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COURT OF APPEAL FILE NUMBER:	2503 0193AC
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	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, TRACEY SCARLETT, ROY TWINN, JONATHON POTSKIN, AND BONNIE BLAKELY, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondent
RESPONDENT	CATHERINE TWINN
STATUS ON APPEAL:	Appellant
RESPONDENT	OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE
STATUS ON APPEAL:	Respondent
DOCUMENT:	**FACTUM**

Appeal from the Decision of
The Honourable Mr. Justice J.S. Little
Dated the 3rd day of September, 2025

FACTUM OF THE RESPONDENT, THE SAWRIDGE TRUSTEES

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I. INTRODUCTION

1. This appeal focuses on a narrow question of whether or not distributions can be made pursuant to a valid private trust which defines beneficiaries in a discriminatory manner.

2. 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**").[1] In the Full Application, the Trustees identified paragraph 1(b) (the "**Threshold Question**") as a preliminary issue for the Court to decide before addressing the rest of the application.

> 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.[2]

3. On November 27, 2024, Case Management Justice Little ordered the Threshold Question would be heard first.[3] Sawridge First Nation (**"SFN**") was granted intervenor status for the Threshold Question and extensive materials were exchanged.[4]

4. Justice Little released his decision (the "**Threshold Decision**"), which was appropriately focused on the narrow question before him.[5] He found that, while the definition of a beneficiary under the 1985 Trust was discriminatory, the Trustees were authorized to make distributions. For the reasons outlined below, Justice Little's decision was accurate in law and ought to be upheld such that the Trustees can proceed to the next part of the Full Application.[6]

II. FACTS

5. The history of the 1985 Trust was recently canvassed by this Court in *Twinn v Alberta*.[7] By way of brief background, the 1985 Trust was established on April 15, 1985 by a

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[1] Record of Appeal – Case Management Application (Final Application).
[2] Record of Appeal – Case Management Application (Final Application) at 05.
[3] Record of Appeal – November 27, 2024 Case Management Order at 08-10.
[4] Record of Appeal – Case Management Order, Justice JS Little, re: Intervenor at 11.
[5] Record of Appeal – Memorandum of Decision, from Case Management Justice Little at 19.
[6] Record of Appeal – Memorandum of Decision, from Case Management Justice Little at 27, para 45.
[7] *Twinn v Alberta* (Office of the Public Trustee), 2022 ABCA 368 (the "**Transfer Decision**").

declaration of trust.[8] SFN created a trust in 1982, and the assets in the 1982 trust were transferred to the 1985 Trust.[9] This transfer was recently upheld by this Court.[10] The creation of the 1985 Trust was approved by Chief and Council and with the consent of the members of SFN, including the Appellant, Catherine Twinn, as per her signature on the resolution.[11] In anticipation of Bill C-31, which included proposed amendments to the *Indian Act* (the "***Act***") intended to make the *Act* compliant with the *Charter*, SFN was concerned Bill C-31 would increase membership in SFN and thereby dilute the assets of the then-members of SFN.[12] Accordingly, in 1985, SFN established the 1985 Trust, transferred assets from the 1982 Trust into the 1985 Trust, and in the 1985 Trust froze the definition of beneficiary to the Act in 1982.

6. "Beneficiaries" of the 1985 Trust were defined as persons who qualify as members of the SFN pursuant to the provisions of the *Act* as such provisions existed pre Bill C-31 (the "**Old *Act***").[13] By cementing the definition of Beneficiary in the Old *Act*, the beneficiary class would not be impacted by Bill C-31 and the assets not diluted.

7. By crystallizing a past version of the *Act* in defining "Beneficiary", the discrimination the amendments to the *Act* were intended to eliminate, remained in the 1985 Trust. Justice Thomas made an order that the parties were committed to upholding the 1985 Trust and declared the 1985 Trust's definition of beneficiaries to be discriminatory.[14]

8. The 1985 Trust Deed prohibits amendment to the definition of Beneficiaries, and confers broad discretionary powers upon the Trustees of the 1985 Trust to distribute assets to its Beneficiaries.[15]

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[8] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit G (Declaration of the 1985 Trust) ["**1985 Trust Deed**"] **[Extracts of Key Evidence of the Sawridge Trustees ("EKE") page 71]**.
[9] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit H (Resolution of Trustees) **[EKE page 82]**.
[10] Transfer Decision at para 53.
[11] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibits H-J **[EKE page 82-96]**.
[12] Excerpts of Questioning of Paul Bujold on July 27, 2016 at 23:3-8 **[EKE page 111]**. See also Transfer Decision at paras 4-5.
[13] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit G (Declaration of the 1985 Trust) at para 2(a) **[EKE page 72]**.
[14] Consent Order (Issue of Discrimination) granted by Thomas, J, January 19, 2018 **[EKE page 115]**. Note Justice Thomas stated in the Order that it was not to be construed as a determination as to the Trust's invalidity.
[15] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit G (Declaration of the 1985 Trust) at paras 6, 8, and 11 **[EKE pages 76-79]**.

9. In 1986 an additional trust was established: (the **"1986 Trust"**). The Beneficiaries under the 1986 Trust are all members of SFN following the amendments to the Old *Act*. It is functionally similar to the 1985 Trust. SFN transferred assets into 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 individuals qualified as members in accordance with the definition of membership that existed following Bill C-31.[16]

10. The 1986 Trust provides benefits to help address hardships for its individual beneficiaries. It currently provides, *inter alia*, a social safety net for Beneficiaries and their children.[17] The 1986 Trust provides benefits for all members of SFN, including those who may not qualify as a beneficiary under 1985 Trust. Any person who does not qualify for the 1985 Trust may apply for membership in SFN, with such membership granting beneficiary status under the 1986 Trust.

11. There is no easy answer to this issue which has been in litigation since 2011. Whatever changes are made or if no changes are made, there will be people left out of the 1985 Trust as beneficiaries. Nevertheless, the Trustees have also been committed to finding solutions to discrimination.[18]

III. GROUNDS OF APPEAL

12. The Appellant cites a total of nine grounds of appeal. Respectfully, many of these cited grounds are irrelevant to the underlying decision, and/or are inappropriate. At issue in the Threshold Decision was whether the Trustees may make distributions, notwithstanding the 1985 Trust's definition of beneficiaries is discriminatory. Justice Little ordered that the Threshold Question would be heard in isolation.[19] That Order was not appealed. No party objected to the hearing of the Threshold Question and the issue is not raised in the Appellant's Notice of Appeal.[20]

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[16] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit K (Declaration of the 1986 Trust) ["**1986 Trust Deed**"] **[EKE page 97]**. See also Transfer Decision at para 9.
[17] Order (Distribution Proposal) granted by Thomas, J, filed December 17, 2015 at para 7 **[EKE page 123]**.
[18] See, for example: Extracts of Key Evidence of SFN – Trustees' Letter of June 1, 2015, with attached list.
[19] Record of Appeal – November 27, 2024 Case Management Order at 08.
[20] Record of Appeal – Civil Notice of Appeal, 2503-0193AC at 28.

IV. STANDARD OF REVIEW

13. The Trustees generally agree with the standard of review set out by the OPGT.

V. LAW AND ARGUMENT

14. Justice Little made no error of law in concluding that the Trustees could make distributions to beneficiaries.

15. The validity of the 1985 Trust is not an issue before the Court as part of the Threshold Question. Nevertheless, the Trustees submit that the 1985 Trust clearly is a valid trust, as it satisfies the three certainties:[21]

    a. 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.

    b. The subject matter of the 1985 Trust is its significant assets. This was found to be the case by this Court in the Transfer Decision.[22]

    c. Beneficiaries are clearly identifiable. The Court, the parties and the intervenor have all been able to identify Beneficiaries, despite allegations to the contrary made by the Appellant in her Factum.[23]

16. The question before this Court is whether the Trustees may finally carry out their fiduciary duty to distribute to Beneficiaries. The Trustees have found no law preventing distributions in a trust which defines beneficiaries in a discriminatory manner and, apart from urging this Court to create new law regarding First Nations Trusts, the Appellant and Intervenor present no legal basis to overturn the Threshold Decision.

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[21] *Knight v Knight* (1840) 49 ER 58 at 63 **[Tab 2]**.
[22] Transfer Decision.
[23] See, for example, Extracts of Key Evidence of the Appellant – Affidavit of Paul Bujold at 065, paras 39-43, 50, 55, 64, 80, 153, and 184; Evidence of the Appellant – Affidavit of Catherine Twinn at 075, paras 17, 19, 20, 29(e), 29(h), and Exhibit B; Evidence of the Appellant – Affidavit of Isaac Twinn at 139, paras 5, 9, and 10; Extracts of Key Evidence of the Appellant – Trustee "Offer" Application and filed June 12, 2015 at 413; Extracts of Key Evidence of the Appellant – Written Brief of the Public Trustee at 469.

A. The Duties and Role of a Trustee

i. Trustees Owe Fiduciary Duties to Beneficiaries and are Duty Bound to Distribute

17. A trustee is appointed to manage assets for the benefit of beneficiaries and adhere to the terms of the trust deed.[24] The role of a trustee comes with significant responsibilities and obligations, collectively referred to as fiduciary duties.[25] These duties are designed to ensure that the trustee, who holds legal title, acts in the best interests of the beneficiaries, who have a personal right to uphold the trust and hold the trustees to their fiduciary duties which include the duty to distribute.[26]

18. Trustees have a duty to administer a trust for the benefit of beneficiaries, in accordance with the purpose of the trust and the law.[27] The duty to follow the trust deed ensures that the trustees' actions align with the settlor's intentions.[28] Trustees must adhere to the 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.

19. Thus, absent any law prohibiting distribution where the trust contains a discriminatory definition for its beneficiaries, which does not appear to exist, the answer to the Threshold Question must be "yes".

ii. The Trustee Act – Statutory Duty to Distribute

20. Alberta's *Trustee Act* aims to clarify trust laws, make trust management more efficient, and limit the need for court involvement in trust disputes.[29] Trustees are legally bound

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[24] *Merril Petroleums Ltd v Seaboard Oil Co* [1957] AJ No 29 at para 83 (SC) 22 WWR 529 **[Tab 3]**, aff'd [1958] AJ No 10 (CA), 25 WWR 236 **[Tab 4]** ("*Merril Petroleums*"). 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 **[Tab 5]**.

[25] Waters' Law of Trusts at 18.II **[Tab 5]**.

[26] Waters' Law of Trusts at 18.III **[Tab 5]**.

[27] *Merril Petroleums* at para 83 **[Tabs 3-4]**.

[28] *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 **[Tab 6]**.

[29] *Trustee Act*, SA 2022, c T-8.1.

to act in the best interests of the beneficiaries, adhering to the terms outlined in the trust document.[30] The *Trustee Act* applies to the Trustees' current and future actions.

21. The *Trustee Act* outlines several statutory obligations that deal with distributions. Trustees are bound to consider the needs of the Beneficiaries,[31] Trustees must follow the instructions and provisions laid out in the trust document and the *Trustee Act*, including specific guidelines regarding asset distribution,[32] Trustees are legally bound to act in the best interests of the Beneficiaries, adhering to the terms outlined in the trust document,[33] and Trustees need to execute distributions in accordance with the settlor's instructions and desires.[34]

22. Trustees are statutorily bound to distribute to beneficiaries. Thus, it appears, based on the governing statute, that the answer to the Threshold Question must be "yes".

B. Discrimination in the Beneficiary Definition Does Not Prevent Distribution

23. The Appellant and SFN describe the 1985 Trust as "sui generis" in an attempt to entice this Court to develop new law in order to deal with this first nation trust.

24. There is no need in this case to recognize a new category of trusts. Discrimination can be addressed in a subsequent application. For instance, in *Hurshman*, the Court permitted a female beneficiary to benefit from the trust regardless of her spouse.[35] In finding remedies, the courts should use a scalpel, not a sword; while there are precise cuts that could be made, this issue is not before this Court.[36]

25. The Trustees submit that Justice Little was correct in concluding the present situation is analogous to *Taylor v Ginoogaming.*[37] *Taylor* involved a First Nations trust that distributed to members who were on a band list at a specific point in time. In that

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[30] *Trustee Act*, SA 2022, c T-8.1 at s. 27(1).
[31] *Trustee Act*, SA 2022, c T-8.1 at ss. 33(4)(a), (c), 47, and 48.
[32] *Trustee Act*, SA 2022, c T-8.1 at ss. 31(2) and (3).
[33] *Trustee Act*, SA 2022, c T-8.1 at ss. 27(1)(b), and 42(2)(c).
[34] *Trustee Act*, SA 2022, c T-8.1 at s. 27(1)(a).
[35] *Hurshman, Mindlin v Hurshman, Re* [1956] 6 DLR (2d) 615 (BCSC) at para 13 **[Tab 8]**.
[36] See, for example, *Schachter v Canada*, [1992] 2 SCR 679.
[37] *Taylor v Ginoogaming*, 2019 ONSC 328 ("**Taylor**")

case, it was recognized that, but for the discriminatory provisions of the *Act* (that were subsequently removed by amendment), there were individuals who *would have* been members on the specific point in time referenced in that trust deed. The Court concluded that given the clear language in the trust deed, even though perhaps those individuals ought to have been members at that time, they were not, and therefore were excluded from the benefit provided for in the trust deed.

26. This is a directly analogous case. In our case, the definition was frozen in time and not subject to legislative changes. *Taylor* stands for the proposition that even where there are legislative changes that address discrimination, that fact does not invalidate the designation of the "point in time" legislation as a means of identifying a beneficiary under a trust. Put another way, even though the legislation itself was discriminatory, that discrimination does not invalidate distribution.

27. With respect, SFN conflated Justice Little's reasoning. SFN argues Justice Little misapprehended the nature of the beneficiaries of the 1985 Trust as being static or frozen in time.[38] This is not true. SFN cites the Threshold Decision for the claim that Justice Little believed beneficiaries were only those who qualified at a point in time in 1985.[39] However, Justice Little was referring to the "point in time" nature of the *Act*.[40]

28. The Trustees submit that it is clear that Justice Little understood it was the legislation that was frozen in time and not the membership list itself. Justice Little heard extensive evidence and submissions over the course of a full-day hearing on how the system of protest works, how the definition affected future beneficiaries and how future beneficiaries could lose status.[41]

29. Justice Little understood this in coming to his conclusion on the application of Taylor. His conclusion on the subject is critical in understanding his reasoning:

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[38] Factum of the Intervenor, SFN, at para 15-16.
[39] Threshold Decision at para 8.
[40] Record of Appeal – Memorandum of Decision, from Case Management Justice Little at 26, para 36.
[41] See, for example: Transcript of the June 16, 2025 Case Management Hearing by Justice Little, at 11:23-27, 20:7-17, 49:14-20, 49:22-35, and 55:19-29 **[EKE page 130]**; Record of Appeal – Memorandum of Decision, from Case Management Justice Little at 26, paras 16-17, 27, and 42.

> In other words, discrimination by virtue of characteristics within a defined group or discrimination by the trustees in making distributions within a defined group is the kind of discrimination in a private trust that may permit intervention by the courts. **Defining the group by reference to federal legislation at a given date does not.**[42] (Emphasis added)

30. SFN suggests Justice Little was incorrect in finding the Trustees are not required to exercise discrimination in the 1985 Trust in respect of distribution which was the question before him. Once qualified as a beneficiary, the Trustees are not required to discriminate in order to make distributions. This is identical to the situation in *Taylor*.

31. Restricting distribution on the basis that discrimination impugns *Charter* rights is not a valid argument – the *Charter* does not apply to actions between private parties.[43] The Trustees have also not found any case, nor have they been provided with a case by the parties to this Appeal, where courts voided a trust on the basis of discrimination.

32. In *Canada Trust v Ontario*, the Court contended with the issue of a discriminatory charitable trust.[44] The Leonard Foundation provided scholarships with blatant discriminatory eligibility criteria. Ultimately, the Court determined that the discriminatory provisions of the trust contravened public policy and were struck out.[45] The scholarship remained, the discrimination did not. However, Justice Tarnopolsky specifically distinguished that public policy considerations apply to charitable trusts, but not private trusts:

> 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.[46] [emphasis added]

33. While the courts have made comments in *obiter* regarding the unpalatable nature of discrimination in private trusts, their focus is on striking the conditions on the bequest but not striking the bequest itself. The issue of amending the 1985 Trust to strike

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[42] Record of Appeal – Memorandum of Decision, from Case Management Justice Little at 26, para 41.
[43] *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at para 35; 33 DLR (4th) 174; *Horse Lake First Nation v Horseman*, 2003 ABQB 152 at para 13.
[44] *Canada Trust Co v Ontario Human Rights Commission* [1990] OJ No 615 (CA); 69 DLR (4th) 321 **[Tab 13]**. ["***Canada Trust***"]
[45] *Canada Trust* at para 106 **[Tab 13]**.
[46] *Canada Trust* at 100 **[Tab 13]**.

conditions which are discriminatory was not at issue in the Threshold Question and subsequent Threshold Decision.

34. The Trustees advised Justice Little they did not intend on distributing until the case is concluded. In fact, the distribution proposal approval is yet to be heard by Justice Little. This Court should permit the Trustees to continue their multi-part application.

35. Chief Twinn, as Settlor of the 1985 Trust, and his Council, made a deliberate choice to freeze the definition of "member" in the trust definition of "beneficiary". He went on to continue to fight to control membership in constitutional litigation, which culminated in Justice Hugesson's landmark 2003 decision and its appeal in 2004.[47] From 1985 to 1997 (when Chief Twinn died) he did not change or merge the 1985 and 1986 Trusts.

36. While the courts may express 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 the 1985 Trust's discrimination.

37. Justice Little concluded his analysis by addressing directly this reality:

> Both Ms. Twinn and the SFN in their briefs and in their oral submissions decry the treatment of First Nations people, as evidenced in part by provisions of the Indian Act that even today perpetuate sexism and racism and, in the case of the [1985 Trust] inevitably create division within the SFN…But trust law in and of itself is not capable of addressing these concerns. Chief Walter Twinn as leader and as settlor of both the 1985 Sawridge Trust and the 1986 Trust was well aware of the implications of his actions. He intentionally created two trusts and two classes of beneficiaries. As a member of both groups, he chose how to define the beneficiaries. **He did so by reference to an admittedly discriminatory, colonial statute. But that was the action of a person defined by that discriminatory, colonial statute. It was not the action of the state.**[48] (Emphasis added).

38. The Appellant makes repeated reference to "unconstitutional discrimination".[49] The 1985 Trust does not deal with governmental actions and therefore the *Constitution* does not apply. The Appellant and SFN belabour the discriminatory nature of the 1985 Trust with no clear ties of relevance to this appeal.

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[47] *L'Hirondelle v Canada*, 2003 FCT 135; aff'd in *Sawridge Band v Canada (FCA)*, 2004 FCA 16.
[48] Record of Appeal – Memorandum of Decision, from Case Management Justice Little at 26, para 43.
[49] Factum of the Appellant, at paras 2, 3, 14(b), 14(c), 14(g), 14(h), 25, 31, and 38.

39. The *Shanks* decision from the Federal Court confirms that SFN can only challenge the Settlor and Council's transfer of funds to the 1985 Trust in Federal Court, subject to limitation issues.[50] The Court found that private corporation powers and thus by extension, private trust decisions are not reviewable,[51] and since the funds were not paid from a trust account, trust principles did not apply.[52] This case focused on the interpretation of the document governing the funds and found the first nation applied an unreasonable interpretation of "member" but did not focus on discrimination. Further, it affirmed the Taylor case was decided correctly.

C. Purpose Trusts

40. It is inaccurate to claim, as the Intervenors do, that Waters states all First Nation trusts are purpose trusts. This is a gross characterization of all First Nation trusts and is insulting and paternalistic to paint all First Nations trusts with the same legal brush without regard to explicit wording of the trust instruments, the intention of the settlors or the needs of their nation or members. Just because a trust is set up by a First Nation does not make is a purpose trust. SFN's interpretation of trust law is incorrect. In a discretionary trust, beneficiaries have enforceable rights, not just expectations. Although their proprietary interest only vests when trustees exercise discretion to distribute assets. Beneficiaries have recourse to the courts regarding the administration of trust. As admitted by SFN, the 1985 Trust benefits members and thus is not a purpose trust.

41. Contrary to the Appellant's assertion,[53] the 1985 Trust is **not** a non charitable purpose trust. Section 77 of the *Trustee Act* recognizes a non charitable purpose trust as being valid if it has a valid object and is for the performance of a function of government **and does not create an equitable interest in any person**.[54]

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[50] *Shanks v Salt River First Nation #195*, 2023 FC 690. ["***Shanks***"]
[51] *Shanks* at para 32-33
[52] *Shanks* at paras 37-41
[53] Factum of the Appellant, at paras 30, 31, and 39.1; Factum of the Intervenor, SFN, at paras 30, 37, and 38.
[54] *Fletcher's Fields Limited v The Ontario Rugger Union*, 2023 ONSC 373 at para 23.

42. The Supreme Court of Canada has described purpose trusts as a "rare species" of trusts for which there is no beneficiary, and for which funds are deposited in trust in order to see a particular purpose is filled; people may benefit, but only indirectly.[55]

43. The 1985 Trust references the beneficiaries as being individuals thereby creating an equitable interest in these individuals. The Trust Deed makes numerous references to **specific individuals** and **members**. For instance, the preamble, and paragraphs 2, 5, 6, 8, and 11, all mention individuals or members, highlighting that the trust is established with **identifiable individual beneficiaries rather than for a general purpose**.[56] Furthermore, the 1985 Trust explicitly states trust funds **cannot be applied for any purpose other than those outlined in the trust deed**.[57]

44. The affidavit of Paul Bujold specifically mentions that the 1985 Trust was established for individual benefit.[58] The 1986 Trust, which is identical to the 1985 Trust in terms of its distributive power, is specifically distributed to individual beneficiaries.

45. Chief Walter Twinn placed assets in trust for the benefit of the members of SFN as they existed in 1982.[59] The "number one objective" of the 1985 Trust, by Chief Walter Twinn's own admission, was to exclude people who might have become band members under Bill C-31,[60] precluding the 1985 Trust from being a purpose trust.

46. The Appellant foreshadows making the alternative argument that the 1985 Trust is a non-charitable purpose trust that is subject to the public policy doctrine, but she notes that she does not have enough space in her factum to actually make the argument and simply cites several cases on the doctrine of public policy. The cases she cites largely support the idea that trusts will tolerate some measure of selectiveness on the

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[55] *Schmidt v Air Products Canada Ltd* [1994] 2 SCR 611 at p. 640 **[Tab 18]**; *Bathgate et al v National Hockey League Pension Society et al*, 11 OR (3d) 449, OJ No 2168 (OCGD) [**Tab 19]**.
[56] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit G (Declaration of the 1985 Trust) **[EKE page 71]**.
[57] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit G (Declaration of the 1985 Trust) at para 3 **[EKE page 75]**.
[58] Affidavit of Paul Bujold, Sworn September 12, 2011, at paras 9 **[EKE page 7]** and 31 **[EKE page 12]** ; Extract of Key Evidence of the Appellant – Affidavit of Paul Bujold, sworn February 15, 2017 at 051, para 103.
[59] Affidavit of Paul Bujold, Sworn September 12, 2011, at Exhibit D (Asset Transfer Agreement) **[EKE page 24]**.
[60] Extract of Key Evidence of SFN – Affidavit of Darcy Twinn, Exhibit B (Transcript of Cross—Examination of Chief Walter Twinn), at 19, 3908:15-20.

basis of religion, etc. as long as there is not blatant racism or religious superiority involved. She cites no cases in which distributions have been prohibited.

