached the age of majority and does not have an income or capital interest vested in interest and in possession, pay to, or for the maintenance, education, benefit or advancement in life of, the individual all or part of the income earned from the property.

(2) A trustee may pay the income earned from the trust property under subsection (1) whether the interest of the individual in the trust property is vested or contingent.

Power to pay amount from capital for benefit of individual

48(1) If property is held by a trustee in trust for an individual for any interest in capital, subject to this section and to any interest or charge affecting the trust property, the trustee may pay an amount in respect of the individual towards the following from the capital of the trust, as the trustee considers reasonable in the circumstances:

(a) if the individual is a minor, towards the individual's past, present or future maintenance, education, benefit or advancement in life;

(b) if the individual has reached the age of majority, towards the individual's maintenance, education, benefit or advancement in life.

(2) In order to pay an amount under subsection (1), the trustee may

(a) create a security interest in a capital asset of the trust, or

(b) otherwise transfer a capital asset of the trust.

(3) A trustee may pay an amount under subsection (1) or exercise the power under subsection (2) whether the interest of the individual in the capital

(a) is vested or contingent, or

(b) is in possession or in remainder or reversion.

(4) A trustee may pay an amount under subsection (1)

(a) to an individual with a vested interest in the capital, with or without court approval, and

(b) to an individual with a contingent interest in the capital, with court approval.

(5) If the court approves an amount under subsection (4)(b) in respect of an individual and a trustee pays an amount under subsection (1) in respect of the individual, the trustee must promptly give written notice of the following to any other beneficiary who, at the time of the payment of the amount, is entitled to receive income from the capital from which the amount was paid:

(a) the terms of the order made by the court under subsection (4)(b);

(b) the amount paid in accordance with the order.

(6) A trustee must not pay an amount under subsection (1)

(a) if the income or accumulated surplus income is available under the terms of the trust for the maintenance, education, benefit or advancement in life of the individual, unless the available income or accumulated surplus income is insufficient, or

(b) if the payment is detrimental to the pecuniary interest of a person who is entitled to a life interest or other interest, whether vested or contingent, in the amount to be paid, unless

(i) the person is of full capacity and consents in writing to the payment, or

(ii) the person is not of full capacity and the court approves the payment, on application by the trustee.

(7) If an amount is paid under subsection (1) in respect of an individual, the individual's interest in the capital of the trust must be reduced by that amount.

(8) If the individual referred to in subsection (7) does not have a vested interest in the capital of the trust when the amount is paid or applied under subsection (1), the reduction under subsection (7) is to be made when that interest is vested.

(9) This section has effect

(a) if a contrary intention is not expressed in the trust instrument, and

(b) subject to the terms of that instrument and the provisions contained in it.

Conditions on payment from capital

49(1) If a trustee pays an amount under section 48(1) or, under the terms of the trust, pays an amount from capital for the benefit of an individual, the trustee may impose conditions on the person receiving the payment or the benefit of the payment, including, without limitation, conditions relating to the following:

(a) the repayment of the payment to the trustee;

(b) the payment of interest to the trustee;

(c) the giving of security to the trustee by the person receiving the payment.

(2) The trustee may do any of the following in respect of a condition imposed under subsection (1):

(a) waive all or part of a condition;

(b) release a person from an obligation undertaken;

(c) release the security given.

(3) If an amount paid under section 48(1) is repaid to or recovered by a trustee in accordance with a condition under subsection (1) of this section, the amount repaid or recovered is deemed not to have been paid under section 48.

(4) When imposing a condition in respect of security under subsection (1), a trustee is not bound by any restrictions on the investment of the trust property.

(5) A trustee who has acted in accordance with section 27 in paying an amount under section 48 is not liable for a loss arising from the transaction, including a loss arising because a person breaches a condition imposed by the trustee.

Payment or transfer in respect of minor or incapacitated person

50(1) If a minor is entitled to trust money or trust securities, a trustee must pay the money to or transfer the securities to

(a) the trustee appointed by court order under the *Minors' Property Act,* or

(b) the Public Trustee.

(2) If an incapacitated person is entitled to trust money or trust securities, a trustee must pay the money to or transfer the securities to

(a) the attorney acting under the *Powers of Attorney Act*, or

(b) the trustee appointed by court order under the *Adult Guardianship and Trusteeship Act*.

(3) If an attorney or trustee is not appointed for an incapacitated person, then an attorney or trustee must be appointed for payment of the money or transfer of the securities.

Division 6
Delegation by Trustee

Appointment of agent and supervision

51(1) In appointing an agent, a trustee must

(a) personally select the agent,

(b) be satisfied of the agent's suitability to exercise the power or perform the duty for which the agent is to be appointed, and

(c) establish the terms of the delegated authority.

(2) A trustee must exercise reasonable and prudent supervision over an agent appointed by the trustee.

(3) A trustee may appoint a co-trustee as an agent only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.

When trustee must not delegate

52 A trustee must not appoint an agent to

(a) exercise a discretion to distribute or transfer trust property to, or for the benefit of, a beneficiary of the trust, or

(b) perform the duties of the trustee in appointing and supervising an agent under section 51.

Delegation of investment authority

53(1) A trustee must not delegate to an agent appointed under section 51 any authority in respect of the investment of trust funds that a prudent investor would not be able to delegate in accordance with ordinary investment practice.

(2) Investment in a mutual fund referred to in section 33(2), a common trust fund referred to in section 34(2) or a similar pooled fund is not a delegation of authority with respect to the investment of trust property.

Delegation of administrative functions

54(1) If it is reasonable and prudent to do so, a trustee may delegate to an agent the authority to carry out administrative functions related to the trust.

(2) Without limiting subsection (1), a trustee may appoint a person as agent to do one or more of the following:

(a) execute documents;

(b) transfer or acquire money or other property;

(c) give a receipt for any money or other property received by the trustee.

Liability of trustee for agent

55 A trustee is liable for a loss in the value of the trust property caused by an act or omission of an agent only if the trustee is in breach of section 51 and the loss is a consequence of that breach.

Liability of agent

56 Where a trustee delegates authority to an agent and the trust suffers a loss because of the agent's breach of the terms of the agency contract, damages for the loss may be recovered from the agent in an action

(a) by the trustee, or

(b) by a beneficiary of the trust if the trustee fails to commence an action within a reasonable time after acquiring knowledge of the breach.

Sub-delegation by agent

57(1) An agent appointed by a trustee may delegate to a person a power or duty of the agent, subject to this Division and any restrictions relating to delegation that are established by the trustee in the terms of the appointment.

(2) In delegating a power or duty under subsection (1), the agent must

(a) personally select the delegate, and

(b) be satisfied of the delegate's suitability to exercise the power or perform the duty delegated to the delegate.

(3) An agent must exercise reasonable and prudent supervision over a person to whom a power or duty is delegated under subsection (1).

Division 7
Miscellaneous Powers and Duties of Trustee

Liability of trustee

58(1) Subject to this Act, a trustee is not liable for a breach of trust committed by a co-trustee unless the trustee participated in the breach of trust by the trustee's own acts or omissions in respect of the trust property.

(2) Subject to section 55, a trustee is not liable for a loss in respect of trust property by reason only of the fact that the trustee has signed a receipt with a co-trustee because the trust instrument imposes a requirement that trustees act unanimously.

Powers conferred and duties imposed on trustees jointly

59(1) If a power is conferred or a duty is imposed on 2 or more trustees, the power is conferred and the duty is imposed jointly.

(2) If a power is conferred or a duty is imposed on 2 or more trustees jointly, the power may be exercised or the duty may be performed

(a) in accordance with section 60, and

(b) by the survivor of them or, if there are more than 2 surviving trustees, by a majority of them.

Trustees may act by majority

60(1) If there are more than 2 trustees, the trustees may perform their duties and exercise their powers by a majority of the trustees holding office.

(2) A trustee who disagrees with a decision or act of the majority of trustees may deliver a written statement of disagreement to the other trustees but, unless the decision or act is unlawful, must join with the majority in doing anything necessary to carry out that decision or act if it cannot be carried out otherwise.

(3) A trustee who delivers a written statement in accordance with subsection (2) is not liable for a loss or breach of trust arising from the decision or act even if the trustee joins with the majority in accordance with that subsection in order to carry out that decision or act.

(4) This section does not apply in respect of a trust created by a trust instrument executed before this section comes into force, unless this section is consistent with the terms of the trust and the trustees agree this section should apply.

Trustee abstentions

61 If a trustee abstains from participating in a decision or act of the trustees because there is a conflict or potential conflict between the trustee's personal interest and the powers and duties of the office of trustee, the trustee is deemed not to be holding office for the purpose only of determining whether a decision is made or act is done by a majority of trustees holding office or unanimously by the trustees holding office.

Deposit of trust property for safekeeping

62 A trustee is liable for a loss in the value of the trust property caused by the conduct of a financial institution or another person with whom trust property is deposited or left for safekeeping only if the trustee fails to

(a) exercise prudence in the selection of the financial institution or other person, or

(b) exercise reasonable and prudent supervision over the financial institution or other person.

Insuring trust property

63(1) A trustee may

(a) insure against loss or damage to any building or other insurable property to any amount, and

(b) pay the premiums for the insurance out of the income of the property or out of the income of any other property that is subject to the same trusts without obtaining the consent of any person entitled wholly or partly to that income.

(2) Subsection (1) does not apply to any building or other property that a trustee is bound forthwith to convey absolutely to a person having a beneficial interest in the building or other property, on being requested to do so.

Allocation of insurance proceeds

64(1) A trustee must allocate insurance proceeds to the capital of the trust if

(a) the trustee entered into a contract of insurance against loss of, or damage to, any trust property,

(b) the trustee paid the premiums owing under the contract, and

(c) insurance proceeds under the contract are paid to the trustee.

(2) If a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, whether or not the beneficiary is required by the trust instrument or by a third party to obtain the insurance, and insurance proceeds under the contract are paid to the beneficiary,

(a) the beneficiary must pay the insurance proceeds to the trustee,

(b) the trustee must allocate the insurance proceeds to the capital of the trust, and

(c) the trustee must reimburse the beneficiary for expenses incurred by the beneficiary in entering into the contract of insurance, in the amount the trustee considers in the trustee's opinion to reflect the interests of the other beneficiaries in the trust property.

(3) A trustee may apply all or part of the insurance proceeds received by the trustee under subsection (1) or (2) to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.

(4) Nothing in this section affects the rights of a secured party, lessor, lessee or other person

(a) to receive insurance proceeds, or

(b) to require that the insurance proceeds be applied to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.

(5) This section prevails over any contrary provisions in a trust instrument.

(6) This section applies only to proceeds under a contract of insurance that are payable after this section comes into force.

Part 5
Variation and Termination of Trusts

Definitions

65 In this Part,

(a) "beneficiary" and "person" include an organization, a charitable trust and a non-charitable purpose trust;

(b) "variation" means

(i) a variation, resettlement or termination of a trust, or

(ii) a variation or deletion of, or an addition to, the powers of a trustee in respect of the management or administration of a trust.

Application of this Part

66 This Part applies to

(a) vested or contingent interests in the trust property of the object of the trust, and

(b) trusts that arise by trust instrument other than an enactment.

Variations

67(1) Subject to any terms in a trust instrument reserving the power to any person or persons to terminate or vary a trust, and except as provided in this section, a variation requires approval of the court.

(2) On application by a trustee or beneficiary, the court may approve a variation after taking into account the following factors:

(a) the nature of all interests and objects and the effect any proposed variation may have on those interests and objects;

(b) the benefit or detriment to any person that may result from the court approving or declining to approve any proposed variation;

(c) the intentions of the settlor, to the extent they can be ascertained;

(d) any other factors the court considers relevant.

(3) Subject to subsection (4), a trustee or beneficiary who makes an application under subsection (2) must have written consent to the application from all persons who are beneficially interested in the trust.

(4) On an application under subsection (2), the court may approve a variation despite that one or more of the following persons who are beneficially interested in the trust have not consented to the application:

(a) a person who is not capable of consenting because the person is a minor or is incapacitated;

(b) an unborn person;

(c) a person who after reasonable inquiry cannot be located;

(d) a 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 any specified description or a member of any specified class of persons;

(e) a person who has the capacity to consent to a variation but refuses to consent to the variation;

(f) a charitable organization that is legally incapable of consenting in its own right;

(g) a charitable trust or a non-charitable purpose trust;

(h) any other person, organization or trust from whom the court considers it to be impractical to obtain consent.

(5) Where a will or other testamentary instrument contains a gift or devise to a beneficiary who is a minor or is incapacitated and the will or other testamentary instrument contains no trust in respect of the gift or devise, the court may, on an application under subsection (2), approve a variation providing for the gift or devise to be held on trust for the beneficiary while the beneficiary is a minor or is incapacitated, if the court is satisfied, having regard to the circumstances and the terms of the gift or devise, that the variation is in the best interests of the beneficiary.

(6) The court may not approve a variation if the variation would reduce or remove any fixed indefeasible interest that has vested absolutely in a beneficiary.

(7) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may only self-appoint if the instrument provides for self-appointment.

(8) This section prevails over any contrary provision in a trust instrument.

Notice of application to approve variation

68(1) A person who applies to the court for an order under section 67(2) must serve notice of the application,

(a) in respect of a minor referred to in section 67(4)(a), on the trustee appointed by court order under the *Minors' Property Act* or the Public Trustee;

(b) in respect of an incapacitated person referred to in section 67(4)(a), on the attorney acting under the *Powers of Attorney Act* or the trustee appointed by court order under the *Adult Guardianship and Trusteeship Act*;

(c) in respect of an unborn person referred to in section 67(4)(b), on the Public Trustee;

(d) in respect of a person referred to in section 67(4)(c) who is a missing person as defined in the *Public Trustee Act*, on the Public Trustee.

(2) If there is no attorney or trustee appointed for an incapacitated person referred to in section 67(4)(a), then an attorney or trustee must be appointed.

(3) A person who applies to the court for an order under section 67(2) must, in respect of a charitable organization referred to in section 67(4)(f) or a trust referred to in section 67(4)(g), serve notice of the application on the Minister at least one month before the date set for the hearing of the application.

(4) The Minister is entitled to appear and be heard on an application under section 67(2) and is entitled to the costs the court orders.

Part 6
Trustee Compensation and Accounts

Compensation of trustee

69(1) A person is entitled to fair and reasonable compensation to be paid out of the trust property for services rendered as trustee of the trust.

(2) As part of the compensation to which a trustee is entitled under subsection (1), a trustee who

(a) has professional skills, and

(b) has rendered services to the trust, apart from those generally associated with the office of trustee, that required the exercise of those professional skills

is entitled to charge fees at reasonable rates for those services that are reasonably necessary for the purpose of carrying out the trust.

(3) The trustees of a trust are not presumed to be entitled to equal compensation under subsection (1).

(4) On application by a trustee or beneficiary during the administration of the trust or on the passing of accounts, the court may determine the amount of compensation to which the trustee is entitled under subsection (1).

(5) In determining a trustee's compensation, the court may consider the following matters:

(a) the terms of any relevant contract;

(b) the gross value of the trust property at the time compensation is claimed;

(c) any change in the gross value of the trust property since compensation was last claimed or the trust was created and the portion of that change attributable to decisions of the trustee;

(d) the amount of revenue received and expenditures incurred in administering the trust;

(e) the complexity of the work involved in administering the trust, including whether or not any difficult or unusual questions were raised;

(f) any unusual difficulties or situations encountered in administering the trust;

(g) whether or not the trustee had to instruct on litigation relating to the trust;

(h) whether or not the trustee was required to manage a business, be the director of a corporation or perform other additional roles in administering the trust;

(i) the amount of skill, labour, responsibility, technological support and specialized knowledge required in administering the trust;

(j) the number and complexity of tasks relating to the administration of the trust that were delegated to others;

(k) the time expended in administering the trust;

(l) the number of trustees;

(m) any other matter the court considers relevant.

(6) An application under subsection (4) may be made even if the trust instrument provides for the determination of the amount of compensation.

(7) The court may enforce or vary the terms of compensation provided to a trustee

(a) whether the terms are found in the trust instrument or another contract between the person making the trust and the trustee,

(b) whether the contract between the settlor and trustee is signed before or after the date of the trust instrument, and

(c) whether or not the contract between the settlor and trustee is incorporated by reference into the trust instrument.

(8) This section prevails over any contrary provisions in a trust instrument.

Interim compensation of trustee

70(1) During the administration of the trust and without prior authorization of the court, if there is at least one beneficiary who is of full legal capacity and who has a vested beneficial interest in the trust property, a trustee may take payment out of the trust property in an amount that, in the trustee's opinion, is fair and reasonable compensation for services rendered as trustee of the trust during the period to which the payment relates.

(2) Before taking a payment under subsection (1), a trustee must deliver to the qualified beneficiaries and any other trustees a written notice

(a) stating the amount of the payment,

(b) describing the services rendered, and

(c) stating that, within a specified period of not less than 2 months from the date the notice was delivered, a qualified beneficiary or trustee may apply to the court under subsection (3) to object to the payment.

(3) A qualified beneficiary or trustee may object to the payment under subsection (1) by bringing an application within the notice period specified in subsection (2)(c).

(4) A trustee who files an application under subsection (3) must serve notice of the application on all qualified beneficiaries and trustees.

(5) A qualified beneficiary who files an application under subsection (3) must serve notice of the application on the trustee, and the trustee must then serve notice of the application on the other qualified beneficiaries.

(6) In an application under this section the court may determine the amount, if any, that the trustee may be paid under subsection (1).

Reimbursement of expenses

71 During the administration of the trust and without prior authorization of the court, a trustee may take reimbursement out of the trust property for expenses incurred by the trustee in the administration of the trust.

Passing of accounts

72(1) On application by a qualified beneficiary or a trustee, the court may order that the trustee's accounts be passed on a single occasion or at intervals set by the court.

(2) A trustee making an application under subsection (1) must serve notice of the application on each of the qualified beneficiaries.

(3) A qualified beneficiary making an application under subsection (1) must serve notice of the application on the trustee and the trustee must then serve notice of the application on each of the other qualified beneficiaries.

(4) If a qualified beneficiary who receives notice under subsection (2) or (3)

(a) is a minor and the trustee appointed by court order under the *Minors' Property Act* or the Public Trustee, as the case may be, is not present at the passing of accounts, or

(b) is an incapacitated person and the attorney acting under the *Powers of Attorney Act* or the trustee appointed by court order under the *Adult Guardianship and Trusteeship Act*, as the case may be, is not present at the passing of accounts,

the court may determine, at the passing of accounts or at a subsequent hearing, that the qualified beneficiary is to be, or is deemed to have been, represented by another person who, at the passing of accounts, is of full legal capacity, has a substantially similar interest in the trust property and is not in a conflict of interest with the qualified beneficiary in respect of any aspect of the accounts.

Repayment by trustee

73 If a trustee's compensation as finally determined by the court is less than the total of the payments taken by the trustee without court authorization during the administration of the trust, the trustee must restore the difference to the trust property.

Part 7
Charitable Trusts and Non-charitable Purpose Trusts

Power of court to vary charitable trusts

74(1) Subject to a gift over or reversion expressly provided for in the trust instrument, on application by the trustee of a charitable trust where the trust instrument does not provide for the variation that is sought, the court may vary the terms of the trust in accordance with subsection (3) if the court is of the opinion that

(a) an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust, or

(b) a variation of the trust would facilitate the carrying out of the charitable intent, whether general or specific, of the settlor.

(2) On an application under subsection (1) to vary the terms of a trust, the court must take into account the following factors:

(a) the nature of all interests and objects and the effect any proposed variation may have on those interests and objects;

(b) the intentions of the settlor to the extent these can be ascertained;

(c) any other factors the court considers relevant.

(3) In varying the terms of a trust under subsection (1), the court may

(a) vary, delete or add to any terms of the trust, whether dispositive or administrative in character, which must include the powers of a trustee in respect of the management and administration of the trust, and

(b) if the court is of the opinion referred to in subsection (1)(a), vary or add to the terms of the trust to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust.

(4) For the purposes of a variation under subsection (1)

(a) it is irrelevant whether the charitable intent of the settlor was general or specific, and

(b) if the terms of the trust expressly provide for a gift over or a reversion in the event of the lapse or other failure of a charitable purpose, the gift over or reversion, if otherwise valid, shall take effect and the court must not vary the terms of the trust under subsection (1).

(5) This section prevails over any contrary provisions in a trust instrument.

Power to order sale of property — charitable trust

75(1) On application, if a specific property held in trust for a charitable purpose may no longer be used advantageously for the charitable purpose or should for any other reason be sold, the court may authorize the sale of the property and give directions concerning the conduct of the sale and the application of the proceeds from the sale.

(2) An application under subsection (1) may be made by

(a) the Minister,

(b) the trustee, or

(c) a person appearing to the court to have a sufficient interest in the matter.

(3) This section prevails over any contrary provisions in a trust instrument.

Notice

76 If an application is made for an order under section 74 or 75 by a person other than the Minister, the order must not be made

unless the applicant has served notice of the application on the Minister and any other persons as the court may require, at least one month before the date set for the hearing of the application.

Non-charitable purpose trust

77(1) A person may create a trust that

(a) is for a non-charitable purpose that

(i) is recognised by law as being capable of being a valid object of a trust, or

(ii) is sufficiently certain to allow the trust to be carried out, is not contrary to public policy and is

(A) for the performance of a function of government in Canada, or

(B) a matter specified by regulation,

and

(b) does not create an equitable interest in any person.

(2) A non-charitable purpose trust may exist indefinitely.

Court may vary non-charitable purpose trust

78(1) If, on application, the court is of the opinion that an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of a non-charitable purpose trust, the court may, subject to subsection (5),

(a) vary or add to the terms of the trust to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, or

(b) if the court is unable to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.

(2) Subject to subsection (5), if on application the court is of the opinion that a change in circumstances since the creation of a non-charitable purpose trust has resulted in a purpose of the trust being obsolete or no longer expedient, the court may vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.

(3) In exercising the power under subsection (2), the court may consider the views of the settlor or the trustee concerning the obsolescence or expedience of the purpose of the trust and the proposed variation.

(4) On an application under subsection (1) or (2), the court must take into account the following factors:

(a) the nature of all interests and the effect any proposed variation may have on those interests and objects;

(b) the intentions of the settlor to the extent these can be ascertained;

(c) any other factors the court considers relevant.

(5) Subsections (1) and (2) do not apply if

(a) the trust instrument contains a valid direction concerning the ultimate disposition of the trust property, or

(b) the intention of the settlor concerning the ultimate disposition of the trust property can be inferred from the trust instrument and is valid.

(6) Despite subsections (1) and (2), if the court cannot determine a replacement purpose for a non-charitable purpose trust, the court may order that the trust property be returned to the settlor or to the settlor's personal representative.

(7) The court may make an order that it considers appropriate

(a) to enforce a non-charitable purpose trust, or

(b) to enlarge or otherwise vary the powers of the trustee of a non-charitable purpose trust.

(8) An application under this section may be made by

(a) the Minister,

(b) a person appointed specifically by the settlor in the trust instrument to enforce the trust,

(c) the settlor,

(d) the personal representative of the settlor,

(e) the trustee, or

(f) a person appearing to the court to have a sufficient interest in the matter.

Imperfect trust provisions — charitable and non-charitable

79(1) A trust is not void by reason only that the objects of the trust consist of a charitable purpose and a non-charitable purpose.

(2) On application by a trustee or beneficiary, the court may make one or more of the following orders:

(a) an order that a charitable purpose constitutes the object of a separate charitable trust, if the court determines that it is practicable to separate the charitable purpose from a non-charitable purpose;

(b) an order that a non-charitable purpose constitutes the object of a separate non-charitable purpose trust, if the court determines that

(i) a non-charitable purpose trust may be validly created under section 77(1), and

(ii) it is practicable to separate the non-charitable purpose from the other objects of the original trust;

(c) an order that the terms of the disposition of property relating to a non-charitable purpose must be construed in accordance with section 80, if the court determines that

(i) the non-charitable purpose does not meet the requirements of section 77(1), and

(ii) it is practicable to separate the non-charitable purpose from a charitable purpose;

(d) an order that a charitable purpose and a non-charitable purpose constitute the objects of a separate non-charitable purpose trust, if

(i) the court determines that

(A) a non-charitable purpose may be validly created under section 77(1), and

(B) it is not practicable to separate the charitable purpose from the non-charitable purpose,

and

(ii) the court makes an order under clause (a), (b) or (c) separating other objects of the original trust;

(e) an order that the terms of the disposition of property relating to a charitable and a non-charitable purpose must be construed as provided in section 80, if the court determines that

(i) the non-charitable purpose does not meet the requirements of section 77(1),

(ii) it is not practicable to separate the charitable purpose from the non-charitable purpose, and

(iii) the court makes an order under clause (a), (b) or (c) separating other objects of the original trust;

(f) an order that the trust takes effect as a non-charitable purpose trust, if the court determines that

(i) the non-charitable purpose meets the requirements of section 77(1), and

(ii) it is not practicable to separate any objects of the trust;

(g) an order that the terms of the disposition of property purporting to create a trust must be construed as provided in section 80, if the court determines that

(i) the non-charitable purpose does not meet the requirements of section 77(1), and

(ii) it is not practicable to separate any objects of the trust.

(3) If the court makes an order under subsection (2)(a), (b), (c) or (d), the trustee must, subject to any terms in the trust instrument regarding apportionment of the trust property or the manner in which a power of apportionment may be exercised, divide the trust property as the trustee considers reasonable in the circumstances between any new trusts and powers of appointment.

(4) Despite subsection (2)(c) and (d), if the objects of a trust consist of a charitable purpose linked conjunctively or disjunctively with a purpose that is not described specifically but is referred to only by an indefinite qualifying term, such as “benevolent”, “worthy” or “philanthropic”, the trust takes effect as a charitable trust.

(5) The trustee must apply all of the property of the trust referred to in subsection (4) as if only the charitable purpose had been set out in the trust instrument.

Disposition purporting to create non-charitable purpose trust construed as power to appoint

80(1) This section applies in respect of a disposition referred to in subsection (2) whether the disposition is made before, on or after the date this section comes into force.

(2) If the terms of a disposition of property purport to create a trust that

(a) does not create an equitable interest in any person, and

(b) is for a specific non-charitable purpose, other than a non-charitable purpose referred to in section 77(1),

the terms of the disposition must be construed, subject to this section, as constituting a power to appoint the income or the capital, as the case may be, for a period not exceeding 21 years.

(3) Despite subsection (2), the terms of a disposition referred to in that subsection must not be construed as constituting a power to appoint if the terms of the disposition provide for an illegal purpose or a purpose contrary to public policy.

(4) Despite subsection (2), if a disposition referred to in that subsection is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that, by voiding the disposition, the result would be closer to the intention of the person disposing of the property than would the period of validity provided by this section.

(5) An order under subsection (4) may be made on application by a person referred to in section 78(8).

(6) If a disposition referred to in subsection (2) provides for the expenditure of all or a specified portion of the income or capital within an annual period or another recurring period that is less than 21 years and that income or capital is not fully expended within that period, the person who would have been entitled to the property that is subject to the power to appoint, if the power to appoint had terminated at the expiration of that period, is entitled to that unexpended income or capital.

(7) If the income or capital that is subject to a power to appoint under subsection (2) is not fully expended within a period of 21 years, the person who would have been entitled to the property that

is subject to the power to appoint, if the power to appoint had terminated at the expiration of the 21-year period, is entitled to that unexpended income or capital.

(8) Nothing in this section applies to any discretionary power to transfer a beneficial interest in property to any person as a gift.

(9) For the purpose of this section, a trustee's power to appoint for a non-charitable purpose trust that has failed is a special power and a trust power.

(10) This section prevails over any contrary provisions in a trust instrument.

Part 8
Additional Powers of the Court

Non-performance by trustee

81(1) On application by a trustee or beneficiary, the court may determine whether a trustee has refused or failed

(a) to perform a duty imposed on the trustee, or

(b) to consider in good faith the exercise of a power conferred on the trustee.

(2) If the court is satisfied that a trustee has refused or failed to perform or exercise duties or powers as provided in subsection (1), the court may

(a) order the trustee to

(i) perform the duty, or

(ii) consider in good faith the exercise of the power and satisfy the court that the trustee has given due consideration to the exercise of the power,

or

(b) remove the trustee.

Trustee may apply to court for directions

82(1) A trustee may apply to the court for directions on any matter or question of fact, law or discretion arising in respect of a trust.

(2) Without limiting subsection (1), if trustees are deadlocked on any matter arising with respect of a trust, a trustee may apply to the court for directions respecting the resolution of the matter.

(3) The duty of a trustee who follows the directions given under subsection (1) or (2) is discharged with respect to the subject-matter of the directions, unless the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

(4) This section prevails over any contrary provisions in a trust instrument.

Trustee may apply to court for order respecting distribution of trust property

83(1) On application by a trustee, the court may authorize the trustee to distribute trust property among the persons entitled to receive the trust property, with the trustee having regard only to

(a) the persons whom the trustee has been able to locate after making diligent efforts, or

(b) the claims or interests that the trustee has been able to determine after making diligent efforts.

(2) In making an order under subsection (1), the court may give directions respecting the procedure to be followed by the trustee in respect of a distribution of the trust property, including, without limitation, directions concerning the notice that must be given to persons who may have an interest in the distribution of the trust property.

(3) An order under subsection (1) does not prejudice the right of any creditor or claimant to follow the trust property into the hands of a person who receives it.

(4) This section prevails over any contrary provisions in a trust instrument.

Trustee may be relieved of liability for breach of trust

84(1) In this section, "exemption clause" means a provision of a trust instrument that excludes or restricts the liability of a trustee, including, without limitation, a provision that purports to do one or more of the following:

(a) make the enforcement of the liability of the trustee subject to restrictive or onerous conditions;

(b) permit a trustee to act despite a conflict between the trustee's personal interest and the powers and duties of the office of trustee;

(c) exclude or restrict any right or remedy in respect of the liability of a trustee, or prejudice any person who pursues such right or remedy;

(d) exclude or restrict rules of evidence;

(e) negate a duty that, in the absence of the provision, would otherwise be imposed on the trustee.

(2) The court may relieve a trustee or former trustee either wholly or partly from personal liability if the court is satisfied that

(a) the trustee or former trustee is or may be personally liable for a breach of trust, and

(b) the trustee or former trustee,

(i) has acted honestly and reasonably, and

(ii) ought fairly to be excused for the breach of trust.

(3) Subject to subsection (4), an exemption clause in a trust instrument is effective to relieve, according to its terms, a trustee of liability for a breach of trust.

(4) If the court is of the opinion that the conduct of a trustee

(a) constitutes a breach of trust, and

(b) has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be relieved by an exemption clause from liability for the breach of trust,

the court may declare that any exemption clause contained in the trust instrument is ineffective in respect of that breach of trust, and that the liability of the trustee for breach of trust is as if the trust instrument did not contain the clause.

(5) An application under this section may be made by

(a) a beneficiary,

(b) a trustee, or

(c) a secured party.

(6) This section prevails over any contrary provisions in a trust instrument.

Contribution and indemnity

85(1) In this section, "breach of trust" includes any act or omission that gives rise to the liability of a trustee to the beneficiaries of the trust, regardless of whether the act or omission

(a) is intentional,

(b) is negligent, or

(c) would give rise to a right for contribution or indemnity apart from this Act.

(2) This section applies only with respect to a breach of trust

(a) that is the subject of a legal proceeding commenced after this Act comes into force, or

(b) if no legal proceeding has been commenced for breach of trust, for which a claim for contribution or indemnity is made after this Act comes into force.

(3) Except as provided in this section, a trustee is not obligated to contribute to or indemnify a co-trustee in respect of a breach of trust.

(4) If a trustee commits a breach of trust, the court, having regard to the responsibility of each trustee for the loss to the trust, may determine the amount the court considers appropriate

(a) for which each trustee is liable in order to make good the loss to the trust, or

(b) that a trustee must contribute to another trustee.

(5) The court may

(a) exempt a trustee from liability to make a contribution to another trustee, or

(b) order that any contribution due to, or to be recovered from, a trustee amounts to a complete indemnity.