D. Limitations – Collateral Attacks are Statute Barred

47. Collateral attacks by SFN on the validity of the 1985 Trust are inappropriate. SFN is not a party to the action and has not brought an action to challenge the validity of the Trust. In any event, any question about validity is statute barred or void for laches, as also noted by the OPGT and in this Court in the Transfer Decision.[61]

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

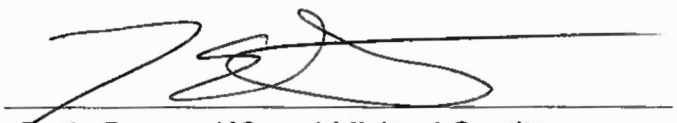
VI. RELIEF SOUGHT

49. The Appellant and SFN seek broad remedies that ask the Court to create new law and are far beyond the scope of the Threshold Question. They provide no legal basis for these novel claims.

50. The Trustees request this Honourable Court dismiss this Appeal in its entirety, and return the matter to Case Management Justice Little.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2026.

Dentons Canada LLP and KPMG LAW LLP



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Solicitors for the Trustees

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[61] Brief of the Office of the Public Guardian and Trustee filed March 14, 2025 at paras 50-51. See also the Transfer Decision at para 69.

TABLE OF AUTHORITIES

1. *Twinn v Alberta* (Office of the Public Trustee), 2022 ABCA 368

2. *Knight v Knight* (1840) 49 ER 58 at 63

3. *Merril Petroleums Ltd v Seaboard Oil Co,* [1957] AJ No 29 (SC)

4. *Merril Petroleums Ltd v Seaboard Oil Co,* [1958] AJ No 10 (CA)

5. Waters' Law of Trusts in Canada, 5th Ed (Thomson Reuters: Westlaw Edge)

6. *Martin v Banting* [2001] OJ No 510 (SC)

7. *Trustee Act*, SA 2022, c. T-8.1

8. *Hurshman, Mindlin v Hurshman, Re* [1956] 6 DLR (2d) 615 (BCSC)

9. *Schachter v Canada*, [1992] 2 SCR 679

10. *Taylor v Ginoogaming*, 2019 ONSC 328

11. *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573

12. *Horse Lake First Nation v Horseman*, 2003 ABQB 152

13. *Canada Trust Co v Ontario Human Rights Commission,* [1990] OJ No 615 (CA)

14. *L'Hirondelle v Canada*, 2003 FCT 135

15. *Sawridge Band v Canada (FCA)*, 2004 FCA 16

16. *Shanks v Salt River First Nation #195*, 2023 FC 690

17. *Fletcher's Fields Limited v The Ontario Rugger Union*, 2023 ONSC 373

18. *Schmidt v Air Products Canada Ltd* [1994] 2 SCR 611

19. *Bathgate et al v National Hockey League Pension Society et al*, 11 OR (3d) 449, OJ No 2168 (OCGD

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.

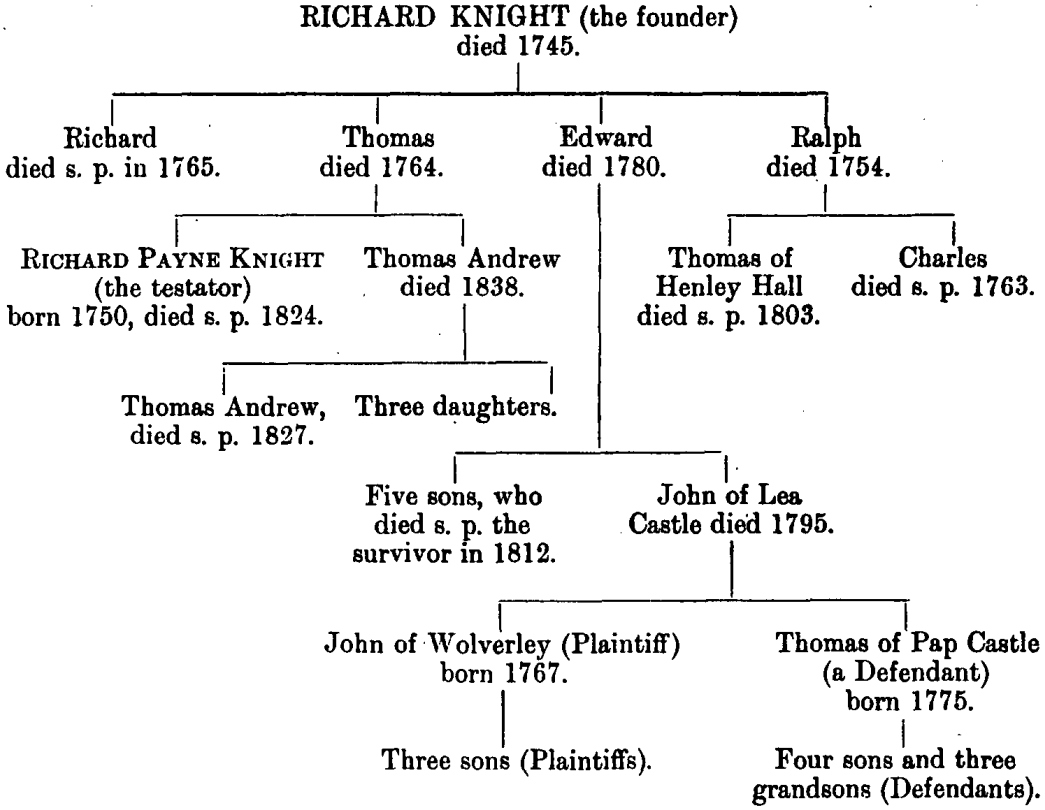
[151] On the 3d of June 1814 he made his will. At that time, his nearest relation, and the next male descendant from Richard Knight his grandfather, was his brother Thomas Andrew Knight, who had an only son, Thomas Andrew Knight, the younger; after his brother and nephew, the next male descendants from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

1957 CarswellAlta 56
Alberta Supreme Court

Merrill Petroleums Ltd. v. Seaboard Oil Co.

1957 CarswellAlta 56, 22 W.W.R. 529

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

Egbert, J.

Judgment: August 28, 1957

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

Subject: Contracts; Natural Resources; Civil Practice and Procedure; Estates and Trusts
Related Abridgment Classifications
Contracts
II Parties to contract
II.2 Privity
II.2.a Third party beneficiary
Contracts
VII Construction and interpretation
VII.2 Resolving ambiguities
VII.2.e Plain language
Contracts
IX Performance or breach
IX.4 Time of performance
IX.4.a Time of essence
Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.b Duties
III.2.b.iii Miscellaneous
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement
Headnote
Contracts --- Parties to contract — Privity — Third party beneficiary
Contracts --- Construction and interpretation — Words and phrases
Contracts --- Performance or breach — Time of performance — Time of essence
Oil and Gas –- Exploration and operating agreements — Joint operating agreement
Trusts and Trustees –- Powers and duties of trustees — Duties
Contracts — Interpretation — Cardinal Principle of — "May.".

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Contracts — Surrender or Quit-Claiming of Rights under — Effect of Lapse of Rights.
Contracts — For Benefit of Third Party — Enforceability.
Contracts — Time as of Essence — Oil Contracts.
Trusts and Trustees — Duties of Trustees — Importance of Trust Instrument.
Mines and Minerals — Oil Production — Three Way Agreement — Option — "May.".
The cardinal principle governing the interpretation of contracts is that there must be assigned to each word in the contract its plain, ordinary meaning: *Beard v. Moira Colliery Co.*, [1915] 1 Ch. 257, 84 LJ Ch 155.
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. "May" in its plain, ordinary meaning, is a word of permission and not of command: *Sheffield Corporation v. Luxford*, [1929] 2 K.B. 180, 98 L.J.K.B. 512; *In re Baker; Nichols v. Baker* (1890) 44 Ch D 262, 59 LJ Ch 661.
Commercial Taxi v. Highway Traffic Board, [1950] 2 W.W.R. 289, 1950 Can Abr 142, affirmed (1951) 1 W.W.R. (NS) 465, 1951 Can Abr 136, wherein it was held that the word "may" therein could be interpreted as "shall," dealt with the interpretation of statutory enactments; it had nothing to do with the language of contracts.
A surrender or quit-claim implies some positive act of release on the part of the person surrendering or quit-claiming, and that act must take place, in the case of the surrender or quit-claim of rights under an agreement, during the currency of the agreement; where the rights are merely permitted to elapse by effluxion of time no surrender or quit-claim thereof is possible: *Insinger v. Cunningham*, [1924] S.C.R. 8, 15 Can Abr 57, 27 Can Abr 146.
When two persons contract for valuable consideration as between themselves 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.
Time is of the essence in contracts relating to the production of petroleum because events affecting activities and values can occur unpredictably and with great suddenness.
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 in question herein set forth in considerable detail the right, duties and obligations of the "operator" or trustee, and the trustee was 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 all trustees is to follow implicitly the terms of the trust instrument, and, secondly, to observe those general principles of trustee law which do not run counter to the express terms of the trust.
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.
The plaintiff companies entered into an agreement (the "three-way agreement") with the defendant Seaboard and Honolulu companies for the joint acquisition, exploration and development of oil and gas lands, which provided, *inter alia*, for the acquisition and disposition of "premises" by unanimous consent only, and for the commencement of drilling operations by the consent of 50 per cent of the contracting parties holding an equity of 66 2/3 per cent. The plaintiffs' combined equity amounted to 33 1/3 per cent. The agreement further provided that any party thereto "may assign" its interest in any "premises" to any other party thereto.
Acting as "operator" for, and with the unanimous consent of, the parties to the "three-way agreement," Seaboard entered into an agreement (the "Superior agreement") with the defendant Superior company, whereby, in return for conducting seismic work on Superior's land within a stated time, Seaboard was to obtain the right to select within such time any areas of interest, the selection of any such area to impose an obligation on Seaboard to drill the selected area to a contract depth, whereupon an interest in such area would then be earned by Seaboard.
The seismic work having been completed, and certain areas having been selected by unanimous consent of the parties to the "three-way agreement," the plaintiffs wished, and Seaboard and Honolulu did not wish, further selections to be made. Seaboard as "operator" refused to make such further selections, and Seaboard and Honolulu refused to assign their interests in the Superior agreement to the plaintiffs, unless Superior released Seaboard from all obligations thereunder. Superior refused so to release

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Seaboard, and the time for making selections expired. The plaintiffs sued for *inter alia* an order compelling Seaboard to make such selections and for alternative remedies.

Held that the action must be dismissed as against all the defendants with costs.

The failure to exercise the option was not in any way a surrender or quit-claim of the "premises."

All that elapsed by effluxion of time was an option or right to make further selections of land. This was not a surrender or quit-claim within the meaning of clause 12 of the three-way agreement in question.

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 sec. 9 (*a*) of the contract.

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 was clear that no approval under any of the above headings was ever obtained to the selection desired by Merrill.

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. 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.

Any participant had the right 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. There was no breach of trust by Seaboard in refusing to make the selections requested by Merrill alone.

Taking into account the nature of the agreement, and all the surrounding circumstances, there is no doubt that time was of the essence of the 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.

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.

This case was very similar to *In re Schebsman*, [1943] Ch. 366, 112 LJ Ch 338, 113 LJ Ch 33, the case 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.

The evidence quite clearly disposed of the allegation of estoppel.

There was no breach of trust by Seaboard in refusing to make the selections requested by Merrill alone.

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 by the trustee, pursuant to such a majority decision, was a failure to protect its (Merrill's) interests.

Even had Seaboard been guilty of a breach of trust, Superior was in no way liable to the plaintiffs in respect thereof.

The action was in reality three separate actions against each defendant. The defendants all filed separate defences, and were represented, and rightly so, by separate counsel. In these circumstances there was no reason why each defendant should not be entitled to its separate costs against the plaintiffs.

***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

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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 per cent 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 and duties and liabilities of a participant in addition to those of operator.

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> 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 per cent (50%) in number of participants owning sixty-six and two-thirds per cent (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 per cent (50%) in number of the participants owning sixty-six and two-thirds per cent (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

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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:

11 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.

12 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.).

13 Part II:

14 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.)

15 Part III:

16 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.)

17 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.

18 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.

19 Part IV:

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20 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."

21 Part V:

22 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.

23 Part VI:

24 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 farmout by Seaboard, Seaboard shall remain liable for the full and faithful performance of its obligations set forth in the agreement.

25 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.

26 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.

27 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.

28 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 per cent 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 per cent; Honolulu, 33 1/3 per cent; Merrill, 20 per cent; Cancoll, 13 1/3 per cent, 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 per cent 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.

29 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.

30 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

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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.

31 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.

32 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: 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.

33 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.

34 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.

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35 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.

36 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.

37 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.

38 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.

39 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.

40 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 conversa tions 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.

41 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:

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> 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].

42 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.

43 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.

44 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."

45 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:

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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.

46 (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%) per cent of your interest in and to the following lands ....

47 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 subsec. (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.

48 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.

49 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.

50 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.

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

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

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

54 (3) In no case were Superior lands involved.

55 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.

56 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.

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

58 (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.

59 (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.

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

61 (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.

62 (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.

63 (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.

64 (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.

65 (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.

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

67 (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.

68 (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

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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.

69 (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.

70 (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.

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

72 The plaintiffs therefore claim, *inter alia*:

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

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

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

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

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

78 (*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.

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

80 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.

81 (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.

82 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.)

83 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."

84 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 W.W.R. 289, affirmed (1951) 1 W.W.R. (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.

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85 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 K.B. 180, 98 L.J.K.B. 512:

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

86 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 ....

87 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.

88 The plaintiffs in their written brief suggest that this clause 12 is very difficult to understand, and that the insertion of addi tional words is required to give it and, 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 part to the agreement. Having become a party to it, it is bound by its terms.

89 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

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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.

90 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.

91 A surrender or quit-claim implies some positive act of release on the part of the person surrendering or quit-claiming, and that act must take place, in the case of the surrender or quit-claim 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] S.C.R. 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.

92 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.

93 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.

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

95 (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.

96 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 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.

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

98 (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.

99 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.

100 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.

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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.

101 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.

102 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.

103 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.

104 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.

105 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.

106 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

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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.

107 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.

108 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.

109 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. L.R. 438, 18 W.L.R. 167; *Evans v. Bonneau* (1911) 17 W.L.R. 243; *Roots v. Carey* (1914) 6 W.W.R. 27, 49 S.C.R. 211; *Forbes v. Connolly* (1857) 5 Gr 657.

110 Moreover, this was an agreement relating to petroleum and natural gas lands, and as I pointed out in *Can. Fina Oil Co. Ltd. Paschke* (1956) 19 W.W.R. 184, affirmed (1957) 21 W.W.R. 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.

111 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.

112 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?

113 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

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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 per cent in number of the participants owning not less than 66 2/3 per cent 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 acquisi tion 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.

114 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.

115 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.

116 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.

117 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.

118 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.

119 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

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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 O.L.R. 606; *Harman v. Gray-Campbell Ltd.*, [1925] 1 W.W.R. 1134, 19 Sask. L.R. 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.

120 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.

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

122 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.

123 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 Sea board'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.

124 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.

125 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.

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126 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.

127 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.

128 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.

129 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.

130 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.

131 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.

132 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.

133 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.

134 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,

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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.

135 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.

136 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.

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

138 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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1958 CarswellAlta 31
Alberta Supreme Court, Appellate Division

Merrill Petroleums Ltd. v. Seaboard Oil Co.

1958 CarswellAlta 31, 25 W.W.R. 236

Merrill Petroleums Limited and Cancoll Oil & Gas Company Limited (Plaintiffs) Appellants v. Seaboard Oil Company, Canadian Superior Oil of California, Limited and Honolulu Oil Corporation (Defendants) Respondents

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

Judgment: May 21, 1958

Counsel: *C. E. Smith, Q.0.* , and *W. M. MacKay* , for plaintiffs, appellants.
G. H. Steer, Q.C. , for Canadian Superior Oil of California Limited.
J. V. H. Milvain, Q.C. , and *J. H. Laycraft* , for Honolulu Oil Corporation.
D. P. McLaws, Q.C. and *M. Bancroft* , for Seaboard Oil Company.

Subject: Contracts; Natural Resources; Civil Practice and Procedure
Related Abridgment Classifications
Contracts
II Parties to contract
II.4 Privity
II.4.b Third party beneficiary
II.4.b.i General principles
Contracts
VII Construction and interpretation
VII.1 General principles
Contracts
IX Performance or breach
IX.5 Time of performance
IX.5.b Time of essence
Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.b Duties
III.2.b.iii Miscellaneous
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement
Headnote
Contracts --- Parties to contract — Privity — Third party beneficiary
Contracts --- Construction and interpretation — Words and phrases
Contracts --- Performance or breach — Time of performance — Time of essence
Oil and Gas –- Exploration and operating agreements — Joint operating agreement
"May.".
Effect of Lapse of Rights.

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Enforceability.
Oil Contracts.
Importance of Trust Instrument.
"May.".
Appeal by the plaintiffs from the judgment of Egbert, J., (1957) 22 W.W.R. 529 , dismissed with costs, for the reasons given by the trial judge.

***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

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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 W.W.R. 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

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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.

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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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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

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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

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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

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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?

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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

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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.

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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

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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

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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

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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.

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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

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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

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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

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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]

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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

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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.

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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

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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

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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

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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

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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

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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

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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;

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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

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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.

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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)).

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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

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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.

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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.*)

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[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.

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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.

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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.).

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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.

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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

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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.).

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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

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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.).

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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.).

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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).

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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.

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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"

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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

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18 — Duties Underlying the Office of Trustee
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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]

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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

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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

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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:

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"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]

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> 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.

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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.).

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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].

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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).

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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.).

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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.

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2001 CarswellOnt 405
Ontario Superior Court of Justice

Martin v. Banting

2001 CarswellOnt 405, [2001] O.J. No. 510, 103 A.C.W.S. (3d) 238, 37 E.T.R. (2d) 270

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

Low J.

Heard: February 2, 2001
Judgment: February 14, 2001
Docket: 98-CV-147329

Counsel: *Kenneth Hood*, for Plaintiff/Responding Party, David Martin
Sean Dunphy, *Christopher Cosgriffe*, for Moving Parties, Robert Banting, Freeburne Banting Foundation, Fenwood Developments Limited
Hendrik Keesmaat, for Moving Party, Barbara Martin

Subject: Estates and Trusts
Related Abridgment Classifications
Estates and trusts
II Trusts
II.2 Express trust
II.2.g Termination
II.2.g.i General principles
Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.a Powers
III.2.a.i Scope
III.2.a.i.B Discretionary powers
III.2.a.i.B.2 Requirement of good faith
Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.a Powers
III.2.a.i Scope
III.2.a.i.B Discretionary powers
III.2.a.i.B.3 Miscellaneous

Headnote

Trusts and trustees --- Powers and duties of trustees — Powers — Scope — Discretionary powers — Requirement of good faith

Plaintiff was one of beneficiaries of two inter vivos trusts created in 1975 to effect estate freeze — Plaintiff brought action following exercise by defendant settlors/trustees of their powers and discretion to distribute trust assets and wind up trusts — Plaintiff alleged that defendants had legal obligation to distribute one-half of one trust and one-third of second trust to him — Defendants brought action for summary judgment dismissing action — Motion granted — Defendants deposed that they

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intended to reserve to themselves wide and complete discretion in matter of determining who among members of appointed class was eventually to receive money from trusts and in what proportions — Trust documents conferred discretionary power of appointment on defendants — No limiting criteria were set out in trust documents — Court will not interfere with exercise of discretion by trustee under discretionary trust in absence of mala fides — Defendants held view that plaintiff lacked industry and loyalty to family and that his conduct lacked integrity — Such considerations were not irrelevant to exercise of defendants' discretion — Defendants were not required to demonstrate objective accuracy of their opinions — Plaintiff failed to establish mala fides on part of defendants.

Table of Authorities

Cases considered by *Low J.*:

Fox v. Fox Estate (1996), 10 E.T.R. (2d) 229, 28 O.R. (3d) 496, *(*sub nom. *Fox v. Fox)* 88 O.A.C. 201 (Ont. C.A.) — considered

Gisborne v. Gisborne (1877), 2 App. Cas. 300 (U.K. H.L.) — considered

Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, 247 N.R. 97, [2000] I.L.R. I-3741, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, 39 C.P.C. (4th) 100 (S.C.C.) — applied

Statutes considered:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

MOTION by trustees of inter vivos trust for summary judgment dismissing action brought by beneficiary.

***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:

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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

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the trust and that those reservation 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 the 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

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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 (U.K. 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 the 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,

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> ... 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

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party must put forward his best case. Bald allegations will not suffice. As stated in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), 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* (1996), 28 O.R. (3d) 496 (Ont. 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

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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 JA in *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496, at 517where 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.

Motion granted.

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1956 CarswellBC 235
British Columbia Supreme Court

Hurshman, Mindlin v. Hurshman, Re

1956 CarswellBC 235, 6 D.L.R. (2d) 615

Re Hurshman, Mindlin v. Hurshman et al.

McInnes J.

Judgment: December 14, 1956
Docket: None given.

Counsel: *D. L. Silvers*, for the applicant
W. L. Warner, for Mary Elizabeth Hurshman
R. J. Hawthorne, for The Children's Hospital
H. C. McKay, for The Loyal Protestant Home for Children

Subject: Estates and Trusts
Related Abridgment Classifications
Estates and trusts
I Estates
I.6 Legacies and devises
I.6.d Conditional gifts
I.6.d.iii Grounds for invalidity
I.6.d.iii.B Public policy grounds
I.6.d.iii.B.1 Promotion of marriage breakdown

***McInnes J.*:**

1 This is an application by way of originating summons brought on behalf of Georgia Wood Mindlin, daughter of the deceased Alfred Hurshman. The questions for determination are:

1. Whether the condition italicized below appearing in the gift to the applicant is a valid condition:

'If my said wife shall have predeceased me, or having survived me, upon her death, one-half of the Trust Fund and of any of my property and estate not then converted shall be given to my daughter GEORGIA WOOD HURSHMAN *provided she is not at that time the wife of a Jew, but if she is such at that time, the share which she would otherwise have taken and all income accruing thereon, shall be held in trust by my said Trustee until my said daughter has ceased to be the wife of a Jew, at which time her share shall be given to her. If my said daughter shall be the wife of a Jew at the time of her death, the share which she would otherwise have taken shall be added to what is to be held in trust for the charitable organization referred to in Sub-Paragraph* (c) *of this my Will.'*

2. If the answer to question 1 is in the negative, does the gift pass to the applicant free of such condition?

3. If the answer to question 2 is in the negative, then how is this gift to pass?

4. Such other directions as the Court may deem necessary to interpret and give effect to this clause.

2 The material facts in connection with the application are set out in the statement of facts filed by counsel on the application. Briefly they are as follows:

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3 The deceased died at Vancouver on January 7, 1955, leaving surviving him his widow, Mary Elizabeth Hurshman, who is still living and one daughter Georgia Wood Mindlin, the applicant herein. The deceased had no other children who predeceased him.

4 The deceased made his last will and testament on July 3, 1952, and the same was admitted to probate on July 8, 1955. The applicant married one Ivan Mindlin on June 3, 1952, and is still married to Mr. Mindlin. It is perhaps significant to note that the will of the deceased was made one month to the day after the marriage of his daughter to Mindlin. By the statement of facts filed it is stipulated that the said Ivan Mindlin is by lay definition a Jew.

5 The disputed portion of the will which involves the applicant has been quoted in the questions for determination, *supra*. It should however be mentioned that in the event that the daughter is the wife of a Jew at the time of her death there is a gift over of the share which she would otherwise have taken.

6 It must be noted that it is not upon the occasion of her father's death but that of her mother which is the determining date insofar as the gift to the daughter is concerned. If at the date of her mother's death she is still married to Mindlin, which of course is a matter of uncertainty because many things may happen between now and that event, then she being married to Mindlin who by lay definition is a Jew it could be said that as it is impossible on the authorities to determine who is a Jew that the condition was uncertain and the law is that if the condition is a condition precedent to her taking and that condition is uncertain then the condition is void and the gift falls with it. See *Re Wolffe's Will Trusts*, [1953] 2 All E.R. 697 and *Clayton v. Ramsden*, [1943] 1 All E.R. 16. The provision with respect to the daughter however, does not stop there but goes on to provide that notwithstanding that she may be married to a Jew at the time of her mother's death nevertheless the gift is not forfeited but the payment thereof merely suspended until as the will says "my said daughter has ceased to be the wife of a Jew at which time her share shall be given to her". In short, if Mindlin is alive at the time of the mother's death and is still married to the daughter then in order for the daughter to inherit she must divest herself of her husband. In my view this is a condition which is directly contrary to public policy. The decision of Romer J. in the case of *Re Piper, Dodd v. Piper*, [1946] 2 All E.R. 503, is in my view directly in point. The headnote reads as follows:

> By his will the testator gave a part of his residuary estate to be held as to both capital and income on trust for such of the four D. children 'as attain the age of 30 years and do not before attaining such age reside with' their father. The children's father had been divorced by their mother before the date of the will: —
>
> Held: on the construction of the will, the condition as to non-residence was a condition precedent which, being calculated to bring about the separation of parent and child, was *malum prohibitum* and void as being against public policy, and the gift would take effect free from it.

7 At p. 505 the learned Judge quotes from Jarman on Wills 7th ed., vol. 2, pp. 1443-4, the following words:

> '... the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gifts and condition void.'

8 Then in his own words he goes on to say:

9 That statement (as contained in Jarman on Wills, 4th edn., vol. 2, p. 12), was considered in *Re Moore* by Cotton, L.J. ((1888), 39 Ch. D. 116, at pp. 128, 129).

10 Counsel for the D. children suggested that the condition as to residence was bad, as being against the policy of the law. In that he is correct, and the fact that the husband and wife had been divorced before the date of the will does not affect the

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matter. The condition is expressed in terms which are calculated to bring about the separation of parent and child, and it has been recognized many times that such a condition will not be enforced. The difference between *malum prohibitum* and *malum in se* has never been very precisely defined or considered. Assistance was given, however, by *Re Hope Johnstone* where Kekewich, J., said ([1904] 1 Ch. 470, at p. 479):

> 'What is meant by a provision being void as against the policy of the law? The phrase means no more than that the provision is not enforceable by anyone or in any court.'

11 And cite:

> In the absence of direct authority I am not prepared to hold that a gift, the object of which is to keep a child away from its parent, is *malum in se*. I am quite satisfied that it is not, but, on the other hand, it is *malum prohibitum*. The position in the present case is, therefore, precisely within the statement of the law in Jarman on Wills, which I accept as accurate, with the result that the gift takes effect freed and discharged from the void condition. ...
>
> The condition is void as against public policy, the gift takes effect free from it, and each of the D. children is entitled to a share on attaining the age of 30 years.

12 I accordingly hold in the present case that the condition is void as being against public policy and that the daughter takes the gift free of the condition.

13 The words of Lord Atkin in the case of *Clayton v. Ramsden*, [1943] 1 All E.R. 16 at p. 17, where he says: "For my own part I view with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries, and should not be dismayed if the power were to disappear", are most appropriate in the circumstances here and with great respect I subscribe wholeheartedly to the sentiment expressed by that very learned Judge. I might add that any propensity toward racial discrimination has no place in this country and while it may be open to a testator to lay down the conditions upon which his children may or may not share in his bounty, yet insofar as those conditions involve racial discrimination, his language must be precise and explicit and clearly within the law if he expects the Courts to assist him in the fulfilment of his aims.

14 The costs of all parties will be payable out of the estate.

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Spence v. BMO Trust Co. | 2016 ONCA 196, 2016 CarswellOnt 3345, 346 O.A.C. 108, [2016] O.J. No. 1162, 395 D.L.R. (4th) 297, 14 E.T.R. (4th) 31, 263 A.C.W.S. (3d) 550, 129 O.R. (3d) 561 | (Ont. C.A., Mar 8, 2016)

1990 CarswellOnt 486
Ontario Supreme Court, Court of Appeal

Canada Trust Co. v. Ontario (Human Rights Commission)

1990 CarswellOnt 486, [1990] O.J. No. 615, 12 C.H.R.R. D/184, 20 A.C.W.S. (3d) 736, 37 O.A.C. 191, 38 E.T.R. 1, 69 D.L.R. (4th) 321, 74 O.R. (2d) 481

RE LEONARD FOUNDATION TRUST; CANADA TRUST CO. v. ONTARIO HUMAN RIGHTS COMMISSION; ROYAL ONTARIO MUSEUM et al. (intervenors)

Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)

Heard: September 7 and 8, 1989
Judgment: April 24, 1990
Docket: Doc. Nos. CA586/87 and CA622/87

Counsel: *Janet E. Minor*, for appellant Ontario Human Rights Commission.
Alan P. Shanoff and *Francy Kussner*, for intervenor-appellant Royal Ontario Museum.
H. Donald Guthrie, Q.C., and *John W.R. Day*, for respondent Canada Trust Co.
William L.N. Somerville, Q.C., *Lindsay A. Histrop*, for intervenor Class of Persons Eligible to Receive Scholarships from the Leonard Foundation.
Stan J. Sokol, for intervenor Public Trustee.

Subject: Estates and Trusts; Constitutional
Related Abridgment Classifications
Estates and trusts
II Trusts
II.2 Express trust
II.2.a Creation
II.2.a.iv Limitations on creation
II.2.a.iv.C Contrary to public policy
Estates and trusts
V Charities
V.4 Doctrine of cy-près
V.4.b When cy-près doctrine applicable
V.4.b.viii Miscellaneous
Human rights
III What constitutes discrimination
III.3 Race, ancestry or place of origin
III.3.f Miscellaneous
Headnote
Human Rights --- What constitutes discrimination — Race, ancestry or place of origin — General
Human rights — Jurisdiction of Supreme Court — Trust established to provide scholarships on discriminatory basis — Complaint filed under Human Rights Code — Trustee seeking Court's direction as to validity of trust — Court having jurisdiction to give directions — Human Rights Code, 1981, S.O. 1981, c. 53.

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Trusts and trustees — Express trusts — Creation — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Nature of gift — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Doctrine of cy-près — When cy-près doctrine applicable — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy — Property subject to trust applied cy-près by striking out invalid discriminatory provisions.

By an instrument made in 1923, certain trusts were established under which the income from the property subject to the trusts was to be used to provide scholarships for students attending schools and colleges in Canada and universities in Canada and Great Britain.

The first three recitals to the trust instrument expressed the settlor's reasons for certain conditions affecting the terms of the trust, and the fourth recital dealt both with the settlor's reasons for and the substance of the conditions. In particular, he expressed the intention to exclude from benefit "all who are not Christians of the White Race, and 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." Similarly, the schools and colleges and universities at which recipients of scholarships could attend were required not to be under the control and domination of the classes of persons described in the recitals as excluded from benefits from the trust. Whereas the administration of the trust property was conducted by the trustee, various other powers, including the power to select students as recipients of the scholarships, were given to a general committee, members of which were required to possess the qualifications set out in the recitals. The instrument further and explicitly provided that, to be eligible for a scholarship, a student was required to 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." The trust instrument empowered the trustee at the expense of the trust to apply to a judge of the Supreme Court of Ontario possessing the qualifications of a member of the general committee, as set out in the recitals, for the opinion, advice and directions of the Court.

The trust instrument further provided that the amount of income spent on providing scholarships for female students in any one year should not exceed one-fourth of the total money available for all students for such year.

The references in the trust instrument to "British Nationality", "British Parentage" and being a "British subject" had, for some time, in practice been replaced, by the general committee, by references to Canadian citizenship.

In August 1986, the Ontario Human Rights Commission filed a complaint to the effect that the provisions of the scholarships infringed the *Human Rights Code, 1981*. Because of this and because of other criticisms of the operation of the trust, the trustee sought the directions of the Court. The alleged invalidity of the trust was put on three main grounds: (1) contravention of the *Human Rights Code, 1981*; (2) contravention of the general principles of public policy; and (3) the uncertainty of some of the conditions affecting the giving of scholarships. The following preliminary issues also arose: (1) whether the Court had jurisdiction to rule on a question of discrimination alleged to be contrary to the *Human Rights Code, 1981*, and whether, in any event, the Court should entertain proceedings before the Human Rights Commission had investigated and considered the complaint; (2) how the interpretation of the instrument should be affected by the recitals to the instrument.

At first instance it was held: (1) that the Court had jurisdiction to make a determination as to the validity of the trust, including the question whether it created discrimination contrary to the *Human Rights Code, 1981*, and it was not premature for the Court to make such a determination prior to the investigation and consideration of the complaint by the Human Rights Commission; (2) in interpreting the trust instrument the Court should not have regard to the settlor's expression of motivation in the first three recitals, since the operative parts of the instrument were not ambiguous and no reference back was made to these recitals; (3) the trust instrument was not invalid since it did not contravene the *Human Rights Code, 1981* or the general principles of public policy, and the conditions affecting eligibility as recipients of a scholarship were not void for uncertainty.

The Human Rights Commission and a party who would be entitled to the property of the trust as residuary legatee of the settlor in the event of invalidity of the trust both appealed.

Held:

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The appeal was allowed.

(1) For the following reasons, the Judge at first instance correctly held that the Court had jurisdiction to make a determination as to the validity of the trust and that it was not premature to make such a determination prior to the investigation and consideration of the complaint by the Human Rights Commission.

(a) The application to the Court did not involve an attempt to advance the common law by creating a new cause of action, rather it was concerned with the administration of a trust over which superior courts have had inherent jurisdiction for centuries.

(b) The determination of the complaint made under the *Human Rights Code, 1981* would not prevent the need for a determination by the Court, since the Commission's mandate to attempt a settlement was not apt in the circumstances that the trustee had no authority, in the absence of authorization by the trust instrument, legislation or court order, to enter into a settlement which would be contrary to the terms of the trust and since the remedial powers under the *Code* appeared not to give a board of enquiry power to alter the terms of the trust or to declare it void.

(c) The fact-finding role of the Commission and a board of enquiry would not be required in the circumstances of the case.

Per Robins J.A. (Osler J. (ad hoc) concurring)

(2) The recitals could be considered in deciding the issues that were raised by the application. Although the operative provisions of a trust instrument will ordinarily prevail over the 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. In the trust instrument under consideration, the recitals and operative parts were so linked as to be inextricably interwoven. One part could not, therefore, be divorced from the other.

In addition, even if the recitals were properly treated as going only to the matter of motive, they could not be ignored. There was a clear public aspect to the purpose and administration of the trust, and, when challenged on public-policy grounds, the reasons, explicitly stated, which motivated the establishment of the trust and gave meaning to its restrictive criteria were highly germane.

(3) The trust violated public policy. Although 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 the law, that interest is limited by public-policy considerations. The trust was premised on notions of racism and religious superiority that contravened contemporary public policy. 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.

(4) The trust was established as a charitable trust which, when created in 1923, was not contrary to public policy and was valid. However, changing social attitudes had the result that it was no longer in the interests of the community to continue the trust on the basis predicated by the settlor: while the trust was practicable when it was created, changing times had rendered the ideas promoted by it contrary to public policy and it had, therefore, become impracticable to carry it on in the manner originally planned by the settlor. Accordingly, the trust should not fail. Rather, the Court should apply the cy-près doctrine and propound a scheme that would 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. This should be done by striking out the recitals and removing all restrictions with respect to race, colour, creed or religion, ethnic origin and sex, as they related to those entitled to the benefits of the trust, to the qualifications of those who may be members of the general committee or give judicial advice and to the schools, colleges or universities in which scholarships may be enjoyed.

Per Tarnopolsky J.A.

(2) The trust instrument established a charitable trust for the advancement of education.

(3) In considering whether the trust could be invalid because of uncertainty, the Court could not refer to the recitals unless the operative words were ambiguous or unless they incorporated the recitals by reference to them. The settlor's beliefs as stated in the opening recitals were evidence of his motives and were irrelevant.

(4) The definition of the persons eligible to be recipients of scholarships or to be eligible to be part of the management of the trust constituted a condition precedent. Such a condition will not fail for uncertainty if some person or persons can be established as satisfying the condition. Moreover, a charitable trust should not fail for uncertainty. Accordingly, the definition was sufficiently certain.

(5) The promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern-day Ontario, as recognized by a variety of sources including provincial and federal statutes, official declarations of government policy, the *Constitution Act, 1982* and international conventions. The charitable trust under consideration was, accordingly, void

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on the ground of public policy to the extent that it discriminated on grounds of race, religion and sex. This public policy would only affect charitable trusts; it would not affect a private family trust. It is the public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination.

(6) A charitable trust which fails can be applied cy-près if the settlor had a general charitable intention. The question was, therefore, whether the settlor's paramount intention was to provide scholarships for education so that the discriminatory provisions were merely the machinery designed to effect that intention or whether he intended to provide it for specific kinds of students and would not have created it otherwise. The answer was that the settlor's intention was to promote leadership through education, and the discriminatory scheme he chose for this purpose was merely the machinery for carrying out this general charitable intention. Accordingly, the provisions of the trust which confined management, judicial advice and benefit on grounds of race, religion and sex should be deleted from the trust instrument.

Annotation

While public policy considerations surrounding the Leonard Foundation Trust are clearly important and will likely attract a good deal of academic comment, this annotation deals only with the application of the cy-près doctrine to the trust. It is concerned with the circumstances and conditions under which a court may apply trust funds cy-près when a well-established charitable purpose subsequently becomes impracticable.

The ability of the Court to apply trust funds cy-près is a part of the Court's inherent scheme-making power. Although many have attempted to define the concept, it seems to have been difficult to articulate a clear definition. In England, the Nathan Committee, (1952, Cmd 8710) reporting on the law and practice relating to charitable trusts, loosely defined it as "a device for keeping in existence a gift to charity so that it may continue as a public benefit from generation to generation." (LA. Sheridan and V.T.H. Delaney, *The Cy-près Doctrine*, 1985 at 2).

An important feature of the charitable trust is its dedication to a purpose for the public benefit. This aspect of the charitable trust has allowed the relaxation of many of the strict rules generally applicable to trusts. Most notable is the preferential treatment of the charitable trust under the rule against perpetuities. Nonetheless, the perpetual nature of charitable trusts creates difficulties that are unique to it:

Its continued existence is almost certain to produce a state of affairs in which its social utility will become impaired if not destroyed. A direction by a testator that his bounty is to be applied along narrow or eccentric lines, coupled with the passage of time, may mean that the purpose for which it was given has disappeared. Far from conferring a benefit upon the community, the continued performance of the trust may be positively detrimental to the commonweal.

[Sheridan and Delaney, supra, at 2.]

Such was the case with the Leonard Foundation Trust. This trust, which, in 1923, was clearly implemented with an element of public benefit in mind, later came to undermine the public quest for equality. The question then arose whether the funds could be applied cy-près.

The cy-près doctrine may only be applied to charitable trusts. It is not available to save a private trust that has been incompletely or improperly created. How the doctrine will be applied in any given case will depend upon whether the impossibility or impracticability of carrying out the charitable purpose is initial or supervening. Initial impossibility or impracticability arises where a donor makes a grant of property on trust for charity which cannot ever take effect in the precise terms specified. The rule in such a case is that the property will be applied cy-près only if the donor can be shown to have had a general charitable intention. If no general charitable intention can be shown, the property will return to the donor on a resulting trust. According to Buckley L.J. in *Re Lysaght*, [1966] 1 Ch. 141, [1965] 2 AU .E.R. 288, at 202 [Ch.], a general charitable intention:

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.

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While it is necessary to demonstrate a general charitable intention on the part of the donor where there is an initial impossibility, this is not necessary where the object of the trust is possible at the date of the gift but subsequently becomes impossible. All that is necessary in such a case is that the donor has made an exclusive dedication of the property to charity. (See D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 611-632.)

In order for a gift to be exclusively for charity, there must be no gift over of any kind. In the case of the Leonard Foundation Trust, it was found by McKeown J. and affirmed by the Court of Appeal, that this was a charitable trust. No provisions were made for a gift over. It is worth noting that the Royal Ontario Museum ("R.O.M.") in this case was not claiming on the basis that it was entitled to a gift over in the event of a failure of the trust purpose. It claimed instead that, as the trust was contrary to public policy, it should fail completely. In such a case, the R.O.M. argued, the trust fund would fall into the Leonard estate to be distributed to the residual beneficiaries, of which the R.O.M. was one.

Unfortunately for the R.O.M., however, once a trust has become vested in charity, it can never return upon a resulting trust to the donor or the donor's estate. (Waters, supra; see also S. G. Maurice & D. B. Parker, eds. *Tudor on Charities*, 7th ed. (1984)). Where the trust purpose fails at some point after the property has vested, the property will pass to the Crown as parens patriae, the ultimate protector of charities. (*Moggeridge v. Thackwell* (1803), 7 Ves. 36, 32 E.R. 15). The Crown will then submit to the court's cy-près jurisdiction, and the trust will be applied to another similar or related charitable purpose.

An analysis of the Leonard Foundation Trust on the basis of a very technical application of the cy-près doctrine would in all certainty lead to the same result as that reached by the Ontario Court of Appeal, but it would arrive at the conclusion by a different route. The appropriate question to ask, it is submitted, is not whether Colonel Leonard had a general charitable intent at the time he created the Leonard Scholarships but rather whether, in making his gift, he dedicated it exclusively to charity? The answer to this latter question, it is submitted, is that the property was dedicated to the purpose of charity alone, there being no gift over. It is this answer which triggers the application of the cy-près doctrine.

Although the doctrine, when considered in the abstract, makes a clear distinction between the need for a general charitable intention in the cases of initial impossibility and for an exclusive dedication to charity in the case of supervening impossibility, the distinction is not always so easily made in actual application of the doctrine to a particular case. It is very common to discover judicial searches for general charitable intent in cases of supervening impossibility, when in fact the question should have been, "Did the donor give the property to charity exclusively?" *Tudor on Charities*, supra. Although these two queries will often lead to the same result and may appear to be synonymous, they are not. As stated by the learned authors of *Tudor on Charities* (supra, at 268):

an intention to make an out-and-out gift may be some evidence and, in some cases, conclusive evidence of a general charitable intention; but it is submitted that the judges who have treated a mere intention to make an out-and-out gift as automatically conclusive evidence of a general charitable intention have failed to recognize and give effect to the established distinction between the two intentions.

The test contained in the phrase "general charitable intention" is a stricter test and more difficult to meet than the standard implied by the concept of "exclusive dedication to charity". Thus, it is possible that the misapplication of the general charitable intention test in a case where exclusive dedication to charity would suffice could result in the failure of a trust that ought to have been applied cy-près. The case of *Wokingham Fire Brigade Trusts*, [1951] Ch. 373 is a good example. Sixty-six years after a public appeal was made for funds to establish a voluntary fire brigade, the National Fire Service took over the operation of the brigade. After the takeover, the trustees were left with a sum of money, and they applied to the Court for directions for the use of the funds. Danckwerts J. found that the original subscribers had donated their money with the specific intention of establishing a fire brigade and that they did not therefore have a general charitable intention. However, Danckwerts J. also concluded that the subscribers had intended to part with all of their interest in their money when they made their donations and that they had thus made an exclusive dedication to charity. He ordered that the money should be applied cy-près by means of a scheme. If, in his analysis, Danckwerts J. had stopped after concluding that the subscribers did not have any general charitable intention, the trust would have failed. It was the exclusive dedication to charity that allowed the funds to be applied cy-près.

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Professor Waters has often bemoaned the confusion in the application of the doctrine. In a comment on the case of *Re Hunter; Genn v. Attorney General (British Columbia)*, [1973] 3 W.W.R. 197, 34 D.L.R. (3d) 602 (B.C. S.C.), Waters stated that:

It was irrelevant that [the testatrix] had ... no general charitable intent. The property now passed to the Crown, and a *cy-près* scheme could be put forward by the Crown from or approval. By the exclusive dedication to charity, [her] next-of-kind had been excluded forever.

However, this was not the result to which MacIntyre J. came.

. . . . .

Left to one's own devices, one is compelled to conclude that *Re Hunter* was wrongly decided.

(D. W. M. Waters, "Comment on *Re Hunter*" (1974) 52 Can. Bar Rev. 598).

In his treatise, *Law of Trusts in Canada*, Professor Waters elaborates on the confusion in Canadian courts applying the *cy-près* doctrine:

A fault with the decision, however, is that it insists on a general charitable intention in the donor before there can be a *cy-près* application, though the problem in hand is one of *supervening* impossibility or impracticability. This idea can be found repeated in a number of earlier and later Canadian cases, and it has support in earlier English authority. In *Re McDougall*, however, Kelly J. would have none of this, and his view has been supported by later English authority. It is to be hoped that Kelly J.'s view prevails in the higher Canadian Courts, because if the doctrine of exclusive dedication to charity means anything, and the Crown is prepared to waive any rights it has to the property already vested in a trust whose objects subsequently can no longer be pursued, the presence or absence of a general charitable intent in the testator or the *inter vivos* settlor is irrelevant.

[Waters, supra, at 629.]

Although it may not be doctrinally correct to look for general charitable intent in the case of supervening impossibility, as a practical matter the attempt to discover a means of applying the trust cy-près may demand an equivalent inquiry. In order to discover another purpose that is as near as possible to the original intent of the donor, it may be necessary to inquire what, generally, the donor was attempting to accomplish. Can it really be said that this question is substantially different from the search for a general charitable intent?