(6) The powers conferred on the court by this section may be exercised despite that the trustee claiming contribution or indemnity or the trustee against whom the claim is made, or both of them, have acted fraudulently in breach of trust.

(7) If a trustee in breach of trust is insolvent, the court may apportion liability for making good the loss to the trust and any

other losses as is appropriate among other solvent co-trustees who are found liable.

(8) If the beneficiaries have settled with a trustee who is in breach of trust and who subsequently seeks contribution from a co-trustee, the court, in making any contribution order and without limiting subsections (4) and (5), may consider whether the settlement was reasonable.

Beneficiaries instigating breaches of trust

86(1) If a trustee commits a breach of trust, and the breach was at the instigation or request or with the consent of some but not all of the beneficiaries, the court may order the beneficiaries who instigated, requested or consented to the breach to contribute to or indemnify the trustee or persons claiming through the trustee.

(2) If the court makes an order under subsection (1), the court may order that all or part of the interest of the beneficiaries in the trust is to be used to satisfy the obligation to contribute to or indemnify the trustee or persons claiming through the trustee.

Payment into court

87(1) A trustee may pay into or deposit in court trust money or trust securities.

(2) If a trustee is not available to receive payment or transfer of trust money or trust securities and give a receipt for the trust money or trust securities, the court may order, on application by a person in possession or control of the trust money or trust securities, that the trust money or trust securities be paid into or deposited in court.

(3) A receipt given by a clerk of the court for any money or securities paid into or deposited in court under subsection (1) or (2) relieves the trustee or other person paying or depositing the money or securities from any further obligations relating to the money or securities.

(4) The court may make any orders it considers necessary or appropriate regarding the trust money or trust securities paid into or deposited in court under subsection (1) or (2) and for the administration of the trust to which the money or securities are subject.

(5) This section prevails over any contrary provisions in a trust instrument.

Costs paid by party or out of trust property

88(1) The court may order costs of a proceeding under this Act, in the amounts or proportions the court considers appropriate, to be paid

(a) by or to a party to the proceeding, or

(b) out of the trust property.

(2) The court may order costs of a transfer of or other transaction respecting trust property, in the amounts or proportions the court considers appropriate, to be paid out of the trust property.

(3) For the purposes of subsection (1)(b) or (2), the court may designate all or part of the trust property as the source for the payment.

Part 9
General

Interpretation and evidence

89 For the purposes of determining the settlor's intention, the court may admit the following evidence:

(a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the trust;

(b) evidence as to the meaning of the provisions of the trust in the context of the settlor's circumstances at the time of the making of the trust;

(c) evidence of the settlor's intention with regard to the matters referred to in the trust.

Ability of person to have child

90(1) In this section, "physician" means

(a) a regulated member of the College of Physicians and Surgeons of Alberta under the *Health Professions Act* who is authorized to use the title "physician" and holds a practice permit issued under that Act,

(b) a professional corporation that is registered under the *Health Professions Act* with the College of Physicians and Surgeons of Alberta, or

(c) in respect of medical services provided in a jurisdiction other than Alberta, a person who is lawfully entitled to practise medicine under the laws of that jurisdiction.

(2) If, in the administration of a trust, a question arises that turns on the ability of a person to have a child at some future time, it must be presumed that

(a) a male is able to have a child at the age of 14 years or over, but not under that age, and

(b) a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years.

(3) Despite subsection (2), in the case of a living person, it may be presumed that the person is or will be unable to have a child at the time in question if

(a) that person provides information or a reason supporting why that person is or will be unable to have a child at that time,

(b) there is a decision of the court that the person is or will be unable to have a child at that time, or

(c) there is an opinion of a physician that the person is or will be unable to have a child at that time.

(4) Subject to subsection (5), if, in the administration of a trust, a question is decided by treating a person as able or unable to have a child at a particular time, then the person must be so treated for the purpose of any related question that may arise in the administration of the trust, even if the evidence on which the finding of ability or inability to have a child at the particular time is proved by subsequent events to have been erroneous.

(5) If, in the administration of a trust, a question is decided by treating a person as unable to have a child at a particular time and that person subsequently has a child at that time, the court may make an order that it considers appropriate to protect the right that the child would have had in the trust property as if

(a) that question had not been decided, and

(b) that child would, apart from the decision, have been entitled to a right in the trust property.

(6) For the purposes of this section, the possibility that a person may at any time have a child by adoption may not be considered in deciding a question that turns on the ability of a person to have a child at some particular time, but if a person does subsequently have a child by adoption, subsection (5) applies in respect of that child.

(7) Subject to subsection (8), a trustee is not liable for a loss arising from a payment of trust money or a transfer of trust property further to a decision to treat a person as unable to have a child at a particular time if, before the trustee has notice that the person subsequently had a child at the particular time, the trustee

(a) relies on a decision of the court that the person is or will be unable to have a child at that time, or

(b) relies on an opinion of a physician that the person is or will be unable to have a child at that time.

(8) Subsection (7) does not apply if the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining a decision or opinion referred to in that subsection.

Assumptions if notice of trust received

91(1) Subsection (2) applies to a person who receives notice of the existence of a trust by reason only of the production or registration of a document evidencing

(a) the appointment of a trustee,

(b) a trustee ceasing to hold office, or

(c) the vesting of property in a trustee.

(2) A person to whom this subsection applies may assume without inquiry that

(a) a former trustee possessed the powers the former trustee exercised or purported to exercise over the trust property, and

(b) a current trustee has the powers the current trustee has exercised or purports to exercise over the trust property.

(3) This section prevails over any contrary provisions in a trust instrument.

Purchaser takes property subject to trust if notice of defect

92(1) In this section, "purchaser" means

(a) a purchaser for value of trust property,

(b) a secured party, or

(c) any other person who for value received an interest in or a claim on trust property.

(2) Subject to the *Land Titles Act,* a purchaser takes the trust property subject to the terms of the trust if the purchaser, at the time of the purchase, has received notice that

(a) a former trustee did not possess, or a current trustee does not possess, a power purported to be exercised with respect to the trust property, or

(b) a former trustee or current trustee has acted in breach of trust with respect to the trust property.

(3) This section prevails over any contrary provisions in a trust instrument.

Person not liable if compliant with Act or order

93(1) Subject to this Act, a person who complies with this Act or with an order made under this Act is not liable for a loss arising from anything done or permitted to be done under this Act, unless it was done or permitted to be done in bad faith.

(2) This section prevails over any contrary provisions in a trust instrument.

Receipt relieves person from further obligation

94 A receipt given by a trustee for any money or other property received by the trustee relieves the person paying or otherwise transferring the money or other property from any further obligation relating to the money or other property.

Incapacitated persons and minors

95(1) If a beneficiary is an incapacitated person for whom an attorney has been appointed under the *Powers of Attorney Act* or a trustee has been appointed under the *Adult Guardianship and Trusteeship Act*, the attorney or trustee, as the case may be, is the representative of that beneficiary for the purposes of this Act.

(2) Without limiting subsection (1),

(a) any action required or permitted to be taken by the beneficiary,

(b) any notice or report required or permitted to be given to the beneficiary, and

(c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if it is taken by, given to or given by the attorney or trustee, as the case may be, on behalf of the beneficiary.

(3) If a beneficiary is a minor for whom a trustee has been appointed by court order under the *Minors' Property Act*, the trustee is the representative of that beneficiary for the purposes of this Act.

(4) Without limiting subsection (3),

(a) any action required or permitted to be taken by the beneficiary,

(b) any notice or report required or permitted to be given to the beneficiary, and

(c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if it is taken by, given to or given by the trustee on behalf of the beneficiary.

Notice to minor

96 If a beneficiary is a minor, notice must be given in accordance with the *Minors' Property Act* to the Public Trustee and, where required under that Act, to the beneficiary.

Agent of beneficiary

97 For the purposes of this Act,

(a) any action required or permitted to be taken by a beneficiary,

(b) any notice or report required or permitted to be given to a beneficiary, and

(c) any consent or agreement required or permitted to be given by a beneficiary

is validly taken or given if it is taken by, given to or given by an agent of the beneficiary acting within the scope of the authority conferred by that beneficiary.

Delivery of documents

98(1) In this section,

(a) "electronic" has the same meaning as in the *Electronic Transactions Act*;

(b) "recorded mail" means a form of delivery by mail or courier in which receipt of the document or notice is acknowledged in writing.

(2) Where this Act requires documents or notice to be delivered to a person, the documents or notice may be delivered

(a) in person or to a lawyer who is authorized to accept delivery on behalf of a person,

(b) by recorded mail, or

(c) by electronic transmission.

Regulations

99 The Lieutenant Governor in Council may make regulations

(a) respecting notices under sections 12 and 14;

(b) specifying a percentage for the purpose of total return investments under section 44;

(c) varying the length of a valuation period for the purposes of section 44(9)(c)(i);

(d) respecting matters for which a non-charitable purpose trust may be created under section 77(1);

(e) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent and purpose of this Act.

Transitional regulations

100(1) In this section, "former Act" means the *Trustee Act*, RSA 2000 cT-8.

(2) The Lieutenant Governor in Council may make regulations

(a) respecting the transition to this Act of anything from the former Act;

(b) to deal with any difficulty or impossibility resulting from this Act or the transition to this Act from the former Act.

(3) The Lieutenant Governor in Council may, by regulation, amend regulations made under any Act of Alberta for the purposes of making any changes the Lieutenant Governor in Council considers necessary or advisable as a result of the transition to this Act from the former Act.

(4) Regulations authorized by subsection (3) may be made despite that the regulation being amended was made by a member of the Executive Council or some other person or body.

Part 10
Consequential Amendments, Repeal and Coming into Force

101 to **103** *(These sections amend other Acts; the amendments have been incorporated into those Acts.)*

Repeal

104 The *Trustee Act*, RSA 2000 cT-8, is repealed.

Coming into force

105 This Act comes into force on Proclamation.

(NOTE: Proclaimed in force February 1, 2023.)

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Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

1984: December 6, 7 / 1986: December 18.

File No.: 18720.

[1986] 2 S.C.R. 573 | [1986] 2 R.C.S. 573 | [1986] S.C.J. No. 75 | [1986] A.C.S. no 75 | Also reported at 33 D.L.R. (4th) 174

Retail, Wholesale and Department Store Union, Local 580, Al Peterson and Donna Alexander, appellants; v. Dolphin Delivery Ltd., respondent, and Attorney General of Canada, Attorney General of British Columbia, Attorney General for Alberta and Attorney General of Newfoundland, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Constitutional law — Charter of Rights — Freedom of expression — Interlocutory injunction against secondary picketing — Application based on common law rule against inducing breach of contract — Whether injunction offending Charter right to freedom of expression — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 32(1) — Constitution Act, 1982, s. 52(1).

Appellant union was the federally certified bargaining agent for the locked out employees of Purolator, an Ontario based courier. Prior to the lockout, respondent made deliveries for Purolator in its area and afterwards, for Supercourier, a company connected with Purolator. Appellant applied to the British Columbia Labour Relations Board for a declaration that respondent and Supercourier were allies of Purolator in their dispute with appellant. Such a finding would have rendered the picketing of respondent's business premises lawful, and consequently would have affected its business in that its collective agreement provided that its employees' refusal to cross a lawful picket line was not a violation of the agreement or grounds for disciplinary action or discharge. When the Board declined to hear the application for want of jurisdiction, the labour relations of the appellant being within federal jurisdiction, the legality of appellant's proposed picketing then fell for determination under the common law because the Canada Labour Code was silent on the issue. No picketing occurred at respondent's premises as respondent was [page574] granted a quia timet injunction which was upheld on appeal. At issue here is whether secondary picketing in a labour dispute is protected as freedom of expression under s. 2(b) of the Charter and accordingly not the proper subject of an injunction to restrain it.

Held: The appeal should be dismissed.

Per Dickson C.J. and Estey, McIntyre, Chouinard and Le Dain JJ: All picketing involves some form of expression and enjoys Charter protection unless some action on the part of the picketers alters its nature and removes it from Charter protection. Charter protection of this freedom does not encompass violence, threats of violence or other unlawful acts. The picketing at issue, although intended to bring about economic pressure and to induce the common law tort of breach of contract, was protected by the Charter.

The Charter applies to the common law. The language of s. 52(1) of the Constitution Act, 1982 clearly includes the common law and a construction of that section that would exclude the common law from the Charter's application would be wholly unrealistic.

The Charter does not apply to private litigation completely divorced from any connection with government. Section 32 specifies that the Charter applies to the legislative, executive and administrative branches of government: their actions are subject to the Charter whether invoked in public or private litigation. An order of the Court, however, cannot be equated with government action for the purposes of Charter application notwithstanding political theory. The courts, while bound by the Charter, act as neutral arbiters and to regard a court order as an element of government action necessary to invoke the Charter would unduly widen the scope of the Charter's application to virtually all litigation.

Although government action is generally dependant on statutory authority, it may rely as well on the common law as in the case of the prerogative. The Charter will apply to the common law where the common law is the basis for some governmental action [page575] which is alleged to have infringed a guaranteed right or freedom.

It is difficult and probably dangerous to attempt to define with narrow precision that element of government intervention necessary to bring the Charter into play by private litigants in private litigation. It would seem that the Charter would apply to delegated legislation such as regulations, orders in council, possibly municipal by-laws and by-laws and regulations of other creatures of Parliament and the legislatures. Where government action of such nature is present, and where a private litigant relies on it to cause an infringement of the Charter rights of another, the Charter applies. Where, however, a private party sues another relying on the common law and where no government action is relied upon to support the action, the Charter will not apply.

The Charter did not apply to the case at bar. This litigation was between purely private parties and did not involve any exercise of or reliance on governmental action which would invoke the Charter. The application for the injunction was supported in this Court solely on the basis of the common law tort of inducing a breach of contract. Had the Charter applied, s. 1 of the Charter would have been effective to justify the granting of the injunction.

Per Beetz J: For reasons stated by the majority of the British Columbia Court of Appeal, the picketing enjoined here would not have been a form of expression and consequently no question of infringement of s. 2(b) of the Charter could arise. The reasons of McIntyre J. were otherwise agreed with.

Per Wilson J: On a s. 1 analysis the purpose and objectives of a common law principle must be ascertained through an objective approach in the same way as the purposes and objectives of an impugned piece of legislation are ascertained. Two distinct questions must be answered in this case. First, does the tort of inducing breach of contract represent a reasonable limit under s. 1 on freedom of expression in the labour relations context? Second, if the tort represents a reasonable limit under s. 1, should injunctive relief be granted in this case? If the tort does not survive the first question, the conduct is not wrongful and no injunction can issue. If the tort survives the first question, the facts must be considered to see whether the other requirements for the award of an interlocutory injunction are present, i.e., [page576] whether the balance of convenience favours the plaintiff. The reasons of McIntyre J. were otherwise agreed with.

Cases Cited

By McIntyre J.

Considered: Re Blainey and Ontario Hockey Association (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513; referred to: Abrams v. United States, 250 U.S. 616 (1919); Boucher v. The King, [1951] S.C.R. 265; Switzman v. Elbling, [1957] S.C.R. 285; Reference re Alberta Statutes, 1938] S.C.R. 100; Thornhill v. Alabama, 310 U.S. 88 (1940); Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941); Channel Seven Television Ltd. v. National Association of Broadcast Employees and Technicians, [1971] 5 W.W.R. 328; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Oakes, [1986] 1 S.C.R. 103; Cat Productions Ltd. v. Macedo, [1985] 1 F.C. 269.

By Wilson J.

Referred to: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canada Labour Code, R.S.C. 1970, c. L-1. Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d), 15(1), 32(1). Constitution Act 1867, ss. 12, 16, 132. Constitution Act, 1982, s. 52(1). Human Rights Code, 1981, S.O. 1981, c. 53, s. 19(2). Labour Code, R.S.B.C. 1979, c. 212, ss. 85(3), 88.

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APPEAL from a judgment of the British Columbia Court of Appeal,191 [1984] 3 W.W.R. 481, 52 B.C.L.R. 1, 84 CLLC 14,036, dismissing an appeal from an order of Sheppard L.J.S.C., [1983] B.C.W.L.D. 100, granting an interlocutory injunction. Appeal dismissed.
F. Schroeder, for the appellants. Peter Gall and Donald Jordan, for the respondent. James M. Mabbutt and Peter K. Doody, for the intervener the Attorney General of Canada. Jack Giles, Q.C., and Robert McDonell, for the intervener the Attorney General of British Columbia. Brian R. Burrows, for the intervener the Attorney General for Alberta. James L. Thistle and Deborah E. Fry, for the intervener the Attorney General of Newfoundland.

Solicitors for the appellants: Laxton, Pidgeon, Vancouver. Solicitors for the respondent: Jordan and Gall, Vancouver. Solicitor for the intervener the Attorney General of Canada: R. Tasse, Ottawa. Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria. Solicitors for the intervener the Attorney General for Alberta: McLennan, Ross, Edmonton. Solicitor for the intervener the Attorney General of Newfoundland: Attorney General of Newfoundland, St. John's.

[Quicklaw note: Errata were published at [1987] 1 S.C.R., page iv. The changes indicated therein have been made to this document and the texts of the errata as published in S.C.R. are appended to the judgment.]

The judgment of Dickson C.J. and Estey, McIntyre, Chouinard and Le Dain JJ. was delivered by

1 McINTYRE J. -- This appeal raises the question of whether secondary picketing by members of a trade union in a labour dispute is a protected activity under s. 2(b) of the Canadian Charter of Rights and Freedoms and, accordingly, not the proper subject of an injunction to restrain it. In reaching the answer, consideration must be given to the application of the Charter to the common law and as well to its application in private litigation.

[page578]

2 The respondent, Dolphin Delivery Ltd. ("Dolphin"), is a company engaged in the courier business in Vancouver and the surrounding area. Its employees are represented by a trade union, not the appellant. A collective agreement is in effect between Dolphin and the union representing its employees, which provides in clause 8: "it shall not be a violation of this agreement or cause for discipline or discharge if an employee refuses to cross a picket line which has been established in full compliance with the British Columbia Labour Code". The appellant trade union is the bargaining agent under a federal certification for the employees of Purolator Courier Incorporated ("Purolator"). That company has a principal place of operations in Ontario but, prior to the month of June, 1981 when it locked out its employees in a labour dispute, it had a place of operations in Vancouver. That dispute is as yet unresolved. Prior to the lock-out, Dolphin did business with Purolator making deliveries within its area for Purolator. Since the lock-out, Dolphin has done business in a similar manner with another company, known as Supercourier Ltd. ("Supercourier"), which is incorporated in Ontario. There is a connection between Supercourier and Purolator, the exact particulars of which are not clearly established in the evidence, but it appears that Dolphin carries on in roughly the same manner with Supercourier as it had formerly done with Purolator and about twenty per cent of its total volume of business originates with Supercourier. This is about the same percentage of business as was done with Purolator before the lock-out.

3 In October of 1982 the appellant applied to the British Columbia Labour Relations Board for a declaration that Dolphin and Supercourier were allies of Purolator in their dispute with the appellant. A declaration to this effect would have rendered lawful the picketing of the place of business of Dolphin under British Columbia legislation. The Board, however, declined to make the declaration sought, on the basis that it had no jurisdiction because the union's collective bargaining relationship with Purolator and any picketing which might be done were governed by the Canada Labour Code, R.S.C. 1970, c. L-1. In the face of this [page579] finding it became common ground between the parties that where the Labour Code of British Columbia, R.S.B.C. 1979, c. 212, does not apply, the legality of picketing falls for determination under the common law because the Canada Labour Code is silent on the question. In November of 1982 the individual appellants, on behalf of the appellant union, advised Dolphin that its place of business in Vancouver would be picketed unless it agreed to cease doing business with Supercourier. An application was made at once for a quia timet injunction to restrain the threatened picketing. No picketing occurred, the application being made before its commencement.

4 The matter came before Sheppard L.J.S.C. and on November 30 he granted the injunction in these terms:

> ...that the Defendants and each of them and anyone acting for them or under their instructions, and anyone who has knowledge of such Order, be restrained from picketing or causing to be picketed the Plaintiff's place of business or near 30 West Fender Street, Vancouver, or elsewhere in the Province of British Columbia pending the trial or other disposition of this action.

He declined to find that Purolator and Dolphin were in fact allies, and said:

> On the material before me, I cannot agree with Counsel's interpretation of the facts. Clearly, the plaintiff is owned by persons who have no relationship with the persons who own Supercourier or Purolator. On a balance of probabilities and on the material before me, I find that even if Supercourier is a subterfuge set up by Purolator to circumvent the labour dispute, (a hypothesis which I find not to have been proven on the material) the plaintiff had no knowledge of this arrangement.

He then went on to say:

> On these facts, it appears to me that one of the leading authorities is the Moffat Communications case (supra) and that what the Union proposes in picketing [page580] the plaintiff applicant is secondary picketing for the purpose either of the tort of inducing breach of contract, or of the tort of civil conspiracy in that the predominant purpose of the picketing is to injure the plaintiff rather than the dissemination of information and the protection of the defendant's interest. Accordingly, I find that the plaintiff is entitled to an injunction to restrain the picketing.

5 The Court of Appeal (Taggart, Hutcheon and Esson JJ.A.) [[1984] 3 W.W.R. 481.] dismissed an appeal. The

appellant did not seek to dispute the application of the common law by the Chambers judge. It chose to advance its argument under the Charter. The Charter had not been raised before the Chambers judge but was argued in the Court of Appeal, the respondent raising no objection to its introduction at that point. The position advanced by the appellant in the Court of Appeal was that the basis for the granting of the injunction, that is, the common law principles adopted and applied by the Chambers judge, had the effect of infringing the fundamental freedoms of the appellant guaranteed under s. 2 of the Charter, particularly s. 2(b), freedom of expression, and s. 2(d), freedom of association.

6 Esson J.A., speaking for himself and Taggart J.A., concluded that neither freedom of expression nor freedom of association could be invoked to protect the activity being restrained, and that even if freedom of expression of the appellant were infringed it would constitute a reasonable limitation under s. 1 of the Charter. Hutcheon J.A. was of the opinion that peaceful picketing is a protected form of expression under the Charter. He was of the view, however, that in so far as the purpose of the picketing was to induce a breach of contract, restraint of such picketing might be a reasonable limit under s. 1. He rejected the application of the tort of civil conspiracy in a labour dispute. He agreed with the majority as to the question of freedom of association. He considered that it should be left to the Chambers judge to decide whether the picketing would induce a breach of contract and also whether Dolphin and Purolator were allies. A finding that they were allies would have excluded, in his opinion, operation of s. 1 of the Charter because picketing of an ally would be an exercise of freedom [page581] of expression. In the result, because one basis for the injunction had been shown, he agreed that the appeal should be dismissed.

7 In this Court, the appellants abandoned any appeal on the basis that the injunction infringed its freedom of association under s. 2(d) of the Charter. The appeal was limited to the claim that freedom of expression, secured under s. 2(b) of the Charter, had been infringed and that such an infringement was not a reasonable limit imposed by law under s. 1. The respondent contended that no freedom of expression had been infringed since picketing of the nature contemplated here was not a form of expression and, in the alternative, the injunction would constitute, in any event, a reasonable limit under s. 1.

8 The task of the Court in dealing with this case is made difficult by the way it developed in the courts below. The application for the injunction was made before any picketing occurred. The evidence was limited to affidavits, and some cross-examination upon them. Findings of fact on the crucial question of the nature of the apprehended picketing are limited. Ordinarily, the Court would not entertain constitutional questions without a more secure factual basis upon which to rest the argument. Because of the nature of this case, however, the Court has felt obliged to do so. I refer below to the findings of fact and to certain assumptions upon which the Court's judgment will rest.

9 It was said by Esson J.A. in the Court of Appeal [at p. 499]:

> The injunction is directed against secondary picketing, i.e., picketing of the premises and operation of some one who carries on business with the employer but who is a third party to the dispute between the union and employer. The chamber judge considered the question whether the relationship between the plaintiff, Supercourier and Purolator was such that the plaintiff should not be considered a third party. He concluded that it was a third party. That conclusion must, for the purposes of this appeal, be accepted.

[page582]

This finding of fact was contested. Counsel for the appellant contended that no such finding could be inferred from the reasons of the Chambers judge. I am of the view, however, from a perusal of the Chambers judge's reasons earlier quoted, that Esson J.A.'s comment was justified and I would accept as a fact that the respondent was found by the Chambers judge to be a third party to the dispute. In addition, the Chambers judge found that the purpose of the picketing was tortious and that the dominant purpose was to injure the plaintiff rather than the dissemination of information and protection of the defendant's interest.

10 Hutcheon J.A., in the Court of Appeal also seems to have recognized the difficulty regarding the factual underpinning. He said [at p. 484]:

> The interim injunction was granted before any picketing took place. The proper assumptions to be made are that the picketing would be peaceful, that some employees of Dolphin Delivery and other trade union members of customers would not cross the picket line, and that the daily business of Dolphin Delivery would be disrupted to a considerable extent.

These assumptions are reasonable and I adopt them. In summary then, it has been found that the respondent was a third party, that the anticipated picketing would be tortious, that the purpose was to injure the plaintiff. It was assumed that the picketing would be peaceful, that some employees of the respondent and other trade union members of customers would decline to cross the picket lines, and that the business of the respondent would be disrupted to a considerable extent.

11 The following questions arise:

1. Does the injunction complained of in this case restrict the freedom of expression secured under s. 2(b) of the Canadian Charter of Rights and Freedoms?
2. Does the Charter apply to the common law?
3. Does the Charter apply in private litigation?
4. If it is found that the injunction does restrict freedom of expression, is the limit imposed by the injunction a reasonable limit in accordance with s. 1 of the Charter?

[page583]

Freedom of Expression

12 As has been noted above, the only basis on which the picketing in question was defended by the appellants was under the provisions of s. 2(b) of the Charter which guarantees the freedom of expression as a fundamental freedom. Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

13 The importance of freedom of expression has been recognized since early times: see John Milton, Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England (1664), and as well John Stuart Mill, "On Liberty" in On Liberty and considerations on Representative Government (Oxford 1946), at p. 14:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility", he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

14 Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy. The courts have recognized this fact. [page584] For an American example, see the words of Holmes J. in his dissent in Abrams v. United States, 250 U.S. 616 (1919), at p. 630:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition....But when men have realized that time has upset many fighting faiths,

> they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

15 Prior to the adoption of the Charter, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status. In Boucher v. The King, [1951] S.C.R. 265, Rand J., who formed a part of the majority which narrowed the scope of the crime of sedition, said, at p. 288:

> There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and [page585] deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

In Switzman v. Elbling, [1957] S.C.R. 285, where this Court struck down Quebec's padlock law, Rand J. again spoke strongly on this issue. He said, at p. 306:

> But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from head 16 as a local matter.
>
> This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.

In the same case, Abbott J. said, at p. 326:

> The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.

He went on to make extensive reference to the words of Duff C.J. in Reference re Alberta Statutes, [1938] S.C.R. 100, at pp. 132-33, strongly [page586] supporting what could almost be described as a constitutional position for the concept of freedom of speech and expression in Canadian law, and then said, at p. 328:

> Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

16 It will be seen at once that Professor Peter W. Hogg, at p. 713 in his text, Constitutional Law of Canada (2nd ed. 1985), is justified in his comment that:

> Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the Charter of Rights.

The Charter has now in s. 2(b) declared freedom of expression to be a fundamental freedom and any questions as to its constitutional status have therefore been settled.

17 The question now arises: Is freedom of expression involved in this case? In seeking an answer to this question, it must be observed at once that in any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent. The question then arises. Does this expression in the circumstances of this case have Charter protection under the provisions of s. 2(b), and if it does, then does the injunction abridge or infringe such freedom?

[page587]

18 The appellants argue strongly that picketing is a form of expression fully entitled to Charter protection and rely on various authorities to support the proposition, including Reference re the Alberta Statutes, supra; Switzman v. Elbling, supra; the American cases of Thornhill v. Alabama, 310 U.S. 88 (1940) (per Murphy J., at p. 95); Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), (per Black J., at p. 302), and various other Canadian authorities. They reject the American distinction between the concept of speech and that of conduct made in picketing cases, and they accept the view of Hutcheon J.A. in the Court of Appeal, in adopting the words of Freedman C.J.M. in Channel Seven Television Ltd. v. National Association of Broadcast Employees and Technicians, [1971] 5 W.W.R. 328, that "Peaceful picketing falls within freedom of speech".

19 The respondent contends for a narrower approach to the concept of freedom of expression. The position is summarized in the respondent's factum:

> 4. We submit that constitutional protection under section 2(b) should only be given to those forms of expression that warrant such protection. To do otherwise would trivialize freedom of expression generally and lead to a downgrading or dilution of this freedom.

Reliance is placed on the view of the majority in the Court of Appeal that picketing in a labour dispute is more than mere communication of information. It is also a signal to trade unionists not to cross the picket line. The respect accorded to picket lines by trade unionists is such that the result of the picketing would be to damage seriously the operation of the employer, not to communicate any information. Therefore, it is argued, since the picket line was not intended to promote dialogue or discourse (as would be the case where its purpose was the exercise of freedom of expression), it cannot qualify for protection under the Charter.

[page588]

20 On the basis of the findings of fact that I have referred to above, it is evident that the purpose of the picketing in this case was to induce a breach of contract between the respondent and Supercourier and thus to exert economic pressure to force it to cease doing business with Supercourier. It is equally evident that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled. There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on

the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom of expression.

Section 1 of the Charter

21 It is not necessary, in view of the disposition of this appeal that I propose, to deal with the application of s. 1 of the Charter. It was, however, referred to in the Court of Appeal and I will deal with it here. It will be recalled that the Chambers judge in granting the injunction did so on the basis that the picketing involved the commission of two common law torts, that of civil conspiracy to injure and that of inducing a breach of contract. Hutcheon J.A. in the Court of Appeal said [at pp. 486-87]:

[page589]

> I think that the two torts must be treated differently. The tort of conspiracy to injure has not received acceptance in this province; s. 5 of the Trade-unions Act, 1959 (B.C.), c. 90 repealed the doctrine of civil conspiracy where the trade-union acted in contemplation or furtherance of a labour dispute. It remains in that state today under the Labour Code (s. 89). Section 89 reads:
>
> > "An act done by 2 or more persons acting by agreement or combination, if done in contemplation or furtherance of a labour dispute, is not actionable unless it would be wrongful without an agreement or combination." Without attempting to trace the position of the tort of conspiracy in the other provinces, I am satisfied that it warrants this description by Professor Arthurs, "Tort Liability for Strikes in Canada" (1960), 38 Can. Bar Rev. 346, at p. 362.
>
> "The modern tort of conspiracy stands condemned, almost universally, as the vehicle of judicial anti-unionism. Authors throughout the common-law world have denounced it as a "weapon...wielded with transparent partisanship to counter the aspirations of the trade union movement."

It should be noted that in British Columbia the common law tort of conspiracy to injure, as employed in labour disputes, has been abolished by statute and it would not be available as a support for an injunction. I am aware that the labour relations of the appellants are governed by the Canada Labour Code. However, since the Canada Labour Code is silent on the question of picketing, the common law applies, in this case the common law of British Columbia from which the tort of conspiracy has been expunged in labour disputes. In my view then the tort of civil conspiracy to injure may not be relied upon to support the injunction, which therefore must find its sole support from the tort of inducing a breach of contract.

22 The question then is: Can an injunction based on the common law tort of inducing a breach of contract, which has the effect of limiting the Charter right to freedom of expression, be sustained as a reasonable limit imposed by law in the peculiar facts of this case. The question of the [page590] application of s. 1 of the Charter has been the subject of comment in this Court in earlier cases, for example, Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295; and, more recently, R. v. Oakes, [1986] 1 S.C.R. 103. Ordinarily, some evidence will be necessary to enable the Court to decide whether s. 1 should be applied to preserve a limitation on a right, and the burden of proof will lie upon the party supporting the limitation. Dickson C.J. in the Oakes case, however, at p. 138, remarked concerning the need for evidence:

> I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

This, in my view, is such a case in so far as the need for evidence is concerned. The evidence before the Chambers judge, together with the assumptions and findings referred to above, provide a sufficient basis for the consideration of this question.