In the case of the Leonard Foundation Trust, the quest for the general charitable intent led the Court of Appeal to find that Colonel Leonard had a general intention to promote education and leadership.

This conclusion allowed a *cy-près* application of the trust fund to education generally. If, instead, the Court had asked whether Colonel Leonard had made and exclusive dedication to charity and concluded that he had and that the trust funds should be applied *cy-près*, they would then have had to determine what alternate means would be as near as possible to the donor's original intent. They would, it is submitted, have applied the property in the same way. The fact that both approaches will in most cases lead to the same result perhaps explains why the application of the doctrine is in such a state of confusion. Despite the confusion, in most cases the courts still arrive at the correct result. Occasionally, in cases where the original intention is simply too narrow for any amount of judicial creativity to discover a general charitable intent, and otherwise salvageable trust will fail. This is the problem with the *cy-près* doctrine in Canada.

The confusion in this area has led to calls for legislative reform in both England and the United States. In England, the *Charities Act, 1960* (U.K.) (8 & 9 Eliz. 2, c. 58; see also *Charities Act, 1985* (U.K.), 1985, c. 20 has alleviated some confusion by expressly laying out the circumstances in which funds may be applied *cy-près*. The legislation also declares the duty of trustees to obtain a scheme whenever their trust falls within the requirements of the Act. In the United States, the doctrine is even less clear than it is here. It is not uncommon for well established trusts which have been in existence for decades to fall into the estate of their original donor long after the donor and any residuary beneficiaries have died. The funds are then lost to charity forever.

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Hopefully, Canadian courts will be able to avoid the extremes encountered in the United States. In Canada, many of the strict rules applicable to private trusts are waived: as a matter of public policy we wish to encourage and facilitate charitable giving. Yet, when the original charitable purpose fails, by misapplying the *cy-près* doctrine, we allow the demise of the charitable gift. The problem has been addressed by the Law Reform Commission of Ontario (*Report on the Law of Trusts*, 1984; more specifically, the Commission is currently conducting a *Project on the Reform of the Law of Charities*). Perhaps the time is now ripe for a legislative response.

L.A. Turnbull [1]

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APPEAL from judgment [reported (1987), 27 E.T.R. 193 (H.C.)] upholding validity of trust instrument.

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***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-près doctrine can be applied to preserve the trust.

2 The appeal is from the order of McKeown J. [reported (1987), 27 E.T.R. 193 (H.C.)] on an application under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, 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 of 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-près?
>
> 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 Honourary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honourary 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.

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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 intervenors 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-près, 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-près.

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) 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-près.

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:

10 1. Do the provisions of the trust contravene public policy or are they void for uncertainty?

11 2. If the answer to that question is in the affirmative, can the doctrine of cy-près be applied to save the trust?

12 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

13 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.

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14 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.

15 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.]

16 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:

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> 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.]

17 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 Scholarship or for the enjoyment of same, as the Committee in its discretion may decide.

[Emphasis added.]

18 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.]

19 The settlor expressed the wish that:

> [T]he 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.]

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20 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.

21 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.

22 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 recommendations of the Committee on Scholarships, approves the awards for the following academic year.

B. The Circumstances Leading Up to the Application

23 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.

24 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'."

25 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.

26 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 Scholarships 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.

27 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*.

28 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.

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29 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.

30 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.

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The Public Policy Issue

A. Can the Recitals Be Considered in Deciding this Issue?

31 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.

32 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.

33 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.

34 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.

35 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?

36 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,

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in which 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, at 7 [S.C.R.]. I have regard also to the observation of Professor Waters in his text on the *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 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.

37 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 (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.

38 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.

39 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.

40 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.

41 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.

42 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.

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The Cy-Près Issue

43 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.

44 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.

45 In these circumstances, the trust should not fail. It is appropriate and only reasonable that the Court apply the cy-près 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.

46 The observations of Lord Simonds in *National Anti-Vivisection Society v. Inland Revenue Commissioners* (1947), [1948] A.C. 31 (H.L.), are apposite to this case. At 74 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 (I)*. 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-près scheme may be established ... A charity once established does not die, though its nature may be changed.*

[Emphasis added.]

47 Reference might also be made to *Scott on Trusts* [W.F. Fratcher ed.], 4th ed., vol. IVA (Boston: Little, Brown & Co., 1989), where, at 535-536, 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. 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.*

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> *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, op. cit, at 611-632; *Power v. Attorney General for Nova Scotia* (1903), 35 S.C.R. 182; *Re Fitzpatrick; Fidelity Trust Co. v. St. Joseph's Vocational School of Winnipeg*, 16 E.T.R. 221, [1984] 3 W.W.R. 429, 6 D.L.R. (4th) 644, 27 Man. R. (2d) 285 (Q.B.); *Re Tacon; Public Trustee v. Tacon*, [1958] Ch. D. 447, [1958] 1 All E.R. 163; and *Re Dominion Students' Hall Trust*, [1947] Ch. 183.

Disposition

48 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.

49 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.

50 Q.1(i), (iii) and (iv) — It is not necessary to answer these questions.

51 Q.2 — No.

52 Q.3 — Yes.

53 Q.4 — As before, but with the deletion of the discriminatory restrictions mentioned in the answer to Q.1(ii).

54 Q.5 and 6 — The application form should be changed in accordance with this decision.

55 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.*:**

I. The Judicial History and the Issues

56 This case concerns appeals from the judgment of McKeown J., dated August 10, 1987, upon an application, under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, 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;

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(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-près?

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?

57 The answers given by McKeown J. were as follows:

58 Question 1

59

(i): No.

(ii): No.

(iii): No.

(iv): No.

60 Questions 2, 3 and 4: The answers given to the previous questions make it unnecessary to answer questions 2, 3 and 4.

61 Question 5: No.

62 Question 6: The answer given to the previous question makes it unnecessary to answer this one.

63 One appellant is the Royal Ontario Museum, 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.

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64 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*"), 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* and so are matters within the exclusive primary jurisdiction of the Commission and any board of inquiry appointed under the *Code*.

65 There are two intervenors 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 and is incapable of being applied cy-près, and the trust fund results to the settlor's estate, to be distributed according to his will.

66 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.

67 All these submissions can be summarized into three main issues:

68 1. Did McKeown J. have jurisdiction to determine this matter or should he have deferred to the jurisdiction of the Ontario Human Rights Commission?

69 2. Is the trust void in whole or in part either for uncertainty or because it violates public policy?

70 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-près?

71 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

72 These are set out in sufficient detail in the judgment of McKeown J. at (1987), 61 O.R. (2d) 75 at 82-87. It is sufficient for our purposes to summarize therefrom.

73 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.

74 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:

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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*.

. . . . .

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 the 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,

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(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.

[Emphasis added.]

75 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.

76 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.

77 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 the 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.

78 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 10 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.

79 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.

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III. The Jurisprudence

(1) Jurisdiction — Human Rights Commission or Court?

80 The Ontario Human Rights Commission submitted that McKeown J. should have deferred to the Commission to exercise its jurisdiction under the *Human Rights Code* 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 J.A. [as he then was] in *Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 21 C.R.R. 44, 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) 274 (headnote), 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 21 C.R.R. 44n, 72 N.R. 76 (note), 17 O.A.C. 399 (note) (S.C.C.), at 532-533 [O.R.]:

> [T]he *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 the 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.
>
> And at pp. 194-195 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.

81 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.

82 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 & Technology (Board of Governors) v. Bhadauria* (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. 14,003, 105 D.L.R. (3d) 707 (C.A.), rev'd [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 22 C.P.C. 130, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 124 D.L.R. (3d) 193, 37 N.R. 455, is in contrast with the situation in this case. In *Bhadauria*, supra, 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 *Human Rights Code*. 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*.

83 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

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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.

84 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.* (1956), [1957] 1 Q.B. 103 at 108 to the effect that: "[W]here 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 [sic] 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

85 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 Commissioners v. Pemsel*, [1891] A.C. 531. For their Ontario application see *Charities Accounting Act*, R.S.O. 1980, c. 65 and *Re Levy* (1989), 68 O.R. (2d) 385, 33 E.T.R. 1, 58 D.L.R. (4th) 375, 33 O.A.C. 99 (C.A.). Also see, generally, D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), c. 14.

86 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 (H.L.); *McGovern v. Attorney General*, [1982] 1 Ch. 321, [1981] 3 All E.R. 493, at 331 [Ch.] and *Re Levy*, 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., 1989) vol. 5, para. 505, p. 309; *Gilmour v. Coats*, [1949] A.C. 426, [1949] 1 All E.R. 848 (H.L.) at 855 [All E.R.] and Waters, supra, 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 (H.L.) at 309 [A.C.]).

87 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.

88 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, 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

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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 [at 214-215]:

> 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.

89 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.

90 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.*, [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at 650-651 [S.C.R.] and *McPhail v. Doulton*, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) at 456 [A.C.]). It is enough that some claimants can satisfy the condition (*Re Selby's Will Trusts; Donn v. Selby*, [1966] 1 W.L.R. 43, [1965] 3 All E.R. 386 (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 (C.A.), subsequent proceedings [1954] Ch. 259, [1954] 1 All E.R. 526). It is well established that a charitable trust should not fail for uncertainty (see *Re Gott*, [1944] Ch. 193, [1944] 1 All E.R. 293). 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.

91 In this case, there has been no difficulty over some 6 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.

92 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; *Clayton v. Ramsden*, [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.) and *Re Tarnopolsk; Barclay's Bank Ltd. v. Hyer*, [1958] 1 W.L.R. 1157, [1958] 3 All E.R. 479 or "impracticable" as in *Re Dominion Students' Hall Trust*, [1947] Ch. 183. In the latter case, the Court found a general charitable intention and then applied the trust property cy-près. The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in *Re Lysaght*, supra, at 206, quoted by McKeown J. at 220:

> 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

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prohibit discrimination on racial grounds — the *Race Relations Act*, (U.K.), 1968, c. 71. 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.

93 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.

94 After the war, this Court, in *Noble and Wolf v. Alley*, [1949] O.R. 503, [1949] 4 D.L.R. 375, rev'd [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 Drummond-Wren*, [1945] O.R. 778 (H.C.), who had found such covenants void as against public policy. The Supreme Court of Canada struck down the covenant in *Noble and Wolf*, supra, on technical grounds but did not refer to the public-policy argument.

95 Subsequently, in *Bhadauria*, supra, at 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, 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* recognizes public policy in Ontario was acknowledged a few years later by the Supreme Court of Canada in *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), 3 C.H.R.R. D/781, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at 23-24 [D.L.R.].

96 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 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 Drummond-Wren*, supra, at 783:

> 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.

97 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

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courts would regard as public policy every time an amendment were made to the *Human Rights Code*. 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.

98 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 the policy (*Hansard Official Report of Debates of Legislative Assembly of Ontario*, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-941). 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* at 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.

99 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 (headnote only), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. 17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (headnote only), 64 N.R. 161, 12 O.A.C. 241, at 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 Corp. of B.C. v. Heerspink et al.* ... [1982] 2 S.C.R. 145 at pp. 157-158 ...), 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 ordinary — and it is for the courts to seek out its purpose and give it effect.

100 In addition, equality rights "without discrimination" are now enshrined in the *Constitution Act, 1982* [*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.

101 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, and the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979, as well as arts. 2, 3, 25 and 26 of the *International Covenant on Civil and Political Rights*, 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.

102 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.

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103 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.

104 It will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss. 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* 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, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255, at 152-153 [S.C.R.] per Wilson J. and 175 per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

105 Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the *Charter* (*Andrews*, supra, at 168-169 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.

106 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 sale, ownership, occupation or use of land because of, inter alia, race, creed or colour are void. Under the *Human Rights Code*, 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, supra, at 601-603 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.

107 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-près, 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, supra, 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-près?

108 One of the great advantages of a charitable trust is that if it fails for some reason, it can be applied cy-près. However, in order to apply the trust property cy-près, the Court must find that the settlor had a general charitable intention. If the mode

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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-près (see *Re Wilson; Twentyman v. Simpson*, [1913] 1 Ch. 314 [1911-13] All E.R. Rep. 1101; *Re Lysaght*, supra, at 203 and *Halsbury's Laws of England*, (4th ed., 1989), vol. 5, Charities, para. 696). Cy-près 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."

109 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-près. The distinction between a general and a specific charitable intent was expressed by Buckley L.J. in *Re Lysaght*, supra, at 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.

110 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.

111 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."

112 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 186:

> 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.

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> 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

113 In the result I would allow the appeal and substitute the following answers for those given by McKeown J.:

114 Q.1 (i) — Yes, but not just as confined by the *Human Rights Code*.

115 (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.

116 (iii) — It is not necessary to answer this question.

117 (iv) — No.

118 Q.2 — No.

119 Q.3 — Yes.

120 Q.4 — As before, but with a deletion of the discriminatory restrictions mentioned in answer to Q.1, (ii).

121 Q.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*.

122 Q.6 — The answer to this question is provided in the answer to Q.5.

123 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.

Footnotes

1 L.A. Turnbull, lecturer, Osgoode Hall Law School.

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Peace Hills Trust Co. v. Canada Deposit Insurance Corp. | 2007 ABQB 364, 2007 CarswellAlta 1525, [2008] A.W.L.D. 164, 162 A.C.W.S. (3d) 165, [2008] A.W.L.D. 174, 55 C.C.L.I. (4th) 204, 288 D.L.R. (4th) 237, 436 A.R. 295, [2008] 7 W.W.R. 372, 84 Alta. L.R. (4th) 376 | (Alta. Q.B., Nov 2, 2007)

1994 CarswellAlta 138
Supreme Court of Canada

Schmidt v. Air Products of Canada Ltd.

1994 CarswellAlta 138, 1994 CarswellAlta 746, 1994 C.E.B. & P.G.R. 8173 (headnote only), [1994] 2 S.C.R. 611, [1994] 8 W.W.R. 305, [1994] A.W.L.D. 603, [1994] S.C.J. No. 48, [1995] O.P.L.R. 283, 115 D.L.R. (4th) 631, 155 A.R. 81, 168 N.R. 81, 20 Alta. L.R. (3d) 225, 3 C.C.P.B. 1, 3 E.T.R. (2d) 1, 48 A.C.W.S. (3d) 439, 4 C.C.E.L. (2d) 1, 73 W.A.C. 81, J.E. 94-983, EYB 1994-66954

AIR PRODUCTS CANADA, WILLIAM M. MERCER LIMITED, CONFEDERATION LIFE INSURANCE COMPANY and T.J. WESTLEY v. GUNTER SCHMIDT in his Personal Capacity and on Behalf of Beneficiaries of STEARNS CATALYTIC LTD. PENSION PLANS

GUNTER SCHMIDT in his Personal Capacity and on Behalf of Beneficiaries of STEARNS CATALYTIC LTD. PENSION PLANS v. AIR PRODUCTS CANADA LTD., WILLIAM M. MERCER LIMITED, CONFEDERATION LIFE INSURANCE COMPANY and T.J. WESTLEY

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: December 1, 1993
Judgment: June 9, 1994
Docket: Docs. 23047, 23057

Counsel: *Dennis R. O'Connor, Q.C., Anne Corbett* and *Barry L. Glaspell* , for appellants Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T.J. Westley.
Neil C. Wittman, Q.C. , and *Kenneth J. Warren* , for respondents Gunter Schmidt in his personal capacity and beneficiaries of Catalytic Enterprises Ltd. — Pension Plan.
Aleck H. Trawick and *Leslie O'Donoghue* , for appellants on cross-appeal Gunter Schmidt in his personal capacity and beneficiaries of Stearns Catalytic Ltd. Pension Plans.
Dennis R. O'Connor, Q.C. , for respondents on cross-appeal Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T.J. Westley.

Subject: Employment; Estates and Trusts; Corporate and Commercial
Related Abridgment Classifications
Pensions
I Private pension plans
I.3 Surplus funds
I.3.c Use of surplus
I.3.c.ii Employer's "contribution holiday"
Pensions
I Private pension plans
I.3 Surplus funds
I.3.d Reorganization or ceasing operations

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Pensions

I Private pension plans

I.3 Surplus funds

I.3.h Miscellaneous

Headnote

Pensions --- Surplus funds — General

Court examining trust aspects of situation and methods of determining entitlement to surplus.

Pension trust being "classic" trust as opposed to mere trust for purpose.

Employees being entitled to surplus.

General amending power not endowing settlor with ability to revoke trust.

Court considering intentions of both.

Principles applying whether or not pension fund subject to trust. .

When two companies, S. Ltd. and C. Ltd., merged to form a new company, the employees' defined benefit pension plans were also amalgamated. At the time of the merger, both the individual plans were in surplus. Prior to the merger, C. Ltd.'s plan had been a contributory defined benefits plan which had undergone amendment over the years, having started out as a contributory money purchase plan administered under a trust fund. It had been silent as to the company's right to surplus until amendments to the plan purported to give the company a discretionary right to any surplus. S. Ltd.'s plan was a defined benefits plan, which repealed and replaced an earlier money purchase plan, and it provided for voluntary employee contributions. Under both original plans the employer was given a discretion as to the distribution of any surplus which might remain upon termination of the plan. The amalgamated plan was a contributory plan, which gave the company a discretion as to the distribution of surplus upon termination and provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached the maximum level specified in the plan. For several years the company met its contributions from the actuarially determined surplus existing in the pension fund, rather than by transferring its own assets. When the company's assets were sold and the pension plan terminated, actuarial calculations established that a substantial surplus would remain in the plan after all benefits had been paid. Both the company and the employee group applied for a declaration of entitlement to the surplus funds. The employee group also applied for a declaration that the company be required to repay the amount of fund surplus it had used to take the contribution holiday. The trial judge found that the portion of the surplus derived from the C. Ltd. employees' fund should be paid out to those employees and that the company was not entitled to take a contribution holiday using any part of the C. Ltd. surplus. The surplus traceable to the S. Ltd. fund was found to belong to the company. Appeals by both the company, in regard to the C. Ltd. surplus and contribution holiday, and the former S. Ltd. employees, in regard to the S. Ltd. surplus, were dismissed. The company appealed and the employees cross-appealed.

Held:

Company appeal allowed in part; S. Ltd. employees' cross-appeal dismissed.

Per Cory J. (La Forest, L'Heureux-Dubé, Gonthier and Iacobucci JJ. concurring):

The *Employment Pensions Act* , which governed the pensions at issue, does no more than establish that surplus entitlement must be determined by the wording of the plan. Contribution holidays are permitted provided that they are not prohibited by the plan. Entitlement to surplus turned upon the determination as to whether the pension fund was impressed with a trust. Whether or not a given fund is subject to a trust is determined by the principles of trust law. If there has been an express or implied declaration of trust and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund. If no trust has been created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan. Where a trust is created, the terms of the pension plan will be relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust. A pension trust is a "classic" trust, not a mere trust for a purpose. Whether or not a pension fund is in fact a pension trust will usually be revealed by the wording of the plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. Furthermore, in creating a pension plan and accompanying trust, an employer may be able to define the subject matter of the trust so as to include only the amount necessary to cover the employee benefits owed. However, very specific wording will be necessary before an ongoing surplus will be excluded from the operation of a pension trust. The employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless

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the employer reserved a power of revocation of the trust at the time the trust was originally created. The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. However, the transfer of trust property to the trustee is absolute, and any power of control of that property will be lost unless the transfer is made expressly subject to it. A general amending power does not endow the settlor with the ability to revoke the trust. A resulting trust may arise if the objects of the trust have been fully satisfied and money still remains in the trust fund. In such situations, the remaining trust funds will ordinarily revert by operation of law to the settlor of the fund. However, a resulting trust will not arise if, at the time of settlement, the settlor demonstrates an intention to part with his or her money outright, without retaining any interest in the remaining funds. In contributory plans, it is not only the employer's, but also the employees' intentions which must be considered, as both are settlors of the trust. Only in rare cases will a resulting trust occur in pension surplus cases.

The C. Ltd. employees' pension plan provided that all contributions would be paid to a trustee to be held and administered in accordance with a trust agreement which formed part of the plan. The plan and trust agreement constituted a clear declaration of an intention to create a trust. The subject matter of the trust was defined as all contributions made by the company and by employees together with all the earnings of those contributions; the beneficiaries were defined in the trust agreement by reference back to the plan. That was a classic trust established for the benefit of a defined group of persons. As there was no evidence that the trust was ever terminated, it should be assumed that the trust continued to exist, notwithstanding the fact that control of the plan was later transferred to another trustee or that a later version of the plan removed all reference to the trust. None of the provisions of the amalgamated plan could have the effect of termination either. Both the trust agreement and the plan made it clear that the trust fund was comprised of all contributions made by both the company and the employees, together with all earnings on those moneys. The fact that the original plan was a money purchase plan under which no surplus could arise did not affect the parameters of the fund. Since all of the moneys in the fund were impressed with a trust, it followed that the company could only claim the surplus remaining on termination by virtue of a resulting trust, or according to the terms of the trust itself. No resulting trust arose under the circumstances as the purposes of the trust were not fully satisfied by payment of all defined benefits. One of the objects of the trust was to use any money contained in the funds for the benefit of the employees. Consequently, the trust objects would not be exhausted so long as some money remained in the funds and some eligible employees could be found. Both the trust agreement and all versions of the plan made some provisions for what would occur on termination of the plan. Although C. Ltd. reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit, C. Ltd. did not clearly reserve a power to revoke the trust, and such a power could not be implied under the general amendment power. Therefore the amendment which purported to give C. Ltd. the power to distribute surplus to itself, as well as a later reversion clause, were both invalid, as they represented attempts to partially revoke the original trust in favour of the employees. Neither was within the scope of the control which the company reserved to itself at that time. The company was therefore not entitled to any share of the surplus in regard to the C. Ltd. employees' plan.

The original S. Ltd. employee's plan differed from the C. Ltd. plan in that it made no reference to the existence of a trust and it specifically contemplated the reversion of surplus assets to the company. A trust was never created, notwithstanding that the subject matter of the alleged trust, the pension fund, was defined; that the employees were identified as those entitled to receive the fund moneys; and that the exclusive benefit and non-diversion clauses were consistent with the existence of a trust. Several other clauses were equally consistent with the non-existence of a trust and clearly identified the plan as a contract to receive defined benefits. No intention to create a trust was apparent on the face of the documents. Any statement contained in the company brochure to the effect that the company intended to pay any remaining surplus to the employees could not under the circumstances form the basis for an estoppel preventing the company from claiming the surplus for itself. Since no trust was ever created in regard to the S. Ltd. plan, entitlement to the surplus should be determined on the basis of an interpretation of the plan itself. As the employees had no interest in the surplus remaining upon termination until the company exercised its discretion to give them an interest, the amendment of the plan did not reduce any then existing employee interests. Furthermore, the amendment did not violate the restriction that no amendments were to have the effect of diverting any part of the fund to purposes other than for the exclusive benefit of the participant. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus. The company was therefore entitled according to its plan's terms to any surplus remaining in the pension fund which could be traced to the former S. Ltd. plan.

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An employer's right to take a contribution holiday must be determined according to the particular circumstances. It can be excluded either expressly or implicitly where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of a plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. Those principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by an employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. Those general considerations are subject to applicable legislation. The relevant plan provisions which governed the taking of a contribution holiday in the present case were those contained in the amalgamated plan. The wording of the plan implicitly authorized an actuary to consider the surplus when calculating the company's annual funding obligation. Since the plan allowed the company to take contribution holidays, it did not need to repay the actuarial surplus taken into account in the years when it made no contributions into the plan.

Per Sopinka J. (dissenting in part):

The C. Ltd. plan surplus should revert to the company. The imposition of a trust on all the moneys in the plan did not prevent the trust from being amended. The nature of the right of amendment depended on the terms of the plan and of the trust agreement. Nothing in the C. Ltd. plan precluded the company from exercising the express power of amendment in the plan so as to provide for the return of surplus funds on termination of the plan. The company reserved from the outset the power to amend the C. Ltd. plan so as to permit any surplus to be distributed to itself, limited only by the condition that the accrued benefits could not be reduced. The right to receive surplus moneys in the pension fund was not a benefit which had accrued to the employees when the company amended the plan to permit the surplus to be distributed to itself. Moreover, even if such a right could be said to have accrued at the time of amendment, it was not a benefit contemplated by that provision. A power of amendment, limited in that it could not reduce accrued benefits, was not inconsistent with the fundamental purpose of a defined benefits pension trust. It should be given effect if sufficiently explicit to permit a change amounting to a partial revocation in law.

Per McLachlin J. (dissenting in part):

The surplus in the defined benefits plan should revert to the employer. The amendment providing that the surplus should go to the employer was a valid amendment to the original trust document and should be permitted. Even if it were to be disregarded, the surplus should devolve to the company under the doctrine of resulting trust.

Table of Authorities

Cases considered:

Considered by majority:

Arrowhead Metals Ltd. v. Royal Trust Co. (March 26, 1992) [unreported] — *applied*

Askin v. Ontario Hospital Assn. (1991), 34 C.C.E.L. 11, 2 O.R. (3d) 641, 46 O.A.C. 278 (C.A.) — *considered*

Bathgate v. National Hockey League Pension Society (1992), 44 C.C.E.L. 1, 98 D.L.R. (4th) 326, 11 O.R. (3d) 449 (Gen. Div.) [additional reasons (1992), 98 D.L.R. (4th) 326 at 411 , affirmed (1994), 1 C.C.P.B. 209, 2 C.C.E.L. (2d) 94, 2 E.T.R. (2d) 1, 16 O.R. (3d) 761, 69 O.A.C. 269, 110 D.L.R. (4th) 609 (C.A.)] — *considered*

C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd. (1988), 24 C.C.E.L. 188, 30 E.T.R. 202, C.E.B. & P.G.R. 8069, 66 O.R. (2d) 535 [additional reasons (1989), 31 E.T.R. 252, 66 O.R. (2d) 535 at 542], affirmed (1990), 39 E.T.R. 1 (C.A.) — *considered*

C.U.P.E.-Ontario Hydro Employees Union, Local 1000 v. Ontario Hydro (1989), 26 C.C.E.L. 67, *(*sub nom. *C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro)* 58 D.L.R. (4th) 552, 68 O.R. (2d) 620, *(*sub nom. *C.U.P.E.-C.L.C., Ontario Hydro Employees Union, Local 1000 v. Ontario Hydro)* C.E.B. & P.G.R. 8078, 33 O.A.C. 63 (C.A.) [leave to appeal to S.C.C. refused (1989), 104 N.R. 320, 37 O.A.C. 400] — *considered*

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Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563 (Ch. D.) — *considered*

Harris v. Robert Simpson Co., 34 Alta. L.R. (2d) 64, [1985] 1 W.W.R. 319, 7 C.C.E.L. 202, 56 A.R. 201 (Q.B.) — *considered*

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Hockin v. Bank of British Columbia (1990), 46 B.C.L.R. (2d) 382, 34 C.C.E.L. 304, 71 D.L.R. (4th) 11, 38 E.T.R. 275 (C.A.) [leave to appeal to S.C.C. refused (1991), 51 B.C.L.R. (2d) xxxv , 74 D.L.R (4th) viii, 130 N.R. 318, *(*sub nom. *Dobb v. Hockin)* 130 N.R. 240] — *considered*

King Seagrave Ltd. v. Canada Permanent Trust Co. (1986), 13 O.A.C. 305, C.E.B. & P.G.R. 8017 , affirming (1985), 51 O.R. (2d) 667, 9 C.C.E.L. 31, 20 D.L.R. (4th) 623 (C.A.) [leave to appeal to S.C.C. refused (1986), 69 N.R. 160, 16 O.A.C. 240] — *referred to*

Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba (1980), 2 A.C.W.S. (2d) 249 — *considered*

Maurer v. McMaster University (1991), 4 O.R. (3d) 139, 82 D.L.R. (4th) 6, C.E.B. & P.G.R. 8107 (Gen. Div.) — *considered*

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Trent University v. Trent University Faculty Assn. (1992), 99 D.L.R. (4th) 451, 60 O.A.C. 225 (Div. Ct.) — *considered*

Considered by Sopinka J.:

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Considered by McLachlin J.:

Askin v. Ontario Hospital Assn. (1991), 34 C.C.E.L. 11, 2 O.R. (3d) 641, 46 O.A.C. 278 (C.A.) — *referred to*

Audio Fidelity Corp v. Pension Benefit Guaranty Corp., 624 F. 2d 513 (4th Cir., 1980) — *referred to*

Bryant v. International Fruit Products Co., 793 F. 2d 118 (6th Cir., 1986) — *referred to*

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Courage Group's Pension Schemes, Re; Ryan v. Imperial Brewing & Leisure, [1987] 1 W.L.R. 495, [1987] 1 All E.R. 528 (Ch. D.) — *referred to*

Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563 (Ch. D.) — *considered*

Maurer v. McMaster University (1991), 4 O.R. (3d) 139, 82 D.L.R. (4th) 6, C.E.B. & P.G.R. 8107 (Gen. Div.) — *referred to*

Murphy v. McSorley, [1929] S.C.R. 542, [1929] 4 D.L.R. 247 — *referred to*

Pollock v. Castrovinci, 476 F. Supp. 606 (N.Y., 1979) — *referred to*

Reevie v. Montreal Trust Co. of Canada (1986), C.E.B. & P.G.R. 8016, 53 O.R. (2d) 595, 11 C.C.E.L. 44, 13 O.A.C. 233, 25 D.L.R. (4th) 312 (C.A.) [leave to appeal to S.C.C. refused (1986), 56 O.R. (2d) 192n, 30 D.L.R. (4th) 767n, 18 O.A.C. 159, *(*sub nom. *Hunt-Wesson Canada v. Reevie)* 72 N.R. 78] — *referred to*

Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 555 F. Supp. 257 (D.C., 1983) — *referred to*

Wilson v. Bluefield Supply Co., 819 F. 2d 457 (4th Cir., 1987) — *referred to*

Statutes considered:

Employment Pension Plans Act, S.A. 1986, c. E-10.05

s. 42(2)*considered*

s. 58*considered*

Income Tax Act, S.C. 1970-71-72, c. 63 — *referred to*

Pension Benefits Act, R.S.A. 1980, c. P-3 — *referred to*

Pension Benefits Act, R.S.M. 1987, c. P32 (also C.C.S.M., c. P32)

s. 26(2)*referred to*

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Pension Benefits Act, R.S.O. 1990, c. P.8 — *referred to*

Pension Benefits Standards Act, S.B.C. 1991, c. 15 — *referred to*

Power Corporation Act, R.S.O. 1980, c. 384

s. 20(4)*considered*

Regulations considered:

Employment Pension Plans Act, S.A. 1986, c. E-10.05

Employment Pension Plans Regulation, Alta. Reg. 364/86

s. 34(9)(b)(i)

s. 34(9)(b)(ii)

s. 34(9)(b)(iii)

s. 34(9)(b)(iv)

Income Tax Act, S.C. 1970-71-72, c. 63

Income Tax Regulations, C.R.C. 1978, c. 945

s. 8502(c)

s. 8503(4)(c)

Appeals from judgment of Alberta Court of Appeal (1992), 46 E.T.R. 21, 89 D.L.R. (4th) 762, 125 A.R. 224 , dismissing appeal and cross-appeal from order of Moore C.J.Q.B. (1990), 37 E.T.R. 64, 66 D.L.R. (4th) 230, 104 A.R. 190 , with respect to entitlement to surplus from employee benefit plan.

***Cory J.* (*La Forest, L'Heureux-Dubé, Gonthier* and *Iacobucci JJ.* concurring):**

1 These two cases raise the issue of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus".

Some Definitions

2 At the outset it may be helpful to review briefly some of the technical terms which often appear in pension surplus cases. For a detailed explanation reference may be made to: Nachshen, G. "Access to Pension Fund Surpluses: The Great Debate", in *New Developments in Employment Law* (Meredith Memorial Lectures, 1988); Deborah K. Hanscom, "A Surplus of Uncertainty: The Question of Entitlement After Hockin" (1990-91), 10 Est. & Tr. J. 258, and the articles contained in vol. 2 of the *Report of the Task Force on Inflation Protection for Employment Pension Plans* (1988).

3 Pension surpluses can only arise in "defined benefit" pension plans. In those plans, each employee belonging to the plan is guaranteed specific benefits upon retirement.

4 An ongoing pension fund is said to have an "existing" or "actuarial" surplus when the estimated value of the assets in the fund exceeds the estimated value of all of the liabilities (i.e., pension benefits owed employees) of the fund. When the calculated fund liabilities exceed the calculated fund assets, the plan is said to be in a state of "unfunded liability". Once the plan is wound up, assets and liabilities can be precisely determined. The fund will then be in a state of "actual" or "real" surplus or liability.

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5 Contribution to a defined benefit plan is made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the present value of future benefits to members of the plan is known as the "current service cost". The obvious difficulties involved in predicting factors such as inflation rates, investment returns and the future employee levels of the company mean that the actuary's task is difficult and to a certain extent speculative. The assumptions made by actuaries in respect of these and other factors will have a significant impact upon the determination of current service costs and the calculation of present levels of fund surplus or liability.

6 Defined benefit plans are to be distinguished from defined contribution (or "money purchase") plans, where set amounts are paid into the pension fund, and the benefits eventually paid equal the amount of the initial contributions plus any return which was obtained on the investment of those funds.

7 Either type of pension plan may be "contributory" (contributions by both employer and employee are mandatory) or "non-contributory" (only the employer's contributions are mandatory). In a non-contributory defined benefit plan, only the employer is obligated to contribute to the pension fund, although employees may have the option of making voluntary contributions in order to increase the benefits they will receive. In a contributory defined benefit plan, the employees must contribute a set amount, which may vary according to factors such as each employee's length of service and earnings, but is usually a defined percentage of salary. The employer's contribution to the fund is the amount over and above the employee contributions which the actuary determines is needed to cover the current service costs of the plan.

8 In the 1980s, a unique combination of conservative actuarial estimates and various economic factors caused many pension funds to accumulate large actuarial surpluses. Many employers sought to recapture this surplus by withdrawing excess monies from pension funds as an alternate source of capital, by applying surplus funds to any required contribution to the pension plan (i.e., taking a "contribution holiday"), or by claiming a proprietary right in any excess remaining upon the termination of the plan once all the employee benefits had been provided for. Employee groups have resisted such actions, claiming that the pension plans were established for their benefit, that the employers never intended or expected to recover any contributions made to the fund, and that any surplus accruing because of fortuitous economic circumstances should be paid to them when the plans are terminated.

Factual Background

9 In 1983, two companies, Stearns-Roger Canada Ltd. ("Stearns") and Catalytic Enterprises Ltd. ("Catalytic") merged to form Stearns-Catalytic, which subsequently became Air Products Canada Ltd. At the time of the merger, both Stearns and Catalytic had defined benefit pension plans for their employees, and both plans were in surplus. The pension plans and funds of Stearns and of Catalytic were amalgamated and evolved into two virtually identical Air Products Plans, one for employees of the Construction Division, and one for members of senior management. It is the employees' pension plan ("the Air Products plan") which forms the subject of the appeal and cross-appeal, although the results of the appeals will also affect the senior management plan.

10 Catalytic first instituted a pension plan for its employees in 1959. This plan was a contributory money-purchase plan which incorporated a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. The Catalytic plan was further amended in 1978.

11 The first Stearns pension plan relevant to these appeals was created in 1970. It repealed and replaced an earlier defined contribution plan. The 1970 plan was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. Pursuant to the plan, Stearns entered into a Group Annuity Policy with the Mutual Life Assurance Company. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan. By contrast, no provision was made for the treatment of surplus in the Catalytic plans until the 1978 amendment to the plan purported to give the company a similar discretion.

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12 The amalgamated Stearns/Catalytic (later Air Products) plan was a contributory defined benefits plan. It was funded by means of an Investment Contract with the Confederation Life Insurance Company. The terms of the plan gave the company a discretion as to the distribution of surplus upon termination and also provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached a maximum level specified in the plan. For the years ending September 30, 1985, September 30, 1986, September 30, 1987 and January 31, 1988, the Company transferred no assets to the Confederation Life fund. Rather, the company's contributions to the pension fund were paid from the actuarially determined surplus existing in the pension fund.

13 On January 31, 1988, following the sale of most of the company assets, the Air Products pension plan was terminated. Actuarial calculations established that once provision had been made for payment to the employees of Air Products Canada Ltd. of all benefits to which they were entitled under the terms of their plans, a surplus of $9,179,130 would remain in the employee pension plan.

14 In February, 1988, first Air Products, and then Gunter Schmidt on behalf of the employees of Air Products, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt, on behalf of himself and the employees also sought a declaration that Air Products be required to pay $1,465,400 into the pension fund. This sum represented the amount of fund surplus applied by Air Products to its contribution requirements from 1985 to 1988.

15 The Chief Justice of the Alberta Court of Queen's Bench (sub nom. *Re Stearns Catalytic Pension Plans* (1990), 104 A.R. 190) found that the portion of the surplus which had been derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not en titled to take a contribution holiday utilising any part of the Catalytic surplus. He therefore ordered the company to return $1,465,400 to the pension fund. In respect of the surplus which was traceable to the Stearns fund, the chambers judge held that it belonged to Air Products.

16 An appeal by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

17 The appeal and the cross-appeal before this court are the same as before the Court of Appeal. The facts and the plans at issue in the appeal and the cross-appeal are sufficiently different that they must be dealt with separately. In order to avoid confusion, I will not refer to the parties as appellants or respondents but to either "Air Products" or "the company" (appellants on the appeal and respondents on the cross-appeal); and to "the employees" or "the plan members". The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

I. Judgments Below

Alberta Court of Queen's Bench (1990), 104 A.R. 190

18 The chambers judge noted that two provisions in the 1983 amalgamated pension plan were of particular importance. Under s. 18.05, any surplus remaining in the amalgamated fund following termination of the plan and distribution of all defined benefits was to revert to the Company. Section 1 of the plan provided that the benefits provided by the plan were in lieu of any benefits to which employees may have been entitled under any of the previous plans and also that the benefits paid under the 1983 plan "in no event shall be less than the benefits to which they were entitled under these Prior Plans." It was this phrase which required the court to review the Stearns and the Catalytic plans which had existed prior to 1983.

19 Following a careful examination of the history and terms of all the relevant pension plans, Chief Justice Moore decided that Air Products was entitled to the surplus funds under the Stearns Plan and that the employees were entitled to the surplus funds under the Catalytic plan. He further held that the company was not entitled to apply any actuarial surplus from the Catalytic fund towards its contributions to the pension fund in the period from 1985-88, but that the relevant plan provisions did permit the company to use the existing surplus in the Stearns fund to pay its contribution to the pension fund.

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20 The Chief Justice first considered the Stearns plans. He noted at pp. 206-207 that art. 14.1 of the 1970 Stearns pension plan, incorporated as art. 14.3 in the 1977 plan, provided:

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1(c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company *or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine* .

[Emphasis of the Chief Justice.]

21 In his view, the concluding words of this section gave the company a discretion as to the distribution of the surplus. He rejected the employees' suggestion that the 1977 plan was amended to remove this discretion, holding instead that the alleged "1982 amendments" to the plan were never more than a draft version which was not adopted and never registered. The Chief Justice considered that s. 14.3, when, read together with s. 13.4 of the 1977 Plan, which permitted funds to be returned to the Company with the consent of the Minister of National Revenue and the Superintendent of Pensions, modified a more general clause which prohibited any amendment, termination, or diversion of the fund other than for the exclusive benefit of the employees.

22 Therefore, on a construction of the plan provisions as a whole, Moore C.J.Q.B. concluded at p. 208:

> From the moment the prior Stearns Plan was terminated in 1969, the company had the right to any surplus as it had from the outset reserved out to itself any surplus. The plan had ended and the company could reserve out the surplus. The company at this point did not enter into a trust agreement but purchased an annuity contract. Insofar as the Stearns Plan is concerned, we are dealing with a defined benefits plan and once all the defined benefits have been satisfied or provided for (as is the case), the balance or any surplus is to be disposed of at the discretion of the company. The plan was not established to create a fund to be divided up among the employees, but rather to provide them with specific pensions on retirement.

He concluded that the Stearns fund was never impressed with a trust, nor could one be implied to any part of the Air Products fund which evolved from the prior Stearns plans. The company's right to control the allocation of surplus was determined in 1970, and the amalgamation of the Stearns and the Catalytic plans did not create any employee entitlement to such surplus.

23 The Chief Justice next considered the Catalytic plans. The first began in 1959 as a defined contribution plan. Unlike the original Stearns plan, this plan was never terminated. Rather it was amended several times over the following twenty-five years. The 1959 plan included a Trust Agreement entered into between Catalytic and the Canada Trust Company for the administration of the pension fund. It contained a provision prohibiting the company from recovering any sums paid into the fund, and an amendment provision which prohibited any amendment which had the effect of reducing members' benefits. These three features were also present in the 1966 restatement of the Catalytic plan, although by then the plan had been changed from a money purchase plan to a defined benefits plan.

24 Moore C.J.Q.B. noted that although in 1974 the agreement between Canada Trust and Catalytic was terminated and replaced by an investment contract with Confederation Life, there was no evidence that the trust itself had terminated. He was therefore of the opinion that the trust was still in place in 1978 when Catalytic purported to amend the plan in order to give itself the right to any surplus remaining upon termination.

25 Moore C.J.Q.B., at p. 210, felt that in 1959 Catalytic had created a trust,

> The sole object of ... which ... was to provide retirement benefits for the employees, not the company ... The fund became a trust fund for the benefit of the Catalytic employees.

He was particularly struck, at p. 210, by the wording of the 1959 Trust Agreement:

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> It states in clear terms that no amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons or their estates. This wording cannot be ignored and in my view it overrides any attempt to amend the trust to give the surplus to the company.

26 Moore C.J.Q.B. therefore held that the 1978 amendment was invalid. He further relied upon *Reevie v. Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595 , and *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.* (1988), 66 O.R. (2d) 535 , affirmed (1990), 39 E.T.R. 1 (C.A.) , in support of his conclusion that, by virtue of the trust in their favour, the former employees of Catalytic were entitled to their portion of the surplus remaining in the Air Products Fund.

27 Moore C.J.Q.B. dealt lastly with the issue of the contribution holidays taken by the company. He observed that, under the provisions of the amalgamated plan, Air Products reserved the right to pay its annual contribution to the fund out of existing surplus. He therefore held that the company could validly use this surplus for its contribution obligations in the years 1985-1988, but that, as a result of the existence of the trust in favour of the Catalytic employees, the contribution could not have been taken from the Catalytic share of the actuarial surplus.

Alberta Court of Appeal (1992), 125 A.R. 224 (McClung, Foisy and Major JJ.A.)

28 The Court of Appeal affirmed the judgment of Moore C.J.Q.B., adding only two brief comments. The former Stearns employees argued again that the Stearns plan had been amended in 1982 so as to give them title to the surplus. The Court noted that the chambers judge held that the draft provision the employees relied upon never became part of the plan and found no evidence to suggest that he was wrong in this conclusion.

29 Secondly, the Court of Appeal dealt with the employees' argument that the company was bound by the terms of an employee benefits brochure issued in 1982 to give the surplus to the employees. Under the heading "Future of the Plan" that brochure provided:

> In the event there is a surplus in the fund after all benefits have been paid, it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the Plan at the date of termination.

The chambers judge had noted the existence of this brochure, but did not comment on its legal effect in his judgment.

30 The Court of Appeal held that the evidence surrounding the brochure was insufficient to alter the plan provisions giving Stearns a discretion as to use of the surplus. The facts were distinguishable from the case of *Collins v. Pension Commission (Ontario)* (1986), 56 O.R. (2d) 274 (Div. Ct.) . In *Collins* the company had given "repeated assurances" to the employees concerning the surplus in the course of collective bargaining, and it knew that the employees were aware of the surplus and expected to receive it. In this case there was no evidence that any employees knew of or relied upon the Stearns brochure. Finally, the court held that the Stearns employees had failed to demonstrate that the brochure estopped the company from appropriating the surplus, or that the company acted unfairly in the exercise of its discretion to distribute the excess funds.

II. Issues on Appeal

A. The Appeal (The Catalytic Plan)

31 1. Whether the Court of Appeal erred in finding that Air Products was not entitled to the monies deriving from the Catalytic plan which remained in its employee pension fund following termination of the pension plan and provision of all benefits.

32 2. Whether the Court of Appeal erred in finding that Air Products was not entitled to take existing actuarial surplus deriving from the Catalytic plan into account in determining the amount of its annual funding obligation.

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B. The Cross-Appeal (The Stearns Plan)

33 1. Whether the Court of Appeal erred in holding that Air Products was entitled to take the surplus remaining in its employee pension fund which was derived from the Stearns plan following termination of the plan and provision of all benefits.

34 2. Whether the Court of Appeal erred in finding that Air Products was entitled to use existing actuarial surplus not derived from the Catalytic plan in order to fund its required annual contribution to the Air Products plan during the years 1985-1988.

III. The Legislative Framework

35 Two separate regimes affect Canadian employer pension plans in surplus. Each province now has in place some form of pension benefits legislation designed to protect member benefits by ensuring that employers meet their funding obligations and that pension funds remain solvent. The federal income tax authorities have also attempted to regulate employer pension plans in order to limit the tax relief which employers and employees can obtain for their contributions to pension funds. Some of the provincial statutes have recently begun to deal with the issue of surplus upon plan termination or of contribution holidays. The tax regulation pertaining to surplus has to date taken the form of non-binding Information Circulars rather than legislation.

1. The Income Tax Act

36 Under the *Income Tax Act* , S.C. 1970-71-72, c. 63, certain tax benefits are granted to those contributing to registered pension plans. Contributions by employers and employees to a registered pension plan are tax deductible; plan earnings are exempt from taxation, and the taxation of employee benefits is deferred until they are received by the employee. The Act also contains two ceilings, one on the amount which an employer can deduct from income in respect of current service contributions to an employee pension plan, and the other on the maximum benefit which each employee can derive from the employer's deductible contributions.