23 From the evidence, it may well be said that the concern of the respondent is pressing and substantial. It will suffer economically in the absence of an injunction to restrain picketing. On the other hand, the injunction has imposed a limitation upon a Charter freedom. A balance between the two competing concerns must be found. It may be argued that the concern of the respondent regarding economic loss would not be sufficient to constitute a reasonable limitation on the right of freedom of expression, but there is another basis upon which the respondent's position may be supported. This case involves secondary picketing -- picketing of a third party not concerned in the dispute which underlies the picketing. The basis of our system of collective bargaining is the proposition that the parties themselves should, wherever possible, work out their own agreement. Professor Weiler in Reconcilable Differences (Toronto 1980), at pp. 64-65, states:

> The basic assumption of our industrial relations system is the notion of freedom of contract between the [page591] union and the employer. There are Powerful arguments in favour of that policy of freedom of contract. We are dealing with the terms and conditions under which labour will be purchased by employers and will be provided by employees. The immediate parties know best what are the economic circumstances of their relationship, what are their non-economic priorities and concerns, what trade-offs are likely to be most satisfactory to their respective constituencies. General legal standards formulated by government bureaucrats are likely to fit like a procrustean bed across the variety and nuances of individual employment situations.
>
> . . .
>
> The freedom to agree logically entails the right to disagree, to fail to reach an acceptable compromise. Most of the time good faith negotiation does produce a settlement at the bargaining table, often without a great deal of trouble. But often enough it does not; and of course it is the failures which generate the visible tumult and shouting. And at that point the collective bargaining system diverges sharply from other components in the market economy.

When the parties do exercise the right to disagree, picketing and other forms of industrial conflict are likely to follow. The social cost is great, man-hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legitimate weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others. Weiler, supra, at p. 80, again comments:

> ...strike action is legal only in order to resolve a dispute with an employer about the negotiation of a new collective agreement. Logically a picket line should be legitimate only on such an occasion. As well the only [page592] permissible target of the picket line should be the primary employer - that employer with whom the union is negotiating and whom it is trying to compel to make favourable concessions in order to settle the agreement. Putting it the other way, unions should not be permitted to picket the business of a third party. Such a secondary employer is not involved in the primary dispute, it does not have it within its power to make the concessions that will settle the new contract, and thus it should not be the target of a weapon whose legitimate purpose is to extract such economic concessions.

24 It should be noted here that in the Province of British Columbia, secondary picketing of the nature involved in this case, save for the picketing of allies of the employer, has been made unlawful by the combined effect of ss. 85(3) and 88 of the British Columbia Labour Code, R.S.B.C. 1979, c. 212, as amended. This statute, of course, does not apply in this case, but it is indicative of the legislative policy, in respect of the regulation of picketing in that Province. It shows that the application of s. 1 of the Charter to sustain the limitation imposed by the common law would be consistent with legislative policy in British Columbia. I would say that the requirement of proportionality is also met, particularly when it is recalled that this is an interim injunction effective only until trial when the issues may be more fully canvassed on fuller evidence. It is my opinion then that a limitation on secondary picketing against a third party, that is, a non-ally, would be a reasonable limit in the facts of this case. I would therefore conclude that

the injunction is "a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society".

Does the Charter apply to the Common Law?

25 In my view, there can be no doubt that it does apply. Section 52(1) of the Constitution Act, 1982 provides:

[page593]

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> * * *
>
> 52.(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "elle rend inopérantes les dispositions incompatibles de tout autre règle de droit". (Emphasis added.) To adopt a construction of s. 52(1) which would exclude from Charter application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.

Does the Charter apply to private litigation?

26 This question involves consideration of whether or not an individual may found a cause of action or defence against another individual on the basis of a breach of a Charter right. In other words, does the Charter apply to private litigation divorced completely from any connection with Government? This is a subject of controversy in legal circles and the question has not been dealt with in this Court. One view of the matter rests on the proposition that the Charter, like most written constitutions, was set up to regulate the relationship between the individual and the Government. It was intended to restrain government action and to protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation.

27 Support for this view is found in Peter W. Hogg, supra, at pp. 670-78, and in an article by Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and [page594] Beaudoin, eds., The Canadian Charter of Rights and Freedoms -- Commentary.

28 At pp. 674-75 in his text, Professor Hogg says:

> The rights guaranteed by the Charter take effect only as restrictions on the power of government over the persons entitled to the rights. The Charter regulates the relations between government and private persons, but it does not regulate the relations between private persons and private persons. Private action is therefore excluded from the application of the Charter. Such actions as an employer restricting an employee"s freedom of speech or assembly, a parent restricting the mobility of a child, or a landlord discriminating on the basis of race in his selection of tenants, cannot be breaches of the Charter, because in no case is there any action by the Parliament or government of Canada or by the Legislature or government of a province. In cases where private action results in a restriction of a civil liberty, there may be a remedy for the aggrieved person under a human rights code, under labour law, family law, tort law, contract law or property law, or under some other branch of the law governing relations between private persons; but there will be no breach of the Charter.

29 In her discussion of this question, Professor Swinton has pointed out that certain sections of the Charter might support the proposition that it could apply in private litigation, but she makes it clear on an overall view of the

Charter that its application to private litigation is, in her view, excluded. She has pointed out that the Charter is not designed to be employed in private litigation and by its very nature it is not suited for that purpose. At pp. 47-48, she says:

> Moreover, in considering whether the Charter should be directly applicable, the courts should bear in mind its drawbacks as a method of dealing with private action and the advantages of leaving the regulation of such conduct to human rights legislation or other legal controls. Legislation can be tailored to deal with the tension between privacy rights and equality or that between freedom of expression and prohibition of hate literature. It can expressly limit the applicability of equality guarantees to services or to areas open to the public, or specify the right to set bona fide job qualifications. The Charter is not so refined, and provides no guidelines for [page595] its application. These would have to be judicially determined.
>
> As well, statutes such as particular human rights and equal pay laws contain an administrative structure designed to promote mediated settlements of disputes, rather than resort to litigation. There is an elaborate structure of conciliation preceding adjudications by an administrative tribunal, which can have an educative effect between the parties. The Charter will be interpreted for the most part in the courts, where there is no built-in mechanism to encourage settlement.

and later, she said, at p. 48:

> One should also keep in mind the concerns of the federal and provincial governments in drafting and agreeing to the Charter. Their focus was its effect on their own governmental operations. That is the reason for s. 1, requiring the courts to interpret the guarantees so as to allow reasonable limitations imposed by law. The override section (s.33), allowing the legislatures to enact laws infringing the Charter, also indicates that governments were concerned about bounds on legislative action. The governments did not address the application of the Charter to private action, and indeed it would have been strange for them to do so, for their existing human rights codes address that matter.

30 More recently, Dubin J.A., speaking for the majority of the Court of Appeal for Ontario (Dubin, Morden JJ.A., Finlayson J.A. dissenting) in Re Blainey and Ontario Hockey Association (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513, in a case involving a claim for discrimination on account of sex, said: "In my opinion s. 15 of the Charter does not reach private activity within a Province". He then expressed agreement with the words of Professor Tarnopolsky (as he then was) in Tarnopolsky and Beaudoin, eds., The Canadian Charter of Rights and Freedoms -- Commentary (supra), at pp. 422-23, where he said:

> In our own case under the Charter, it is suggested that s. 15 is not likely to be applied in the courts except in cases where a discriminatory act is committed by legislative action, and the jurisdiction concerned does [page596] not have an overriding clause in its Human Rights Act, as do Alberta, Quebec and Saskatchewan. This would be so for the following reasons:
>
> 1. By s. 32(1), the Charter is specifically made applicable only to the Parliament and government of Canada and to the legislature and government of each province "in respect of all matters within the authority" of the respective legislative body. Thus, although legislative and executive actions are covered by the Charter, it is not made applicable to private action.
> 2. Section 15 refers to equality before and under the law, as well as equal protection and benefit of the law. Thus, although an anti-discrimination (human rights) law would itself have to conform to s. 15, it, and not s. 15, would be directly applicable to discriminatory actions by private persons.
> 3. Every jurisdiction in Canada has an anti-discrimination statute which is explicitly made applicable to the Crown. It is unlikely, therefore, that a complainant would resort to a constitutional action in the courts, rather than the complaint process under the anti-discrimination laws.

Dubin J.A. then noted that McNair J., of the Federal Court, Trial Division, in Cat Productions Ltd. v. Macedo, [1985] 1 F.C. 269, had approved the words of Professor Swinton, at pp. 44-45 in the Canadian Charter of Rights and Freedoms: Commentary (supra):

> The automatic response to a suggestion that the Charter can apply to private activity, without connection to government, will be that a Charter of Rights is designed to bind governments, not private actors. That is the nature of a constitutional document: to establish the scope of governmental authority and to set out the terms of the relationship between the citizen and the state and those between the organs of government. The purpose of a Charter of Rights is to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed by the document, while relationships between individuals are left to the regulation of human rights codes, other statutes, and common law remedies, such as libel and slander laws. Furthermore, s. 32(1) specifically states that the Charter applies to "the Parliament and government of Canada in respect of all matters within [page597] the authority of Parliament" (emphasis added). It is governmental action which is caught, not private action.

He concluded on this point: "I agree with McNair J., and with respect, I do not agree with the contrary opinion to be found in R. v. Lerke (1984), 11 D.L.R. (4th) 185, 13 C.C.C. (3d) 515, 55 A.R. 216 (Alta.Q.B.)"

31 Further support for the view that the Charter does not apply in litigation between private parties is to be found in a helpful article in (1986), 24 Alta. L. Rev. 361, by Anne McLellan and Bruce P. Elman, entitled, "To Whom Does the Charter Apply: 'Some recent cases on s. 32?", which reviews the case law as it has developed, and says at p. 367:

> In conclusion it is suggested that the better view is that the Charter applies only to government action. To hold otherwise would be to increase the scope of the Charter immeasurably. In cases involving arrests, detentions, searches and the like, to apply the Charter to purely private action would be tantamount to setting up an alternative tort system. In the area of private discrimination, an entirely new system of civil liability in competition with the dispute resolution mechanisms fostered by human rights legislation would result.

32 Views to the contrary have been expressed in articles by Dale Gibson: "The Charter of Rights and the Private Sector" (1982), 12 Man. L.J. 213; "Distinguishing the Governors from the Governed: The Meaning of "Government' under Section 32(1) of the Charter" (1983), 13 Man. L.J. 505, as well as Morris Manning, Rights, Freedoms and the Courts (Toronto 1983).

33 I am in agreement with the view that the Charter does not apply to private litigation. It is evident from the authorities and articles cited above that that approach has been adopted by most judges and commentators who have dealt with this question. In my view, s. 32 of the Charter, specifically dealing with the question of Charter application, is conclusive on this issue. Section 32 is reproduced hereunder:

[page598]

> 32.(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
>
> * * *
>
> 32.(1) La présente charte s'applique:
>
> a) au Parlement et au gouvernement du Canada, pour

> tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
>
> b) à la legislature et au gouvernement de chaque province pour tous les domaines relevant de cette législature.

Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word 'government' is used in s. 32 it refers not to government in its generic sense -- meaning the whole of the governmental apparatus of the state -- but to a branch of government. The word 'government', following as it does the words 'Parliament' and 'Legislature', must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word 'government' is used in s. 32 of the Charter in the sense of the executive government of Canada and the Provinces. This is the sense in which the words 'Government of Canada' are ordinarily employed in other sections of the Constitution Act, 1867. Sections 12, 16 and 132 all refer to the Parliament and the Government of Canada as separate entities. The words 'Government of Canada', particularly where they follow a reference to the word 'Parliament', almost always refer to the executive government.

34 It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government. It will apply to those [page599] branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the Charter will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a Charter right or freedom. In this way the Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.

35 The element of governmental intervention necessary to make the Charter applicable in an otherwise private action is difficult to define. We have concluded that the Charter applies to the common law but not between private parties. The problem here is that this is an action between private parties in which the appellant resists the common law claim of the respondent on the basis of a Charter infringement. The argument is made that the common law, which is itself subject to the Charter, creates the tort of civil conspiracy and that of inducing a breach of contract. The respondent has sued and has procured the injunction which has enjoined the picketing on the basis of the commission of these torts. The appellants say the injunction infringes their Charter right of freedom of expression under s. 2(b). Professor Hogg meets this problem when he suggests, at p. 677 of his text, after concluding that the Charter does not apply to private litigation, that:

> Private action is, however, a residual category from which it is necessary to subtract those kinds of action to which s. 32 does make the Charter applicable.

[page600]

He added:

> The Charter will apply to any rule of the common law that specifically authorizes or directs an abridgement of a guaranteed right.

and he concluded by saying, at p. 678:

> The fact that a court order is governmental action means that the Charter will apply to a purely private arrangement, such as a contract or proprietary interest, but only to the extent that the Charter will preclude judicial enforcement of any arrangement in derogation of a guaranteed right.

Professor Hogg, at p. 678, rationalized his position in these words:

> In a sense, the common law authorizes any private action that is not prohibited by a positive rule of law. If the Charter applied to the common law in that attenuated sense, it would apply to all private activity. But it seems more reasonable to say that the common law of fends the Charter only when it crystallizes into a rule that can be enforced by the courts. Then, if an enforcement order would infringe a Charter right, the Charter will apply to preclude the order, and, by necessary implication, to modify the common law rule.

36 I find the position thus adopted troublesome and, in my view, it should not be accepted as an approach to this problem. While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation [page601] would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies.

37 An example of such a direct and close connection is to be found in Re Blainey and Ontario Hockey Association, supra. In that case, proceedings were brought against the hockey association in the Supreme Court of Ontario on behalf of a twelve year old girl who had been refused permission to play hockey as a member of a boys' team competing under the auspices of the Association. A complaint against the exclusion of the girl on the basis of her sex alone had been made under the provisions of the Human Rights Code, 1981, S.O. 1981, c. 53, to the Ontario Human Rights Commission. It was argued that the hockey association provided a service ordinarily available to members of the public without discrimination because of sex, and therefore that the discrimination against the girl contravened this legislation. The Commission considered that it could not act in the matter because of the provisions of s. 19(2) of the Human Rights Code, which are set out hereunder:

> 19.--(1) ...
>
> (2) The right under section 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.

In the Supreme Court of Ontario it was claimed that s. 19(2) of the Human Rights Code was contrary to s. 15(1) of the Charter and that it was accordingly void. The application was dismissed. In the Court of Appeal, the appeal was allowed (Dubin, Morden JJ.A., Finlayson J.A. dissenting). Dubin J.A., writing for the majority, stated the issue in these terms at [D.L.R., p. 735]:

> Indeed, it was on the premise that the ruling of the Ontario Human Rights Commission was correct that [page602] these proceedings were launched and which afforded the status to the applicant to complain now that, by reason of s. 19(2) of the Human Rights Code she is being denied the equal protection and equal

> benefit of the Human Rights Code by reason of her sex, contrary to the provisions of s. 15(1) of the Canadian Charter of Rights and Freedoms (the "Charter").

He concluded that the provisions of s. 19(2) were in contradiction of the Charter and hence of no force or effect. In the Blainey case, a law suit between private parties, the Charter was applied because one of the parties acted on the authority of a statute, i.e., s. 19(2) of the Ontario Human Rights Code, which infringed the Charter rights of another. Blainey then affords an illustration of the manner in which Charter rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation -- government action -- against the Charter.

38 As has been noted above, it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the Charter by private litigants in private litigation. Professor Hogg has dealt with this question, at p. 677, supra, where he said:

> ...the Charter would apply to a private person exercising the power of arrest that is granted to "any one" by the Criminal Code, and to a private railway company exercising the power to make by-laws (and impose penalties for their breach) that is granted to a "railway company" by the Railway Act; all action taken in exercise of a statutory power is covered by the Charter by virtue of the references to "Parliament" and "legislature" in s. 32. The Charter would also apply to the action of a commercial corporation that was an agent of the Crown, by virtue of the reference to "government" in s. 32.

39 It would also seem that the Charter would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures. It is not suggested that this list is exhaustive. Where such [page603] exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.

40 Can it be said in the case at bar that the required element of government intervention or intrusion may be found? In Blainey, s. 19(2) of the Ontario Human Rights Code, an Act of a legislature, was the factor which removed the case from the private sphere. If in our case one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the appellants, the case -- assuming for the moment an infringement of the Charter -- would be on all fours with Blainey and, subject to s. 1 of the Charter, the statutory provision could be struck down. In neither case, would it be, as Professor Hogg would have it, the order of a court which would remove the case from the private sphere. It would be the result of one party's reliance on a statutory provision violative of the Charter.

41 In the case at bar however we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While, as we have [page604] found, the Charter applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the Charter. It follows then that the appeal must fail. The appeal is dismissed. The respondent is entitled to its costs. ln the circumstances of this case, it becomes unnecessary to answer the constitutional question framed by the Chief Justice on September 5, 1984.

The following are the reasons delivered by

BEETZ J.

42 I agree with the reasons of the majority in the British Columbia Court of Appeal for holding that in the

circumstances and on the evidence of this case, the picketing which has been enjoined would not have been a form of expression and that no question of infringement of s. 2(b) of the Canadian Charter of Rights and Freedoms could accordingly arise.

43 This reason suffices for the dismissal of the appeal with costs.

44 It is unnecessary for me to express any view on other issues in order to reach this conclusion. However, given the importance of these issues, I wish to state that I otherwise agree with the reasons for judgment written by my brother McIntyre.

The following are the reasons delivered by

WILSON J.

45 I agree with the reasons of my colleague, McIntyre J., with the exception of his reasons dealing with the application of s. 1 of the Charter.

46 The search under s. 1 is, I believe, for the appropriate test to apply when weighing a principle of the common law against a fundamental freedom protected by the Charter. On a s. 1 analysis the purposes and objectives of a piece of impugned legislation are ascertained through an objective approach: see, for example, the approach taken by this Court in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, and R. v. Oakes, [1986] 1 S.C.R. 103. It seems to me that the same objective approach must be taken when weighing a principle of the common law against a fundamental freedom.

[page605]

47 There are, as I see it, two distinct questions which must be answered, namely:

(1) Does the tort of inducing breach of contract represent a reasonable limit under s. 1 on freedom of expression in the labour relations context? and

(2) If the tort does represent a reasonable limit under s. 1, should injunctive relief be granted in this particular case?

The first question requires the application of the objective approach mentioned above. If the tort does not survive the first question then, of course, the conduct is not wrongful and no injunction can issue. If, however, it does survive the first question, then the facts of this particular case (including the subjective impact on the employer) must be considered in order to see whether the other requirements for the award of an interlocutory injunction are present, i.e., does the balance of convenience favour the plaintiff? However, even on this question it seems to me that some weight must be given to the freedom of speech of the picketers.

48 My difficulty with my colleague's approach to s. 1 is two-fold. First, he has used the subjective impact on the employer on the first question. It is, on his analysis, the "pressing and substantial concern". And second, he has given no consideration to the origin and historical development of the tort and its role in relation to labour disputes. I would have thought that this was crucial on the s. 1 inquiry. As a consequence the two questions referred to above have been merged into one and no objective criteria for the s. 1 inquiry have been identified.

49 I nevertheless agree with McIntyre J.'s proposed disposition of the appeal.

Appeal dismissed.

* * * * *

Errata, published at [1987] 1 S.C.R., page iv

[1986] 2 S.C.R. p. 591, line h-1 of the English version. Read "a legitimate weapon" instead of "legislative weapon".

[1986] 2 S.C.R. p. 582, line i-4 of the English version. Read "freedom of expression" instead of "freedom of information".

End of Document

Horse Lake First Nation v. Horseman

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

Lee J.

Heard: January 29 and 31, 2003.

Judgment: February 13, 2003.

Filed: February 14, 2003.

Action No. 0303 01739

[2003] A.J. No. 227 | 2003 ABQB 152 | 223 D.L.R. (4th) 184 | [2003] 8 W.W.R. 473 | 17 Alta. L.R. (4th) 93 | 337 A.R. 22 | [2003] 2 C.N.L.R. 193 | 121 A.C.W.S. (3d) 429

Between Horse Lake First Nation, as represented by its Chief and Council, Chief Dion Horseman and Councillors Dean Horseman, Rick Horseman, Priscilla Horseman and Peter Joachim, applicants/plaintiffs, and Faye Horseman, Charlotte Lynn Horseman, Norma Horseman, Francis Cross also known as Francis Parsons, Judy Belcourt, Gail Belcourt and Mavis Bellerose, defendants/respondents

(33 paras.)

Case Summary

Indians, Inuit and Metis — Civil rights — Canadian Charter of Rights and Freedoms — Application of — Practice — Costs — Funding before judgment.

Supplementary reasons. This was a trespass and defamation action based on the occupation of the offices of the Horse Lake First Nation by several individual respondents. The respondents alleged that the First Nation Chief and Band Council were guilty of poor management. They occupied the Band offices in an attempt to have their demands for audits and drug testing met. The respondents requested pre-emptive costs to assist them with their legal fees of the action. The respondents argued that the Charter applied to the actions of Band Council and that the issues were more complex than the defamation and trespass issues.
HELD: The Charter applied to the actions of Band Council.

Therefore, the respondents were able to raise freedom of expression arguments against the Council. The determination as to whether they were entitled to pre-emptive funding was referred back to the court for consideration.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 15, 24, 32. Federal Court Act, R.S.C. 1985, c. F-7, s. 2(1). Human Rights Act, s. 67. Indian Act, R.S.C. 1985, c. I-5, s. 81(1), 81(2). Matrimonial Property Act. Narcotic Control Act, R.S.C. 1985, c. N-1, s. 4(2).

Counsel

H.L. Treacy, for the plaintiffs.

SUPPLEMENTARY REASONS FOR JUDGMENT

LEE J.

1 In my written Reasons for Judgment dated February 5, 2003 now reported at Horse Lake First Nation v. Horseman, [2003] A.J. No. 179, 2003 ABQB 114, I discussed two issues, namely whether the Charter applied to Aboriginal Band Councils such as the Horse Lake First Nation ("HLFN"); and the general law with respect to pre-emptive cost orders.

2 Counsel for the HLFN has now filed further written submissions with the Court on February 7, 2003 addressing the issue of interim costs in advance of trial. These submissions concede that costs are usually in the discretion of the trial Judge, and that the Court has an inherent jurisdiction to order one party to pay costs in advance of trial in exceptional cases. Counsel submits that this extraordinary remedy should not be applied in this case.

3 One point that counsel has raised that has not previously been dealt with is that when Courts do on an exceptional basis award pre-emptive costs, it is usually in the case where the legal and factual issues are so complex that the Defendants' ability to defend themselves is undermined without an interim order for costs. In the case at bar, counsel for the HLFN submits that the legal and factual issues are not complex, as this is a trespass and defamation action.

4 This may be the case, however it is open for one to draw the inference that there may be greater and more complex issues underlying the basic so-called trespass and defamation aspects of this suit. This inference can be drawn based on the fact that the "occupation" of the HLFN Band Offices appears to have been motivated by demands by the Respondents for "forensic audits", and for mandatory drug testing for the Chief and Band Council, which both would connote allegations of poor management.

5 If the latter is in fact what the Respondents are challenging, the matter can be complicated, and is equivalent to the "constitutional challenge or a case that is a matter of great public importance" that counsel for the HLFN seems to concede could attract a pre-emptive costs order in paragraph 8 of her written submissions.

6 This is particularly the case if there is an argument, as there appears to be in this case, as to whether or not the Charter applies to Aboriginal Band Councils. I will be discussing this whole issue as to the Charter's applicability to Aboriginal Band Councils later in these Supplementary Reasons.

7 As for the various other cases that have been cited by counsel for the HLFN, one does bear some special mention in these Supplementary Reasons.

8 British Columbia v. Okanagan Indian Band [2001] B.C.J. No. 2279 was applied by Watson, J. in Spracklin v. Kichton [2003] A.J. No. 29; 2003 ABCA 9. Counsel for HLFN correctly describes in paragraph 18 of her latest submissions that the plaintiff in the case before Watson, J. had been involve in a common-law relationship with the defendant, and claimed that she should be considered a "spouse" for the purposes of the Matrimonial Property Act. She commenced a Charter application alleging that her equality rights were infringed by the Act.

9 Watson, J. added the Provincial Crown as a party, and he granted the Order for Interim Costs against the Provincial Crown for purposes of the Charter challenge.

10 Watson, J.'s decision was reversed on appeal, primarily because the Court of Appeal noted that the issues raised by the plaintiff had recently been addressed by the Supreme Court of Canada thereby significantly resolving the exceptional nature of the litigation.

Powers of Aboriginal/Indian Bands and Band Councils

11 In contrast to the Spracklin analysis, a number of the items that I have discussed in my previous Reasons for

Judgment, and will further amplify in these Supplementary Reasons, have not really be settled upon. For example the application of Section 32 of the Charter cited by counsel for HLFN at the beginning of these proceedings to Aboriginal Native Band Councils, is a somewhat unsettled area, and is also a critical area for purposes of the Respondents in terms of the HLFN's defamation and trespass action.

12 Section 32 applies to both Parliament and the provincial Legislatures, and accordingly these bodies "have lost the power to enact laws that are inconsistent with the Charter. ... It follows that any body exercising *statutory authority* , for example, . . . municipalities [and] administrative tribunals, . . . is also bound by the Charter": P.W. Hogg, Constitutional Law of Canada, Loose-leaf ed. (Toronto: Carswell, 1997), p. 34-12.1 (emphasis added).

13 According to Hogg, "[t]he distinctive characteristic of action taken under statutory authority is that it involves a power of compulsion that is not possessed by a private individual or organization. . . . Where the Parliament or Legislature has delegated a power of compulsion to a body or person, then the Charter will apply to the delegate": p. 34-12.1. It is equally clear that the Charter does not regulate the relations between private persons and private persons: p. 34-25; Nor does it "apply to the rules of the common law that regulate relationships between private parties": p. 34-19.

14 Indian Bands and Band Councils, which have authority to govern and regulate persons and activity on reserves, derive their authority to act, where their scope of action is greater than that of a private citizen or corporation, from the Indian Act, R.S.C. 1985, c. I-5.

15 The Indian Act defines the terms "Band" and "Council of the Band" and gives Bands, through their Band Councils, authority to govern and regulate many aspects of Band life. For example, s. 81. (1) provides that "[t]he council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for . . ." activities ranging from health, to traffic, to maintenance of roads, to allotment of reserve land among members and so on.

16 Further, the Band Council has authority to enforce its by-laws. Section 81(2) provides that:-

> (2) Where any by-law of a band is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.
>
> (3) Where any by-law of a band passed is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by court action at the instance of the band council.

17 Indian Band Councils fall within the definition of a federal board, commission or tribunal in the Federal Court Act, R.S.C. 1985, c. F-7. Section 2(1) of the Federal Court Act provides that a "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867."

18 The Alberta Court of Appeal in R. v. Paul Band, [1984] 1 C.N.L.R. 87 held that "[b]and councils are created under the Indian Act and derive their authority to operate qua band councils exclusively from that Act. In the exercise of their powers they are concerned with the administration of band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the Minister. They have no other source of power. Band councils are thus within the exclusive legislative jurisdiction and control of the Parliament of Canada over 'Indians, and Lands reserved for Indians' . . . and such councils are thus immune to provincial legislation": p. 7 of 8.

19 Consequently, the Charter should apply to the by-laws and actions of Band Councils; and members of Bands should be able to assert rights, such as the right to freedom of expression, against Band Councils.

Case law that suggests that the Charter applies to native band councils

20 In Scrimbitt v. Sakimay Indian Band Council, [1999] F.C.J. No. 1606 (T.D.) the applicant sought judicial review of the Band Council's decision to refuse to let her vote in the Band Council election. She claimed that the decision violated her Charter rights under ss. 7 and 15.

21 The Court stated that "[i]t is well settled that an Indian band council is a 'federal board, commission or other tribunal' as defined by subsection 2(1) of [the Federal Court Act] when it acts pursuant to the Indian Act": para. 22. The Court held that "refusing the applicant the right to vote breached her rights under subsection 15(1) of the Charter by discriminating against her because of her gender and her marital status at an earlier date": para. 53, but that her s. 7 rights were not violated: para. 62.

22 In Nakochee v. Linklater, [1993] O.J. No. 979 (Ont. Gen. Div.) the Band Council passed a by-law prohibiting people from selling or possessing alcohol on the reserve. The plaintiff, upon entering the reserve, was searched.

23 The Court held that the search was reasonable but did not decide if the Charter applied. However, the Court stated that A[a]lthough none of the parties raised the issue, it is likely that the Charter applies, as the search was conducted by members of the police in response to the direction of a statutorily mandated body with legislative authority.

24 In Canada (Human Rights Commission) v. Gordon Band Council, [2000] F.C.J. No. 1175 (C.A.) it was held that Section 67 of the Human Rights Act prevented judicial review of the Band Council's housing allocations.

25 However, the Court stated in obiter that Ait is possible . . . to challenge Gordon Band Council decisions on the basis of an infringement of the Canadian Charter of Rights and Freedoms . . . as was successfully done in Corbiere v. Canada (Minister of Indian & Northern Affairs), [1999] 2 S.C.R. 203": para. 32. In Corbiere, the Court had struck down a provision in the Indian Act.

26 In R. v. Hatchard, [1993] 1 C.N.L.R. 96 (Ont. Gen. Div.) the accused was charged with possession of narcotics contrary to s. 4(2) of the Narcotic Control Act, R.S.C. 1985, c. N-1 after he was searched upon entering a reserve. The accused argued that the evidence discovered during the search was inadmissible because the search contravened s. 8 of the Charter.

27 The Court, without deciding if the Charter applied, held that the evidence need not be excluded pursuant to s. 24 of the Charter: p. 20 of 20. However, the Court also stated that "the scheme of the Indian Act, in relation to elected band councils, introduces a semblance of government-like organization in a 'body of Indians' specifically recognized by statute. That degree of organization and that kind of structure does not comport well with most notions of 'private citizen' activity": p. 14 of 20.

28 The Saskatchewan Court of Appeal in Whitebear Band Council v. Carpenters Provincial Council Saskatchewan, [1982] S.J. No. 312 held at para. 13, 14 and 19 that:-

> [13] As municipal councils are the "creatures" of the Legislatures of the Provinces so Indian Band Councils are the "creatures" of the Parliament of Canada. Parliament in exercising the exclusive jurisdiction conferred upon it by Section 91.24 of the British North America Act to legislate in relation to "Indians and Lands Reserved for the Indians" enacted the Indian Act which provides - among its extensive provisions for Indian status, civil rights, assistance, and so on and the use and management of Indian Reserves - for the election of a Chief and twelve councillors by and from among the members of an Indian Band resident on an Indian Reserve. These elected officials constitute Indian Band Councils who in general terms are

> intended by Parliament to provide some measure - even if rather rudimentary of Local Government in relation to life on Indian Reserves and to act as something of an intermediary between the Band and the Minister of Indian Affairs.
>
> [14] More specifically Section 81 of the Act clothes Indian Band Councils with such powers and duties in relation to an Indian Reserve and its inhabitants as are usually associated with a rural municipality and its Council: a Band Council may enact bylaws for the regulation of traffic; the construction and maintenance of public works; zoning; the control of public games and amusements and of hawkers and peddlers; the regulation of the construction, repair and use of buildings, and so on. Hence a Band Council exercises - by way of delegation from Parliament - these and other municipal and governmental Powers in relation to the Reserve whose inhabitants have elected it.
>
> ...
>
> [19] Summary, an Indian Band Council is an elected public authority, dependent on Parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power - delegated to it by Parliament - in relation to the Indian Reserve whose inhabitants have elected it; as such it is to act from time to time as the agent of the Minister and the representative of the Band with respect to the administration and delivery of certain Federal programs for the benefit of Indians on Indian Reserves, and to perform an advisory, and in some cases a decisive role in relation to the exercise by the Minister of certain of his statutory authority relative to the Reserve.

CONCLUSION

29 The Charter should apply to any decision or by-law or action the Band Council or the Band makes under the authority of the Indian Act because the Band is using its statutory authority to regulate the life of its members. Therefore, the women whom the Band seeks to restrain from protesting should be able to raise freedom of expression against the Band Council.

30 There are circumstances where the decisions of the Band should not be subject to the Charter. For example, if the Band or Band Council is contracting with a private party for goods or services, the relationship is one that would likely be governed by private contract law.