37 In addition, on December 31, 1981, Revenue Canada issued Information Circular No. 72-13R7. This circular contains two significant requirements for the registration of pension plans. First, s. 39 of the circular requires that all plans provide that any existing actuarial plan surplus in excess of the employer's normal current service costs over a two-year period must either be refunded to the employer or used to take a contribution holiday. The circular also sets a maximum limit on the benefits which an employee can recover under a plan, and in s. 13.1 stipulates that all pension plans must contain a provision permitting actual surplus to be refunded to employers upon termination of the plan. However, these requirements were never incorporated into the *Income Tax Act* or its Regulations during the lifetime of the Air Products plan or its predecessors.

38 One of the results of the Information Circular has been that many pension plans which originally were silent on the issue of surplus or which stated that employer contributions to a plan were "irrevocable" have been amended to provide that any surplus should be refunded to employers upon termination of the plan. Air Products cites the Information Circular in support of its position, presumably as evidence that Revenue Canada supports employer ownership of a surplus. The employees in turn emphasize the non-binding effect of the circular and contend that the employer's motivation for amending the plan is not a relevant consideration in determining its legal effect.

39 Several years ago I agreed with Zuber J.A. of the Ontario Court of Appeal that the Information Circular is of limited legal significance: *King Seagrave Ltd. v. Canada Permanent Trust Co.* (1986), 13 O.A.C. 305 , affirming (1985), 51 O.R. (2d) 667 (C.A.) . I am still of that opinion. At the time the pension plans which are the subject of these appeals were wound up, the requirements contained in the circular did not have binding legal force. The circular did not purport to clarify any provisions of the *Income Tax Act* , and the fact that some pension plans may have been amended to comply with its provisions does not alter my approach to the surplus entitlement issue.

2. Provincial Legislation

40 No Canadian province has yet dealt directly with the issue of ownership of or entitlement to pension surplus by legislation. The preferred approach in most jurisdictions has been to provide that the withdrawal or transfer of actuarial surplus can only

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be accomplished when certain specified conditions have been met. See, for example, the Ontario *Pension Benefits Act* , R.S.O. 1990, c. P.8. The British Columbia *Pension Benefits Standards Act* , S.B.C. 1991, c. 15, requires that all pension plans must contain clauses providing for the arbitration of disputes concerning entitlement to surplus or contribution holidays. Manitoba has also enacted an interesting variation on the treatment of surplus funds. Section 26(2) of its *Pension Benefits Act* , R.S.M. 1987, c. P32, provides that no existing surplus may be withdrawn from a pension fund unless the Pension Commission "believes it equitable to do so".

41 The B.C. and Manitoba provisions represent welcome legislative steps. Regrettably, a comprehensive approach to the issues arising from pension surplus has yet to be enacted in any part of this country. The courts have on a number of occasions been required to determine the allocation of pension surplus. Yet the courts are limited in their approach by the necessity of applying the sometimes inflexible principles of contract and trust law. The question of entitlement to surplus raises issues involving both social policy and taxation policy. The broad policy issues which are raised by surplus disputes would be better resolved by legislation than by a case by case consideration of individual plans. Yet that is what now must be undertaken.

42 The pension plans under consideration are governed by the Alberta *Employment Pension Plans Act* , S.A. 1986, c. E-10.05 (proclaimed into force January 1, 1987). Section 42(2) of the Act requires that all plans provide for the allocation of surplus on termination to either the employer, the employees, or both. Section 58 prohibits employer withdrawal of surplus from an ongoing fund unless such withdrawal is specifically permitted in the plan and the permission of the Superintendent of pensions is obtained.

43 Withdrawal, together with the issue of contribution holidays, is also referred to in s. 34(9) of the Regulations to the Act (Alta. Reg. 364/86) which provides:

> (9) Where the actuarial valuation report ... reveals that the plan has surplus assets,
>
> (*b*) when the unfunded liabilities have been amortized or where no unfunded liability exists, the surplus assets may be
>
> (i) used to increase benefits,
>
> (ii) left in the plan,
>
> (iii) if the plan does not so prohibit, applied to reduce employer contributions referred to in subsection (3)(*a*), or
>
> (iv) where no solvency deficiency exists and subject to section 58 of the Act and section 39 of this Regulation, paid or transferred to the employer.

44 The *Employment Pension Plans Act* and its regulations do no more than establish that surplus entitlement must be determined by the wording of the plan. Contribution holidays are permitted provided they are not prohibited by the plan. The previous legislation governing pensions in Alberta, the *Pension Benefits Act* , R.S.A. 1980, c. P-3, did not deal with either surplus remaining on termination or with contribution holidays. As a result, the primacy of the wording of individual pension plans has never been displaced by legislation, and it is therefore those specific provisions which must be considered.

IV. Relevant Pension Plan Provisions

45 The parties most helpfully compiled a summary of the history and relevant provisions of all the pension plans and related documents pertinent to these appeals. An abbreviated version of this summary, taken from the Agreed Statement of Facts, is attached as an appendix to these reasons [p. 269].

V. Analysis

46

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A. Surplus Entitlement

47 An employer who creates an employee pension plan agrees to provide pension benefits to retiring employees. At first, employers undertaking this obligation paid retired employees directly from company income. Gradually, the practice of creating separate pension funds emerged following the passage of regulations designed to protect employees from the bankruptcy or termination of the company, coupled with the realization of employers that the cost of providing pensions is reduced if money is put aside on behalf of present employees for their future benefit.

48 Pension funds thus began to be structured in several different ways. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers since they provided the requisite degree of "irrevocability" of contribution to entitle an employer to obtain tax relief on its pension contributions. The relatively recent phenomenon of pension plan surplus has created an inevitable tension between employers who claim that they never lose their entitlement to monies which they contribute to the fund but which are not needed to provide agreed benefits, and employees who assert that all pension fund monies belong to them. It is suggested that if employers are not able to retrieve surpluses, they will be tempted to fund existing plans less generously. I cannot agree. First, unless the terms of the plan specifically preclude it, an employer is entitled to take a contribution holiday. Second, most pension plans require the level of employer contribution to be determined by an actuary. The employer will not be able to reduce the level of contribution unilaterally below that required according to standard actuarial practice. Third, employers are required by legislation to make up any unfunded liability. Finally, the fact that some employers cannot recoup surplus on termination is unlikely to influence the conduct of employers as a whole. In order to obtain registration, plans created since 1981 must make provision for distribution of surplus on termination. It is generally only in pre-existing plans that the problem of ownership of surplus arises and, as the results of these appeals demonstrate, even then employee entitlement to the surplus is not automatic.

49 Entitlement to the surplus will often turn upon a determination as to whether the pension fund is impressed with a trust. Accordingly, the first question to be decided in a pension surplus case is whether or not a trust exists.

1. Trust or Contract?

50 Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.

51 If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan. However, when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.

52 Typically, when a pension fund is subject to a trust, several issues arise: Are such trusts for a purpose or are they "classic" trusts? What part of the pension fund is subject to the trust? To what extent can a settlor-employer alter the terms of a trust in order to appropriate the fund surplus for itself? Is the surplus subject to a resulting trust? Let us consider the nature of the trust in this case.

2. Purpose or "True" Trust?

53 Air Products has suggested that the Catalytic pension fund was not subject to an express trust but instead to a trust for a purpose. Relying on dicta of the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11 , the company argues that a trust set up as part of a pension plan constitutes a trust whose sole purpose is to provide

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defined benefits to members. Once those benefits have been provided the purpose is fulfilled, the trust expires and the terms of the pension plan alone determine entitlement to any remaining fund surplus. I cannot accept this proposition.

54 Trusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void. (See D.W.M. Waters, *Law of Trusts in Canada* (2nd ed., 1984), at pp. 127-28.) The pension trust is much more akin to the classic trust than to the trust for a purpose. I agree with the following comments of the Pension Commission of Ontario in *Arrowhead Metals Ltd. v. Royal Trust Co.* (March 26, 1992), at pp. 13-15, cited by Adams J. in *Bathgate v. National Hockey League Pension Society* (1992), 11 O.R. (3d) 449 (Gen. Div.) , at p. 510:

> Purpose trusts are trusts for which there is no beneficiary; that is, they are trusts where no person has an equitable entitlement to the trust funds. Funds are deposited in trust in order to see that a particular purpose is filled; people may benefit, but only indirectly ...
>
> People are clearly direct beneficiaries of pension trusts. Pension trusts are established not to effect some purpose, such building [sic] a recreation centre, but to provide money on a regular basis to retired employees. It misconceives both the nature of a purpose trust and of a pension trust to suggest that pensions are for purposes, not persons. It is important to recognize that the characterization of pension trusts as purpose trusts results in the pension text, a contract, taking precedence over the trust agreement. That is, in making common law principles of contract paramount to the equitable principles of trust law. It is trade [sic] law that where common law and equity conflict, equity is to prevail. In light of that rule, it seems inappropriate to do indirectly that which could not be done directly.

55 To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. A pension trust is a "classic" or "true" trust and not a mere trust for a purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

3. The Definition of the Trust Fund

56 Before proceeding to an examination of the actual effect of the trust, one more brief investigation must be undertaken. That is the determination of whether *all* of the monies contained in a given pension fund are subject to the trust, or whether the surplus remaining after termination is separate from the remainder of the fund and thus not subject to the trust. In creating a pension plan and accompanying trust, an employer may be able to define the subject matter of the trust so as to include only the amount necessary to cover the employee benefits owed. However, very specific wording will be necessary before an ongoing surplus will be excluded from the operation of the pension trust.

57 The definition of the trust fund in the pension plan and in the trust agreement will usually establish that any surplus monies form part of the trust. In *Reevie v. Montreal Trust Co. of Canada* , supra, for example, part of Canada Dry's pension plan, cited at p. 596 of the judgment of Zuber J.A., provided:

> 10.1 A Trustee shall be appointed by the Board of Directors from time to time and a Trust Agreement executed between the Board of Directors and such trustee, under the terms of which *a Trust Fund shall be established to receive and hold all Contributions payable by the Members and the Company, interest and other income* , and to pay the benefits provided by the Plan and any of its expenses not paid directly by the Company.

[Emphasis added.]

58 In the absence of any more specific definition of the content of the trust fund in either the plan or the trust agreement such a phrase establishes that all money in the care of the trustee is subject to the trust in favour of the employees. The wording of the plan in *Hockin* , supra, at p. 13, was even more explicit:

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> (h) 'Fund' means the trust consisting of all sums of money and other property as shall from time to time be paid or delivered to the Trustee in accordance with the provisions hereof, all investments and proceeds thereof and all earnings, profits and other accretions thereto, less all payments and deductions that are made therefrom as herein provided.

59 I would have thought that the wording of this clause would make it clear that any existing surplus formed a part of the trust and was subject to the provisions of the trust.

60 The definition of the trust fund should not be confused with the issue of the definition of the benefits to which the employee/beneficiaries are entitled according to the terms of the pension plan. As the examples demonstrate, the trust fund will normally include all monies contributed to the pension fund, including both any ongoing actuarial surplus and any surplus on termination.

4. Amendment of the trust

61 When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles. The significance of this for the present appeals is twofold. Firstly, the employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created. Secondly, if the objects of the trust have been satisfied but assets remain in the trust, those funds may be subject to a resulting trust.

62 The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

63 Employers seeking to obtain a pension surplus have frequently made the argument that they reserved a power to revoke, or to revoke partially the pension trust fund they set up for the benefit of their employees. This approach has had mixed results. The inconsistency of the decisions on the revocation of pension trusts exists on two levels. At one level, the different decisions can be explained on the basis of the wording of the particular amending clause and the limitations put upon it in each case. However, the decisions also reveal a more fundamental difference of opinion as to whether the revocation of trusts is possible when a settlor has reserved a broad power of amendment. This difference must be resolved in this case.

64 The differing approaches to revocation of the trust are perhaps most starkly illustrated by the cases of *Reevie* , supra, and *Hockin* , supra. In both of these cases, a trust fund was established pursuant to a pension plan which contained a broad power of amendment. Each amending power was subject only to the proviso that no amendment could reduce members' entitlement to accrued benefits.

65 The court in *Reevie* relied upon a passage from Waters to the effect that it is a cardinal rule of trust law that a settlor can only revoke his or her trust when the settlor has expressly reserved the power to do so and found that the broad amendment power reserved by Canada Dry did not amount to an express reservation. The Court in *Hockin* , on the other hand, preferred the approach of McLennan J. in *Campbell-Renton v. Cayley*, [1960] O.R. 550 (H.C.) .

66 In *Campbell-Renton v. Cayley* , the settlors of a private trust sought to revoke the trust in order to set up a more tax-beneficial trust in England. After considering the unlimited power of amendment contained in the trust agreement, McLennan J. stated at pp. 552-53:

> I am advised that there is no decision either in England or in this country as to whether or not a power to alter and amend includes the power to revoke or perhaps it would be better to say includes a power to amend in such a way as to permit the revocation of the trust instrument but there is American law on the subject and statements in 3 *Scott's Law of Trust* , 2nd ed., pp. 2393, 2402-3, 2413, 2395 and 2416 and at the latter citation it is stated that an unrestricted power to amend is equivalent to a power to revoke.

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McLennan J. elected to follow the American jurisprudence on this point, as did the court in *Hockin* at p. 19 which relied upon the following more recent excerpt from Scott (*The Law of Trusts* (4th ed., 1987), vol. 4, at pp. 346-48):

> §330.1 ... Where the creation of a trust is evidenced by a written instrument that purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable.
>
> The intention to reserve a power of revocation need not be manifested by an express provision to that effect; it can be indicated by the use of language from which it may be inferred. [Footnote omitted.]

67 Based upon this authority, the B.C. Court of Appeal concluded at p. 19 that "a power to amend includes the power to revoke unless revocation is precluded by specific wording of the power to amend." With respect, I cannot agree with this position.

68 In my view, the nature and purpose of the trust as it has evolved in Canada is consistent with a more restrictive interpretation as to when the trust instrument will permit a unilateral revocation of the trust. One of the most fundamental characteristics of a trust is that it involves a *transfer* of property. In the words of D.W.M. Waters, *Law of Trusts in Canada* , at p. 291:

> ... the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration has been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of "restricted transfer." So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene once the trust has taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer.

69 The judgment of the B.C. Court of Appeal in *Hockin* , if followed to its logical conclusion, would mean that the presence of an unlimited power of amendment in a trust agreement entitles a settlor to maintain complete control over the administration of the trust and the trust property. That result is inconsistent with the fundamental concept of a trust, and cannot, in my opinion, be sustained without extremely clear and explicit language. A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change not cancellation which the word revocation connotes.

70 Furthermore, prior to the 1981 circular, the amendment power in most trust arrangements was specifically made broad and ambiguous at the behest of the employer, who was entitled to tax relief on funds designated for employee pensions only if those funds were committed *irrevocably* to a trust or some other funding arrangement. The tax motivations of the respective parties to pension plans are not particularly relevant to a judicial interpretation of the trust. However, a court should not be eager to sanction a result which would allow an employer to represent to the Minister of National Revenue that it has irrevocably committed funds to an employee pension plan, only to later purport to revoke the pension trust in order to recoup surplus funds.

71 As a result I find that, at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

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5. The Resulting Trust

72 A resulting trust may arise if the objects of the trust have been fully satisfied and money still remains in the trust fund. In such situations, the remaining trust funds will ordinarily revert by operation of law to the settlor of the fund. However, a resulting trust will not arise if, at the time of settlement, the settlor demonstrates an intention to part with his or her money outright. This is to say the settlor indicates that he or she will not retain any interest in any remaining funds.

73 Several Canadian cases have dealt with the resulting trust in relation to pension surplus cases. In *Canada Trust Co. v. Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 [[1979] 6 W.W.R. 656] (B.C.S.C.), the pension plan had been terminated. The plan provided that upon termination, assets were to be applied to four listed categories of beneficiaries. All the beneficiaries were paid in accordance with this provision, and a surplus remained in the fund. The trustee of the fund, Canada Trust, sought directions from the court as to how to deal with the surplus.

74 Gould J. held (at p. 111) that the "purposes of this trust simply did not exhaust the fund and the outcome here, *i.e.* , a surplus balance of $31,163.38, was not foreseen by the respondent ... The situation appears to be one where a resulting trust arises by operation of the law." This conclusion could well be questioned in light of another provision in the plan (at p. 110) which provided that " 'no alteration, amendment or termination of the Plan or any part thereof shall permit any part of the trust fund to revert to or to be recoverable by the Company or to be used for or diverted to purposes other than the exclusive benefits of members ...' " Perhaps the decision can be explained on the basis that the employees were not parties before the court and did not contribute to the plan which was funded solely by the employer.

75 In most cases, the existence of a non-reversion clause will be evidence of a permanent intention to part with the trust property and it will preclude the operation of the resulting trust. The trust agreement in *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.* , supra, contained the following clause (at p. 538):

> No part of the capital or income of the fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of the employees and former employees under the plan except as therein and herein provided.

I agree with Montgomery J.'s conclusion, at p. 540, that these provisions "effectively dispose of the respondents' arguments that the surplus is subject to the doctrine of resulting trust." The employer had absolutely and irrevocably waived its interest in any surplus that might arise upon the termination of the pension fund despite the contributions it had made to that fund.

76 The exigencies of tax law are such that preferential tax treatment will only be afforded to registered pension plans. Registration, originally contingent upon clear evidence that the employer's contribution would be irrevocable, now requires a plan to provide that, following termination of the plan, any remaining surplus in excess of the statutory maximum level of employee benefits must revert to the employer. Therefore, the provisions of most registered pension plans will normally themselves exclude the possibility of a resulting trust's arising. That is not to say that the resulting trust will never have a place in the context of pension funds. Yet the practical reality is that the factual circumstances which could trigger the operation of a resulting trust will rarely occur in pension surplus cases.

77 The relevant documents in this case are such that it is not necessary to examine all of the difficult issues which can arise in relation to resulting trusts. Nonetheless, when a resulting trust arises in respect of a contributory plan, I would be inclined to prefer the view of Nitikman J. in *Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba* (1980), 2 A.C.W.S. (2d) 249 , to that of Scott J. in *Davis v. Richards & Wallington Industries Ltd.*, [1991] 2 All E.R. 563 (Ch. D.) . Nitikman J. held that where employers and employees are (by virtue of their contributions) settlors of the trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions. Scott J., on the other hand, held that employees cannot benefit from a resulting trust since, by the mere act of contributing to the fund, they manifest an intention to part irrevocably with their money.

78 I do not think that any general rule can be laid down as to the intentions of employees contributing to a pension trust. Where the circumstances of a particular case do not indicate any particular intention to part outright with money contributed to a

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pension fund, equity and fairness would seem to require that all parties who contributed to the fund should be entitled to recoup a proportionate share of any surplus subject to a resulting trust. However, this issue should be left to be resolved when it arises.

79 In most pension trust cases the resulting trust will never arise. This may be because the objects of the trust can never be said to be fully satisfied so long as funds which could benefit the employees remain in the pension trust, or because the settlor has manifested a clear intention to part outright with its contributions. The operation of the resulting trust may also be precluded by the presence of specific provisions dealing with the disposition of surplus on plan termination.

B. Contribution Holiday

80 Two issues arise in respect of the contribution holiday. The first is whether or not, in the calculation of an employer's required annual contribution to a pension plan, consideration of actuarial surplus in an ongoing pension fund is permitted by law. The second is whether a consideration of that surplus is permitted or prohibited under the terms of a specific plan.

81 Both parties to the appeals accept that, subject to the plan provisions, the application of an existing surplus to contribution obligations was at all relevant times permitted by Alberta law. This proposition seems incontrovertible in light of the provisions of the *Employment Pension Plans Act* and *Pension Benefits Act* referred to earlier. It also accords with the provisions of Information Circular 72-13R7. Therefore the provisions of the plan must determine the issue.

82 Before turning to the Air Products plan, it may be helpful to review the cases which have dealt with contribution holidays. The Ontario Court of Appeal held in *C.U.P.E.-Ontario Hydro Employees Union, Local 1000 v. Ontario Hydro* (1989), *(*sub nom. *C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro)* 68 O.R. (2d) 620 (C.A.) , that Ontario Hydro could not take a contribution holiday when its employee pension plan was in surplus. The pension plan for Hydro employees was unusual in that it was established pursuant to a statute which enacted the employer's obligation to contribute. Section 20(4) of the *Power Corporation Act* , R.S.O. 1980, c. 384 (as cited by Robins J.A. at p. 623), provided:

> 20(4) The Corporation *shall* contribute towards the cost of the benefits mentioned in subsection (1) *the amount of the difference between the amount of the contributions of the employees and the amount of the cost of the benefits as determined by actuarial valuations* . [Emphasis of Robins J.A.]

Robins J.A. held that this clause was unequivocal and required Hydro to contribute each year the difference between the cost of the benefits for that year as determined by an actuary and the contributions of the employees. The existence of an ongoing fund surplus was irrelevant to this obligation. Robins J.A. explicitly added at p. 630 that s. 20(4) should not be treated:

> ... as tantamount to stating that "the corporation shall make contributions to the plan on such basis as may be determined by the actuary from time to time" or "the corporation shall contribute to the plan an amount determined by an actuary in accordance with generally accepted actuarial principles". While clauses of that kind may not be uncommon, particularly in private pension plans, the statutory provisions regulating this plan and under which it operates are not to that effect. Under the formula mandated by the Act, an actuarial valuation is required only for the purpose of ascertaining the cost of the benefits. The actuary is not empowered to set the over-all level of corporation contributions on such basis as he may determine, notwithstanding that his determination may be by reference to generally accepted actuarial principles.

83 Subsequent cases have limited the application of *Ontario Hydro* . In *Askin v. Ontario Hospital Assn.* (1991), 2 O.R. (3d) 641 , the Ontario Court of Appeal considered a plan (at p. 644) which required that " 'Each Contributing Member Hospital shall make contributions to the Plan on a basis determined by the Actuary from time to time.' " Carthy J.A. held that this provision allowed the employers to take a contribution holiday. He distinguished *Ontario Hydro* in this way, at p. 651:

> To repeat for clarity, the ratio I take from the *Ontario Hydro* case is that, if a specific calculated contribution is mandated by statute or by the plan itself, it is an indirect use of trust funds to apply surplus to meet that obligation. The intended *ratio* of the present case is that, where the specific method of calculation is not mandated, it is inoffensive and in accordance with statutory authorization and normal actuarial practice to consider a surplus as one factor in the calculation of the contribution.

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84 A contribution holiday was also permitted in *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139 (Gen. Div.) . The relevant plan provision there (at p. 144) provided that " 'The University shall pay into the Fund each year the amount required to fund fully the current service cost of the Plan, as determined by the Actuary, after allowing for the Members' required contributions.' " Haley J. considered that the words "as determined by the Actuary" modified the phrase "the amount required to fund fully the current service cost of the Plan", and therefore held that the provision enabled the University to use the actuarial surplus to offset current contributions.

85 Most recently, the Ontario Divisional Court applied *Ontario Hydro* and held that the specific contribution requirements contained in its pension plan prohibited Trent University from taking a holiday from its contributions to its employee pension plan (*Trent University v. Trent University Faculty Assn.* (1992), 99 D.L.R. (4th) 451).