31 Equally so the applicability of the trust and pension cases that I discussed in great detail in my previous Reasons for Judgment, and their possible applicability to the case at bar, is also an unsettled area of some complexity that may well require the Respondents to have some preliminary funding of legal expenses in order for them to properly advance these issues before me, if they so wish.

32 As I stated previously, any such decision as to pre-emptive funding would only take place after a thorough analysis of the law in this area, as well as a determination as to whether or not the Respondents are raising any complex issues, whether or not they wish funding, what their personal financial circumstances are, whether Legal Aide is available to them, and other related areas of examination.

33 This matter will now return to court for an inter partes hearing in respect of the interim injunction to be held on Friday, February 28, 2003 at 4 p.m.

LEE J.

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Canada Trust Co. v. Ontario Human Rights Commission

Ontario Judgments

Ontario

Court of Appeal

Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)

April 24, 1990.

Action Nos. 586/87 and 622/87

[1990] O.J. No. 615 | 74 O.R. (2d) 481 | 69 D.L.R. (4th) 321 | 37 O.A.C. 191 | 38 E.T.R. 1 | 20 A.C.W.S. (3d) 736 | 12 C.H.R.R. D/184 | 1990 CarswellOnt 486 | 1990 CanLII 6849

Canada Trust Co., trustee for the Leonard Foundation v. Ontario Human Rights Commission; Royal Ontario Museum, Class of Persons Eligible to Receive Scholarships from the Leonard Foundation and Public Trustee

Counsel

Janet E. Minor, for Ontario Human Rights Commission, appellant.

Alan P. Shanoff and Francy B. Kussner, for Royal Ontario Museum, intervener.

H. Donald Guthrie, Q.C., and John W.R. Day, for Canada Trust Company, respondent.

William L.N. Somerville, Q.C., and Lindsay A. Histrop, for Class of Persons Eligible to Receive Scholarships from the Leonard Foundation, intervener.

Stan J. Sokol, for Public Trustee, intervener.

ROBINS J.A. (OSLER J. (ad hoc) concurring)

1 The principal question in this appeal is whether the terms of a scholarship trust established in 1923 by the late Reuben Wells Leonard are now contrary to public policy. If they are, the question then is whether the cy-pres doctrine can be applied to preserve the trust.

2 The appeal is from the order of McKeown J. [reported (1987), 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193 (H.C.J.)] on an application under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee of a scholarship trust known as the Leonard Foundation, for the advice, opinion and direction of the court upon certain questions arising in the administration of the trust. The questions put before the court are as follows:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of
>
> (i) public policy as declared in the Human Rights Code, 1981 (the "Code");

(ii) other public policy, if any;

(iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or

(iv) uncertainty?

2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?

3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?

4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/ or the General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite the infringement of rights under Part 1 of the Code?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

3 McKeown J. found that the trust provisions were not invalid for any of the reasons set out in Question 1, which made it unnecessary for him to answer Questions 2, 3 and 4. He answered Question 5 in the negative, which made it unnecessary to answer Question 6.

4 The order has been appealed by two of the parties to the proceedings. The first appellant, the Ontario Human Rights Commission, takes the position that the learned weekly court judge should have declined to answer Questions 1(i), 1(iii) and 5 on the ground that these questions concern the applicability of the Human Rights Code, 1981, S.O. 1981, c. 53, and relate to matters within the exclusive primary jurisdiction of the Commission and, therefore, are not properly before the court.

5 The appellant, the Royal Ontario Museum (the ROM), has status in these proceedings as one of the charitable institutions named in the last will of Reuben Wells Leonard. Under this will, any amount that falls to be administered in the residuary estate is to be divided among certain individuals and charitable institutions as set out by the testator. The ROM's position on this appeal is that the scholarship trust violates public policy and fails completely. In its submission, the judge erred in not holding that the trust fund falls into the Leonard estate and must be distributed to the residual beneficiaries, including the ROM, in accordance with the provisions of the will.

6 The Public Trustee and the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation are interveners in the case. They both support the judgment below and ask that the appeal be dismissed. However, should the court find that the terms of the scholarship trust violate public policy, the Public Trustee submits that the trust nonetheless has a valid charitable purpose and should not fail but should be applied cy-pres without the offending conditions. On the other hand, counsel for the Class of Persons Eligible to Receive Scholarships takes the position that if the trust violates public policy, it fails completely and is incapable of being applied cy-pres.

7 The respondent, Canada Trust Company (the trustee), takes no position other than to suggest that: (1) the court

below had jurisdiction to hear the application, and (2) that the indenture in 1923 created a valid charitable trust and, should this court determine by reason of the Human Rights Code, 1981 or other grounds of public policy that the conditions are now void, then either (a) such conditions are merely malum prohibitum and the court should strike them out and leave the charitable trust to operate freed therefrom, or (b) a reference should be directed to apply the fund cy-pres.

THE ISSUES

8 The preliminary issue as to jurisdiction raised by the Ontario Human Rights Commission, can be disposed of very briefly. In my opinion, this application is properly before the court. I agree with McKeown J. and Tarnopolsky J.A. in this regard and have nothing to add to their reasons. On the remaining issues, while I agree with Tarnopolsky J.A. that the appeal must be allowed, my reasons for reaching that conclusion differ from those of my learned colleague.

9 The remaining issues, in my view, reduce themselves to these questions:

1. Do the provisions of the trust contravene public policy or are they void for uncertainty?
2. If the answer to that question is in the affirmative, can the doctrine of cy-pres be applied to save the trust?

10 Before considering these issues, I think it important to examine the trust and review the circumstances that compelled the trustee to launch this application for advice and direction.

THE FACTS

A. The trust document

11 By indenture dated December 28, 1923 (the indenture or trust document), Reuben Wells Leonard (the settlor) created a trust to be known as the Leonard Foundation (the trust or the scholarship trust or the Foundation). He directed that the income from the property transferred and assigned by him to the trust (the trust property or trust fund) be used for the purpose of educational scholarships to be called the Leonard Scholarships. The Canada Trust Company has been appointed successor trustee of the Foundation.

12 The indenture opens with four recitals which relate to the race, religion, citizenship, ancestry, ethnic origin and colour of the class of persons eligible to receive scholarships. These recitals read as follows:

> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:
>
> AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.

13 The schools, colleges and universities in which the scholarships may be granted are described in the body of the Indenture in these terms:

> 2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the Settlor intends shall be excluded from the management of or benefits in the said Foundation ...
>
> . . . . .
>
> Provided further and as an addition to the class or type of schools above designated or in the Schedule "A" hereto attached, the term "School" may for the purposes of Scholarships hereunder, include Public Schools and Public Collegiate Institutes and High Schools in Canada of the class or type commonly known as such in the Province of Ontario as distinguished from Public Schools and Collegiate Institutes and High Schools (if any) under the control and domination of the class or classes of persons hereinbefore referred to as intended to be excluded from the management of or benefits in said Foundation, and shall also include a Protestant Separate School, Protestant Collegiate Institute or Protestant High School in the Province of Quebec.
>
> Provided further that in the selection of Schools, Colleges and Universities, as herein mentioned, preference must always be given by the Committee to the School, College or University, which, being otherwise in the opinion of the Committee eligible, prescribes physical training for female students and physical and military or naval training for male students.

(Emphasis added)

14 The management and administration of the Foundation is vested in a permanent committee known as the General Committee. The Committee consists of 25 members, all of whom must be possessed of the qualifications set out in the indenture's recitals:

> The administration and management of the said Foundation is hereby vested in a permanent Committee to be known as the General Committee, consisting of twenty-five members, men and women possessed of the qualifications hereinbefore in recital set out.

(Emphasis added)

15 The General Committee is given, inter alia, the following power:

> (c) Power to select students or pupils of the classes or types hereinbefore and hereinafter described as recipients of the said Scholarships or for the enjoyment of same, as the Committee in its discretion may decide.

(Emphasis added)

16 The class of students eligible to receive scholarships is described as follows:

> Subject to the provisions and qualifications hereinbefore and hereinafter contained, a student or pupil to be eligible for a Scholarship shall be a British Subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the following classes or descriptions of persons who are not of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said

> Foundation as in the preamble or recital more particularly referred to, but regardless of the order of priority in which they are designated herein, namely:
>
> (a) Clergymen,
>
> (b) School Teachers,
>
> (c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,
>
> (d) Graduates of the Royal Military College of Canada,
>
> (e) Members of the Engineering Institute of Canada,
>
> (f) Members of the Mining & Metalurgical (sic) Institute of Canada.
>
> Provided further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for Scholarships under the terms hereof, shall not exceed one-fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

(Emphasis added)

17 The settlor expressed the wish that:

> ... the students or pupils who have enjoyed the benefits of a scholarship ... will form a Club or association for the purpose of
>
> . . . . .
>
> (b) Encouraging each other when the occasion arises and circumstances will permit, to personally afford financial assistance to pupils and students of similar classes as in recital hereinbefore described to obtain the blessings and benefits of education ...

(Emphasis added)

18 The trustee is empowered at the expense of the trust to apply to a judge of the Supreme Court of Ontario possessing the qualifications set out in the recitals for the opinion, advice and direction of the court:

> 9. The Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared.

(Emphasis added)

I should perhaps note that no challenge was put forth on this basis in either this court or the court below.

19 The Leonard Scholarships have been available for more than 65 years to eligible students across Canada and elsewhere, and are tenable at eligible schools, colleges and universities in Canada and Great Britain. Application forms are available upon request from members of the General Committee. An applicant submits the application through a member of the General Committee who conducts a personal interview of the applicant, completes the nomination and recommendation and forwards the application to the General Committee.

20 The Committee on Scholarships meets in April or May of each year to consider all of the applications and to make recommendations to the General Committee. Finally, the General Committee meets and, after consideration of the recommendation of the Committee on Scholarships, approves the awards for the following academic year.

B. The circumstances leading up to the application

21 The circumstances leading up to this application are described in the affidavit of Jack Cummings McLeod, a trust officer with Canada Trust Company who has been the secretary of the General Committee since 1975. In light of the public policy aspects of the application, the circumstances described by Mr. McLeod become significant.

22 Mr. McLeod deposes that since 1975 he, as secretary, and various members of the General Committee have received correspondence from students, parents and academics expressing concerns and complaints with regard to the terms of eligibility for scholarships under the trust. Since 1956, numerous press articles, news reports and letters to the editor have appeared in the daily and university press of Canada commenting on, or reporting on comments about, the eligibility conditions. Mr. McLeod is aware of approximately 30 such articles, all generally critical of the eligibility requirements. The tenor of these articles is evident from their headings, which include "A Sorry Anachronism", "Act Now on Racist Funding" and "Whites Only Scholarship is Labelled 'Repugnant' ".

23 Since 1971, the Human Rights Commissions of Alberta and Ontario and the Human Rights Branch of the Department of Labour of British Columbia have complained to the trustee and officials of the General Committee about the conditions of eligibility. Other bodies such as the Saskatoon Legal Assistance Clinic and units of the Anglican Church of Canada have made similar complaints.

24 Over the years 1975 to 1982, various schools and universities, including the University of Toronto, the University of Western Ontario and the University of British Columbia, have also complained, without success, to the Foundation about the eligibility requirements. In 1982, the University of Toronto discontinued publication of the Leonard Scholarship and refused to continue processing award payments because of the University's policy with respect to awards containing discriminatory or irrelevant criteria. The University of Alberta has taken similar action.

25 In January 1986, the chairman of the Ontario Human Rights Commission advised the Foundation that the terms of the scholarships appear to "run contrary to the public policy of the Province of Ontario" and requested "appropriate action to have the terms of the trust changed". In response, the Foundation took the position that it was administering a private trust whose provisions did not offend the Human Rights Code, 1981.

26 At various times over the past 25 years, members of the General Committee and officials of the trustee have themselves expressed concern about the eligibility criteria. The matter has been considered internally and, it appears, has been the subject of "divisive" debate at meetings of the General Committee.

27 In April 1986, the Most Reverend Edward W. Scott, then Primate of the Anglican Church of Canada, the church of which the late Colonel Leonard was a prominent member, wrote to the Foundation expressing his "deep concerns" about the trust. He recorded, in strong terms, his view that the eligibility criteria are discriminatory and against public policy and not "in keeping with the spirit and intent of the Canadian Charter of Rights". He urged the Committee to apply to the courts to have the offensive terms "read out of the trust deed ... with the ultimate result that effect will continue to be given to the trust deed and gift as a whole". He concluded his letter stating:

> I have every confidence that if the kind benefactor of this Trust were living in 1986, rather than those many years ago, there would be agreement that the scope of possible recipients be widened bringing the document in line with standards of public acceptance of today. There is every reason why the good works of the generous benefactor of the Foundation should live on in perpetuity but, in my view, they must be in keeping with the society of today just as what was written those many years ago was, no doubt, although regretfully, in keeping with the society of that day.

28 In August 1986, the Ontario Human Rights Commission, not satisfied with the response to its earlier letter, filed a formal complaint against the Leonard Foundation alleging that the trust contravened the Human Rights Code, 1981. This prompted the trustee to seek the advice and direction of the court. In his affidavit, Mr. McLeod explains the Trustee's position in bringing the application as follows:

21. ... the Trustee has been advised that it is, and has hitherto seen it to be its duty to support, maintain and administer the trusts which were accepted by the original Trustee until such time as a Court of competent jurisdiction determines that the trust is illegal or void. This the Trustee and its predecessor corporations have done for upwards of 63 years since the inception of the trust, without serious difficulty or opposition until the more recent of the events described in paragraphs 14 to 20 hereof.

22. The inquiries from the press, complaints of universities, schools, Human Rights Commissions and similar agencies, academics, members of the public and certain members of the General Committee, as well as the Complaint referred to in paragraph 17 hereof, the press articles and reports referred to in paragraphs 14 and 18 hereof, the divisive effect of the motion and vote referred to in paragraph 20 hereof, and other similar recent events have, in my view, had an unsettling effect and have interfered with the due administration of the trusts declared by the Indenture and the ability of the Trustee to carry on such administration effectively. They have also impacted and can be expected to continue to impact unfavourably on the efficient administration of the scholarship programme by the General Committee, its Committee on Scholarships and its officials.

23. Although there has not to date been any serious difficulty experienced by the General Committee in identifying and making awards to students who fulfil the eligibility requirements of the Indenture, there have obviously been great changes in Canadian society and in the British Empire that have occurred in the 63 years since the inception of the Foundation. It may become more difficult than in the past to interpret and apply such eligibility terms as "British Nationality", "British Parentage", "allegiance to any Foreign Government, Prince, Pope or Potentate", "Christians of the White Race", "British Subject" and "of the Christian Religion in its Protestant Form". The Trustee has received an opinion of its counsel that a charitable trust is exempt from the requirement of certainty of objects and cannot fail for uncertainty so long as there are some eligible persons who are with certainty within the ambit of the qualifications. Nevertheless, in the context of modern Canadian life and society, the increasingly multi- cultural makeup of Canada and the attention which has now been focused on the eligibility requirements of the Indenture, these difficulties may be expected to increase.

24. The Trustee accordingly believes that it requires the opinion, advice and direction of this Honourable Court as to the essential validity of the Indenture under which it operates, pursuant to the provisions of section 60 of the Trustee Act and the Court's inherent jurisdiction to supervise charitable trusts.

THE PUBLIC POLICY ISSUE

A. Can the recitals be considered in deciding this issue?

29 In holding that the provisions of the trust did not violate either the Human Rights Code, 1981 or public policy, McKeown J. took into account only the operative clauses of the trust document and the second sentence of the fourth recital. In his view, the balance of the recitals were merely expressions of the settlor's motive and, hence, irrelevant to a determination of the issues before him. While he found the motives offensive to today's general community, he concluded that these recitals could play no part in interpreting the trust document or in resolving the question of whether the trust contravened public policy.

30 In my opinion, the recitals cannot be isolated from the balance of the trust document and disregarded by the court in giving the advice and direction sought by the trustee in this case. The document must be read as a whole. While the operative provisions of an instrument of this nature will ordinarily prevail over its recitals, where the recitals are not clearly severable from the rest of the instrument and themselves contain operative words or words intended to give meaning and definition to the operative provisions, the instrument should be viewed in its entirety. That, in my opinion, is the situation in the case of this trust document.

31 The recitals here in no way contradict or conflict with the operative provisions. The settlor made constant reference to them throughout the operative part of the document. He restricted the class of persons entitled to the benefits of the trust by reference to the recitals; he set the qualification for those who might administer the trust and

give judicial advice thereon by reference to the recitals; and he stipulated the universities and colleges which might be attended by scholarship winners by reference to the recitals.

32 Moreover, the recitals were intended to give guidance and direction to the General Committee in awarding scholarships. They go beyond the restriction in the second sentence of the fourth recital excluding "all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual" from benefits in the Foundation. They indicate that not all white Protestants of British parentage should be eligible for the benefits of the trust but, rather, only those "whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire" and "who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire". Those statements were intended as standards which, if not binding, were meant to be taken into account in the making of awards. I would not regard them as irrelevant. Nor would I regard any other of the recitals as irrelevant. The operative provisions were intended to be administered in accordance with the concepts articulated in the recitals. As this document is framed, its two parts are so linked as to be inextricably interwoven. In my opinion, one part cannot be divorced from the other.

33 Furthermore, and perhaps more fundamentally, even if the recitals are properly treated as going only to the matter of motive, I would not think they can be ignored on an application of this nature in which a trustee seeks advice with respect to public policy issues. While the Foundation may have been privately created, there is a clear public aspect to its purpose and administration. In awarding scholarships to study at publicly supported educational institutions to students whose application is solicited from a broad segment of the public, the Foundation is effectively acting in the public sphere. Operating in perpetuity as a charitable trust for educational purposes, as it has now for over half a century since the settlor's death, the Foundation has, in realistic terms, acquired a public or, at the least, a quasi-public character. When challenged on public policy grounds, the reasons, explicitly stated, which motivated the Foundation's establishment and give meaning to its restrictive criteria, are highly germane. To consider public policy issues of the kind in question by sterilizing the document and treating the recitals as though they did not exist, is to proceed on an artificial basis. In my opinion, the court cannot close its eyes to any of this trust document's provisions.

B. Does the trust violate public policy?

34 Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds": Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 [per Crocket J., quoting Lord Aitkin in Fender v. Mildmay, [1937] 3 All E.R. 402, at p. 13 S.C.R.]. I have regard also to the observation of Professor D.W.M. Waters in his text on the Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), at p. 240 to the effect that:

> The courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.

Nonetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. This, in my opinion, is manifestly such a case.

35 The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law: Blathwayt v. Lord Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684, 119 Sol. Jo. 795 (H.L.). That interest must, however, be limited in the case of this trust by public policy considerations. In my opinion, the trust is couched in

terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.

36 According to the document establishing the Leonard Foundation, the Foundation must be taken to stand for two propositions: first, that the white race is best qualified by nature to be entrusted with the preservation, development and progress of civilization along the best lines, and, second, that the attainment of the peace of the world and the advancement of civilization are best promoted by the education of students of the white race, of British nationality and of the Christian religion in its Protestant form.

37 To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.

38 To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

39 Given this conclusion, it becomes unnecessary to decide whether the trust is invalid by reason of uncertainty or to consider the questions raised in this regard in para. 23 of Mr. McLeod's affidavit which I reproduced earlier. Nor is it necessary to make any determination as to whether other educational scholarships may contravene public policy.

40 On the material before the court, it appears that many scholarships are currently available to students at colleges and universities in Ontario and elsewhere in Canada which restrict eligibility or grant preference on the basis of such factors as an applicant's religion, ethnic origin, sex, or language. None, however, so far as the material reveals, is rooted in concepts in any way akin to those articulated here which proclaim, in effect, some students, because of their colour or their religion, less worthy of education or less qualified for leadership than others. I think it inappropriate and indeed unwise to decide in the context of the present case and in the absence of any proper factual basis whether these other scholarships are contrary to public policy or what approach is to be adopted in determining their validity should the issue arise. The court's intervention on public policy grounds in this case is mandated by the, hopefully, unique provisions in the trust document establishing the Leonard Foundation.

THE CY-PRES ISSUE

41 On this issue, I agree with the learned weekly court judge that the trust established by the indenture is a charitable trust. I am persuaded that the settlor intended the trust property to be wholly devoted to the furtherance of a charitable object whose general purpose is the advancement of education or the advancement of leadership through education.

42 It must not be forgotten that when the trust property initially vested in 1923 the terms of the indenture would have been held to be certain, valid and not contrary to any public policy which rendered the trust void or illegal or which detracted from the settlor's general intention to devote the property to charitable purposes. However, with changing social attitudes, public policy has changed. The public policy of the 1920s is not the public policy of the 1990s. As a result, it is no longer in the interest of the community to continue the trust on the basis predicated by the settlor. Put another way, while the trust was practicable when it was created, changing times have rendered the

ideas promoted by it contrary to public policy and, hence, it has become impracticable to carry it on in the manner originally planned by the settlor.

43 In these circumstances, the trust should not fail. It is appropriate and only reasonable that the court apply the cy- pres doctrine and invoke its inherent jurisdiction to propound a scheme that will bring the trust into accord with public policy and permit the general charitable intent to advance education or leadership through education to be implemented by those charged with the trust's administration.

44 The observations of Lord Simonds in National Anti-Vivisection Society v. Inland Revenue Commissioners, [1948] A.C. 31, [1947] 2 All E.R. 217, 177 L.T. 226 (H.L.), are apposite to this case. At p. 74 A.C. he said:

> A purpose regarded in one age as charitable may in another be regarded differently. I need not repeat what was said by Jessel M.R. in In re Campden Charities, 18 Ch. D. 310. A bequest in the will of a testator dying in 1700 might be held valid on the evidence then before the court but on different evidence held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. But this is not to say that a charitable trust, when it has once been established can ever fail. If by a change in social habits and needs or, it may be, by a change in the law the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases to the charity commissioners or in educational charities to the Minister of Education and ask that a cy-pres scheme may be established. ... A charity once established does not die, though its nature may be changed.

45 Reference might also be made to A.W. Scott and W.F. Fratcher, eds., The Law of Trusts, 4th ed. (Boston: Little, Brown & Co., 1989), where, at vol. IVA, pp. 535-36, the following comment appears:

> The result of a too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and to render it useless is to defeat his intention (Dunbar v. Board of Trustees of George W. Clayton College, 170 Colo. 327, 461 P.2d 28 (1969) (quoting the text)). Said John Stuart Mill,
>
> "Under the guise of fulfilling a bequest, this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow. ... No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found."
>
> Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. He is permitted to devote his property in perpetuity to charitable purposes only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity that by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity that shall be forever exempt from modification.

(Emphasis added)

See generally, Waters, Law of Trusts, at pp. 611-32 (a section entitled "Cy-pres: the Scheme-Making Power"); Power v. Nova Scotia (Attorney General) (1903), 35 S.C.R. 182; Re Fitzpatrick (1984), 6 D.L.R. (4th) 644, 16 E.T.R. 221, 27 Man. R. (2d) 284 (Q.B.); Re Tacon; Public Trustee v. Tacon, [1958] Ch. 447, [1958] 1 All E.R. 163, 102 Sol. Jo. 53 (C.A.); and Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.).

DISPOSITION

46 To give effect to these reasons, I would strike out the recitals and remove all restrictions with respect to race, colour, creed or religion, ethnic origin and sex as they relate to those entitled to the benefits of the trust and as they relate to the qualifications of those who may be members of the General Committee or give judicial advice and, as well, as they relate to the schools, universities or colleges in which scholarships may be enjoyed. (The provision according preferences to sons and daughters of members of the classes of persons specified in the trust document remains unaffected by this decision.) I would answer the questions posed as follows:

47 Q. 1(ii). Yes, the provisions of the trust which confine management, judicial advice, schools, universities and colleges and benefits on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

48 Q. 1(i), (iii) and (iv). It is not necessary to answer these questions.

Q. 2. No.

Q. 3. Yes.

49 Q. 4. As before, but with the deletion of the discriminatory restrictions mentioned in the answer to Q. 1(ii).

50 QQ. 5 and 6. The application form should be changed in accordance with this decision.

51 In the result, I would allow the appeal, set aside the order of McKeown J., and issue judgment as aforesaid. The costs of the appeal and of the application before McKeown J. shall be paid to the parties on a solicitor-and-client basis out of the corpus of the trust.

TARNOPOLSKY J.A. (concurring in result)

THE JUDICIAL HISTORY AND THE ISSUES

52 This case concerns appeals from the judgment of McKeown J., dated August 10, 1987 [reported 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193] upon an application, under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee under an indenture made on December 28, 1923, between one Reuben Wells Leonard, the settlor, and the Toronto General Trusts Corporation, the trustee, for advice and direction upon the following questions arising out of the administration of the trust created by the indenture:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of
>
> (i) public policy as declared in the Human Rights Code, 1981 (the "Code");
>
> (ii) other public policy, if any;
>
> (iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or
>
> (iv) uncertainty?
>
> 2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?

3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?

4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/ or the General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite the infringement of rights under Part 1 of the Code?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

53 The answers given by McKeown J. were as follows:

54 Question 1 (i): No; (ii): No; (iii): No; (iv): No.

55 Questions 2, 3 and 4: The answers given to the previous question make it unnecessary to answer Questions 2, 3 and 4.

56 Question 5: No.

57 Question 6: The answer given to the previous question makes it unnecessary to answer this one.

58 One appellant is the Royal Ontario Museum (ROM), which was one of several charitable institutions which were, by order of the Associate Chief Justice of Ontario dated December 3, 1986, required to be served, as residuary legatees of the settlor, with notice of the application of the trustee. This appellant asks that the appeal be allowed in part and that positive answers be given to Questions 1(ii), 1(iii), 1(iv); and to Question 2, with the added declaration that the residual beneficiaries are entitled to the trust fund; and also that the answer to Question 3 be in the negative.

59 The other appellant is the Ontario Human Rights Commission which had, pursuant to s. 31(2) of the Human Rights Code, 1981, S.O. 1981, c. 53 (hereafter Human Rights Code, 1981), initiated a formal complaint with itself against the trustee on August 12, 1986, alleging discrimination in the provision of services and facilities and in contracting, on grounds of race, creed, colour, citizenship, ancestry, place of origin and ethnic origin. Subsequent to being informed of this complaint the trustee applied to the High Court for directions and the Commission was added as the respondent. The Commission appeals that part of the decision of McKeown J. in which he provides answers to Questions 1(i), 1(iii) and 5, on the ground that they concerned the applicability of the Human Rights Code, 1981 and so are matters within the exclusive primary jurisdiction of the Commission and any board of inquiry appointed under the Code.

60 There are two interveners in this appeal. The first is the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation, added by the order of the Associate Chief Justice of the High Court referred to earlier. On behalf of this class it was argued that the appeal should be dismissed, but that, if the answer to Question 1 is answered in the affirmative, then the answers to Questions 2, 3 and 4 should be that the trust fails, is incapable of being applied cy-pres, and the trust fund results to the settlor's estate to be distributed according to his will.

61 In his order of December 3, 1986 mentioned above, the Associate Chief Justice of the High Court also ordered that notice of the application be served on the Public Trustee, rather than upon the Official Guardian as set out in clause 9 of the indenture. The Public Trustee also argued that the appeal should be dismissed. However, in the alternative it was submitted that if it should be found that certain terms or clauses breach public policy or are uncertain, such terms or clauses should be treated as conditions subsequent or unessential, which could be expressed so as not to detract from a valid charitable purpose of creating a scholarship fund for students in need of financial assistance to pursue their studies in selected schools, colleges or universities.

62 All these submissions can be summarized into three main issues:

1. Did McKeown J. have jurisdiction to determine this matter or should he have deferred to the jurisdiction of the Ontario Human Rights Commission?
2. Is the trust void in whole or in part either for uncertainty or because it violates public policy?
3. If the trust is void on grounds of public policy or uncertainty, is there a general charitable intention so that the court can apply the trust cy-pres?

63 Questions 5 and 6 of the original application, which are subsidiary questions, could need to be addressed depending upon the answers to the three main issues.

II. THE FACTS

64 These are set out in sufficient detail in the judgment of McKeown J. at pp. 82-87 O.R. It is sufficient for our purposes to summarize therefrom.

65 By indenture dated December 28, 1923, the trustee accepted the burden of certain trusts thereby created with respect to the trust property transferred and assigned to it. The trust was directed to be known as the Leonard Foundation (the Foundation), the scholarships from which were directed to be known as the Leonard Scholarships. There was provision for the settlor to revoke the indenture during his lifetime, but he did not do so before his death on December 17, 1930.

66 The most pertinent parts of the indenture are:

> The Recitals
>
> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian Religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:
>
> AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by any allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seal of which government, power or authority is outside of the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual. (Emphasis added)

. . . . .

2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the Settlor intends shall be excluded from the management of or benefits in the said Foundation ...

. . . . .

If a vacancy in the General Committee is not filled for two years after it occurs, pursuant to the above provisions, the Trustee may apply to any Judge of the Supreme Court of Ontario, possessed of the qualifications herein required of a member of the said General Committee ...

. . . . .

The General Committee shall have the following powers ...

. . . . .

(c) Power to select students or pupils of the classes or types hereinbefore and hereinafter described as recipients of the said Scholarships or for the enjoyment of same, as the Committee in its discretion may decide.

. . . . .

SUBJECT to the provisions and qualifications hereinbefore and hereinafter contained, a student or pupil to be eligible for a Scholarship shall be a British subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the following classes or descriptions of persons who are not of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said Foundation as in the preamble or recital more particularly referred to, but regardless of the order of priority in which they are designated herein, namely:

(a) Clergymen,

(b) School Teachers,

(c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,

(d) Graduates of the Royal Military College of Canada,

(e) Members of the Engineering Institute of Canada,

(f) Members of the Mining & Metalurgical (sic) Institute of Canada.

PROVIDED further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for Scholarships under the terms hereof, shall not exceed one- fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

. . . . .

8. THE Trustee shall disburse the whole or such part of the net annual income derived from the Trust Estate among the persons, Schools, Colleges and Universities in such amounts, at such times, upon such

> terms and in such manner as the General Committee shall in its discretion consistent with the intention of the Settlor as hereinbefore set out, decide, and the money payable in respect of such Scholarships shall, except as hereinafter provided, be paid to the respective Schools, Colleges or Universities in which the respective student or students, pupil or pupils, are in attendance ...
>
> 9. THE Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared ...

67 The indenture indicates that the administration and management of the Foundation, as distinct from the powers and duties of the applicant with respect to the trust estate, are vested in a General Committee and a sub-committee thereof known as the Committee on Scholarships.

68 Application forms for scholarships are made available during the months of January, February and March to members of the General Committee and, upon request, to schools, colleges, universities and individuals. An applicant submits an application through a member of the General Committee, who conducts a personal interview of the applicant, completes the nomination and recommendation, and forwards the application to the General Committee before March 31.

69 The Committee on Scholarships meets in April or May in each year to consider the applications and to prepare recommendations to the General Committee for the award of scholarships. The General Committee then meets and, inter alia, receives the report and recommendations of the Committee on Scholarships and approves the awards to be made for the ensuing scholastic year. In making awards, the General Committee bases its decision in each individual case upon, inter alia, the requirements set out in the indenture. To be eligible for a scholarship, a person must be one who, without financial assistance, would be unable to pursue a course of study and meets the other criteria in the indenture.

70 Since 1971, the Ontario Human Rights Commission and its equivalents in the Provinces of Alberta and British Columbia, together with other bodies, have expressed concerns over conditions of eligibility to officials of the trustee. There are universities which, in the last ten years, have also complained or expressed concern to officers of the Foundation regarding eligibility requirements. Notwithstanding instances of this kind, the Foundation receives approximately 230 new and renewal applications annually.

71 Evidence was submitted to McKeown J. to show that there exist in Ontario and elsewhere in Canada numerous educational scholarships which contain eligibility restrictions based on race, ancestry, place of origin, ethnic origin, citizenship, creed, sex, age, marital status, family status and handicap.

III. THE JURISPRUDENCE

(1) Jurisdiction -- Human Rights Commission or court?

72 The Ontario Human Rights Commission submitted that McKeown J. should have deferred to the Commission to exercise its jurisdiction under the Human Rights Code, 1981 with respect to the complaint against the trustee that the Leonard Trust contravenes the Code. In considering this submission one must start with the following fundamental proposition offered by Dubin A.C.J.O. in Blainey v. Ontario Hockey Assn. (1986), 54 O.R. (2d) 513, 21 C.R.R. 44, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 26 D.L.R. (4th) 728, 14 O.A.C. 194 (C.A.) [leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274n, 21 C.R.R. 44n, 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 72 N.R. 76n, 17 O.A.C. 399n], at pp. 532-33 O.R., p. 64 C.R.R.:

> ... the Human Rights Code provides a comprehensive scheme for the investigation and adjudication of complaints of discrimination. There is a very broad right of appeal to the Court from the ultimate determination of a board of inquiry constituted under the Human Rights Code. The procedure provided for in the Human Rights Code must first be pursued before resort can be made to the Court. This was so held

in Board of Governors of Seneca College v. Bhadauria, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 ... Chief Justice Laskin, speaking for the Court, stated at p. 183 S.C.R., pp. 194-5 D.L.R.:

"In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of The Ontario Human Rights Code cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law."

73 And at pp. 194-5 S.C.R., p. 203 D.L.R.:

"The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.

For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use."

74 Nevertheless, although this may be taken as a starting proposition, I agree with McKeown J. that in this case several factors militate towards the High Court, as the superior court of inherent jurisdiction in this province, assuming jurisdiction despite a complaint being filed with the Human Rights Commission with respect to the same subject-matter.

75 In the first place, the state of the law dealt with by this court and the Supreme Court of Canada in Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 2 C.H.R.R. D/468, 81 C.L.L.C. Paragraph14,117, 22 C.P.C. 130, 124 D.L.R. (3d) 193, 37 N.R. 455, revg (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. Paragraph14,003, 105 D.L.R. (3d) 707 (C.A.) is in contrast with the situation in this case. In Bhadauria this court had attempted "to advance the common law" in filling a void by creating a new tort of discrimination. The Supreme Court held that not to be necessary because of the comprehensive scheme of the Ontario Human Rights Code, R.S.O. 1970, c. 318 [later R.S.O. 1980, c. 340]. Here, however, we are concerned with the administration of a trust, over which superior courts have had inherent jurisdiction for centuries and, in particular, with respect to charitable or public trusts. As noted at the beginning of this judgment, the trustee in this case applied to the High Court for advice and direction pursuant to the trust instrument itself as well as s. 60 of the Trustee Act.

76 Second, we are not concerned here with a typical proceeding under the Human Rights Code, 1981 in which an allegation of discrimination is brought against a respondent. The Commission's first mandate is to effect a settlement. However, the trustee has no authority, absent authorization of the trust deed or legislation or a court order, to enter into a settlement which would be contrary to the terms of the trust. Even if no settlement could be effected and a board of inquiry were to be appointed, there is serious question as to whether the board could grant an adequate remedy. Its remedial authority is governed by s. 40(1) of the Code. If a Code infringement is found, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

These remedial powers do not appear to give the board of inquiry the power to alter the terms of the trust or declare it void. In any case, resort to a court would have to be made to determine authoritatively whether such power exists.

77 Finally, I agree with McKeown J. that this is not a case where the fact-finding role of the Commission and a board of inquiry would be required. Even in Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, where some further fact-finding and, particularly, fact-verification might have been useful, Martland J., on behalf of the majority on the Supreme Court of Canada, quoted Lord Goddard in R. v. Tottenham and District Rent Tribunal; Ex parte Northfield (Highgate) Ltd., [1957] 1 Q.B. 103, [1956] 2 All E.R. 863, 100 Sol. Jo. 552 (Q.B.) at p. 108 Q.B., to the effect that:

> ... where there is a clear question of law not depending upon particular facts -- because there is no fact in dispute in this case -- there is no reason why the applicants should not come direct to this court for prohibition ...

Similarly, here, I agree with McKeown J. that we are concerned with a question of law; there are no facts in dispute. The trustee is entitled to come to the superior court pursuant to s. 60 of the Trustee Act to seek advice and direction.

(2) Is the trust Void in whole or in part either for uncertainty or because it violates public policy?

78 We are concerned here with a charitable trust. In order to be considered charitable, a trust must have been established for one of the following four purposes: relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community as a whole as enunciated by the courts. (For the original summary and categorization of these see Income Tax Special Purposes Commissioners v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28, 65 L.T. 621 (H.L.). For their Ontario application see the Charities Accounting Act, R.S.O. 1980, c. 65 and Re Levy Estate (1989), 68 O.R. (2d) 385, 58 D.L.R. (4th) 375, 33 E.T.R. 1, 33 O.A.C. 99 (C.A.). Also see, generally, D.W.M. Waters, Law of Trusts in Canada (Toronto: Carswell, 1974), c. 14 "Charitable Trusts".)

79 The general rule is that in order to achieve charitable status, a trust must satisfy three conditions. It must have as its object one of the four purposes stated above; its purpose must be wholly and exclusively charitable; and it must promote a public benefit (Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137, 94 Sol. Jo. 777 (H.L.); McGovern v. Attorney General, [1982] Ch. 321, [1981] 3 All E.R. 493, [1982] 2 W.L.R. 222 (Ch. D.), at p. 331 Ch., and Re Levy Estate, supra). To satisfy the public benefit requirement, the trust must be beneficial and not harmful to the public and its benefits must be available to a sufficient cross-section of the public (Halsbury's Laws of England, 4th ed. (London: Butterworths, 1974), vol. 5 "Charities", p. 309, para. 505; Gilmour v. Coats, [1949] A.C. 426, [1949] 1 All E.R. 848, 93 Sol. Jo. 355 (H.L.), at p. 855 All E.R., and Waters, Law of Trusts, c. 14, pp. 460-504). If there is a personal nexus between each of the beneficiaries and the settlor, the trust will fail for lack of public benefit (Oppenheim v. Tobacco Securities Trust Co., [1951] A.C. 297, [1951] 1 All E.R. 31, [1951] 1 T.L.R. 118 (H.L.), at p. 309 A.C.

80 In the case at bar, all of these tests are met. The trust is dedicated to the advancement of education and it is wholly charitable. Education is clearly a benefit to the public. Because the class was not ascertainable by the settlor, there was no personal nexus between him and the beneficiaries. The benefit, although not available to everyone, is available to a sufficiently wide cross-section of the public.

81 Next, it is necessary to consider whether the trust could be invalid because of uncertainty. It is important to note that in analyzing the validity of the trust on this basis, the court may refer only to the operative words, unless they are ambiguous, in which case it can refer to the recitals. Regular rules of statutory construction apply (Re Moon; Ex parte Dawes (1886), 17 Q.B.D. 275, 55 L.T. 114, 34 W.R. 753 (C.A.)). Since recitals are descriptions of motive and are normally irrelevant to determining validity, McKeown J. held that they were irrelevant and inoperative. However, it could be argued that many sections of the indenture refer to the recitals and thereby incorporate them. In fact, McKeown J. noted eight references, after the recitals, to the definition of the class of beneficiaries, but then went on to state [p. 89 O.R.]: "At no time throughout the operative clauses does Colonel Leonard refer back to the three opening recitals; thus his beliefs as stated therein are not incorporated into the operative words and play no part in the interpretation of this instrument".

82 Without deciding whether the recitals are incorporated in the trust instrument by subsequent references to them, I would agree that Colonel Leonard's beliefs as stated in the opening recitals are evidence of motive and are irrelevant. However, that part of the trust instrument which matters for the purpose of assessing certainty is the second sentence in the first full paragraph on p. 2 of the instrument, which reads as follows:

> For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

83 This definition of the class of beneficiaries is a condition precedent. A condition precedent is one in which no gift is intended until the condition is fulfilled. A condition subsequent differs in that non-compliance with the condition will put an end to an already existing gift. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class (Jones v. T. Eaton Co. Ltd., [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at pp. 650-51 S.C.R., and McPhail v. Doulton, [1971] A.C. 424, [1970] 2 All E.R. 228, 114 Sol. Jo. 375 (H.L.) at p. 456 A.C.). It is enough that some claimants can satisfy the condition (Re Selby's Will Trusts; Donn v. Selby, [1965] 3 All E.R. 386, [1966] 1 W.L.R. 43, 110 Sol. Jo. 74 (Ch. D.)). The condition will not fail for uncertainty unless it is clearly impossible for anyone to qualify (Re Allen; Faith v. Allen, [1953] Ch. 810, [1953] 2 All E.R. 898, 97 Sol. Jo. 606 (C.A.) [subsequent proceedings at [1954] Ch. 259, [1954] 1 All E.R. 526, 98 Sol. Jo. 146]. It is well established that a charitable trust should not fail for uncertainty (see Re Gott; Glazebrook v. Leeds University, [1944] Ch. 193, [1944] 1 All E.R. 293, 88 Sol. Jo. 103 (Ch. D.)). Historically, courts have been reluctant to strike down such gifts if it can be avoided. If a condition is uncertain, the court can consider it inoperative, but rarely will a trust fail because of uncertainty if the condition is a condition precedent.

84 In this case there has been no difficulty over some six decades in ascertaining whether students qualify. The clause referred to above is sufficiently certain, except possibly for the "allegiance" exclusion. In my view, however, the clause as a whole meets the requirements established for a condition precedent and the provisions containing the conditions are sufficiently certain. If I am wrong, however, I would find only the clause referring to "allegiance" to be uncertain and I would hold that it is severable from the other restrictions as to class.

85 Turning now to the public policy issue, it must first be acknowledged that there has been no finding by a Canadian or a British court that at common law a charitable trust established to offer scholarships or other benefits to a restricted class is void as against public policy because it is discriminatory. In some cases, British courts have chosen to delete offensive clauses as "uncertain", as in Re Lysaght; Hill v. Royal College of Surgeons of England, [1966] Ch. 191, [1965] 2 All E.R. 888, 109 Sol. Jo. 577 (Ch. D.); Clayton v. Ramsden, [1943] A.C. 320, [1943] 1 All E.R. 16, 86 Sol. Jo. 384 (H.L.), and Re Tarnpolsk; Barclays Bank Ltd. v. Hyer, [1958] 3 All E.R. 479, [1958] 1 W.L.R. 1157, 102 Sol. Jo. 857 (Ch. D.), or "impracticable" as Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.). In the latter case the court found a general charitable intention and then applied the trust property cy-pres. The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in Re Lysaght, supra, at p. 206 Ch., quoted by McKeown J. at p. 93 O.R.:

> I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects and I am aware that there is a Bill dealing with racial relations at present under consideration by Parliament, but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or are to exclude adherents to a particular faith, is contrary to public policy. The testatrix's desire to exclude persons of the Jewish faith or of the Roman Catholic faith from those eligible for the studentship in the present case appears to me to be unamiable, and I would accept Mr. Clauson's suggestion that it is undesirable, but it is not, I think, contrary to public policy.

However, in considering these observations of Buckley L.J., it is necessary to keep in mind two points. First, the observations themselves indicate that they were made before the enactment of the first comprehensive statute in the United Kingdom to prohibit discrimination on racial grounds -- the Race Relations Act of 1968, c. 71 [now Race

Relations Act, 1976 (U.K.), c. 74]. Second, religion as a prohibited ground of discrimination is conspicuously left out of the anti-discrimination laws of the United Kingdom. I do not, therefore, find the English cases on point to be of any help or guidance.

86 In Canada the leading case on public policy and discrimination at the commencement of World War II was Christie v. York Corp., [1940] S.C.R. 139, [1940] 1 D.L.R. 81, wherein the majority of the Supreme Court of Canada found that denial of service on grounds of race and colour was not contrary to good morals or public order.

87 After the war this court, in Noble v. Alley, [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.) [revd [1951] S.C.R. 64, [1951] 1 D.L.R. 321] upheld a racially restrictive covenant in the course of deciding that there was insufficient evidence to conclude that racial discrimination was contrary to public policy in Ontario. In this the court specifically overruled Mackay J., in Re Wren, [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.J.), who had found such covenants void as against public policy. The Supreme Court of Canada struck down the covenant in Noble on technical grounds, but did not refer to the public policy argument.

88 Subsequently, in Bhadauria (C.A.), at pp. 149-50 O.R., p. 715 D.L.R., in concluding that the common law had evolved to the point of recognizing a new tort of discrimination, Wilson J.A. referred to the preamble to the Ontario Human Rights Code, R.S.O. 1970, c. 318 [later R.S.O. 1980, c. 340], the first two paragraphs of which then provided:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin ...

She then observed:

> I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights.

That the Human Rights Code, 1981 recognizes public policy in Ontario, was acknowledged a few years later by the Supreme Court of Canada in Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, 3 C.H.R.R. D/781, 82 C.L.L.C. Paragraph17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at pp. 213-14 S.C.R., pp. 23-24 D.L.R.

89 Therefore, even though McKeown J. referred to the caution of Duff C.J.C. in Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, at pp. 7-8 S.C.R., to the effect that public policy is a doctrine to be invoked only in clear cases where the harm to the public is substantially incontestable and does not depend upon the "idiosyncratic inferences of a few judicial minds", the promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern- day Ontario. I can think of no better way to respond to the caution of Duff C.J.C. than to quote the assertion of Mackay J. of nearly 45 years ago in Re Wren, supra, at p. 783 O.R.:

> Ontario and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

90 Further evidence of the public policy against discrimination can be found in several statutes in addition to the preamble and content of the Human Rights Code, 1981: s. 13 of the Conveyancing and Law of Property Act, R.S.O.

1980, c. 90; s. 4 of the Ministry of Citizenship and Culture Act, 1982, S.O. 1982, c. 6; s. 117 of the Insurance Act, R.S.O. 1980, c. 218; and s. 13 of the Labour Relations Act, R.S.O. 1980, c. 228. All of these indicate that this particular public policy is not circumscribed by the exact words of the Human Rights Code, 1981 alone. Such a circumscription would make it necessary to alter what the courts would regard as public policy every time an amendment were made to the Human Rights Code, 1981. This can be seen just by comparing the wording of the second paragraph of today's preamble with that considered by Wilson J.A. in 1979 and quoted above. Currently this paragraph reads:

> AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province ...

91 It is relevant in this case to refer as well to the Ontario Policy on Race Relations (Race Relations Directorate, Ministry of Citizenship) as well as the Premier's statement in the Legislature concerning that policy (Hansard Official Report of Debates of Legislative Assembly of Ontario, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-41). The Policy on Race Relations states:

> The government is committed to equality of treatment and opportunity for all Ontario residents and recognizes that a harmonious racial climate is essential to the future prosperity and social well-being of this province. ... The government will take an active role in the elimination of all racial discrimination, including those policies and practices which, while not intentionally discriminatory, have a discriminatory effect. ... The government will also continue to attack the overt manifestations of racism and to this end declares that: (a) Racism in any form is not tolerated in Ontario.

In introducing it in the Legislature, Premier David Peterson said (Hansard, supra, at p. 937):

> This policy recognizes that Ontario's commitment to equality has grown from benign approval to active support. It leaves no doubt that the path we will follow to full racial harmony and equal opportunity is paved, not just with good wishes and best intentions but with concrete plans and active measures.

92 Public policy is not determined by reference to only one statute or even one province, but is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti- discrimination laws of every jurisdiction in Canada. These have been given a special status by the Supreme Court of Canada in Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. Paragraph17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241, at p. 547 S.C.R., p. 329 D.L.R.:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at pp. 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect.

93 In addition, equality rights "without discrimination" are now enshrined in the Canadian Charter of Rights and Freedoms in s. 15; the equal rights of men and women are reinforced in s. 28; and the protection and enhancement of our multicultural heritage is provided for in s. 27.

94 Finally, the world community has made anti-discrimination a matter of public policy in specific conventions like the International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX), and the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180, as well as Articles 2, 3, 25 and 26 of the International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), all three of which international instruments have been ratified by Canada with the

unanimous consent of all the provinces. It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public policy invalidity is restricted to any particular activity or service or facility.

95 Clearly this is a charitable trust which is void on the ground of public policy to the extent that it discriminates on grounds of race (colour, nationality, ethnic origin), religion and sex.

96 Some concern was expressed to us that a finding of invalidity in this case would mean that any charitable trust which restricts the class of beneficiaries would also be void as against public policy. The respondents argued that this would have adverse effects on many educational scholarships currently available in Ontario and other parts of Canada. Many of these provide support for qualified students who could not attend university without financial assistance. Some are restricted to visible minorities, women or other disadvantaged groups. In my view, these trusts will have to be evaluated on a case by case basis, should their validity be challenged. This case should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy.

97 It will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss. 1 [am. 1986, c. 64, s. 18(1)] and 13 of the Human Rights Code, 1981 and that adopted by the courts when approaching s. 15(2) of the Charter. Those charitable trusts aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the Human Rights Code, 1981 or s. 15(2) of the Charter would not likely be found void because they promote, rather than impede, the public policy of equality. In such an analysis, attention will have to be paid to the social and historical context of the group concerned (see Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 36 C.R.R. 193, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 10 C.H.R.R. D/5719, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289, at pp. 152-53 S.C.R., pp. 201-02 C.R.R., per Wilson J. and p. 175 S.C.R., p. 228-29 C.R.R., per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

98 Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the Charter (Andrews, supra, pp. 168-69 S.C.R., p. 223 C.R.R., per McIntyre J.). In the indenture in this case, for example, there is nothing contrary to public policy as expressed in the preferences for children of "clergymen", "school teachers", etc. It would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women, aboriginal peoples, the physically or mentally handicapped, or other historically disadvantaged groups would be void as against public policy. Clearly, public trusts restricted to those in financial need would be permissible. Given the history and importance of bilingualism and multiculturalism in this country, restrictions on the basis of language would probably not be void as against public policy subject, of course, to an analysis of the context, purpose and effect of the restriction.

99 In this case the court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions on freedom of both contract and testamentary disposition. Under the Conveyancing and Law of Property Act, s. 22, for instance, covenants that purport to restrict the sale, ownership, occupation or use of land because of, inter alia, race, creed or colour are void. Under the Human Rights Code, 1981 discriminatory contracts relating to leasing of accommodation are prohibited. With respect to testamentary dispositions, as mentioned earlier, one cannot establish a charitable trust unless it is for an exclusively charitable purpose (see Waters, Law of Trusts, at pp. 601-03 and 626; and Ministry of Health v. Simpson, supra). Similarly, public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void.

100 A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection: (1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if

the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property cy-pres providing they can discern a general charitable intention. This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community (Waters, Law of Trusts, p. 502). It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.

(3) Is there a general charitable intention so that the court can apply the trust cy-pres?

101 One of the great advantages of a charitable trust is that if it fails for some reason, it can be applied cy-pres. However, in order to apply the trust property cy-pres, the court must find that the settlor had a general charitable intention. If the mode of application is such an essential part of the gift that the court cannot distinguish any general purpose of charity, but is obliged to say that the prescribed mode of doing the charitable act is the only one the testator intended, it cannot apply the trust cy-pres (see Re Wilson; Twentyman v. Simpson, [1913] 1 Ch. 314, [1911-3] All E.R. Rep. 1101, 57 Sol. Jo. 245 (Ch. D.); Re Lysaght, supra, at p. 203 Ch., and Halsbury's Laws of England, supra, pp. 430-31, para. 696). Cy-pres should never depart from the testator's true intention. This must be discerned from reading the trust instrument as a whole. The court may have regard to the recitals in order to determine the "substantial, overriding, true or paramount intention".

102 If the court must decide that the settlor would not have established the trust if it could not be carried out in the specific way set out, then there is no general charitable intention and the trust fails. If, on the other hand, the discriminatory provisions can be said to be the "machinery" of the trust, separable from the general intention to educate, then the court may apply the money cy-pres. The distinction between a general and a specific charitable intent was expressed by Buckley L.J. in Re Lysaght, supra, at p. 202 Ch.:

> A general charitable intention, then, may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention -- not, that is to say, part of his paramount intention.
>
> In contrast, a particular charitable intention exists where the donor means his charitable disposition to take effect if, but only if, it can be carried into effect in a particular specified way.

103 The question in this case is, then, whether the testator's paramount intention was to provide scholarships for education or whether he intended to provide it for specific kinds of students and would not have created it otherwise. To preserve the trust, this court must find that the settlor's general intention was to educate young people for the benefit of the Empire (now the Commonwealth and this country) and that the discriminatory provisions are merely the machinery designed to effect that intention. Was it his intention to educate particular kinds of people because only they could be entrusted with the future of the country? Was it his overriding purpose to select students of the right breeding and prepare them for leadership? If so, then his intention was specific and the trust must fail.

104 It seems to me, however, that his intention must be viewed as one to promote leadership through education. The scheme he chose was the one he thought best because of the time in which he lived. Although today discrimination is considered to have been an ugly feature of our society in the past (and is still too prevalent), we judge attitudes of the past with hindsight. It is easy, with the benefit of such hindsight, to feel contempt for the views expressed in the recitals of the trust instrument and to find the racial and religious restrictions contained in its text to be repugnant. In his day, however, Colonel Leonard was a philanthropist. He obviously believed that education was the key to a strong and prosperous country and a peaceful world. In that, he was no doubt right. The fact that he chose to implement his desire to promote education through a discriminatory scheme cannot displace his general charitable intention. In my view, the tests for finding a general charitable intention are met. This conclusion finds support in para. 13 of the trust instrument which provides that the testator could alter the trust or change its objects and purposes and that any income that became available "shall thereupon become applicable for such other

objects or purposes, being an object or purpose conducive to the promotion or encouragement of education, as the settlor may from time to time think proper".

105 I find support for this conclusion in the case of Re Dominion Students' Hall Trust, supra, where Evershed J. granted a petition by the charity to remove a restriction which confined a student hostel to members of the Empire of European origin. He said, at p. 186 Ch.:

> It is not necessary to go to the length of saying that the original scheme is absolutely impracticable. Were that so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire.
>
> I have, however, to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the hall to members of the Empire of European origin. But times have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain.

This observation, made in 1946, is particularly apt today.

IV. THE DISPOSITION

106 In the result I would allow the appeal and substitute the following answers for those given by McKeown J.:

Q. 1 (i) - Yes, but not just as confined by the Human Rights Code, 1981.

(ii) - Yes, the provisions of the trust which confine management, judicial advice and benefit on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

(iii) - It is not necessary to answer this question.

(iv) - No.

Q. 2 - No.

Q. 3 - Yes.

Q. 4 - As before, but with a deletion of the discriminatory restrictions mentioned in answer to Q. 1.(ii).

R. 5 - This question should not be answered in this decision. After the application form is changed in accordance with this decision the question will become moot and, if not, it should be considered under the procedures in the Human Rights Code, 1981.

S. 6 - The answer to this question is provided in the answer to Q. 5.

107 As far as costs are concerned, the order made by McKeown J. should stand and the same disposition should apply with respect to costs on this appeal.

Appeal allowed.

End of Document

So far as the claim under section 32 is concerned, I have had an opportunity of reading Roskill L.J.'s judgment and have nothing to add. I would allow the appeal.

Appeal allowed.
Judgment entered for council on counterclaim.
No order as to costs except defendants' legal aid taxation in Liverpool District Registry.
Leave to appeal to House of Lords refused.

Solicitors: *Howlett & Clarke, Cree & Co. for K. M. Egan, Liverpool City Council; J. L. Linden, Vauxhall Community Information Service, Liverpool.*

M. M. H.

October 16. The Appeal Committee of the House of Lords (Lord Diplock, Lord Kilbrandon and Lord Edmund-Davies) allowed a petition by the tenants for leave to appeal.

[HOUSE OF LORDS]

BLATHWAYT . . . . . APPELLANT

AND

CAWLEY (BARON) AND OTHERS . . . . . RESPONDENTS

1975 May 6, 7, 8, 12, 13, 14; Oct. 22

Lord Wilberforce, Lord Simon of Glaisdale, Lord Cross of Chelsea, Lord Edmund-Davies and Lord Fraser of Tullybelton

Will — Construction — Forfeiture clause — Prohibition of being Roman Catholic—Shifting clause—Acceleration of interest—Decision that accelerated interest not determined by birth of son to original tenant for life—Whether son estopped from claiming against remaindermen—Operation of forfeiture clause —Whether son incurred forfeiture between coming of age and executing disentailing deed

Will—Construction—Uncertainty—Condition subsequent—If any person entitled should be a Roman Catholic his estate shall "determine and be utterly void"—Whether void for uncertainty or public policy—Whether tendency to influence parents' decisions relevant

By clause 6 of his will a testator who died in 1936 settled certain estates upon trust for C for life with remainder to his first and other sons successively in order of seniority in tail male, with remainder to J (the younger brother of C) for life with remainder to his first and other sons successively in order of seniority in tail male, with remainders over. By clause 9 if any person who should become entitled as tenant for life or tenant in tail male to possession of the estate should

"be a Roman Catholic . . . the estate hereby limited to him shall cease and determine and be utterly void and my

A principal estate shall thereupon go to the person next entitled ... in the same manner as if the person whose estate shall so cease determine and become void being a tenant for life were then void or being a tenant in tail male were then dead without issue inheritable under the estate tail."

In November 1939 C was received into the Roman Catholic Church. He had then no son and in June 1940 Farwell J. B on an originating summons held that he had forfeited his life interest and that the interest of J was accelerated, subject to determination in the event of the birth of a son. In June 1949 a son, M, was born to C and was received into the Roman Catholic Church by baptism in infancy. In February 1950 Wynn-Parry J. on an originating summons held that the interest of J had not determined by reason of the birth of M. In 1970 M (having attained his majority by the operation of C the Family Law Reform Act 1969) executed a deed of disentail, with the consent of C and J as protectors of the settlement, and also assigned to J all the interest (if any) to which he was entitled in equity in the settled estates during the life of J.

In 1971 proceedings were commenced to determine how the trust property should be held on the death of J. Goulding J., whose decision was affirmed by the Court of Appeal, held that D the property would be held on the same trusts as would have taken effect if C had previously died without issue.

On M's appeal: —

Held, (1) (Lord Wilberforce and Lord Fraser of Tullybelton dissenting) that, on the true construction of the will, the property should be held during the remainder of the life of C on the same trusts as would have taken effect if he had previously died without issue and subject thereto on trust for E M, since the terms of clause 9 meant no more than that on forfeiture the subsequent interests were to be accelerated, although the life tenant was still alive, and did not prevent M from taking an entailed interest on his birth (post, pp. 699A, 705F–G, 710G–H, 711C–D).

Doe d. Heneage v. *Heneage* (1790) 4 Term Rep. 13 applied.

(2) That, since the remaindermen were not represented in F the proceedings before Wynn-Parry J., there could be no estoppel between them and M, since estoppels must be mutual, and accordingly was not estopped from claiming as against them that he was entitled to an entailed interest after J, whether on his death or subject to his interest (post, pp. 691A–B, D–E, 699A, 701A–C, 709C–D, 711H).

(3) That such a forfeiture clause was not invalid either for uncertainty or for public policy (post, pp. 696A–B, 697C–E, 699A, G 700D–F, 711E–F, H—712A).

Clayton v. *Ramsden* [1943] A.C. 320, H.L.(E.) and *In re Borwick, Borwick* v. *Borwick* [1933] Ch. 137 distinguished.

(4) (Lord Wilberforce and Lord Fraser of Tullybelton dissenting) that M incurred no forfeiture by remaining a Roman Catholic between coming of age and executing the disentailing deed because any entailed interest which he may have had H was not an interest in possession to which alone the condition in clause 9 applied (post, pp. 611A, 706G–H, 711G).

Quaere. Whether such a forfeiture clause was void as against a person who was an infant at the date when the instrument containing the relevant interest took effect because it might influence the decision of his parents as to what (if any) religious education he was to receive (post, pp. 697H—698B, C–D, 706A–D, G, 712A–B).

Decision of the Court of Appeal reversed.

The following cases are referred to in their Lordships' opinions:

Blathwayt's Will Trusts, In re, Blathwayt v. *Blathwayt* [1950] 1 All E.R. 582.
Borwick, In re, Borwick v. *Borwick* [1933] Ch. 657.
Brooke, In re, Brooke v. *Dickson* [1923] 2 Ch. 265, C.A.
Carr v. *Earl of Errol* (1805) 6 East 58.
Clavering v. *Ellison* (1859) 7 H.L.Cas. 707, H.L.(E.).
Clayton v. *Ramsden* [1943] A.C. 320; [1943] 1 All E.R. 16, H.L.(E.); sub nom. *In re Samuel, Jacobs* v. *Ramsden* [1942] Ch. 1; [1941] 3 All E.R. 196, C.A.
Clive v. *Clive* (1872) 7 Ch.App. 433.
Conyngham, In re, Conyngham v. *Conyngham* [1921] 1 Ch. 491, C.A.
Doe d. Heneage v. *Heneage* (1790) 4 Term Rep. 13.
Evans, In re, Hewitt v. *Edwards* [1940] Ch. 629.
Lambarde v. *Peach* (1859) 4 Drew. 553.
McCausland v. *Young* [1948] N.I. 72; [1949] N.I. 49.
McKenna, decd. In re, Higgins v. *Bank of Ireland* [1947] I.R. 277.
May, In re, Eggar v. *May* [1917] 2 Ch. 126.
May, In re, Eggar v. *May (No. 2)* [1932] 1 Ch. 99, Luxmoore J. and C.A.
Morrison's Will Trusts, In re, Walsingham v. *Blathwayt* [1940] Ch. 102; [1939] 4 All E.R. 332.
Patton v. *Toronto General Trusts Corporation* [1930] A.C. 629, P.C.
Sandbrook, In re, Noel v. *Sandbrook* [1912] 2 Ch. 471.
Stanley v. *Stanley* (1809) 16 Ves.Jun. 491.
Talbot v. *Earl of Shrewsbury* (1840) 4 My. & Cr. 672.
Trustees of Church Property of the Diocese of Newcastle v. *Ebbeck* (1960) 104 C.L.R. 394.
Tegg, In re, Public Trustee v. *Bryant* [1936] 2 All E.R. 878.
Wright, In re, Public Trustee v. *Wright* (1937) 158 L.T. 368.

The following additional cases were cited in argument:

Allen, In re, Faith v. *Allen* [1953] Ch. 116; [1953] 2 W.L.R. 244; [1953] 1 All E.R. 308; [1953] Ch. 810; [1953] 3 W.L.R. 637; [1953] 2 All E.R. 898, C.A.
Baden's Deed Trusts, In re [1971] A.C. 424; [1970] 2 W.L.R. 1110; [1970] 2 All E.R. 228, H.L.(E.).
Bekind, In re [1969] N.Z.L.R. 669.
Brown's Will, In re (1884) 27 Ch.D. 179.
Bullock v. *Downes* (1860) 9 H.L.Cas. 1, H.L.(E.).
Defries, In re, Norton v. *Levy* (1883) 48 L.T. 703.
Dickson's Trust, In re (1850) 1 Sim.(N.S.) 37.
Donaghey v. *P. O.'Brien & Co.* [1966] 1 W.L.R. 1170; [1966] 2 All E.R. 822, C.A.; sub nom. *Donaghey* v. *Boulton & Paul Ltd.* [1968] A.C. 1; [1967] 3 W.L.R. 829; [1967] 2 All E.R. 1014, H.L.(E.).
Evanturel v. *Remillard* (1874) L.R. 6 P.C. 1, P.C.
Executor Trustee & Agency Co. of South Australia Ltd. v. *Deputy Federal Commissioner of Taxes South Australia* (1939) 62 C.L.R. 545.
Falkiner v. *Commissioner of Stamp Duties* [1973] A.C. 565; [1973] 2 W.L.R. 334; [1973] 1 All E.R. 598, P.C.
Fussell v. *Dowding* (1884) 27 Ch.D. 237.
Giffard v. *Hort* (1804) 1 Sch. & Lef. 386.
Henderson v. *Henderson* (1843) 3 Hare 100.
Lysanght, decd., In re [1966] Ch. 191; [1965] 3 W.L.R. 391; [1965] 2 All E.R. 888.
Shiloh Spinners Ltd. v. *Harding* [1973] A.C. 691; [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90, H.L.(E.).
Tasmania (Owners) v. *City of Corinth (Owners)* (1890) 15 App.Cas. 223, H.L.(E.).