86 Finally, I note that the taking of a contribution holiday was contemplated by the court in *Reevie* , supra, even though in that case employees were held to be entitled to the fund surplus upon termination. The thought was expressed in this manner at pp. 600-601:

> While the plan continues to operate, a surplus will simply afford a cushion against years during which the fund performs poorly, or, it may lead to the reduction of future contributions. If the plan is discontinued, other considerations will arise.

87 All of these cases are perfectly consistent with one another. Together they demonstrate only that whether or not a contribution holiday is permissible must be decided on the basis of the applicable plan provisions. I can see no objection in principle to employers' taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost. It is a practice that is in keeping with the nature of a defined benefits plan, and one which is encouraged by the tax authorities.

88 An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the *Ontario Hydro* and *Trent University* cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices.

89 The former Catalytic employees successfully argued before the chambers judge that to permit a contribution holiday is to permit an encroachment upon the trust fund of which they are the beneficiaries. I do not agree. As noted earlier, the trust property usually consists of all the monies contributed to the pension fund. To permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

90 Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable

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upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.

91 Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.

92 While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

C. Summary

93 In the absence of provincial legislation providing otherwise, the courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. The first step is to determine whether the pension fund is impressed with a trust. This is a determination which must be made according to or dinary principles of trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries.

94 If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying the principles which pertain to the interpretation of contracts to the pension plan.

95 If, however, the fund is impressed with a trust, different considerations apply. The trust is not a trust for a purpose, but a classic trust. It is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. However an employer may explicitly limit the operation of the trust so that it does not apply to surplus.

96 The employer, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, that power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general unlimited power of amendment.

97 Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employees' intentions which must be considered. Both are settlors of the trust. Both are entitled to benefit from a reversion of trust property.

98 An employer's right to take a contribution holiday must also be determined on a case by case basis. The right to take a contribution holiday can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. These principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. These general considerations are, of course, subject to applicable legislation.

99 Let us see how these principles should be applied to the agreements presented in this case.

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VI. Application to the Facts

100

A. Surplus Entitlement

1. The Catalytic Plan

101 The plan provided under art. V that all contributions would be paid to a trustee to be held and administered in accordance with a trust agreement which formed part of the plan. The plan also contained the following definitions in art. II:

> 12. "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing the Trust Fund;
>
> 13. "Trustee" means the Canada Trust Company, or such other successor trust company, if any, as the Board may appoint;
>
> 14. "Trust Fund" means the pension fund established pursuant to the Trust Agreement and to which contributions are made after January 1, 1959, by the Company and by contributing members and from which pensions and other benefits under this Plan are to be paid.

102 A trust agreement was executed between the company and Canada Trust, which contained the following:

> AND WHEREAS under the PLAN contributions will be made to the Trustee which when received by the Trustee shall constitute a Pension Trust Fund (hereinafter called the "FUND") to be held and administered for the benefit of such persons or their estates as may from time to time be designated in or pursuant to the PLAN ...
>
> **Article I Establishment Of Trust**
>
> 1. This Agreement is hereby made a part of the PLAN.
>
> 2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, *all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the Fund hereby created and established* . [Emphasis added.]

103 These provisions establish that a trust was created in 1959. The plan and the agreement constitute a clear declaration of an intention to create a trust. The subject matter of the trust is defined as all contributions made by the company and by employees together with all the earnings of those contributions; the beneficiaries are defined in the Trust Agreement by reference back to the plan. This is a classic trust established for the benefit of a defined group of persons.

104 As Moore C.J.Q.B. noted, there is no evidence that this trust was ever terminated. I agree with that finding. It must then be assumed that the trust continues to exist. This conclusion is strengthened by the definition of "Trustee" in the original plan, which accepts that Canada Trust might not always be in charge of the fund. Thus it can be seen that the parties contemplated that the trust would continue if a different trustee was named. It follows that the trust was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company pursuant to the terms of an investment contract which is not included in the evidence. Further, the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns-Catalytic and Confederation Life have that effect.

105 What then is the effect of this trust? The preamble to the Trust Agreement, the emphasized portion of art. I.2 of that agreement, and the definition of "Trust Fund" contained in the 1959 plan, taken together, make it clear that the trust fund was comprised of *all* contributions made by both the company and the employees, together with any earning of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the

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trust fund. These provisions in themselves refute the company's argument that only that portion of the fund necessary to cover the benefits defined in the plan was subject to the trust.

106 All monies in the Catalytic pension fund were impressed with a trust. It follows that the company could only claim the surplus remaining on termination by virtue of a resulting trust, or according to the terms of the trust itself. No resulting trust arises in this case. In my opinion, the purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use *any* money contained in the fund for the benefit of the employees.

107 This objective can be implied from the "exclusive benefit" and "non-diversion" clauses contained in the original trust agreement. Furthermore, s. XI of the plan provided that all contributions on behalf of employees who left the company prior to the vesting of their rights as members should be forfeited to the fund "and allocated among the Company Accounts of the remaining Members at that date".

108 Section XV of the plan governed an employee's pension entitlement. It reads:

SECTION XV AMOUNT OF PENSION
---------- ----------

> When a Member retires, the proceeds of his Member's Account, if any, and of his Company Account ... shall be used *in their entirety* to purchase for the Member an Annuity from an insurance company ... [Emphasis added.]

These clauses demonstrate that all money in the fund was to be used for the benefit of employees. Even though originally the plan was one of "defined contribution", the entitlement of each employee was never limited to the contributions made on his behalf. Collectively, the entitlement of all eligible employees was to all monies contained in the fund, whether the money resulted from contributions made on their behalf or "windfall" funds resulting from the withdrawal of employees from the plan prior to the vesting of their rights.

109 These provisions, specifically incorporated by reference into the 1959 Trust Agreement, clearly indicate that one of the objectives of the trust was to divide all monies in the fund among eligible members. The corollary to this is that the trust objects are not exhausted so long as some money remains in the fund and some eligible employees can be found. Therefore, a resulting trust cannot arise in this case.

110 Air Products is only entitled to the surplus, if at all, under the terms of the trust. In this case both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. The question is which of the different provisions dealing with termination governed in 1988? The answer depends upon the validity of the amendments purportedly made by the employer since 1959.

111 Section XXII of the 1959 plan provided:

> 3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination ...

112 This section was reproduced in nearly identical form in the 1966 plan. The issue of entitlement to surplus was not specifically addressed until the plan was amended again in 1978. Article 17.05 of the 1978 plan provided that any surplus remaining on termination was to be distributed according to the directions of the company. The 1983 Air Products plan contained the same stipulation (renumbered to become art. 18.05), and added an additional clause imposing a maximum level of benefits recoverable by an employee and stating that any surplus remaining once that maximum level had been reached was to revert to the company.

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113 The validity of these amended provisions depends upon the original 1959 documents. Article XXII.2 of the pension plan prohibited any amendment which would operate to reduce the benefits which had accrued to the employees prior to the date of the amendment. The Trust Agreement contained the following provision:

> **Article V Modification and Termination**
>
> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided ... that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time ...

114 The company therefore reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit. The company did not expressly reserve for itself the power to revoke the trust. Such a power cannot be implied under the broad general amendment power.

115 I cannot accept that when the Catalytic plan became a defined benefit plan in 1966, the parties did not intend art. V of the Trust Agreement to apply to any surplus which might arise. Although the Trust Agreement was not altered, several provisions contained in the 1959 plan were modified in the 1966 version of the plan. The nature of the modifications indicates that the parties considered the effect of changing to a defined benefit plan and made the necessary amendments to the 1966 plan. In these circumstances, the parties must be taken to have intended that the unaltered provisions of the plan and the Trust Agreement should continue to apply to the new arrangement. Article V therefore continued to apply to all monies in the pension fund after 1966.

116 In the result, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, are invalid. Both represent attempts to revoke partially a trust in favour of the employees which was established in 1959. Neither is within the scope of the control which the company reserved to itself at that time.

117 I agree with the chambers judge and the Court of Appeal that, by virtue of a continuing trust in their favour, the employees are entitled to those surplus funds which are derived from the Catalytic plans.

B. Contribution Holiday

118 The relevant plan provisions which govern the taking of a contribution holiday are those contained in the 1983 Air Products plan. As the employees point out, the chambers judge, when considering this issue, mistakenly quoted the contribution provisions from the 1977 Stearns plan. The Stearns plan expressly reserved to the company the right to pay its contributions from surplus. It is therefore necessary to consider whether the actual provisions of the 1983 plan would affect the result he reached.

119 Section 4.03 of the Air Products plan (which is identical to s. 4.03 of the 1978 Catalytic plan) provides that:

> **4.03. Company Contributions**
>
> The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

120 The employees submit that this section, like the contribution clause in the *Ontario Hydro* case, provides a fixed formula according to which the annual contribution obligation must be calculated. On this approach, the standard actuarial practice

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of applying surplus to current service funding obligations is excluded. Instead, s. 4.03 requires the company to contribute an amount equal to not less than the sum of:

> i) the amount necessary to provide the retirement benefits accruing to members during the current year, and
>
> ii) the amount required to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the *Pension Benefits Act* , after taking into account the assets of the Pension Fund and all other relevant factors.

Where no amount is required under (ii), the employees submit that the Company's minimum annual contribution is the amount determined under (i).

121 In my view, the words "after taking into account the assets of the Pension Fund and all other relevant factors" must qualify *all* of the preceding phrase beginning with "as necessary ..." Such an interpretation is consistent with the natural grammatical construction of s. 4.03. The absence of a comma between the phrases "to provide the retirement benefits accruing to Members during the current year pursuant to the Plan" and "to make provision for the proper amortization of any initial unfunded liability or experience deficiency" supports this position. Further, to agree to the interpretation suggested by the employees would be to accept that the company either overlooked or decided not to take advantage of the chance to take into account a surplus in the ongoing plan in determining its contributions. This seems to me unlikely since elsewhere in the amended provisions specific reference is made to a potential surplus on termination. There is as well the Revenue Canada circular which requires employers to take contribution holidays when the actuarial surplus exceeds certain levels. It is more likely that in 1983 the company simply assumed that the wording of s. 4.03 permitted the consideration of an actuarial surplus in the calculation of the current service cost.

122 The Air Products plan, like those considered in *Askin* and *Maurer* , supra, is not one which specifically mandates regular contribution on a specified basis which would leave an actuary no discretion to employ the standard actuarial practice of considering existing surplus. The wording of the plan itself implicitly authorizes an actuary to consider an actuarial surplus when calculating the company's annual funding obligation.

123 As a result, I am of the opinion that the plan did allow the company to take contribution holidays. The appeal should be allowed in respect of the order made by the courts below requiring Air Products to pay $1,465,400 (which represents the actuarial surplus applied to the current service costs in the years when the company made no contributions) into the plan.

2. The Stearns Plan

124 The Stearns employees also claim entitlement to the surplus remaining in the pension fund. They argue that the original Stearns fund was subject to a trust in their favour. Even if no trust existed, the employees say that the company is obligated by the provisions of a 1972 employee pension brochure and by the existence of a fiduciary duty to exercise its discretion to distribute the surplus in favour of the employees.

125 The 1970 Stearns plan differs in two significant ways from the original Catalytic plan. Firstly the Stearns plan makes no reference to the existence of a trust; secondly, it specifically contemplates the reversion of surplus assets to the company in these words:

> **Article XIV Amendment of Termination of the Plan**
>
> 14.1 ...
>
> (c) ...
>
> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time,

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be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

126 This provision remained in the 1977 version of the Stearns plan and was then replaced in 1983 by s. 18.05 of the Air Products plan which, as observed earlier, provided for the automatic reversion of surplus to the company. The employees seek to establish the existence of a trust in order to make the further argument that the 1983 amendment to the plan was invalid as an unauthorized partial revocation of the trust.

(a) Was the Stearns fund impressed with a trust?

127 Neither the 1970 nor the 1977 Stearns plans make any reference to a trust nor provide for the creation of a trust agreement. The plan was funded by means of a Group Annuity Policy entered into between the company and the Mutual Life Assurance Group. The employees contend that the terms of the pension plan clearly implied a trust onto this fund. In particular, the employees rely upon the following provisions of the plan:

13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries ...

14.1(b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants ...

128 This plan, together with the 1972 Brochure and the 1977 Stearns plan, are said to constitute the trust documents.

129 It is true that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, and that the employees were identified as those entitled to receive the fund monies. Furthermore, the exclusive benefit and non-diversion clauses relied upon by the employees above are consistent with the existence of a trust. Nonetheless, I am not convinced that a trust was ever created. Certain phrases, such as the exclusive benefit and non-diversion clauses identified above, are commonly found in plans which do create pension trusts. They may point to the existence of a trust but of themselves they cannot be taken as demonstrating an intention by the employer to create a trust.

130 The company identifies several other clauses which it claims are equally consistent with the non-existence of trust, and clearly identify the plan as a contract to receive defined benefits. These individual clauses are of little assistance in determining whether a trust came into existence. Rather, all of the documents relied upon by the employees must be construed in their entirety in order to see whether an intention to create a trust can be imputed to the company. I do not see any such intention apparent on the face of these documents.

131 Unlike the Catalytic plan, the Stearns plan makes no mention of any trust, trust fund or trustee. The Stearns fund was not created pursuant to a trust agreement but pursuant to a contract. This is so even though by 1970 the use of the trust in the creation of private employer pension plans had become a well-established practice. The absence of any reference to a trust in these circumstances indicates that there was a deliberate decision to avoid the use of a trust. Any argument that the employer merely "omitted" to state explicitly its intention to create a trust is difficult to accept.

132 At the time of the 1970 plan, the employer tax benefits to be gained from the creation of a "trusted" pension fund were equally available to employers who preferred to purchase a group insurance policy.

133 Finally, the employees contend that three documents — the 1970 and the 1977 plans and the 1972 employee brochure — made up the trust deed. On this approach, it would seem that the employer's intention to create a trust was not perfected until seven years after the creation of the fund. There was no significant change in circumstances between 1970 and 1977 which warrants a finding that a trust which did not exist at the inception of the plan suddenly came into existence in 1977.

134 I do not think that the Stearns pension fund was ever subject to a trust.

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(b) The Pension Brochure

135 The Stearns employees relied upon the effect of a pension brochure which was distributed to employees in 1972. They urged us to accept that clauses contained in that document must be taken to have fixed the employer with an equitable obligation to distribute any surplus remaining on termination to the employees.

136 The brochure is entitled "Stearns-Roger Canada Ltd. — Employee Benefits". In his supplementary affidavit, Gunter Schmidt stated that he received the brochure, which is dated June 1, 1972, when he joined the company in 1973. It consists of eight pages of text in which the operation of the pension plan is explained in some detail. The brochure contains the following relevant provisions:

> **Future of the Plan**
>
> It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time ... In the event that there is a surplus in the fund after all benefits have been paid it is the Company's intention that the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.
>
> **General**
>
> This outline has been prepared to acquaint you with the provisions of your plan. Please read it carefully.
>
> The precise terms of the plan are contained in the official plan text and Insurance company contract which may be read by any employee on request at the Calgary Office of the Company ...
>
> The company reserves the right to revise or discontinue any of the benefit plans at any time.
>
> The above are transcripts from the various insurance policies and contracts. If more detailed information is desired our insurance group will be pleased to answer questions.

137 The employees assert that this brochure formed a binding part of the pension plan documents and that the statement contained in it to the effect that the company intends to pay any remaining surplus to the employees estops the company from now claiming the surplus for itself.

138 Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

139 Foisy J. explained why courts will in specified circumstances bind an employer to the terms of a pension brochure in *Harris v. Robert Simpson Co.*, [1985] 1 W.W.R. 319 at 327 [34 Alta. L.R. (2d) 64] (Q.B.):

> If it were otherwise then an employer could provide the employee with a brochure claiming to represent the significant and material terms in the company's pension plan. Yet the "true" plan could vary significantly from this representation without the employee's knowledge. In such a case it cannot be said that the "true" agreement prevails, as to do so would leave the door open to mischief.

140 In other words it would be unfair or unacceptable if an employer were to attract and retain employees by making representations as to the pension benefits available upon which the employees could be expected to rely and then resile from those representations as being contrary to the actual pension terms.

141 The 1972 brochure does not purport to have any contractual effect. It does, however, contain a detailed outline of an employee's entitlements under the plan, although it states that it is merely a "transcript" of the various policies and that

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the benefits can be amended by the company. The brochure is worded in a way that is declarative of the rights of individual employees under the plan. For example, the plan states "The Life Insurance is payable in the event of your death from any cause ... If you should become totally and permanently disabled while insured and prior to age sixty your life insurance will remain in force as long as you remain so disabled but you must furnish proof of disability ..."

142 The only notable exception to this didactic style is contained in the clause concerning the future of the plan. The brochure there sets out the "intention" of the company. This is a declaration of intention as to a future act, but it does not in any way indicate that the company is undertaking an obligation to allocate surplus to the employees.

143 The brochure is potentially misleading. Yet there is no evidence as to the effect that this brochure had on the employees of the company. All that is known is that the brochure was distributed to the employees of the company in June, 1972, and that Mr. Schmidt received a copy in 1973 when he joined the company. There is no indication that Mr. Schmidt was induced to join the company on the basis of the terms of the brochure, or that he even read it. There is no evidence that either the employees or their union relied upon the brochure in such a way as to affect their position during collective bargaining sessions. This may be contrasted to the situation in *Collins v. Pension Commission (Ontario)* , supra, where the Ontario Divisional Court found (at p. 277) that a booklet describing the terms of the pension plan, together with the plan itself, led to a belief amongst plan members that the company had no right to claim any part of the fund.

144 Finally, I have some doubts as to the extent to which a brochure issued in 1972 can influence entitlement to plan surplus in 1988 particularly since it specifically states that the plan will be subject to amend ment from time to time. As a brochure describing pension benefits becomes outdated, it becomes increasingly difficult for employees to rely upon it as the source of a supplementary obligation undertaken by the employer.

145 I agree with the Court of Appeal that the brochure provisions concerning the treatment of surplus did not, on the evidence adduced in this case, amount to a promise intended to affect the legal relationship between the parties. It cannot form the basis for an estoppel as there is no evidence of inducement or reliance upon it by the employees.

(c) Interpretation of the Plan Provisions

146 Since no trust was ever created under the Stearns plan and the 1972 brochure did not have any legal effect, the issue of entitlement to the plan surplus must be decided on the basis of an interpretation of the plan's provisions.

147 The position of the employees is that s. 18.05 of the Air Products plan was an invalid amendment. Therefore, they argue that s. 14.1(c) of the 1970 plan (s. 14.3 of the 1977 plan) still applies, that that section gives the company a discretion as to whether to distribute surplus to employees or to itself, and that the employer owes a fiduciary duty to the employees which compels it to exercise that distribution discretion in favour of the employees.

148 Moore C.J.Q.B. did not explicitly deal with the validity of the 1983 amendment. He decided that, even under the 1977 version of the plan, the employer was entitled to take the surplus. The issue of fiduciary duty was not raised before him.

149 It may be helpful to begin by examining the 1983 amendment. Whether or not the surplus reversion clause contained in s. 18.05 of the Air Products plan is valid must be determined by reference to the amendment clause contained in both the 1970 and the 1977 plans:

> 14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:
>
> (a) No amendment shall have the effect of reducing any Participant's, former Participant's, beneficiary's, or estate's then existing interest in the Fund.
>
> (b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates ...

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150 In my opinion, the 1983 amendment of the pension plan was within the limits of this power of amendment. The amendment does not violate s. 14.1(a) because at the time it was enacted it did not reduce any "*then* existing" interest of the employees. Under the prior plans, the employees had no interest in the surplus remaining upon termination until such time as the company exercised its discretion to give them an interest. The removal of a mere potential interest in the funds was within the company's amending power.

151 Nor do I think that the amendment violated the limitation on the amending power contained in s. 14.1(b). I agree with Moore C.J.Q.B. that this restriction on amendment was in the nature of a general protection of the benefits and rights of the plan participants and that it must be read in the light of other provisions dealing with specific rights including the treatment of surplus. He considered that two particular provisions in the 1977 plan overrode any conflict with the more general terms of the amendment power. I agree. This was also true of the corresponding provisions in the 1970 plan. The relevant 1970 clauses are that part of s. 14.1(c) which gives the employer a discretion as to the allocation of surplus, and:

> 13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

152 The amending power contained in s. 14.1(b) must therefore be read in light of the fact that the employee rights under the plan are limited by s. 13.2 (and indeed throughout the plan) to the benefits defined in the plan, as well as by the stipulation that the company has the right to distribute surplus as it chooses. The 1970 plan does not deal with the issue of whether the reversion of surplus to the company is inconsistent with the non-diversion and exclusive benefit clauses contained in s. 13.2. I do not think it is. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus. The revamped version of s. 13.2, which appeared as s. 13.4 in the 1977 plan, and upon which Moore C.J.Q.B. based his conclusion, clarified this point but did not change the substance of the original provisions:

> 13.4 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, *except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions* ... No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan. [Emphasis added.]

153 Whether measured against the 1970 or the 1977 plan provisions, s. 18.05 of the Air Products plan was a valid amendment. The company is entitled according to its terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. This is the conclusion which must be reached on an interpretation of the contract. The issue of a fiduciary duty does not arise.

(d) The Contribution Holiday

154 For the reasons given on the appeal, Air Products was entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products plan, and did not have the effect of reducing any benefits which had accrued to the employees.

(e) The Need for Legislation

155 The results in these appeals demonstrate the need for legislation. In both appeals the pension fund was created to benefit the employees. During the contribution holiday enjoyed by the employer they continued to pay into the pension fund. They had a real stake in the fund which was created for their benefit and funded in part by their contributions. It seems unfair that there should be a different result for these two groups of employees based only upon a finding that a trust was created in one case but

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not in the other. In my opinion there should be a legislative scheme set up for determining the proportion of the surplus which should be awarded to the employer and the employees. It could be based at least in part upon their contributions to the creation of the surplus. Principles of equity and fairness should encourage legislators to draft a scheme to provide for the equitable distribution of any surplus in pension plans that are terminated.

VII. Disposition

156 In the result, I would dispose of these appeals as follows:

The Appeal

157 1. The former Catalytic employees are entitled to any surplus remaining in the pension fund which derives from former Catalytic plans. The appeal is dismissed on this ground and the order of the Court of Appeal varied accordingly.

158 2. Air Products was entitled under the terms of its pension plan to take a contribution holiday. The appeal is allowed on this ground.

The Cross-Appeal

159 1. Air Products is entitled to all surplus remaining in the pension fund which derives from the former Stearns plan.

160 2. Air Products was entitled to take a contribution holiday.

161 The cross-appeal is dismissed on both grounds. In light of the potentially misleading provisions contained in the brochure prepared and circulated by the employer, there should be no costs against the employees.

162 The costs of all parties on the appeal should be paid out of the Catalytic pension fund on a solicitor and client basis.

163 Similarly the costs of all parties on the cross-appeal should be paid out of the Stearns pension fund on a solicitor and client basis.