A *Waring, In re, Westminster Bank* v. *Burton-Butler* [1948] Ch. 221; [1948] 1 All E.R. 257.
Whitehouse v. *Board of Control* [1960] 1 W.L.R. 1093; [1960] 3 All E.R. 182, H.L.(E.).
Williams, In re (1860) 6 Jur.N.S. 1064.
Yat Tung Investment Co. Ltd. v. *Dao Heng Bank Ltd.* [1975] 2 W.L.R. 690, P.C.

B

APPEAL from the Court of Appeal.

This was an appeal, by leave of the Court of Appeal, from an order of that court (Davies, Karminski and Stamp L.JJ.) dated March 16, 1972, affirming an order of Goulding J. dated July 9, 1971.

The respondents, Frederick Lee, Baron Cawley, Charles Stephen Hare Blathwayt and Edward Herbert Frank were the trustees of a settlement C created by the will dated August 7, 1934, of Robert Wynter Blathwayt, deceased in 1936, the testator. By clause 6 of the will the testator gave the settled property (a) upon trust for Christopher George Wynter Blathwayt during his life with remainder (b) upon trust for the first and other sons of Christopher successively in order of seniority in tail male with remainder (c) upon trust for the respondent Justin Robert Wynter Blathwayt during his life with remainder (d) upon trust for the first and other sons of Justin D successively in order of seniority in tail male, with remainders over. By clause 9 of the will the testator declared that the estate of any person who, being entitled as a tenant for life or tenant in tail male by purchase to the possession of the settled property should (a) be or become a Roman Catholic or (b) disuse the surname and arms of Blathwayt should be forfeited.

E The appellant, Mark Henry Wynter Blathwayt, was the first son of Christopher. Justin had no sons. The respondent, the Reverend Linley Dennys Blathwayt, was the person next entitled in remainder to the settled property on the determination or failure of the estates limited to the first and other sons of Justin.

The facts are stated in the opinion of Lord Wilberforce.

F

A. J. Balcombe Q.C. and *J. M. Chadwick* for the appellant.
G. M. Godfrey Q.C. and *Elizabeth Gloster* for the respondents.

Their Lordships took time for consideration.

October 22. LORD WILBERFORCE. My Lords, this is an appeal, relat- G ing to the trusts of the will of Robert Wynter Blathwayt, from an order of the Court of Appeal affirming an order of Goulding J. There have been previous proceedings relating to this will in 1940, and again in 1949, which have added to the complications arising from the will itself. I shall first refer to the relevant provisions.

The will was made on August 7, 1934, and the first three respondents H are the present trustees. We are concerned only with the trusts affecting the trust estates in Somerset and Gloucestershire, or their proceeds of sale, referred to as "my principal estate". By clauses 6 to 9 of the will the principal estate was settled on the following trusts and subject to the following powers and provisions:

> "6. (*a*) Upon trust for Christopher George Wynter Blathwayt (the elder son of my late cousin Henry Wynter Blathwayt) during his life with remainder (*b*) Upon trust for his first and other sons successively

in order of seniority in tail male with remainder (*c*) Upon trust for Justin Robert Wynter Blathwayt (the younger son of my said late cousin) during his life with remainder (*d*) Upon trust for his first and other sons successively in order of seniority in tail male with remainder (*e*) Upon trust for the said Francis Linley Blathwayt during his life with remainder (*f*) Upon trust for such person or persons being male and for such purposes as the said Francis Linley Blathwayt shall by any deed revocable or irrevocable or by will or codicil appoint.

"Provided always and I hereby declare that if any person in whose favour such an appointment shall be made shall:—(*a*) Be a Roman Catholic at the date when such appointment takes effect or (*b*) If not then using or bearing the surname and arms of Blathwayt shall neglect or refuse or fail within 12 months from the date aforesaid to assume the said surname (either with or without his or her own proper surname) and apply for proper authority to bear the said arms (either alone or marshalled with his or her own arms) and in case such authority shall be obtained to assume such arms forthwith then and in any of such cases my principal estate or the portion thereof appointed to such person shall go and devolve as if such appointment had never been made.

"7. I declare that if any person who under the limitations herein contained (including this clause) of my principal estate takes an estate in tail male by purchase shall be born in my lifetime then and in every such case I revoke such estate in tail male and in place of such estate in tail male my trustees shall hold the principal estate (*a*) Upon trust for such person for life with remainder (*b*) Upon trust for his or her first and other sons successively in tail male with the like remainders over as are hereinbefore limited to take effect after the determination of such estate in tail male so revoked as aforesaid . . .

"9. I further declare that if any person who under the trusts hereof shall become entitled as tenant for life or tenant in tail male by purchase to the possession of my principal estate shall (*a*) Be or become a Roman Catholic or (*b*) Disuse the surname and arms of Blathwayt then and in either of such cases the estate hereby limited to him shall cease and determine and be utterly void and my principal estate shall thereupon go to the person next entitled under the trusts hereinbefore declared in the same manner as if the person whose estate shall so cease determine and become void being a tenant for life were then dead or being a tenant in tail male were then dead without issue inheritable under the estate tail and so that in the case of a tenant for life all powers annexed to his estate shall cease to be exercisable and that the enjoyment of any jointure rentcharge previously appointed by such person in favour of his wife under the power hereinafter contained shall not be accelerated."

Christopher George Wynter Blathwayt ("Christopher") was alive at the death of the testator in 1936 and was unmarried. He was received into the Roman Catholic Church on November 10, 1939. The appellant Mark Henry Wynter Blathwayt ("Mark") is the eldest son of Christopher and was born on June 8, 1949: he was received into the Roman Catholic Church by baptism in infancy and has at all times adhered to the faith of that Church. He attained majority on January 1, 1970, by virtue of the Family Law Reform Act 1969. The third respondent Justin Robert Wynter Blathwayt, designated in clause 6 (*c*) of the will, is alive but has no son.

A The fourth respondent the Reverend Linley Dennys Blathwayt ("Linley") is the person next entitled in remainder to the settled estates by virtue of an appointment made pursuant to clause 6 (*f*) of the will.

On September 16, 1970, Mark executed a deed of disentail of the settled estates with the consent (as protectors) of Christopher and Justin. By a deed of assignment of the same date, Mark assigned to Justin all the interest (if any) to which Mark was entitled in equity in the settled estates
B during the life of Justin.

Before considering the effect of these dispositions it is necessary to refer to the proceedings in Chancery which took place in 1940 and 1949.

(i) The 1940 proceedings were brought by the then trustees as plaintiffs with Christopher and Justin as defendants. The questions submitted to the court were (*a*) whether Christopher had forfeited his life interest by recep-
C tion into the Roman Catholic Church in 1939 and, if so, (*b*) whether Justin's life interest was accelerated subject to determination in the event of the birth of a son to Christopher, or (*c*) whether section 175 of the Law of Property Act 1925 applied so that the income of the settled estates should be accumulated until the expiry of 21 years from the death of the trustee or the previous birth of a son to Christopher, or his previous death without having had a son; (*d*) generally, who was entitled to the income
D of the settlement estates.

This originating summons was heard by Farwell J. who, on June 5, 1940, made an order declaring that Christopher forfeited his life interest on reception into the Roman Catholic Church, and further declaring:

> "... that the life interest of the defendant Justin Robert Wynter Blathwayt in the said settled property is accelerated subject to deter-
> E mination in the event of the birth of a son to the defendant Christopher George Wynter Blathwayt and the defendant Justin Robert Wynter Blathwayt is entitled to the income thereof and to the usual vesting deed."

(ii) The 1949 proceedings were brought soon after, and no doubt in consequence of, the birth of Mark. The parties were the then trustees
F as plaintiffs and Justin and Mark as defendants. Mark was represented by Christopher as his guardian ad litem. The questions submitted to the court were: (*a*) whether the life interest (sic) of Justin was determined upon the birth of Mark, and (*b*) generally that it might be determined what were the respective estates interests and rights in or over the settled estates of the two defendants (i.e. Justin and Mark respectively).

G On February 22, 1950, an order on this summons was made by Wynn-Parry J. [*In re Blathwayt's Will Trusts* [1950] 1 All E.R. 582]. This contained a declaration:

> "... that upon and by reason of the birth on June 8, 1949, of the infant defendant Mark Henry Wynter Blathwayt the life interest of the defendant Justin Robert Wynter Blathwayt in the settled estates comprised in the above mentioned settlement or otherwise under the
> H trusts of the will of the above mentioned Robert Wynter Blathwayt has not determined."

A report of the judgment given by the learned judge is available and included in the record. He is reported as having said, in explanation of his judgment, that he had not decided as to what was to happen on the death of Christopher and had only decided that Justin's interest had not determined on Mark's birth.

(iii) The present proceedings were started in 1971. The substantive question submitted to the court was whether: A

> "(*a*) upon the death of Justin Robert Wynter Blathwayt or (*b*) upon the forfeiture of the estate limited to the said Justin Robert Wynter Blathwayt during his life by the said will the property then subject to the trusts of the said will will be held—(i) upon trust for the defendant Mark Henry Wynter Blathwayt absolutely or (ii) upon the same trusts during the remainder of the life of the said Christopher George Wynter Blathwayt (if he is then living) as would have taken effect if the said Christopher George Wynter Blathwayt had previously died without having had issue and subject thereto upon trust for the defendant Mark Henry Wynter Blathwayt or (iii) upon the same trusts as would have taken effect if the said Christopher George Wynter Blathwayt had previously died without having had issue or (iv) upon some other and if so what trusts." B C

This question was answered by Goulding J. and the Court of Appeal in the sense of (iii).

It is necessary to add three points at this stage. First, in the Court of Appeal, in case that court might consider itself precluded by the decision of Wynn-Parry J. from deciding in favour of Mark, leave was asked to appeal out of time against that decision. The Court of Appeal, on independent consideration, reached the conclusion that the decision was correct and, having done so, refused leave to appeal. Mark's application was renewed in his printed case before this House. D

Second, in this House, leave was asked, on behalf of Mark, to appeal out of time against the decision of Farwell J. in 1940 that Christopher's life interest determined upon his reception into the Roman Catholic Church. In support of this it was pointed out that Mark was not a party to the 1940 summons and that no representation order was made by which he would be bound. Your Lordships however considered that this point could have been contested during or at any time after the 1949 proceedings; that the 1949 proceedings were conducted and decided on the basis that such determination had occurred; that over 20 years elapsed from the 1949 proceedings until the present action was commenced, during which time persons interested under the will must have assumed that the determination had occurred; that the present originating summons was issued upon the same assumption, and that no application was made for the point to be raised, nor was it raised either before Goulding J. or the Court of Appeal. It was therefore announced to the parties during the hearing that your Lordships would not allow the point to be taken in this House at this stage. E F G

Third, it was submitted by the respondents that Mark was estopped by the order of Wynn-Parry J. from arguing that upon his birth he became entitled under the trusts of the will to an entailed interest in the settled property. It was said that a decision to that effect would be inconsistent both with the order made by Wynn-Parry J. and with the terms of his judgment. For Mark it was contended that although he was a party to the 1949 proceedings, the remaindermen (represented by the present fifth respondent) were not: that estoppels must be mutual, and that since the remaindermen would not have been estopped by any order of Wynn-Parry J. as against Mark, conversely Mark is not estopped against them. In answer to this it was contended that the remaindermen would have been bound by any order against their interest in 1949 either because their H

A interest was represented by the trustee, or because they should be regarded as " privies " of Justin who was a party in 1949.

My Lords, in my opinion this series of issues, which gave rise to some intricate arguments, must be resolved in favour of Mark. The general proposition that estoppels must be mutual is clear (vide *Halsbury's Laws of England*, 3rd ed., vol. 15 (1956), p. 201). I do not think that there is any doubt that Justin, as a party to the 1949 proceedings, was only concerned B to represent, and to defend, his own particular interest (for his life or during Christopher's life) and not the interest of any remaindermen. The form of the questions submitted to the court, which I have already quoted, makes this clear. In no sense therefore could the remaindermen be said to be " privies " of Justin; his interest was not theirs: they could not succeed to that interest of his which was at issue in 1949.

C I cannot, either, agree with the alternative argument that the interests of the remaindermen were represented by the trustees, attractively though this was put. It is true that in proceedings brought against a trust estate by a third person, or on behalf of a trust estate against a third person, the interests of beneficiaries under a trust can and normally ought to be represented by the trustees—this situation is procedurally regulated by R.S.C., Ord. 15, r. 14 (in 1949 by Ord. 16, r. 8). But when the proceedings D are internal to the trust and concern the rights inter se of beneficiaries, the situation is different: beneficiaries represent their own interests, or those which they are appointed by the court to represent: if trustees are to represent them, this must be made clear in the summons or at least in the order. This situation is procedurally regulated by Ord. 83, r. 3. In 1949, if it had been intended to call in question, or to bind, the remaindermen's E interests, nothing would have been easier than for the fifth respondent, joined as a trustee, to have been made a defendant. This was not done, and, as I have pointed out, the originating summons was not framed so as to extend to any interest beyond that of Justin.

I am therefore of opinion that Mark is not estopped from claiming as against the remaindermen, after Justin, that, whether on his birth, or subject to Justin's interest, he became entitled to an entailed interest.

F I can now deal with the substance of the appeal. It may be useful first to set out the various and successive points which Mark has to establish if he is to succeed.

1. He must show that, whether on birth, or upon the determination of Justin's interest (these are alternatives) he became entitled to an entailed interest in the settled estates. This involves his saying that the decision of G Wynn-Parry J. in 1949 was wrong, as also were the decisions of Goulding J. and the Court of Appeal. It is a pure question of construction of the will.

2. If he succeeds in submission (1) he must then face the contention that his interest has been forfeited by reason of his adherence to the Roman Catholic Church. This he seeks to do in one of the following ways: (*a*) the clause directing forfeiture in this event is void, either for uncertainty or as contrary to public policy. No such contention has ever yet H been put forward in any proceeding upon this will. (*b*) Alternatively, Mark was not, at the relevant time for considering whether the clause of forfeiture applied, a tenant " in tail in possession " as this clause requires. This paradoxical result is arrived at by the following reasoning: although upon birth Mark became *entitled* to an entailed interest, he was de facto kept out of it as regards possession by the decision of Wynn-Parry J. which though—on Mark's own submission ((i) above)—wrong, takes effect as a fact in the situation. In aid of this argument Mark did not pursue his

application to appeal against Wynn-Parry J's. order, success in which would embarrass him. He merely said that he is not bound by it and that it is wrong. Finally, Mark having now disentailed, the forfeiture clause cannot operate. It is not unfair to say that by the effect of this convoluted submission Mark seeks to achieve a result directly contrary to the intention of the testator.

3. As an alternative to the above submissions, Mark contends that the settled property will be held upon trust for himself absolutely upon the determination of Justin's interest in possession. This means that upon forfeiture by Christopher the estate was shifted to Justin, but that on his interest coming to an end the limitations (viz. to Christopher's issue) may take effect. A submission to this effect is not necessarily inconsistent with the earlier decisions but it found no favour below. Nor, I should say at once, does it find favour with me; it is effectively negated by the argument on the main issue.

The main issue of construction ((1) above) turns upon the comparatively short clause 9 (*b*). I have to confess that I find it reasonably clear and in this I am in agreement with both courts below. It is articulated in two parts. First the life interest (in the case we are considering) is to cease and determine and be utterly void. With these words alone it would be clear that the following interests are accelerated, and in accordance with normal principle it might be the case that if, what would according to the trusts set out in clause 6, be the next interest, was not represented by anyone in existence, there would be a gap, or suspense of vesting, so that the income would have to be dealt with by accumulation, or by temporary payment to the next person in succession (cf. *In re Conyngham* [1921] 1 Ch. 491). But this possibility is unequivocally removed by the words which follow. The estate (i.e. the capital) is to go to (i.e. vest in) the person next entitled in the same manner as if the life tenant were then dead. To a layman there would seem to be no room for doubt that there is a complete and final passing to that person who would take if the life tenant were dead in 1939, i.e., to Justin as the next tenant for life. This seems the plain meaning of plain words. Are there any solid arguments against giving the words this effect? First it is said that the use of the words "under the trusts hereinbefore declared" the shifting must be in favour of persons taking under the next limitation in clause 6 immediately following that which confers the forfeited interest, i.e., here, to the issue of Christopher. But to say this is artificially to divide the shifting clause into two parts: in fact there is one provision only—in favour of the person next entitled in the same manner as if the tenant for life is then dead. I do not see how these words can authorise retention of the estate in favour of a person who may become entitled during the life of the tenant for life. Then it is said that there is significance in the reference to a hypothetical absence of issue in the case of a tenant in tail and the absence of any such reference in the case of a tenant for life. The answer to this is that there was no occasion to presuppose absence of issue in the latter case: if there are issue they take, if there are not, the property goes to the next entitled. The reference to issue in the case of an entailed interest is needed in order to shift the whole of the entailed interest rather than only part of it. Thirdly, an argument is sought to be drawn from the final provision about powers. This, it is said, would be unnecessary if the tenant for life is supposed to be dead for the purpose of ascertaining who is entitled. But this is transparently fallacious. Under clause 6 (initial words) the estate is given (as is normal) "upon trusts and with and subject to the powers and provisions following" one of the powers being (clause 10) to

A appoint a jointure rentcharge to a wife. Clause 9 (*b*), in the first part, deals with the *trusts* on which the estate is to devolve. It would be an elementary blunder not to continue to deal specifically with the *powers*, and that is all that the latter words do. Finally, the clause is said to be capricious if it allows the estate to go to a child of the forfeiting tenant for life, if living at the time of forfeiture, but not to an afterborn child. My Lords, I agree with the judges below in their approach to this argument.
B Whether such a distinction was intended by the trustees or the draftsman is pure speculation; how can one say what the testator would have intended, as regards a child such as Mark who was born and brought up in the Roman Catholic Church or, it might be, with some other surname than Blathwayt, except by interpreting the words used? A will, which eliminates as this will does the issue of a forfeiting tenant in tail (existing or not),
C which distinguishes between a wife in whose favour there is a subsisting rentcharge and one in whose favour none has been appointed, shows, to my mind, that the only safe course is to follow out what has been said—certainly if it has been clearly said.

It was sought to escape from the consequences of this analysis by references to conveyancing precedents and your Lordships were referred to numerous editions of the works of such eminent craftsmen as Vaizey,
D Davidson and the successive editors of *Key and Elphinstone's Precedents in Conveyancing* and *Prideaux, Precedents in Conveyancing.* I would say of this process, as an aid to interpretation, that it is to be deprecated. It is one thing to appeal to the settled practice of conveyancers on some question of law—a course which has often been approved (see for example *Clive* v. *Clive* (1872) 7 Ch.App. 433, 437 *per* James L.J.). It is
E quite another to appeal to various drafts by persons, however eminent, as a guide to the construction of a clause not identical with any of them. Who can say which precedent was used in this case—it may resemble one more than another, but what conclusion does that suggest? If one could identify the book which was used where would that lead one? From all the material which was read to us, there were, in my opinion, only two legitimate sources of enlightenment. The first lies in decided cases which may have
F been based on, or influenced, certain specific words: the second lies in the identification of certain problems which in the relevant area (here that of strict settlement) face the draftsman.

To take the second first. It has been apparent for some 150 years that draftsmen have had to ask themselves what is to happen if, when a shifting clause comes into operation, the next person to take, according to the limitations, is not in existence, and, as part of the same problem, what is to
G happen meanwhile to the income? If this was not realised before, it became crystal clear when Mr. Charles Butler produced his annotated edition of *Coke upon Littleton.* In the edition of 1823, Vol. 2 in Note II to section 597 this matter receives detailed treatment. "There are few occasions", says Mr. Butler, "where greater nicety, or skill, is required, in limiting uses of this kind, than in the two following cases . . .". The second case is that
H of a name and arms clause—which we have here. Mr. Butler draws attention to the necessity for providing in detail to whom the estate is to go on forfeiture, for whether the estate is to be preserved for persons not in esse, and for the interim destination of the income. In order to practise as well as preach, he even sets out in extenso a clause which he suggests covers everything.

The relevant portion of it repays attention. (Note II 2). After the name and arms clause has been spelt out he continues,

"... the limitation hereinbefore contained of the said manors and other hereditaments, to the use of him or them so refusing, or neglecting, shall cease, determine, and become utterly void: and that the same manors, and other hereditaments shall, in such cases, immediately thereupon, devolve to the person next beneficially entitled in remainder, under the limitations hereinbefore contained, in the same manner, as if the person or persons whose estate shall so cease, determine, and become void, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was or were dead without issue inheritable under such entail; ... And it is hereby further agreed and declared between, and by, the parties to these presents, that the cesser or determination of the estate of the said A or of any other tenant for life, by force of the proviso hereinbefore contained, shall not operate to exclude, prevent, or prejudice, any of the contingent remainders hereinbefore limited to her, his, or their son or sons, daughter or daughters, or any other person or persons; but that the remainder limited to the said C. and D. and their heirs, during the life of the said A. or such other tenant for life, shall, after such cesser or determination, take effect, and continue, for preserving such contingent remainders, and giving them effect as they may arise. And that immediately from and after such cesser or determination of such preceding estate for life, and during the suspense and contingency of such then expectant remainder, the said C. and D. their heirs and assigns, shall receive, pay and apply the rents and profits of the said manors and other hereditaments, which would belong to such tenant for life, if such cesser or determination had not taken place, unto the person or persons, for the intents and purposes, and in the manner, to, for, and in which, the same rents and profits would be, or would have been payable and applicable respectively, under and by virtue of the limitations and provisoes hereinbefore contained, in case such tenant for life was actually dead; so that, immediately from and after such cesser or determination, the issue of the said A or of such other tenant for life, entitled for the time being, under the limitations aforesaid, to the said manors and other hereditaments, in remainder immediately expectant on the decease of the said A, or of such other tenant for life, may be entitled to the rents and profits of the said manor and other hereditaments, for his and their own proper use and benefit respectively, during the life of the parent, as if such parent were dead: and that in case no such issue shall be in existence, then, during the vacancy or contingency of such issue, the person next entitled, for the time being, under the limitations aforesaid, to a vested remainder in the said manors and other hereditaments, expectant on the decease of the said A or of such other tenant for life, and failure of such issue of her, or his body, shall and may be entitled to the said rents and profits for his and their proper use and benefit respectively, but without any exclusion of, or prejudice to the estate, interest, or right of any such issue, afterwards coming into existence, but only from the time of the birth of such issue respectively."

My Lords, if one eliminates the provisions as regards trustees for preserving contingent remainders, which in the modern law are unnecessary, here is a clause which clearly and explicitly provides for exactly those events which it is said are intended to be provided for here. Yet although in the present will we find initial dispositions corresponding—in fact almost

verbatim—to the suggested draft, the later provisions for enabling after born issue to take and for disposing of the income are totally lacking. The problem is stated, it must have been appreciated: a solution is offered: it is not adopted, either in the words proposed or in any other words. What conclusion can be drawn other than that the testator or his professional adviser has chosen another course?

Then as to authority: the argument here overlaps because Mr. Butler cites and must have in mind some of the most relevant—*Doe d. Heneage* v. *Heneage* (1790) Term Rep. 13 and others. I shall refer to this case and to one other.

Doe d. Heneage v. *Heneage* was decided in the King's Bench on an ejectment action. It was a case where the particular life estate determined, on vesting of another family property, before the birth of issue to the tenant for life. Lord Kenyon C.J. in a brief and trenchant judgment found that the gift to trustees to preserve contingent remainders during the life of the tenant for life showed an intention that the estate should be preserved for the benefit of issue when born, and held that the trustees' interest continued notwithstanding that the life interest determined as if the tenant for life were dead.

The judgment of Kindersley V-C. in *Lambarde* v. *Peach* (1859) 4 Drew. 553 contains an ample discussion of clauses similar to the present. In the will before him, the words " as if he were dead " occurred in the shifting clause but only in the clause providing for cesser of the life interest. They did not appear in the following provision which directed that the estate should go to the next in remainder. The Vice-Chancellor continues at p. 573:

> " . . . the direction is that the estate is to cease as if he were dead, but not that the lands shall go over to the next in remainder as if he were dead. This appears to me to be a substantial and important distinction ".

The opposite is of course the case in the present will and there can surely be no doubt that Kindersley V.-C. would have interpreted the present will as I would do.

> " Why " he asks, " are we to construe this latter branch as if the testator had said that the lands shall go over to the person next entitled in remainder *as if the party were dead,* when in truth he had said no such thing? " (p. 574)

Here he has said just this. That an intention to pass the estate direct to the " next entitled " without holding it for the benefit of contingent remaindermen is nothing extraordinary, or outrageous is exemplified by *Carr* v. *Earl of Erroll* (1805) 6 East 58: see also *Stanley* v. *Stanley* (1809) 16 Ves.Jun. 491, where also the omission of such words as " as if he were dead " was considered decisive.

Of the two possible results in these cases, viz., (a) that contingent remainders are to be respected or (b) that they are to be passed over in favour of the existing person first next in line, which is correct is a question of intention, and even if one accepts that the court is ready to find in favour of the former, and perhaps to strain words to do so, the words used in the present case, in my opinion, are too clear to admit that any such intention exists.

I am therefore in agreement with the Court of Appeal and Goulding J. on this point, and so I would dismiss the appeal.

On this view of the matter, no further points arise, but since your Lordships take a different view, I may briefly express my opinion upon them—at least such as may be of general application apart from the present will.

1. On the question whether the forfeiture clause, in so far as it relates to being or becoming a Roman Catholic is void for uncertainty. I am clearly of opinion that it is not. Clauses relating in one way or another to the Roman Catholic Church, or faith, have been known and recognised for many years both in Acts of Parliament (e.g. the Bill of Rights and the Act of Settlement ("Popish religion") and Roman Catholic Relief Acts of 1791 and 1829) and in wills and settlements for it now to be possible to avoid them on this ground. I am of course aware that the present clause is a condition subsequent (or resolutive condition) and I need not quarrel with the accepted doctrine of English law derived from Lord Cranworth's words in *Clavering* v. *Ellison* (1859) 7 H.L.Cas. 707, 725 which requires a greater degree of certainty in advance as to the scope of such conditions than is needed when the condition is precedent (or suspensive). I can respect this distinction for the purposes of this case without renouncing the right, which I conceive judges have, to judge the degree of certainty with some measure of common sense and knowledge and without excessive astuteness to discover ambiguities. The decisions which have been given, in relation to clauses as to Roman Catholicism, as well as those in which such clauses have passed scrutiny sub silentio, are, with rare exception, one way. They include: *In re May, Eggar* v. *May* [1917] 2 Ch. 126; *In re May, Eggar* v. *May (No. 2)* [1932] 1 Ch. 99, *In re Wright, Public Trustee* v. *Wright* (1937) 158 L.T. 368; *In re Morrison's Will Trusts, Walsingham* v. *Blathwayt* [1940] Ch. 102, *In re Evans, Hewitt* v. *Edwards* [1940] Ch. 629; *In re McKenna Higgins* v. *Bank of Ireland* [1947] I.R. 277; *McCausland* v. *Young* [1948] N.I. 72; [1949] N.I. 49. A decision the other way is *In re Borwick, Borwick* v. *Borwick* [1933] Ch. 657, but there the condition was composite: "be or become a Roman Catholic or not be openly or avowedly Protestant". The balance of authority is thus strongly in favour of validity and the contrary would be barely arguable but for the views expressed in this House in *Clayton* v. *Ramsden* [1943] A.C. 320. The condition there was composite "not of Jewish parentage and of the Jewish faith". It was held by all members of the House that the first limb (and therefore on this ground the whole condition) was void for uncertainty and by four of their Lordships that the second limb was void on the same ground. Lord Wright took the opposite view on the second limb, as had Lord Greene M.R. delivering the judgment of the Court of Appeal.

My Lords, I have no wish to whittle away decisions of this House by fine distinctions; but accepting, as I fully do, the opinions of the majority of their Lordships as regards the religious part of this condition, I do not consider myself obliged, or, indeed justified, in extending the conclusion there reached, as to uncertainty, to other clauses relating to other religions or branches of religions. The judgment of Lord Greene M.R. in the Court of Appeal (sub nom. *In re Samuel, Jacobs* v. *Ramsden*) [1942] Ch. 1 contains a very full account of decisions relating to the Roman Catholic faith, to the Protestant religion and the Church of England (amongst which he cited *Clavering* v. *Ellison* 7 H.L.Cas. 707 and to which could be added the *Trustees of Church Property of the Diocese of Newcastle* v. *Ebbeck* (1960) 104 C.L.R. 394) and the Lutheran religion (*Patton* v. *Toronto General Trusts Corporation* [1930] A.C. 629). All of these cases must, from a reading of that judgment, and from their Lordships' own

A experience, have been present to their minds. The absence of any reference to them in the speeches in this House refutes any suggestion that a new general principle was being laid down as to the invalidity on ground of uncertainty of all subsequent conditions whatsoever relating to all varieties of religious belief. It confirms that the decision in *Clayton* v. *Ramsden* [1943] A.C. 320 was a particular decision on a condition expressed in a particular way about one kind of religious belief or B profession. I do not think it right to apply it to Roman Catholicism.

2. Finally, as to public policy. The argument under this heading was put in two alternative ways. First, it was said that the law of England was now set against discrimination on a number of grounds including religious grounds, and appeal was made to the Race Relations Act 1968 which does not refer to religion and to the European Convention of Human Rights of C 1950 which refers to freedom of religion and to enjoyment of that freedom and other freedoms without discrimination on ground of religion. My Lords, I do not doubt that conceptions of public policy should move with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move. It may well be that conditions such as this are, or at least are becoming, inconsistent with standards now widely accepted. But acceptance of this D does not persuade me that we are justified, particularly in relation to a will which came into effect as long ago as 1936 and which has twice been the subject of judicial consideration, in introducing for the first time a rule of law which would go far beyond the mere avoidance of discrimination on religious grounds. To do so would bring about a substantial reduction of another freedom, firmly rooted in our law, namely that of testamentary E disposition. Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.

The other and narrower branch of the argument is that first given modern currency by Parker J. in *In re Sandbrook*, *Noel* v. *Sandbrook* [1912] 2 Ch. 471, 477. A condition "is bad which operates to restrain or forbid a man from doing his duty." This principle was applied to a F condition applicable to a child during infancy, forfeiting his interest if he should "be or become a Roman Catholic or not be openly or avowedly Protestant" (*In re Borwick* [1933] Ch. 659). On the other hand, *In re May* (*No.* 2) [1932] Ch. 99 an argument that the condition was void as against public policy, though put forward at first instance, was abandoned before the Court of Appeal and in *In re Morrison's Will Trusts* [1940] G Ch. 102, a case concerned with the mother of Christopher and Justin Blathwayt, no contention based on public policy seems to have been raised and Bennett J., who decided *In re Borwick*, held that the condition operated.

My Lords, the force of the observations of Parker J. in *In re Sandbrook*, in relation to conditions applying to infants, may well be appreciated but is diminished to some extent at least by the doctrine evolved by the courts H that, where an infant is involved, the time for choice as to compliance or non-compliance with the condition must be postponed until majority and a reasonable time thereafter (see *In re May* [1917] 2 Ch. 126 and (*No.* 2) [1932] 1 Ch. 99). In view of this sensible mitigation of the condition, I do not find myself able to discern a rule of public policy sufficiently clear and definite for total invalidation of conditions of the kind now in question. To say that any condition which in any way might affect or influence the way in which a child is brought up, or in which parental duties are

exercised, seems to me to state far too wide a rule. And even if the rule were confined to religious upbringing, I am unpersuaded that, in relation to landed estates in which family attitudes and traditions may be strong and valued by testators, and moreover which may often involve close association with one or another Church, public policy requires that testators may not prefer one branch of the family to another upon religious grounds. Certainly I should need much more concrete and positive reasons bearing upon the particular gift in question before I felt justified in nullifying the condition the testator has chosen to attach. After all, a choice between considerations of material prosperity and spiritual welfare has to be made by many parents for their children—and, one may add, by judges in infants' interests—and it would be cynical to assume that these cannot be conscientiously and rightly made. I find reassurance in the case of *Talbot* v. *Earl of Shrewsbury* (1840) 4 My. & Cr. 672 and in the whole discussion by Lord Cottenham L.C. I would therefore reject all the appellant's arguments against the validity of the condition.

My Lords, for the reasons I stated earlier I would dismiss this appeal.

LORD SIMON OF GLAISDALE. My Lords, on all the points dealt with in his speech, save as to the principal issue of construction, I agree with my noble and learned friend, Lord Wilberforce. In particular, I agree with what he has said about public policy as applied by the law to a religious forfeiture clause such as your Lordships are concerned with. The actual personal circumstances can differ so greatly in these matters from case to case that it is difficult to apply a general rule of public policy which is not either practically unreal in many cases or open to some logical objection. Creed or religious observance or sectarian adherence cannot be isolated from other human activities or ideologies. "Attempt to rule the living from the grave" is a vivid phrase apt to cause revulsion from the conduct referred to: but it is difficult to see why, if public policy is invoked, a particular disposition should be more objectionable if made by will than if made inter vivos. Moreover, it would appear that the policy of English law is to allow a testator considerable freedom in the way in which he disposes of his estate: modern English law knows nothing (apart from taxation and discretionary intervention under the Inheritance (Family Provision) legislation) of a part of a deceased's estate reserved from his disposition. Balancing these various matters, I agree with my noble and learned friend, Lord Wilberforce, that in these days society's interest in a parent's conscientious choice as to what influence should be brought to bear on his own child during minority is sufficiently vindicated by the rule that a forfeiture clause shall not operate till after the lapse of a reasonable period after the child reaches the age of majority. This also accords with the contemporary view that it is for a youth himself to take the crucial decision on such a matter. He cannot hope to do so emancipated from conflicting influences and interests.

I must not be taken thereby to be implying that it is for courts of law to embark on an independent and unfettered appraisal of what they think is required by public policy on any issue. Courts are concerned with public policy only in so far as it has been manifested by parliamentary sanction or embodied in rules of law having binding judicial force. As to such rules of law your Lordships have the same power to declare, to bind and to loose as in regard to any other judicial precedent. Rules of law expressing principles of public policy therefore fall to be treated with the same respect and circumspection, the same common sense and regard to changing circum-

A stances, as any other rules of law. So approaching the authorities expressing public policy with regard to forfeiture clauses—specifically those relating to religious and other ideologies—I agree that the law is as stated by my noble and learned friend, Lord Wilberforce.

This issue arises for decision by me because on the main question—the construction of clause 9 of the will—I agree with my noble and learned friend, Lord Cross of Chelsea. The two matters that strike me most forcibly B in arriving at this concurrence are, first, that the will is obviously drawn by a knowledgeable conveyancer and, secondly, that the same provisions govern forfeiture in relation to both religion and name and arms. The fact that the will was professionally drawn by someone who must have been conversant with the works of authority on conveyancing convinces me that the various contingencies which might arise would have been envisaged—in particular, C that a son, such as Mark, might be born to Christopher after Christopher's forfeiture; and, indeed, that Mark might have had an elder brother born to Christopher immediately before forfeiture. Moreover, it involves more than ordinary significance being ascribable to the repercussions of the rival constructions in weighing the validity of those constructions. And the fact that the provisions for forfeiture are identical in relation to religion and to name and arms enables one to probe the testator's intention by reference D to the less emotive name and arms provisions and apply them to the religious forfeiture provisions.

On this basis may I take the following hypotheses? A distant cousin, Sir Prosper Deleveque, leaves Christopher a life interest in the enormous Deleveque estate (ten times the value of the Blathwayt estate) on condition that Christopher takes the name and arms of Deleveque. Christopher does E so, and thereby forfeits his interest in the Blathwayt estate. At the time of the forfeiture Christopher has a six month old child, Matthew. Twelve months after the forfeiture Mark is born. Both Matthew and Mark continue to bear the name and arms of Blathwayt. There can be no question but that, under the Blathwayt will, Matthew becomes next entitled on Christopher's forfeiture. Is it really credible that the Blathwayt testator intended to cut out Mark should Matthew die without issue during Mark's lifetime, because F what he has said means that Christopher must be taken to have died at the time of the forfeiture and was therefore incapable of having a child twelve months later? My noble and learned friend, Lord Cross of Chelsea, has shown that so extraordinary an intention need not—indeed, should not—be ascribed to the testator.

But the fantastically and insensately capricious implications of the G respondents' construction do not even stop there. Mark might have been born not ten years, not twelve months, but six months after Christopher's forfeiture; and a dead man *can* have issue six months after his death. So that, on the respondents' construction, whether a son of Christopher's was cut out of the line of succession designated by clause 6 would not even depend on whether he was born before or after Christopher's forfeiture, but on how soon he was born after the forfeiture.

H For the foregoing reasons, which merely embroider those of my noble and learned friend, Lord Cross of Chelsea, I would allow the appeal.

LORD CROSS OF CHELSEA. My Lords, the facts of this case are stated in the speech of my noble and learned friend Lord Wilberforce, which I have had the advantage of reading. As I agree with him on all the points with which he deals save only the question of the construction of clause 9 of the will of the testator I will deal with the other points very briefly.

The summons issued by the trustees of the will on February 23, 1940, asked two questions—first, whether Christopher forfeited his life interest in the property settled by the will on being received into the Roman Catholic Church on November 10, 1939, and, secondly, if the answer to the first question was " Yes ", how the trustees were to deal with the income of the property pending the birth of a son to Christopher. I do not suppose that the legal advisers of the family at that time expected the first question to be answered otherwise than Farwell J. answered it—that is to say in the affirmative; for before the decision of this House in *Clayton* v. *Ramsden* [1943] A.C. 320 few if any Chancery practitioners would have thought it seriously arguable that a condition subsequent forfeiting a life interest on the life tenant becoming a Roman Catholic was void. The decision in *Clayton* v. *Ramsden* turned primarily on a condition for forfeiture on the beneficiary marrying a person " not of Jewish parentage " but four of the members of the House expressed the view that a condition against marriage with a person " not of the Jewish faith " was also void for uncertainty. If that be so then it is certainly arguable that a condition for forfeiture on the beneficiary becoming a Roman Catholic is void. That point was not however taken on behalf of Mark on the hearing of the summons taken out after his birth in 1949. That proceeded on the footing that Christopher forfeited his life interest in 1939 and that the only point to be determined was whether the interest in the income to which Justin then became entitled in possession had come to an end on Mark's birth. Your Lordships refused Mark leave to raise the issue of Christopher's forfeiture on this appeal; but the question whether the condition is or is not void emerges again in its application to Mark's estate tail. In agreement, I believe, with all your Lordships, I am clearly of opinion that the condition was not and is not void either for uncertainty or, as applied to a person of full age at the date of the will, on grounds of public policy. I accept, of course, that by the law of England a stricter test of certainty is applied to a condition subsequent than to a condition precedent but I agree with the judges both in the Irish Republic and in Northern Ireland that it would be an affront to common sense to hold that a condition for forfeiture if the beneficiary should become a Roman Catholic is open to objection on the ground of uncertainty: see *In re McKenna* [1947] I.R. 277 and *McCausland* v. *Young* [1948] N.I. 72; [1949] N.I. 49. If I had been a member of the House which heard *Clayton* v. *Ramsden*, I might well have agreed with Lord Wright that a condition for forfeiture on marriage with a person " not of the Jewish faith " was valid. But it is a vaguer conception than being or not being a Roman Catholic and acceptance of the view of the majority does not involve the consequence that a condition of forfeiture on becoming a Roman Catholic is open to objection on the score of uncertainty. Turning to the question of public policy, it is true that it is widely thought nowadays that it is wrong for a government to treat some of its citizens less favourably than others because of differences in their religious beliefs; but it does not follow from that that it is against public policy for an adherent of one religion to distinguish in disposing of his property between adherents of his faith and those of another. So to hold would amount to saying that though it is in order for a man to have a mild preference for one religion as opposed to another it is disreputable for him to be convinced of the importance of holding true religious beliefs and of the fact that his religious beliefs are the true ones.

Mark did not appeal against the decision of Wynn-Parry J. (*In re Blathwayt's Will Trusts* [1950] 1 All E.R. 582 that Justin's life interest did

A not determine on his birth and that decision is undoubtedly binding on Mark as against Justin; but the respondents contended that Mark was also estopped by the order of Wynn-Parry J. from asserting as against those entitled in remainder after Justin's death that Wynn-Parry J. misconstrued the will of the testator. If that is so then, as estoppels must be mutual, it must follow that had Wynn-Parry J. held in favour of Mark that Justin's life interest determined on his birth the remaindermen would have been B estopped from contending that he had misconstrued the will and that they would become entitled to the property after Justin's death. Despite the able argument of junior counsel for the respondents, I do not think that an order in favour of Mark made in proceedings to which the remaindermen were not parties and in which no representation order was made could have bound them. They were not " privies " of Justin and, although, if there is C no party to argue some point, the court may allow it to be argued by the trustees on behalf of absent parties, it is clear that in this case the trustees were playing their usual neutral role and simply asking the court to decide as between Mark and Justin whether Justin's interest in the income had determined.

So the question arises whether, on the true construction of the will of the testator, Mark, having been born after his father forfeited his life interest, D took no interest in the settled property under the trusts declared by clause 6. Goulding J., the Court of Appeal, and, finally, my noble and learned friend, Lord Wilberforce, have all said that he took no interest and in these circumstances it is only with great diffidence that I venture to advance the contrary opinion. When one has a series of limitations such as those contained in clause 6 of the will of the testator—to A for life with remainder to his first E and other sons successively in order of seniority in tail male with remainder to B for life with remainder to his first and other sons successively in order of seniority in tail male with remainder to C for life with remainder, etc.—and one of the life estates determines prematurely, then, in the absence of any contrary intention shown in the instrument, two results follow (*a*) that there is no gap in the limitations during the rest of the life of the life tenant in question but the subsequent limitations are accelerated and (*b*) that, if at F the date of the determination of the life estate in question the life tenant has no issue living to take under the estates tail to his sons, the next life interest will take effect in possession subject to defeasance in favour of a son of the life tenant born after the date of the determination of his life interest: see *In re Conyngham, Conyngham* v. *Conyngham* [1921] 1 Ch. 491. Counsel for the respondents accepted that had Christopher's life interest deter- G mined for some reason other than forfeiture under the provisions of clause 9—for example by disclaimer or his having witnessed the will—the life interest taken by Justin in possession would have ceased on Mark's birth and that the same result would have ensued if clause 9 had ended with the words " the estate hereby limited to him shall cease, determine and be utterly void." It is said, however, that the rest of clause 9—the so-called " shifting provision "—shows that what I have called the second H result of the general rule does not apply here and that though the subsequent interests were accelerated the life interest to which Justin then became entitled in possession was not liable to defeasance on the subsequent birth of a son to Christopher. The words in question run as follows:

> " and my principal estate shall thereupon go to the person next entitled under the trusts hereinbefore declared in the same manner as if the

person whose estate shall so cease determine and become void being a tenant for life were then dead or being a tenant in tail male were then dead without issue inheritable under the estate tail and so that in the case of a tenant for life all powers annexed to his estate shall cease to be exercisable and that the enjoyment of any jointure rent-charge previously appointed by such person in favour of his wife under the power hereinafter contained shall not be accelerated."

On Christopher's forfeiture—so the argument runs—the person next entitled was Justin and since the property was then to go to him "in the same manner as if Christopher were then dead," his life interest did not determine on Mark's birth since, if Christopher had died when he became a Roman Catholic, Mark would never have been born. Now if that be indeed the effect of the clause, I am sure that it was not an effect intended by the testator or his draftsman. When a settlor provides for the forfeiture of a life interest on the life tenant doing or failing to do some act then, as the old conveyancers point out, it is not generally his intention that the life tenant's issue shall be prejudiced by the non-compliance of their parent with the condition in question (see e.g. Butler's Note II 2 to section 597 of *Coke upon Littleton; and Vaizey on Settlements* (1887) vol. II, p. 1288). Nevertheless one can without much difficulty, imagine a settlor or testator deliberately providing that failure by a parent to comply with a condition should forfeit not only his life interest but also the estates in remainder of his issue since he might think that so to provide would afford an added inducement to the parent to comply with the condition. But what is to my mind inconceivable is that a settlor or testator should deliberately provide that failure by the parent to comply with a condition should not forfeit the interests in remainder of his children living at the date of forfeiture but should forfeit the interests of after born children. Suppose, for example, that Christopher had forfeited his life estate by ceasing to use the name and arms of Blathwayt—in compliance, perhaps, with a condition in some other will—that he already had a son X and that Mark was born after the date of forfeiture. Suppose, further, that the two boys grew up with the full intention of using the old family name—without maybe any objection from their father—but that X dies before attaining the age of 21, then if the clause means what the respondent says it means the estate which was being held on trust for X would pass on his death to Justin, and Mark who was in the same position as X, save that he was born after his father changed his name, would be cut out. I cannot believe that any draftsman would use words which he realised might have that effect without express instructions from the testator and I cannot imagine any testator giving such instructions. That, of course, is not in itself an answer to the respondents' argument for one cannot rectify a will by reference to the instructions given to counsel or the notes on counsel's draft. If the testator has said something clearly and unambiguously, one must give effect to it even though one may strongly suspect that he did not mean to say it. But the improbability of the testator having meant to draw a distinction between sons born before and sons born after a forfeiture of his life interest by their parent is at least a ground for looking at the language used very carefully to make sure that it does indeed clearly and unambiguously say what it is said to say. Now if I examine the language of the "shifting provision" I am struck by two things. The first is that, whereas the testator took pains to spell out the results of the hypothetical death of the forfeiting life tenant as regards his wife, he took no such pains as regards his after born sons. With regard to a wife, he says that

A the forfeiting life tenant is to be considered as having died at the date of forfeiture so far as concerns any subsequent exercise of the power to jointure but is not to be considered as being actually dead so as to entitle his wife to claim a jointure already appointed to her as though she had become his widow. One would have thought that had the testator meant that a forfeiting life tenant was to be considered as being actually dead so as to be incapable of having sons who could take under the limitations in B clause 6 he would have said so expressly and not left that consequence to be inferred from the words " in the same manner as if the life tenant were then dead." The second point which strikes me is that the words " my principal estate shall thereupon go to the person next entitled under the trusts hereinbefore declared," in the same manner as if the life tenant was then dead, are on any footing in need of some explanation or expansion. In C the event which happened of Christopher having had no son before he forfeited his life interest, it is easy enough to say that Justin is the person next entitled and that there is nothing in the clause to carry the estate back to Mark. Suppose, however, that—as in the example which I gave above—Christopher had had a son X born before his forfeiture and a second son, Mark, born afterwards. Then the estate on Christopher's forfeiture would have gone to X as the person next entitled in the same manner as if D Christopher was then dead and, if X died later before disentailing, Mark could have argued that there was nothing left in the clause to carry the estate on to Justin over his head in defiance of clause 6. No doubt Justin would have countered this argument by saying that the clause should be read as saying that after the forfeiture the estate should be held on trust for the persons who would have become successively entitled to it from time E to time if the life tenant had died at the moment of forfeiture. But the fact that the vital part of the clause must be regarded on any footing as " shorthand " makes it easier to say that the " shifting provision " does no more than say that there is to be no gap but that subsequent interests are to be accelerated notwithstanding that the life tenant is still alive. This view of the " shifting provision " gains some support from its provenance. In his note mentioned above Butler gave a precedent of a name and arms clause F which appears to have been the ancestral model of all or most of the various precedents in use in the last 150 years. After providing that on failure to comply with the condition the estate of the life tenant shall " cease determine and become utterly void," the precedent continues:

> " and that the same manors, and other hereditaments shall, in such cases, immediately thereupon, devolve to the person next beneficially G entitled in remainder, under the limitations hereinbefore contained, in the same manner as if the person or persons whose estate shall so cease, determine and become void, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was or were dead without issue inheritable under such entail."

The " shifting provision " in clause 9 is so far—apart from the insertion H of the word " then " before " dead " which does not really add anything—substantially identical with Butler's form. Butler, however, goes on to provide that as from the date of forfeiture of the life interest the trustees, to preserve contingent remainders, shall during the rest of the life tenant's life pay the income of the property to the person who would from time to time be entitled to it if the life tenant were actually dead so that while no issue of the tenant for life is in existence the income shall go to the person next entitled but that on birth of issue it shall go to the issue. If one reads

the opening passage of Butler's shifting provision quoted above in the light of the subsequent provisions, it is clear that it does no more than say in general terms that the forfeiture is not to cause any gap but that the subsequent remainders are to be accelerated. In the form used in this will, however—which does not apparently figure in any published collection of precedents—the first part of Butler's "shifting provision" appears without the later part which spells out its meaning. It may be that its author left out the later part because there was no longer any need of trustees to preserve contingent remainders, failing to observe that the first part standing alone might be construed as cutting out after born children. But, however that may be, I think that the fact that the clause obviously derives from Butler, and that as used by him it was simply intended to state that the remainders should be accelerated, affords some support for so construing it in this will even though there is here nothing corresponding to the directions to the trustees as to the disposal of the income during the remainder and the life tenant's life. Further, I find some support for construing clause 9 in this way which I favour in the case of *Doe d. Heneage* v. *Heneage*, 4 Term Rep. 13 to which my noble and learned friend, Lord Wilberforce, refers. In that case the testator devised the property in question to his son G. F. Heneage for life with remainder to trustees during the life of G. F. Heneage to preserve contingent remainders with remainder to the first and other sons of G. F. Heneage successively in tail male with remainders over. The will contained a proviso in the following terms:

> "Provided always, and my will is expressly, that in case it shall happen that my said son G. F. Heneage, or any son or sons of his, to whom the said manors, &c thereinbefore mentioned are limited as aforesaid, shall ever inherit or take by descent, or by any gift, grant, or devise, or otherwise become seised in possession for his or their life or lives, or for any greater estate, of the whole or so much of the real estate of my said brother George Heneage as shall exceed the yearly value of the estate by this my will limited in use to him and them by 100 *l.* by the year, that then and from such time as my said son G. F. Heneage, or any son or sons of his shall so inherit, or take by descent, gift, grant, or devise, or otherwise become seised in possession of such or so much of the said real estate of my said brother George Heneage as aforesaid, for the term of his or their natural life or lives, or of any greater estate, all and every the use and uses, limitations and estates, hereinbefore created and declared of and concerning the said manors, &c. hereinbefore mentioned, to and for or in favour of my said son G. F. Heneage, or any son or sons of his so coming into possession of such and so much of my said brother's estates as aforesaid, shall cease, determine, and be utterly void: And in such case my will and meaning is, that the next in remainder according to the uses of this my will shall succeed to and have and enjoy my said estate hereby devised, as if my said son G. F. Heneage, or any such son or sons of his, was or were respectively dead; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding."

The testator's brother devised real estate of a value in excess of £100 a year to his nephew G. F. Heneage for life with remainder to his first and other sons successively in tail male. At the date of his uncle's death G. F. Heneage had no sons but later two sons were born to him. The question at issue was whether upon G. F. Heneage becoming entitled in possession to a life estate in his uncle's lands the property devised by his

A father's will did or did not go to the trustees to preserve contingent remainders. If it did not the contingent remainders to his sons who were unborn were destroyed. If it did his sons became on their births successive tenants in tail male in remainder. The main argument against the property going to the trustees to preserve contingent remainders was, of course, that the shifting clause said that on the life estate of G. F. Heneage determining on his succeeding to the lands devised to him for life by his uncle the B testator's property was to go to the next in remainder as if G. F. Heneage were dead. Obviously if G. F. Heneage were dead the estate granted to trustees to preserve contingent remainders which was only for the life of G. F. Heneage would never have taken effect. Nevertheless the Court of King's Bench held that the will showed a clear intention that the testator's property should go to the first and other sons of G. F. Heneage if he had C any and that the estate limited to the trustees to preserve contingent remainders took effect in order that that purpose might be achieved notwithstanding the words "as if my son G. F. Heneage were dead." It is true that in the case of *Lambarde* v. *Peach*, 4 Drew. 557 to which my noble and learned friend also refers Kindersley V.-C. described *Doe d. Heneage* v. *Heneage* as a "strong case" and pointed out that in the case before him it was much easier to give effect to the testator's intention D because the words "as if he were dead" occurred in the part of the clause which provided for the cesser of the life estate and not in the part which provided what was to happen to the property after the cesser of the life estate: but he treated *Doe d. Heneage* v. *Heneage* as a subsisting authority which, though commented on, had never been overruled and added, at p. 574:

E > "And even if *Doe* v. *Heneage* had been actually overruled (which it never has been) it would not cease to be deserving of notice as showing how strong is the disposition of a court of justice to get over difficulties in order to give effect to the testator's intention that the estate should go to the unborn son of the party whose estate is to cease and determine."

F How one construes clause 9 of this will must depend to a great extent on how sure one feels that the testator cannot have meant to draw a distinction between sons born before and sons born after the act of forfeiture. If I thought, as the courts below thought and my noble and learned friend thinks, that it is pure speculation whether or not he intended or, if he had thought about it, would have intended to draw such a distinction then I G would construe the clause as they do. But, as I cannot believe that the testator would have intended to draw the distinction, I think that for the reasons which I have attempted to give I am justified in construing it so as not to prevent Mark from taking an estate tail in possession on his birth.

If Wynn-Parry J. had held that Justin's life interest determined on Mark's birth and that Mark became at birth entitled to an entailed interest in possession, it is clear that Mark's baptism as a Roman Catholic would H not have forfeited his interest. The question whether or not Mark forfeited his interest by reason of his religious beliefs would not have arisen until he came of age—in his case until January 1, 1970,—and so was in the eyes of the law able to make up his mind whether or not to remain a Roman Catholic if he then was one: see *In re May* [1917] 2 Ch. 126. I agree with counsel for the respondents that Mark could not have avoided the need to choose by executing a disentailing deed after he came of age because he would have been already of an age to decide what (if any) form of religion

to adopt and, if he was still a Roman Catholic when he executed the disentailing deed, he would already have forfeited his entailed interest if the condition was valid. The question would, therefore, have arisen whether the forfeiture condition as attached to Mark's entailed interest was valid. I have already given my reasons for thinking that it was not void for uncertainty or on general grounds of public policy—but it can be argued that such a condition is void as against anyone who is an infant at the date when the instrument containing it takes effect because it may tend to influence the decision of his parents as what (if any) religious education he is to receive. In the Northern Irish case already mentioned the judges considered that it was a sufficient answer to this argument that a forfeiture could only be incurred by a deliberate act of the beneficiary concerned at a time when he must be regarded as free from parental influence and able to choose a religion for himself. But—with respect—I doubt whether this is really an answer to the argument. What his parents teach a child, or cause him to be taught, with regard to religion—even if it is only that religion is of no importance—is bound to affect any choice of religion which he makes when he comes of age, and some parents might be influenced by the existence of the condition to bring up their child in a way which would be likely to ensure that he did not forfeit his interest even though that form of religious education was not the one which they would have chosen for him apart from the condition. On the other hand, this line of reasoning if pressed home would lead to absurd results. To take an example given in argument —a grandfather who was anxious that his grandson should be educated at his old school might make some provision for him or his father to enable him to go to that school, stipulating that it should only become payable when he went there and only last while he was there. It would be ridiculous to suggest that such a stipulation was contrary to public policy—yet in any given case the financial benefit might induce the boy's father to send his son to a school which he might think not so good or so suitable for the boy as some other school. Is it possible to draw any intelligible line here? Is it, for instance, possible to draw a ring round religious education and say that in that field conditions tending to influence the parents' choice are invalid? Or is it not, perhaps, more sensible to say that the suggested public mischief is non-existent because no parents who were convinced that it was of great importance that their child should be brought up to hold certain religious beliefs would allow financial considerations to deter them from bringing him up to hold them while conversely no harm could come from offering parents who thought that religion was a matter of little importance financial inducements to bring up their children to hold certain religious beliefs. For my part, I prefer to express no concluded opinion on this question which I find difficult to answer because, as I see it, even if one assumes in favour of the respondent that the condition as applied to Mark was valid he incurred no forfeiture by remaining a Roman Catholic between January 1, 1970, and September 16, 1970, when he executed a disentailing deed with the consent of Christopher and Justin, since any entailed interest which he then possessed was not an entailed interest in possession to which alone the condition in clause 9 of the will applies. He was, in fact, never faced with the choice of changing his religion in order to retain his property. The respondents submitted that it is not right that Mark should, as it were, " have it both ways "—that he should be able to rely on the decision of Wynn-Parry J. for the purpose of disentailing and destroying the forfeiture condition while his entailed interest was in remainder and at the same time

A attack the decision in so far as it decided that he had no entailed interest at all. But, though at first sight it may appear somewhat odd that Mark, by losing the battle with Justin before Wynn-Parry J., should in the end be in a stronger position as against the remaindermen than if Wynn-Parry J. had decided in his favour, there is not, as I see it, any question of his "approbating and reprobating" in a way that is open to any legal objection. The B decision of Wynn-Parry J. was, and is, binding as between Mark and Justin, and Mark, by recognising the fact that any entailed interest which he might have was subject to a prior interest and disentailing on that footing, did not disentitle himself from arguing as against the remaindermen that Wynn-Parry J.'s reason for deciding in favour of Justin were wrong. For these reasons, I would allow the appeal.

C LORD EDMUND-DAVIES. My Lords, the terms of the will of Robert Wynter Blathwayt relevant to this appeal, the manner in which it has been previously construed by the courts, and the course of events since the testator's death, have already been considered in detail in the speech of my noble and learned friend, Lord Wilberforce. The primary issue to be determined is the proper construction of clause 9 of the will, so that, in the terms of the originating summons dealt with by Goulding J. and the Court of D Appeal:

> "It may be determined whether ... (a) upon the death of Justin Wynter Blathwayt or (b) upon the forfeiture of the estate limited to the said Justin Robert Wynter Blathwayt during his life by the said will the property then subject to the trusts of the said will will be held —(i) upon trust for the defendant Mark Henry Wynter Blathwayt E absolutely or (ii) upon the same trusts during the remainder of the life of the said Christopher George Wynter Blathwayt (if he is then living) as would have taken effect if the said Christopher George Wynter Blathwayt had previously died without having had issue and subject thereto upon trust for the defendant Mark Henry Wynter Blathwayt or (iii) upon the same trusts as would have taken effect if the said Christopher George Wynter Blathwayt had previously died without F having had issue or (iv) upon some other and if so what trusts."

If Goulding J. and the Court of Appeal were correct in holding that construction (iii) was the proper one and that, upon the death of Justin or the forfeiture of the estate limited to him during his life, nothing will pass to Mark, it is common ground that no further questions strictly call for G answer in this appeal, though it may nevertheless be convenient that some indication be given of what strikes one as the proper answers thereto.

I have read with great profit in draft the speeches of my noble and learned friends, Lord Wilberforce and Lord Cross of Chelsea. But, since they come to opposite conclusions regarding the manner in which the primary question involved in this appeal should be answered, I am confronted by the unenviable task of choosing between them, or, it may be, H agreeing with neither and arriving at a destination different from that reached by either.

The first point of importance, as I think, is that in this family will the priorities fixed by clause 6 thereof should never be departed from unless it emerges clearly that the conditions subsequent imposed by clause 9 render such departure inescapable. As evidenced by the form of the respondents' case to this House and the marshalling of their argument, I do not think that this cardinally important approach was adhered to. The second point

of importance is that the matter of construing clause 9 should be dealt with unfettered by the manner in which it was decided in earlier litigation over this will. I have to say with respect that Goulding J. was in error in thinking otherwise. Having said that five possible constructions of clause 9 had been debated before him, and dealing with the first of these, he continued:

> " (2) One can limit the hypothesis of notional death to the purpose of excluding Christopher's own interest. One then looks at clause 6 to see who comes in next, i.e. Mark. There is no room for Justin until after the eldest or only son of Christopher. This would result in the intermediate income being accumulated under section 175 of the Law of Property Act 1925 or, alternatively, such income being undisposed of. There is authority for this interpretation, *Doe d. Heneage* v. *Heneage*, 4 Term Rep. 13, explained by Kindersley V.-C. in *Lambarde* v. *Peach*, 4 Drew. 553, 574. So, if the court were of opinion that the testator had manifested an intention that Christopher's son should take, there would be some precedent for doing violence to the language of the will in favour of the unborn son. But this conclusion is not open to me because of the orders made in the earlier proceedings.
>
> " (3) There is a half-way house. It is possible to hold that the first interest is displaced; that the second is not yet ready; so that the third interest takes provisionally. This would mean that Christopher is displaced and Justin takes until the birth of Mark. Cf. *In re Conyngham* [1921] 1 Ch. 491 where the court held that the testator had shown a clear intention to make the equitable limitations of his estate absolute as against his heir at law, and *In re Brooke* [1923] 2 Ch. 265 where the daughter went into possession until a son who could take was born to her brother not himself being a person able to take. This construction also is not open to me because of the orders made in the previous proceedings."

After dealing with the two remaining submissions, Goulding J. concluded:

> " So I find the position to be that constructions (2) and (3) are ruled out and that constructions (4) and (5) are unattractive; so that I am left with construction (1), which at least does no violence to the language and gives natural effect to the words ' were then dead '."

The Court of Appeal rightly regarded themselves as unfettered by the earlier constructions of clause 9, but arrived at the same conclusion as Goulding J. regarding the outcome of the appeal. Were they right? With diffidence (greatly increased by the fact that they are upheld by two of my noble and learned friends), I have come to the conclusion that they were not. It is not now open to dispute that Farwell J. rightly held that upon Christopher Blathwayt's reception into the Roman Catholic Church he forfeited his life interest in the principal estate and that what that learned judge inaccurately described as " the life interest " of Justin was accelerated, but that this was " subject to determination in the event of the birth of a son to the defendant Christopher . . . and the defendant Justin . . . is entitled to the income thereof and to the usual vesting deed." For what it is worth, one may note in passing that the originating summons heard by Farwell J. expressly raised the question whether Justin's interest was to be determined in the event of the birth of a son to Christopher, and that neither the learned judge nor anyone else then seemed to consider that Christopher's descend-

A ants were forever deprived of any chance of succeeding to any interest by the simple fact of Christopher's having become a Roman Catholic. Wynn-Parry J. [1950] 1 All E.R. 582, 585D doubted that the question whether the fact of the birth of a child to Christopher would destroy the accelerated interest of Justin was debated before Farwell J. and therefore felt free to form the conclusion that it did not. But, though the summons before him asked inter alia, " that it may be determined what are the respective estates,
B interests, or rights " of Justin and Mark as from the latter's birth he ended his judgment with these words, at p. 585:

> " I say nothing in regard to the interests arising on the death of Christopher, or in regard to what would then happen, but merely say that the interest of Justin did not determine on the birth of Christopher's son, Mark."

C

One of the questions arising in this appeal is whether the appellant is estopped in these proceedings from challenging the correctness of Wynn-Parry J.'s decision. As to that matter, I desire to say no more than that I am in respectful agreement with my noble and learned friend, Lord Wilberforce, that, for the reasons he gives, the appellant is not estopped from inviting this House to examine that decision and (if we think it was
D wrong) to hold that upon birth Mark became entitled to an entailed interest in the principal estate. The reasons submitted by both counsel for the appellant convinced me, as I think they convicted all my noble and learned friends, that such was the right conclusion on this particular issue.

What, then, should have been the legal consequence of Christopher's reception into the Roman Catholic Church in 1939? We are no longer
E concerned to enquire whether, despite Wynn-Parry J.'s decision, Mark has any present interest in the settled estate, he having immediately followed his disentailing deed of September 16, 1970, by another deed assigning to Justin " all that the interest (if any) to which Mark Blathwayt is entitled in equity during the lifetime of Justin Blathwayt." But the question still remains, What *should* have happened when Mark was born? If, after setting
F out conditions (a) and (b), clause 9 had continued simply.

> " then and in either of such cases the estate hereby limited to him shall cease and determine and be utterly void and my principal estate shall thereupon go to the person next entitled under the trusts hereinbefore declared "

G the result would be that Mark would at birth have succeeded by virtue of clause 6 (b). The fact that Christopher was a bachelor at the time of his change of faith and therefore had no issue living then to succeed him would have created no problem: *In re Conyngham* [1921] 1 Ch. 491. But difficulty arises from the further words:

> " . . . in the same manner as if the person whose estate shall so cease
H determine and become void being a tenant for life were then dead or being a tenant in tail male were then dead without issue inheritable under the estate tail . . ."

It is the addition of these words which led Stamp L.J. to hold that the method of filling the gap between Christopher's forfeiture and Mark's birth which such cases as *In re Conyngham* and *In re Brooke* [1923] 2 Ch. 265 approved of is not here available. Dealing with the words immediately

following "... the trusts hereinbefore declared" in clause 9, Stamp L.J. said:

> "But the second limb of the shifting clause does *not* stop there. It says that the principal estate shall not merely go to the person entitled under clause 6, but is to go 'in the same manner' as if Christopher were 'then'—that is to say, at the time he became a Roman Catholic —'dead.' We cannot ignore those words, but must look back again at clause 6 and ask the question: To whom would the principal estate go and in what manner if Christopher were dead at the time he became a Roman Catholic? The answer to that question can, in our judgment, only be that upon the hypothesis that Christopher was then dead it could not go to a son of his but would go to Justin for life with remainder to his first and other sons and so on, as directed in sub-clauses (d) and (e) of clause 6. We agree with the views expressed by Mr. Justice Wynn-Parry that this is not a case where one has to fill a gap in the limitations, because by the very terms of the shifting clause the testator has provided that there shall be no gap. We are encouraged in the view that the hypothetical death of a tenant for life is to have precisely the same consequences as would have ensued if he had been actually dead by the provision at the end of the shifting clause that the enjoyment of any rentcharge previously appointed in favour of a wife of the forfeiting tenant for life is not to be accelerated—a provision which would be unnecessary unless for all the purposes of clause 6 he was to be treated as having then been dead."

As the foregoing passage appears to set out and approve of the basic submissions of the respondents both in the Court of Appeal and before this House which have been considered in detail by my noble and learned friends, Lord Wilberforce and Lord Cross of Chelsea, whose experience and knowledge of this branch of the law so greatly exceed my own, I propose to do no more than indicate shortly the conclusions I have come to regarding them:

(a) Mr. Balcombe was correct in contending that the shifting and the acceleration portions of clause 9 were inserted to give effect to the forfeiture provision with which the clause opens and *not* for the purpose of defeating the primary limitations contained in clause 6, and that unless a contrary intention was shown, they should be construed so as to preserve those primary limitations.

(b) The effect of clause 6 alone is that if one of the life estates thereby disposed of prematurely determines without the holder having issue to succeed him, there is no gap during the rest of his life but the next life interest takes effect—subject to defeasance if and when a son is born to the life tenant whose interest had been prematurely determined.

(c) Clause 9 does not, as has been contended, contain a clear indication that, having regard to Christopher's forfeiture without issue, the foregoing provisions of clause 6 were not to operate in favour of Mark. On the contrary, the shifting provision that "my principal estate shall thereupon go to the person next entitled under the trusts hereinbefore declared" included a person unborn at the time of forfeiture of the prior estate.

(d) The provision in clause 9 regarding the non-acceleration of the enjoyment of any rent-charge previously appointed in favour of the wife of a forfeiting tenant for life is not (contrary to the view expressed by Stamp L.J.) an indication that the hypothetical death of a forfeiting tenant for life

A was to have the same consequences as if he had actually died, for the provision does not affect the *identity* of the person who is to take the jointure rent-charge.

In the course of his helpful submissions, Mr. Godfrey found himself obliged to concede that it would be capricious of the testator to impose forfeiture not only upon Christopher but also upon his unborn son, Mark, whereas had Christopher been a married man with issue when he incurred B forfeiture, his eldest son would have succeeded under clause 6 (b). He rightly reminded us that testators have a fairly unfettered right to be capricious when disposing of their estates. Nevertheless, a disposition which, if the respondents are right, has such an undoubtedly capricious result must be scrutinised with care to ascertain whether the testator intended any such consequence to flow from his will. Having conducted that scrutiny to the best C of my ability, bearing in mind the submissions of counsel, and having borne in mind in particular the observations of my noble and learned friend, Lord Wilberforce, regarding the absence of any express provision as to the disposition of income accruing between Christopher's forfeiture and Mark's birth, the conclusion I have come to, consonant with that of my noble and learned friend, Lord Cross of Chelsea, and for the same reasons as those which have found favour with him, is that Wynn-Parry J. arrived at a wrong con- D clusion and that Justin's enjoyment of income should have terminated at Mark's birth.

Wynn-Parry J. was careful to point out ([1950] 1 All E.R. 582, 584B) that the fact of Mark's baptism as a Roman Catholic "for the purposes of the question which arises today, that is not a material fact." Mark's continued adherence to his faith is similarly not a material fact in the present E appeal, he having disentailed before coming into possession. I therefore refrain from expressing any concluded view regarding the validity of the provision for forfeiture by one who "shall (a) be or become a Roman Catholic," save to say that I would not hold it void for uncertainty. Furthermore, in the light of the reported decisions considered in detail by my noble and learned friend, Lord Wilberforce, I would also not hold the forfeiture provision void on the ground of impermissible discrimination, F and I am at present inclined to the view that it did not offend against public policy in the narrower sense spoken of by Parker J. in *In re Sandbrook* [1912] 2 Ch. 471. After all, a not unimportant matter of public policy is involved in limiting a testator's power to dispose of his own property in his own way without clear justification for so curtailing his freedom being first established, and I echo the doubt expressed by my noble and learned friend, G Lord Cross of Chelsea, that it is self-evidently against public policy for an adherent of one religion to distinguish between people of one faith or another when he is making his testamentary dispositions.

Be that as it may, for the reasons I have given I would hold that, upon the death of Justin Blathwayt, the property then subject to the testamentary trusts will be held upon trust for the appellant, Mark Blathwayt, absolutely. H I would accordingly allow the appeal.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Wilberforce. I entirely agree with it, and for the reasons stated in it I would dismiss the appeal.

But as the majority of your Lordships take a different view on the

question of construction, other questions arise. I have nothing to add on the question of uncertainty or on the general question of public policy in relation to the condition in this will, but I wish to refer to the narrower argument that a forfeiture condition is void as against a person, such as Mark, who was an infant at the time when the instrument containing the condition takes effect, because it might influence his parents in bringing him up. I share the doubt of my noble and learned friend, Lord Cross of Chelsea, whether it is an answer to that argument to say that the beneficiary has the chance to make up his own mind after he has attained years of discretion: he may have been so conditioned by his upbringing during infancy that his decision is almost inevitable. But I doubt whether the argument itself is acceptable. The authority relied upon as the foundation for it was *In re Sandbrook* [1912] 2 Ch. 471, where the condition was that, if either of the testatrix's grandchildren should " live with or continue under the custody, guardianship or control of their father ", they should lose all benefits under the will. One of the reasons why Parker J. held that condition void was that it had the direct object of deterring the father from performing his parental duties towards the children and that it would operate to restrain or forbid him from doing his duty. But deterring a father from performing his parental duty and from exercising any control at all over his children seems to me quite different from influencing him to exercise his authority in a particular way, as the will in the present case might tend to do. That part of the ratio of *Sandbrook* is, in my opinion, therefore not applicable in the present case. *Sandbrook* was relied on in *In re Borwick* [1933] Ch. 657, where the testator provided that any grandchild who should, before obtaining a vested interest, be or become a Roman Catholic, or not be openly or avowedly Protestant, should forfeit all interest under the will. That condition was held void on the ground that it operated to interfere with the parent in the exercise of his parental duty as regards the religious instruction of his children. Bennett J. held that the parents' duty ought to be discharged " solely with a view to the moral and spiritual welfare of their children, and ought not to be influenced by mercenary considerations affecting the infant's worldly welfare " (p. 666). Similarly in *In re Tegg, Public Trustee* v. *Bryant* [1936] 2 All E.R. 878, a condition requiring that " at no time may any child of hers go to or be sent to any Roman Catholic school for education " was held void as a fetter upon the parent doing what she might think best for the welfare and education of her children. The decisions in these cases do not appear to me to follow from the ratio in *Sandbrook* and, in any event, I would not follow them in the present case. If a parent has strong convictions he may well regard the religious upbringing of his child as of overriding importance not to be set against purely material considerations; if, on the other hand, his religious convictions are weak or non-existent, he can weigh a testamentary benefit with a religious condition attached as one among the many factors affecting the welfare of his child. In neither case does the existence of the religious condition seem to me to offend against public policy merely because it might affect the parent's action. One must remember also the public policy that a testator should be free, subject to the rights of his surviving spouse and children, to dispose of his property as he pleases. It would surely be going too far to say that a bequest for the benefit of a child to help with paying his school fees, payable on condition of his going to a particular school, would be contrary to public policy. Conversely, a bequest on condi-

tion of his not going to a particular type of school—say a fee paying public school—ought not to be contrary to public policy either. In my opinion the same rules should apply to conditions about the religious upbringing of a child. For these reasons, I am of opinion that the religious condition in the present will was not invalid either because it was altogether contrary to public policy or because it might influence the child's father as to how to bring up his child.

Appeal allowed.

Solicitors: *Radcliffes & Co.; Lawrence, Graham & Co.*

F. C.

[COURT OF APPEAL]

REGINA *v.* KELLETT

1975 April 17, 18; June 20

Stephenson and Orr L.JJ. and Kenneth Jones J.

Crime—Common law offence—Attempt to pervert course of justice—Defendant informing potential witnesses of intention to sue for slander—Whether offence to intend or threaten to exercise legal right to prevent witnesses giving evidence

The defendant received from solicitors acting for his wife in divorce proceedings copies of disparaging statements made about him to an inquiry agent by the defendant's neighbours, who were potential witnesses in the proceedings. The defendant sent a friend, posing as a prospective tenant of the defendant, to ask the neighbours their opinion of him as a prospective landlord. Having obtained the information the defendant wrote a letter to the neighbours stating that he intended to sue them for slander; that the question of damages would be discussed with his solicitor and that they might like to let the defendant have by the following day written notification of the withdrawal of the statements made to the inquiry agent. One neighbour gave evidence in the divorce proceedings, the other neighbour was not called.

The defendant was charged on two counts of an indictment with attempting to pervert the course of justice. The judge directed the jury that the defendant was guilty if he was threatening to bring a slander action against his neighbours with the intention of causing them not to give evidence in the divorce proceedings. The judge added that the jury had to be sure that the defendant was not intending to bring an action and was merely making an empty threat to persuade them not to give evidence. The defendant was convicted.

On appeal by the defendant:—

Held, dismissing the appeal, that a threat or promise made to a witness with the intention of persuading him to alter or withhold his evidence was an attempt to pervert the course of justice even if the threat or promise related to a lawful act or the exercise of a legal right; that, accordingly, it was immaterial whether the defendant intended to bring an action

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[Reported by A. G. B. HELM, ESQ., Barrister-at-Law]

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CLERK OF THE COURT

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, C. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS	**ROLAND TWINN, EVERETT JUSTIN TWIN, MARGARET WARD, TRACEY SCARLETT and DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")**
RESPONDENTS	**THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN**
DOCUMENT	**REPLY SUBMISSIONS OF THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE ("OPGT")**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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III SUBMISSIONS

The SFN intervention application is overbroad

36. The Trustees' Application seeks an overall resolution of this proceeding, seeking advice and direction concerning the following:

a) Confirming the validity of the 1985 Trust;

b) Affirming that notwithstanding the discriminatory nature of the 1985 Trust, the Trustees may proceed to make distributions to trust Beneficiaries;

c) Approving the Distribution Proposal submitted by the Trustees;

d) Confirming the OPGT has satisfied its Court imposed obligations;

e) Discharging the OPGT;

f) Declaring the indemnification and funding of the OPGT to be ended; and

g) Confirming the subject proceedings to have ended.

The parties have agreed the overall application should be heard in stages, the first dealing with whether the Trustees can make distributions to the beneficiaries as currently defined. The Trustees' Distribution Proposal and the role of the OPGT will be dealt with in later stages.

37. The application by the SFN to participate in other stages of this application is overbroad. First, the later stages of the application are contingent on the outcome of the first. If, for example, the Court's advice and direction at the first stage were that the Trustees can not distribute to the currently defined beneficiaries, the proceeding would necessarily take a different direction and the second and third stages would be deferred and potentially reframed. Moreover, the SFN has not identified any interest it might have in stage 3 which, if reached in the context of this application, will address whether the OPGT has fulfilled its court-directed mandate.

The SFN intervention application impermissibly seeks to introduce new issues into the proceeding.

38. By proposing to question whether the 1985 Trust satisfies the requirement of certainty of objects, the SFN intervention application explicitly seeks to raise a new issue that would widen the *lis* framed by the parties.

39. In his concurrence in the recent Supreme Court of Canada decision in *R. v. McGregor*, Justice Rowe set out at length why interveners should not be permitted to introduce new issues in a proceeding. Interveners in the case had urged the Court to overturn one of its precedents, a case which both parties explicitly assumed valid. In doing so, Justice Rowe observed, the interveners exceeded "the well-established limits on interveners."[30]

40. As Justice Rowe observed, the limits on the role of interveners are "grounded in the adversarial system: the parties control their case and decide which issues to raise."[31] Interveners are not parties and must not widen or add to the points in issue or adduce evidence without specific leave.[32]

41. Justice Rowe summarized his conclusions as follows:

> [109] In sum, an intervener can make useful contributions when it respects the rules, practice directions, and jurisprudence of this Court. **By contrast, it exceeds its role when it seeks to alter the nature of the litigation by usurping the role of the parties, expanding the issues before the Court, or presenting new evidence.** An intervention that contravenes these settled rules is improper, and has negative consequences for the parties, potential interveners, and the administration of justice. (emphasis added)

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[30] *R. v. McGregor*, 2023 SCC 4,*(McGregor)* at para 98 [**Authorities Tab 8**]
[31] *McGregor*, at para. 104
[32] *McGregor*, at paras. 105-108

42. The prohibition on widening the issues is equally well-established in the Alberta jurisprudence concerning interventions at both the trial and appellate levels.[33] It has also been expressed in colorful and colloquial terms in a recent Federal Court of Appeal decision:

> "In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way."[34]

43. The history of these proceedings illustrates the mischief that may result when this basic rule is not imposed and enforced. When the SFN was granted intervener status in the application concerning the effect of the Asset Transfer Order (ATO), no limits were placed on its participation. The SFN position effectively expanded the scope of the question before Henderson J. who granted what amounted to a remedial order desired by the SFN, namely that the assets of the 1985 Trust were held for the beneficiaries of the 1982 Trust.[35]

44. The result was a three-year detour in the case before the Alberta Court of Appeal set aside the decision of Henderson J. and put the proceedings back on track.

45. Here the SFN is explicitly clear that if granted intervener status it will raise an issue that is not raised by the Threshold Application as contemplated by the Trustees, or the Trustees' Application as a whole, and that seeks to undermine the very existence of the 1985 Trust on the basis that its objects are unascertainable.

46. As the SFN says at paragraphs 74 and 75 of its brief, if granted intervention it will argue that the beneficiaries of the 1985 Trust are unascertainable, that the 1985 Trust fails

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[33] *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2017 ABCA 280 at paras 9-10 [**Authorities Tab 2**]; *Qualex-Landmark Towers Inc v 12-10 Capital Corp,* 2023 ABCA 177 (CanLII), at paras. 6 and 7 [**Authorities Tab 7**]; *Rebel News Network Ltd v Alberta (Election Commissioner),* 2020 ABQB 687 (CanLII) [**Authorities Tab 9**]

[34] *HMK v. DAC Investment Holdings Inc.,* 2025 FCA 37, at para. 10, quoting *Tsleil-Wauth Nation v. Canada (Attorney General)*, 2017 FCA [**Authorities Tab 4**]

[35] *Twinn v. Trustee Act*, 2022 ABQB 107 at paras.13, 286 [**Authorities Tab 14**]; *Twinn v. Alberta (Office of the Public Trustee)*; 2022 ABCA 368, at para 59 [**Authorities Tab 13**]. It should be noted that the Court of Appeal was also critical of Henderson J. for steering the proceedings in that direction.

accordingly, and that its assets should be returned to the SFN, which amounts to a remedial order.

47. This, on its face, goes beyond the SFN offering a unique perspective on the Trustees Application and would transform the Trustees' Application into a vehicle for the SFN's own aspirations, as occurred in the ATO application.

48. These advice and directions proceeding have never concerned the validity of the 1985 Trust vis-à-vis the three certainties. On the contrary, the proceedings throughout have been predicated on Its validity on that account. The focus is, and always has been, on the discriminatory nature of the beneficiary definition.

49. As the Court of Appeal found in the ATO appeal: "As noted, the whole point of the 2016 Consent Order was to confirm the validity of the of the 1985 transfer **so as to create a stable platform for settlement and resolution of the discriminatory aspects of the Trust."** (emphasis added).[36] The question the Trustees now pose has changed from whether the beneficiary definition can be changed to whether the trust can be distributed notwithstanding the beneficiary definition, but the underlying issue remains the same.

The new issues are also time-barred.

50. Further, any attempt by the SFN to challenge the validity of the 1985 Trust based on its beneficiary definition (whether based on certainty of objects or discrimination) would be prohibited by limitations and *laches*.

51. The trust was settled by then Chief Walter Twinn on April 15, 1985, almost exactly 40 years ago, well outside any possible limitation date. Moreover, the SFN has been aware of, and participated in these proceedings since 2011. It would be inequitable, and contrary to the doctrine of *laches*, to allow them to now advance an argument that would render the past 13 years of litigation, with its attendant cost and effort, pointless.

[36] *Twinn v. Alberta (Office of the Public Trustee)*; 2022 ABCA 368, para. 52 [**Authorities Tab 13**]

The SFN application also seeks to introduce new evidence. The new evidence is unnecessary to address the issue before the Court.

52. In its Application for intervener status and its brief (see, for example, para. 79) SFN also seeks permission of the Court to lead evidence on the "application of existing beneficiary definition to existing SFN membership". It is stated, in turn, that this may require evidence to be led on the lineage of individual members as well as expert evidence.

53. Such proposed evidence goes well beyond what is required to address the Threshold Issue and further illustrates how the SFN's proposed intervention would constitute an unnecessary widening of the issues between the actual parties.

54. As described above, the Court was previously provided with information about how many 1985 Trust beneficiaries were and were not members of the SFN, on which the Court has relied. Similar information concerning minor beneficiaries has also been provided. While those numbers may have changed over time, the ability to ascertain beneficiaries has been established. Given that, the precise identification of "who is who" or, "how many sit where" is not necessary to decide the legal question of whether the Trustees may distribute notwithstanding the discriminatory nature of the Beneficiary definition.

55. The additional evidence, including expert evidence, proposed to be introduced by the SFN would clearly result in significant delay to the proceedings with the resulting prejudice to the parties. The scope of the proposed evidence further reflects how the proposed intervention would commandeer the Trustees' Application and take it in a different direction.

The SFN application cannot be granted as currently framed. The OPGT would not object to the SFN being an intervener on proper terms described below.

56. For all the reasons described above the SFN intervention application goes far beyond the scope of a proper intervention.

57. The OPGT does not contest that the SFN could meet the criteria to intervene on behalf of its members who will be affected by the outcome of the Threshold Application as framed

by the Trustees. However, as currently advanced, the intervention application cannot be granted as it plainly seeks to improperly expand the issues before the Court and threatens to take the Court and parties on another long and costly detour.

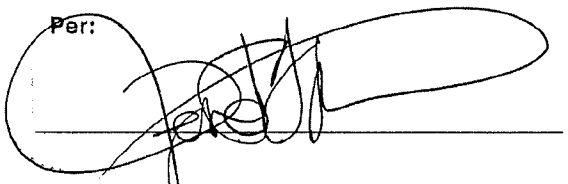
58. The OPGT does not object to the SFN being granted the right to intervene on the Threshold Application provided that its intervention reflects the proper role of an intervener. Specifically, the SFN should not be permitted to raise any new issue or evidence, including any argument the 1985 Trust is invalid on the basis that its objects are uncertain.

59. The OPGT has seen the draft Order appended to the Trustees' submissions which contains such terms and would be agreeable to it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of March, 2025

HUTCHISON LAW

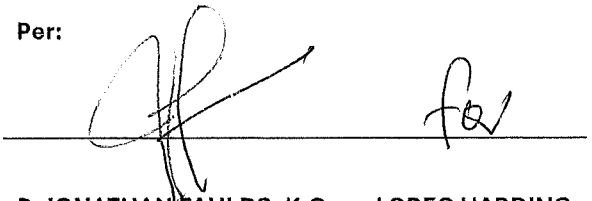
Per:



JANET L. HUTCHISON
Solicitors for the Office of the Public Guardian and Trustee of Alberta

FIELD LAW

Per:



P. JONATHAN FAULDS, K.C. and GREG HARDING K.C.
Solicitors for the Office of the Public Guardian and Trustee of Alberta

Lindsay Petroleum Co. v. Hurd

Privy Council Judgments

Judicial Committee of the Privy Council

Lord Chancellor, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier

Heard: January 19, 1874.

Judgment: January 19, 1874.

[1874] J.C.J. No. 2 | 5 LRPC 221 | 6 CRAC 337 at 384

Between Lindsay Petroleum Co., and Hurd

(8 paras.)

Counsel

Sir Richard Baggallay, Q.C. and Mr. Ferrers, for the Respondent Farewell.

Mr. Kay, K.C., and Mr. Smart, for the Appellants.

Judgment of Privy Council

The judgment of the Court was delivered by

SIR BARNES PEACOCK

1 The Court of Error and Appeal of Ontario does not appear to have differed from the two Courts below so far as the substantial merits of this case were concerned. The point on which three judges of the Court of Appeal, who had not been concerned in the earlier stages of the case, differed from two other judges who had taken part in those earlier stages, and on which they founded their alteration of the judgment of the Vice-Chancellor and the Chancellor, was this, that they thought the Plaintiffs had lost their option to rescind the entire contract by the delay which had taken place in the assertion of their right, accompanied, as we must suppose they considered themselves entitled to presume, with knowledge sufficient to make that delay material.

2 Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place his if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. In this case the delay was at all events not of very long duration, because the conveyance to the company was dated about fifteen months before the filing of the bill; the there is nothing which would justify in reckoning the currency of time from an earlier period than that conveyance. Neither were any acts done in the interval, as it appears to us, at all material to the equity between the

parties. There was possession taken, no doubt, but it would be a very novel proposition that mere possession is to be a bar, so as to raise a counter equity in cases of this description. Nothing appears to have been done beyond the sinking of a single well, by way of trial, upon the ground. The sinking of that well, if the land is restored, can in no substantial way operate to the prejudice of the Respondents; and, if any profit had been derived from it, the Court of first instance offered an account of that profit; but it manifestly was known that there was none, for that account was not accepted. The situation of the parties having therefore, in no substantial way been altered, either by the delay or by anything done during the interval, there is in these circumstances nothing to give special importance to the defence founded on time, even had there been such an allegation of facts in the pleadings as would have been proper, if it was meant seriously to rely upon this as a substantial defence to the suit. There is a submission at the end of the answer; but the substance and body of the answer contains no allegation by which that submission can be supported; and it does not seem to us that the parties went to issue upon any statement of facts, one way of there other, which fairly raised a question of laches or delay. In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily -- and certainly when the delay has been only such as in the present case -- necessary that there should be sufficient knowledge of the facts constituting the title to relief. What knowledge is there allegation or proof of here? Allegation there is none. The answer does not suggest that the statement in the bill, of recent discovery, is in point of fact incorrect; and the absence of any such suggestion in the answer is, at least, an excuse to the Plaintiffs for not having gone into particular evidence as to the time at which and the manner in which the company made the discovery.

3 But this matter does not remain upon the mere absence of averment in the pleading; for there is evidence given by the Defendants themselves, that is, by Mr. Hurd, who distinctly states, and all the statements of the other parties are consistent with it, that he never informed the Plaintiffs or any of the people interested in the company of the fact that the price named in the written document was not the real price paid to the vendors. The way in which he expresses it is, he never informed them of the discount which he was to received. Therefore, it is admitted that the transaction was carried through, the material fact on which the equity depends being at the time suppressed; and that being admitted, it clearly was for the Defendants and not for the Plaintiffs to shew when that which was concealed at the beginning became known afterwards. Also, Mr. Farewell distinctly admits that in his communications with the parties he did nt mention that fact of his interest; and it was not mentioned in the first instance, to shew when and by what means the company became aware of it, if that was material to his defence. It is said indeed, in one of the judgments of the Court below, that one of the Appellant's witnesses, Mr. Orde, stated something to have taken place in the month of July, 1866, from which the company ought to have either derived the requisite knowledge, or at least to have been put upon inquiry. We think it is not possible for us to take that view of Mr. Orde's evidence. All he says is this, that in July he began to lose faith in the oil wells and in the company , and that a Mr. Melville Parker told him, about that time, that the transaction was a swindle, and that the 12 1/2 acres could have been got for a third of the money. But mere inadequacy of value would have been no ground for rescinding the purchase. It is not because the purchasers have given more money than the thing is worth, or because a stranger calls it a swindle, only suggesting that the consideration is excessive, that an equity would arise upon which such a bill as this could be filed; nor is this bill filed upon any such ground. It is impossible for their Lordships to infer from that statement that anything was said by Mr. Melville Parker from which the Plaintiffs could understand that he meant to say or to suggest that the money which they had paid, or any part of it, had found its way back into the pocket of their president, Mr. Hurd, or that Mr. Farewell, upon whose opinion they had relied as a disinterested adviser as to value, was not disinterested in his advice. No such things are said to have been suggested by Mr. Melville Parker, and we cannot infer or imply them.

4 There is, therefore, as it appears to us, no evidence whatever of any knowledge on the part of the company, or of those who could bind the company. there is evidence of the original concealment and suppression of the material facts constituting the title to relief , and there is nothing against the averment in the bill not really contradicted by the answer, that those facts were recently discovered when the bill was filed.

5 It appears therefore to their Lordships that the objection of delay entirely fails; and, further, we have some difficulty in reconciling the decree actually pronounced by the Judges in the Court of Error, not against Hurd alone, but also as against the other parties, with the force and the weight which that Court has attributed to delay. It is

undoubtedly true that a delay, which might be available by way of defence to persons not under any fiduciary relation or obligation, might not be available by way of defence to those who are affected by a fiduciary relation or obligation; but the Court below, in holding Mr. Kemp and Mr. Farewell responsible for the repayment of the money which found its way to Mr. Hurd's pocket, have held Mr. Farewell and Mr. Kemp to be affected by knowledge of and participation in the fiduciary obligation which lay upon Mr. Hurd; and the fiduciary obligation extending tot them for that purpose, it is difficult to see how the court could stop there, and refuse to extend it to them for every purpose connected with the whole transaction, which was one entire transaction and, as their Lordships are of opinion, cannot be severed as to its parts.

6 An argument has been addressed to us, not with very great confidence, against the unanimous opinion of all the Judges in all the Courts, to the effect that, so far as Mr. Farewell was concerned, there was here no fraud. But it is difficult to conceive anything more clearly fraudulent than for the owners of property to arm a person, whom they knew to be about to endeavour to find others to take up a purchase, whether as a company or otherwise, with a document purporting to be an offer made by themselves as owners to sell at a fictitious price, at which price he is to propose to other people to take up and to accept that offer as if it were the real one. If that be not the real price which the owners of the property expect to get, and if they are parties to an arrangement that the intermediate agent, who is to induce others to accept the offer, is himself to put a considerable part of the nominal price into his own pocket, without any communication of the facts, the document is a dishonest and false document upon the face of it, representing no real transaction, but evidently representing a false transaction, only in order to deceived somebody. It was used to deceive, and so used with the knowledge of Mr. Farewell throughout, as much as with the knowledge of any other of the parties; he having, as he admits, in order to make the transaction one, placed his interest for the purpose of that offer, and for no there reason, in the hands of Mr. Kemp, and, through his, of Mr. Hurd. Mr. Hurd takes the offer to the company; the company are formed to take up the offer, but not without something to fortify Mr. Hurd's recommendation? And from whom does that come? From Mr. Farewell, whose own interest is not disclosed, who is known to be a person of special experience, and whose opinion has a special value in the province with regard to this particular description of property. He writes a letter, in which he says that, according to his judgment, it will be a good bargain at that price, and that if he had known that those properties or some of them had been sold at that price - - that fictitious and false price so with his participation introduced into the document to deceive -- he would himself have been willing to be a purchaser. He writes that to be shewn, and it is admitted, not indeed by him, but by one of the other witnesses, that the real price was purposely kept back, because it was known that the bargain would not have been obtained if that had been communicated. It is the language of Mr. Kemp, the person in whose hands Mr. Farewell placed himself and his own interests: "I did not tell them, nor did Farewell in my presence tell them, that the price was a sham price. I believe if the real price had been mentioned it would likely have defeated the object with which the offer was made. It is not likely it would have been revealed." And Farewell admits that he knew his opinion had a special value. He says, "I expected it" -- the letter -- "would be shew, and that it would influence the opinion of such parties, as I was pretty generally known through that part of the country, and also known to have acquired knowledge respecting oil lands." He says, that he not only wrote that letter, but he personally communicated with a Mr. Martin and a Mr. Neads, recommending them to invest in the company, and repeated to one of them, Martin, what he had said in the letter. "I told him that if I had known a certain piece of the property had been in the market at the price offered, I would have purchased myself." And when Brown and Sadler, two gentlemen who are not shewn to know anything about the value of oil property themselves, go down to look at the land, an inspection on which so much reliance is placed, -- when they come to look at the land Farewell contrives to meet them, and says this:-- "I went to see them because I was interested in any of the lands." But he talked to them, and helped to persuade them to be satisfied; and he says, distinctly, "I did not tell Brown and Sadler I was so interested. To all appearance I was a disinterested party to those that did not know it. I did not think it necessary to tell them." More abundant evidence of what a Court of Equity calls fraud it would be very difficult to conceive, and their Lordships have no hesitation in saying that, in their judgment, the decree made by the Vice-Chancellor was perfectly and entirely right.

7 The sole difficulty which their Lordships have felt or now feel arises from the suggestion, which they do not think themselves at liberty altogether to disregard, though it ought not in their judgment to stop the appeal, that the company may now have been dissolved, and may not be in a position to make the necessary reconveyance.

Undoubtedly, if they are not in that position, they have come here by the appeal asking for that to which they must know they are not entitled except upon conditions, which, if that be so, they cannot fulfil; and justice would not be done if provision were not made in the form of the Order for the possible contingency of their inability to make a reconveyance. What therefore their Lordships propose to recommend to Her Majesty is this:-- To reverse the decree appealed from, and to substitute for it a decree to this effect: Declare that, subject to the right of the Respondents to a reconveyance of the lands in the pleadings mentioned, the Appellants are entitled to have the sale and the conveyance of such lands cancelled and rescinded; and that on such reconveyance being made to the satisfaction of the Court of Chancery for the province of Ontario, in the manner directed by the decree of the 15th of December, 1868, the Defendants do repay to the Plaintiffs the sum of $13,750, with interest from the date of the payment of the said purchase money to the date of such reconveyance, together with the costs of the suit to be taxed by the master, including all the costs in the several Courts below. But if such reconveyance be not made, then the bill ought to be dismissed as against the Defendants other than Hurd, without costs, so far as it asks relief beyond that given by the Court of Error and Appeal, in Ontario. Declare the Appellants entitled to the costs of this appeal if such reconveyance is made; but the Respondents entitled to the costs of the appeal if it be not made; and reserve any order as to such costs until after it shall be known whether the reconveyance is made or not, with liberty to apply, and then an affidavit of course can be made.

8 Credit must be given to the Respondents, as against the sum to be repaid by them if a reconveyance is made, for the amount paid under the Order appealed from; the sum carrying interest being reduced, by that payment, as at the date when it was made. If it should appear that, although a reconveyance can be made, some persons other than the company are now entitled to receive the money to be repaid, the form of the order may be expressed so as to meet that case, by directing repayment to the Appellant, or to such other persons, if any, as are now entitled in their right. The rate of interest will be the same as that allowed by the decree of the 15th of December, 1868. Their Lordships will advise Her Majesty to remit the case to the Court below, with these declarations.

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