Sopinka J. **(dissenting in part):**

164 I have read the reasons of Justices Cory and McLachlin. Like McLachlin J. I agree with most of Cory J.'s conclusions but disagree with him on the question of entitlement to the surplus in the Catalytic plan. In my view, the surplus in the Catalytic plan reverts to the employer. However, I have arrived at this conclusion by a somewhat different route from McLachlin J.

165 While I agree with Cory J. that all monies in the Catalytic pension fund, including the surplus, were impressed with a trust, this does not foreclose amendment of that trust. In the case of a pension plan, the nature of the rights of amendment will continue to depend upon the terms of the plan and the trust agreement, if any. In my view, nothing in the Catalytic plan precluded the company from exercising the express power of amendment in the plan so as to provide that any surplus funds would revert to it upon termination of the plan.

166 I should state at the outset that I agree with Cory J.'s conclusion that the parties intended art. V of the Trust Agreement to apply to all monies in the pension fund after 1966, including the surplus funds. Article V purports to restrict the company's right to make amendments which divert parts of the "FUND" and reads as follows:

167 Under the 1959 Catalytic plan, the Trust Agreement was made part of the plan. It was clear that the terms upon which the monies contributed to that plan were to be held and administered were contained in both the plan and the Trust Agreement. The 1966 Catalytic plan amended the 1959 plan but retained a provision stating that all contributions to the plan were to be administered in accordance with the terms of the Trust Agreement. Thus it is clear that when the Catalytic plan became a defined benefit plan in 1966, the parties intended the provisions of the Trust Agreement to continue to apply to monies contributed to the plan. Furthermore, at all relevant times the Trust Agreement provided that the "FUND" referred to in that Agreement included all the monies paid to the Trustee by the Company for the purpose of the plan, as well as the earnings, profit and increments

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therefrom. The Catalytic surplus is derived from monies contributed to the plan after 1966 and thus is obviously part of the Fund. Therefore, it follows that art. V applies to amendments concerning the use of the surplus.

168 This, however, does not end the matter. By its terms art. V is subject to the terms of the plan. Both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than those con tained in art. V of the Trust Agreement. The relevant provisions of the 1959 Catalytic plan are as follows:

169 These provisions were carried over into the 1966 version of the Catalytic plan, renumbered as s. XXI. By virtue of those provisions, the only limitation upon the company's power to amend the plan was that no amendment could reduce accrued benefits. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan at the time that the company amended the plan to permit the surplus to be distributed to itself. Under the terms of the 1959 and 1966 plans the employees may have obtained a right to the surplus upon termination of the plan, but no such right had accrued to them prior to termination. Even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision. The benefits contemplated by the plan are those to which the members were entitled pursuant to other Articles of the plan. The right to the surplus is not one of those benefits. Indeed, when s. XXII.2 was drafted, it could not have referred to a surplus because no surplus was possible under a defined contribution plan. For both these reasons I conclude that from the outset the company reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself.

170 Assuming that a provision disposing of the surplus in favour of the employer is a partial revocation, I see no magic in the use of those specific words. If the powers of amendment are sufficiently explicit to permit a change which is in law a partial revocation, they should be given effect. After all, a trust can be created by the use of apt words without express reference to a trust. Words are apt to create a trust if the intention of the settlor is clear. Conversely, limitations on the nature of the trust must surely be determined on the same basis.

171 It is the contention of the respondents that the right to the surplus is an accrued benefit and a reduction of accrued benefits is a revocation or partial revocation of the trust. The fact that reduction in accrued benefits was made an express exception from the power of amendment shows that when the trust was created the parties considered that in the absence of this exception the power of amendment would extend to reduce accrued benefits. It follows that the power of amendment included the power to make changes having the effect of revocation or partial revocation. The real issue, therefore, is whether the right to the surplus comes within the exception. For the reason I have given above, it does not.

172 As Cory J. points out, there is a fundamental disagreement in the authorities as to whether a power of amendment can be sufficiently explicit to include a power of revocation. This disagreement is said to derive from the conflicting views expressed in Waters, *Law of Trusts in Canada* (2nd ed., 1984), and *Scott on Trusts* , 2nd ed., vol. 3. As I understand my colleague's reasons, he would apply a statement in Waters as requiring nothing short of the use of the actual words "power of revocation" in order to permit the settlor to effect a change which would amount to a revocation or partial revocation. With respect, I am of the opinion that Waters does not go that far. In the passage to which my colleague refers and which was quoted by Zuber J.A. in *Reevie v. Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595 , at p. 600, the learned author states: " 'A settlor cannot revoke his trust unless he has expressly reserved the power to do so.' " I do not read this to mean that if the settlor uses language that, when interpreted by reference to the usual canons of construction, clearly establishes an intention to include changes having the effect of revocation, the absence of the magic words is fatal. Nor do I believe that Zuber J.A. was of the opinion that no power of amendment could authorize a change having the effect of revocation. It is clear that he was of the opinion that, in applying the statement in Waters, the appropriate inquiry was whether the wording of the relevant documents could be interpreted to authorize a change having the effect of revocation. At p. 600, he stated:

173 The terms of the trust agreement and plan in *Reevie* , supra, were not identical to the wording of the agreements in this case.

174 But even if Waters stands for the proposition advanced by Cory J., the logic of the contrary position, which is stated in *Scott on Trusts* and adopted by McLennan J. in *Campbell-Renton v. Cayley*, [1960] O.R. 550 (H.C.) , and the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11 , appeals to me in preference to a formulaic

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approach that would disregard the clear intention of the parties. Nor am I persuaded that we should adopt a rule of interpretation that ignores the clear intention of the parties in order to maintain the fundamental character of a trust. Trusts can be revocable or irrevocable. Neither is more fundamental than the other. All we are debating is the means by which we distinguish one from the other. Moreover, the true nature of a trust established as part of a pension plan is to provide funds needed to pay the benefits which accrue to employees under the plan. A power of amendment which is qualified by the requirement that it cannot be used to reduce accrued benefits is not inconsistent with the fundamental purpose of a defined benefits pension trust.

175 Cory J. also reasons that the circumstances which prevailed when the plans in question were created support his interpretation of the breadth of the power of amendment. In my view, however, the most relevant of those circumstances is the fact that neither the company nor the employees appear to have foreseen the existence of a surplus when the plan was created. In fact, there was no reason for the employees to expect to receive anything more than the defined benefits set out in the plan. Therefore, I see nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

176 As far as the tax legislation in force when the plans were created is concerned, I agree with Cory J.'s observation that the tax motivations of the parties to pension plans are of limited relevance in interpreting those plans. I note, however, that the Catalytic plan expressly stated that the plan was structured so as to ensure that the company's contributions were deductible under the *Income Tax Act* , S.C. 1970-71-72, c. 63, and any amendments thereto. It is not unreasonable to infer that the broad amending power retained in the 1959 Catalytic plan and subsequent versions of the plan was retained in part to deal with changes in income tax legislation. The amendment of the 1983 Air Products plan to include s. 18.05 was required by Revenue Canada in order to comply with the pension plan registration requirements under the *Income Tax Act* . Therefore, if anything, consideration of the parties' tax motivations supports a broad interpretation of the power of amendment.

177 Moreover, the approach which Cory J. adopts may make it difficult for the numerous pension plans that had an existence prior to 1981, which do not have an express power of revocation, to conform with the new registration requirements. Both information circulars 72-13R7 (1981) and 72-13 R8 (1988) provide that the plan must contain a provision permitting an actuarial surplus to be refunded to the employer on termination of the plan. This requirement has apparently been incorporated in ss. 8502(*c*) and 8503(4)(*c*) of the *Income Tax Regulations* . The Minister has indicated that these regulations may be amended; for the time being, however, they have the force of law.

178 For the above reasons I conclude that art. 17.05 of the 1978 plan was a valid amendment to the Catalytic plan, as was art. 18.05 of the 1983 Air Products plan. Pursuant to those provisions the surplus in the Catalytic plan should revert to the company. In light of the result which I have reached by interpreting the terms of the plan it is not necessary for me to consider whether the funds could revert to the employer by the operation of a resulting trust.

179 In the result I would dispose of the appeals as proposed by Cory J., except with regards to the distribution of the surplus in the Catalytic plan. In this respect, I would allow the appeal with costs.

McLachlin J. **(dissenting in part):**

180 I have read the reasons of Justice Cory. I agree with his conclusions except on the question of the right to surplus on the Catalytic plan. In my view, the surplus on the Catalytic plan reverts to the employer, either on the terms of the plan or on the basis of the doctrine of resulting trust.

Background: Situating the Problem

181 Modern private pension plans date to the late 19th century. Fundamental and pervasive societal changes — large scale industrialization coupled with the breakdown of family, village and church assistance networks — produced a need to devise methods of caring for those past working age. Employer-sponsored private pension plans, supplemented later by government plans, were the response. Today, together with personal savings, private and public pension plans provide the primary source of income for retired Canadians.

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182 There are two main types of pension plans. In the first type, the "defined contribution" plan, the amount paid in by the contributors to the fund is set. The eventual size of the employee's annuity is determined by the rate of return on the invested contributions. It follows that a low rate of return on investment will result in a smaller pension than if the rate of return is high. While the employer contributes to the plan, the employer does not guarantee the amount of the annuity. The employee is not assured of any particular benefit. The 1959 Catalytic plan was this sort of plan.

183 In the other type of pension plan, the "defined benefit" or "money purchase" plan, the employee, who may or may not contribute to the fund, is assured of a certain monetary benefit upon retirement. An actuary is employed to determine the amount of contribution which the employer must make in order to ensure that the plan can meet its present and future obligations. The market risk, assumed by the employee in a defined contribution plan, falls on the employer in a defined benefit plan. If, at any time, the plan is unable to meet its obligations, the employer is liable to make up any shortfall. For these two reasons — the guarantee of a certain benefit and the assumption by the employer of the market risk — a defined benefit plan is regarded as more advantageous to employees than a defined contribution plan.

184 The defined benefit plan possesses a feature which the defined contribution plan does not — a feature which is at the heart of this appeal, the actuarial surplus. A defined contribution plan can never have a surplus; everything, after deduction of taxes and expenses, must be paid out to the pensioners. However, a surplus may accumulate in a defined benefit plan when the amount in the fund exceeds the amount required to meet the defined benefits as calculated by the actuary.

185 In valuing the assets of a pension plan, the actuary must take into account a number of factors and make assumptions about each of them. These factors include the rate of investment return, the rate of price inflation, salary increases, rates of mortality for active and retired members, rates of employee turnover, incidence of disability and utilization of early retirement options. As might be expected, actuaries advising employers tend to err on the side of caution to produce what is called an "experience gain" rather than an "experience deficiency", since the latter would deprive pensioners of the benefits guaranteed to them.

186 In the early 1980s this actuarial conservatism combined with a particular set of economic factors to produce massive surpluses in many pen sion funds. These factors included the level of interest rates — as high as 20% at one point — which gave returns on investments in fixed value securities far in excess of those predicted. The stock market boom from 1982 to 1987 also resulted in much higher capital gains than were anticipated. Furthermore, the recession of 1981-82 caused widespread layoffs of employees who had no vested right to pension benefits. Money contributed on their account remained in the plan and either reduced unfunded liability for other employees or fell into surplus. At the same time, employers, uncertain as to whether they could use surplus for ongoing funding, often continued to contribute to over-funded plans in years when investment returns were at their highest, increasing existing surpluses: Gary Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in *New Developments in Employment Law* (1988). The result of these events was to increase pension surpluses in Canada which, by 1982, had already been estimated to be between $4 billion and $8 billion: D. Don Ezra, *The Struggle for Pension Fund Wealth* (1983).

187 So long as a pension plan remains operational, hefty surpluses pose no problem except perhaps to employers wondering whether they can use the surplus for current funding needs, taking a "contribution holiday". When a plan terminates, however, the question arises of who is entitled to the surplus. That is the problem that faces us on this appeal. It is not, we are told, an isolated one. Many plans such as this were set up in the 1960s and the decades that followed. Few contained express provisions as to distribution of surplus.

188 The Catalytic plan in this appeal was set up in 1959 as a defined contribution plan. As one would expect in that type of plan, all funds would ultimately be paid out to the pensioners or beneficiaries. There could be no surplus.

189 In 1966, however, the plan was changed to a defined benefit plan and the possibility of a surplus arose. In 1978, the Plan Agreement was redrafted. This restatement raised for the first time the issue of what should be done with any surplus. It empowered the company to use the surplus as it saw fit after making full provision for the accrued benefits payable to members

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and beneficiaries. When the plan was terminated in 1988, a large surplus was revealed. The issue was who should have it — the employees and their beneficiaries or the employer?

Implications Flowing from the Nature of the Defined Benefit Plan

190 As noted, the employer is legally obliged under a defined benefits plan to ensure that all pension benefits owing are paid when they fall due. The employer thus bears the risk that contributions may be insufficient or that investments may not perform as well as predicted. The converse of this proposition is that the employer should be permitted to take advantage of the excess when investments do better than predicted.

191 From an economic policy perspective, if employers cannot retrieve surpluses, they may be inclined to request that their actuaries take a more optimistic view of the future of their investments and fund existing pensions less generously. Alternatively, they may refuse to enter into new pension regimes or, in some cases, terminate those which already exist. Inability to retrieve surpluses may also lead employers, unwilling to assume the risk of providing guaranteed benefits without the possibility of recovering surplus funding, to choose defined contribution plans rather than defined benefit plans. Employees, no longer assured of a specific pension and required to assume the risk of insufficient funding themselves, would be the losers.

192 On the other side of the coin, permitting employers to recover surplus in a defined benefit plan is not unfair to employees. It is argued that employees should have the surplus because they have paid for it through direct contributions or by accepting lower wages and fewer fringe benefits. This argument overlooks the nature of the employees' legitimate expectations under a defined benefit plan. The employees, having bargained for specific benefits, will receive precisely what they bargained for. The benefits, as defined by the plan, are the quid pro quo for their services and contributions. Indeed, the intention of the parties — and the very purpose of the plan — is that they receive these benefits. To give the employees the surplus, however, is to give them more than they bargained for. It is a windfall to the employees and a denial of the equitable interest which the employer holds in the surplus.

193 This practical view of things is supported by the policy of the Minister of National Revenue. Information Circular No. 72-13R7, December 31, 1981, is based on the assumption that surplus is normally returnable to the employer. In order to comply with registration requirements, surplus in excess of the employer's current service funding obligations in the following 24-month period must be either refunded to the employer or applied against the employer's obligations for contributions on account of current or past service in the current and subsequent years. Furthermore, all pension plans are to contain a provision permitting an actuarial surplus to be refunded to contributing employers of the plan. This requirement, it may be noted, may prevent problems such as the one presented on this appeal from arising in plans set up after the Circular.

The Position in Other Jurisdictions

194 The problem of surplus in defined benefit pension plans is a recent one. The matter has, however, been considered by courts in England and the United States. It is fair to say that they have generally come down on the side of returning the surplus to the employers.

195 Courts in Great Britain have relied primarily upon principles of trust law when attempting to resolve the question of pension surplus. In *Davis v. Richards & Wallington Industries Ltd.*, [1991] 2 All E.R. 563 (Ch. D.) , for example, Scott J. applied the doctrine of resulting trust and concluded that a surplus in a contributory defined benefits pension fund should be paid to the employer. He held that the result could be otherwise only if the plan contained a provision expressly excluding return of the funds to the employer. He rejected the argument that a resulting trust operated in favour of the employees in view of their contributions mainly on the ground that what the employees had paid for was the specific benefit received from the fund. See also, *Re Courage Group's Pension Schemes; Ryan v. Imperial Brewing & Leisure*, [1987] 1 W.L.R. 495 (Ch. D.) .

196 In the United States, the courts look to the terms of the plan documents and the intent of the parties. They also tend to the view that the surplus would represent an unintended windfall profit if it were retained by the employees: *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 555 F. Supp. 257 (D.C., 1983). Provisions to the effect that amendments to the plan or trust documents may not enable an employer to divert or recover any portion of the trust funds are

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treated as prohibiting diversion prior to satisfaction of the plan's liabilities, but not thereafter. Once the pensioners are assured of their benefits, the surplus is recoverable by the employer: *Re C.D. Moyer Co. Trust Fund* , 441 F. Supp. 1128 (Pa., 1977); *Pollock v. Castrovinci*, 476 F. Supp. 606 (N.Y., 1979); *Washington-Baltimore Newspaper Guild* , supra; *Wilson v. Bluefield Supply Co.*, 819 F. 2d 457 (4th Cir., 1987). Where courts in the United States have found that a surplus could not be recovered by the employer, they have done so on the basis that the wording of the plan documents unequivocally precluded such recovery: *Bryant v. International Fruit Products Co.*, 793 F. 2d 118 (6th Cir., 1986); *Audio Fidelity Corp. v. Pension Benefit Guaranty Corp.*, 624 F. 2d 513 (4th Cir., 1980).

Consistency with the Right to Use Surplus for a "Contribution Holiday"

197 It has repeatedly been held that employers are entitled to use the surplus in defined benefit plans for purposes of funding their actuarially determined contributions: *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139 (Gen. Div.) ; *Askin v. Ontario Hospital Assn.* (1991), 2 O.R. (3d) 641 (C.A.) ; *Reevie v. Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595 (C.A.) . Cory J. arrives at the same conclusion in this case.

198 The obvious question immediately presents itself. If the employer is entitled to use the surplus to fund future contributions, why should the employer be denied the ability to recoup the surplus from previous funding? If, on the other hand, the fund in equity belongs to the employees in some notional sense, how can the employer usurp that interest by using the surplus to discharge its ongoing funding responsibility? Consistency suggests that both past and present funding and entitlement should be treated in the same way.

199 Some commentators, while recognizing the anomaly of allowing the employer to use the surplus for a contribution holiday but not to recoup past over-contributions from the surplus, argue that, from a "practical and symbolic" point of view, the two questions may be different, "since all funds paid into the pension stay there, at least notionally": Bernard Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", *Task Force on Inflation Protection for Employment Pension Plans, Research Studies* , vol. 2, at p. 242. Cory J. makes a similar point. So, it is suggested, an employer's entitlement to a contribution holiday may "not automatically entitle him to ownership of the actuarial surplus, as well": Nachshen, at p. 77.

200 Nevertheless, it remains true that as a matter of principle, there appears to be no reason why an employer permitted to use surplus for ongoing contributions should not be allowed to reclaim the result of past over-contributions from the same surplus.

Summary

201 Consideration of the nature of defined benefit plans leads to the conclusion that the normal and just result is that surplus in such plans (as distinguished from defined contribution plans) should revert to the employer. Against this background, I turn to the documents which govern this case and the principles of law applicable to them.

Analysis

The Private Regime

202 Pension plans such as those at issue here are private arrangements bestowed by an employer on employees as a benefit of employment or set up pursuant to agreement between employer and employees. The employees may contribute (contributory plans), or the employer may bear the entire cost (non-contributory plans). The plan may be funded through insurance purchased by the employer for payment of the benefits (an insured plan), or the monies may be placed in a trust (a "trusteed" plan). Whatever form they take, as private contractual or as trust arrangements, the law of contract or trust determines how the funds are distributed. This may be varied by legislation, but in this case that did not occur. We must look to the principles of private law for a solution to the problem of distribution of surpluses. In so far as we are concerned with an agreement, we look to the law of contract; in so far as a trust arises, we look to the law of trusts. We are not concerned with making some new law peculiar to pension surpluses.

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203 The primary rule in construing an agreement or defining the terms of a trust is respect for the intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan.

The Documents

204 It is my conclusion, after studying the documents and applying them to the plan as it stood at all relevant times, that apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents are silent on the question of surplus. There is a dispute about whether the 1978 stipulation was a valid "amendment" to the original trust documents. As I see it, and for the reasons discussed below, it was a valid amendment and, as such, ought to stand. Alternatively, even if the 1978 stipulation were disregarded, the surplus would devolve on the employer under the doctrine of resulting trust.

205 The crux of the debate is art. V of the 1959 Trust Agreement:

206 Moore C.J.Q.B., upheld in the Court of Appeal, interpreted the emphasized portion of art. V as precluding any amendment of the plan which would have the effect of conferring money in the plan to anyone other than the beneficiaries. Reasoning that the surplus here in issue constituted funds under the plan, he concluded that the 1978 amendment was ineffective and that, consequently, the surplus must go to the employees. Cory J., as I understand his reasons, adopts the same approach.

207 The problematic step in this logical process is the assumption that the surplus arising after conversion to a defined benefit plan in 1966 forms part of the fund to which art. V is addressed. For the reasons outlined earlier, at the time art. V was drafted, there could never be a surplus. It was simply impossible to have a surplus under the defined contribution plan then in place. The surplus was a new entity, created years later as a consequence of converting the plan to a defined benefits plan. The "FUND" referred to in art. V cannot therefore refer to the surplus with which we are concerned. Rather, it refers to the fund in place under the defined contributions scheme. This is apparent from the latter part of art. V, which permits deductions for only those things which would be deductible under a defined contribution policy: "taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof."

208 With respect, I think Moore C.J.Q.B. gave a broader scope to art. V of the 1959 Trust Agreement than it can reasonably be made to bear. In effect, he read "FUND", which at the time of drafting could not by definition have included any surplus, as extending to the surplus which later arises under quite a different arrangement.

209 The problem is a common one. A contract or trust deed is drafted. Later, a new, unanticipated situation arises. The first question is whether the new situation falls within an existing term of the document. Courts facing this question look at the factual context in which it was drafted. They consider the wording against this background to determine whether the new situation can reasonably be said to fall within this clause. If the answer to this question is negative, the court may go on to ask itself whether a term covering the new situation can be implied, whether as a matter of fact, law or custom: see Treitel, *The Law of Contract* (4th ed., 1975), at p. 128. The limiting principle is that the courts will not make a new contract or trust to which the parties have not agreed: *Murphy v. McSorley*, [1929] S.C.R. 542 .

210 In the case at bar, there is nothing in the evidence that suggests that the parties who signed art. V intended it to apply to a surplus which might arise under a conversion of the plan to a defined benefit plan. There is no suggestion that conversion of the plan was foreseen, much less that a surplus might arise under such a scheme. Article V by its terms clearly applies to the specific defined contribution plan which the parties were putting in place in 1959. It refers to a specific "PLAN", the 1959 plan, and, consistent with a defined contribution plan, it treats all funds as falling into one of two categories — benefits payable to the employees and expenses. Finally, to apply art. V to a surplus under the unforeseen defined benefit plan would, for the reasons enunciated earlier, produce a result which, if not anomalous, is out of step with the characteristics of a defined benefits plan and the approach which has been taken to this problem in other jurisdictions. It is not reasonable, in my opinion, to conclude that art. V applies to the surplus that could only develop after conversion of the plan years later to a defined benefit plan.

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211 The same considerations negate the possibility of implying a term that the provisions of art. V apply to the unforeseen surplus. An attempt to imply a term to cover an unforeseen factual situation will generally fail if it is not clear that the parties would have agreed to the term, or where one or both of the parties is shown not to have known of the new situation at the time of contracting: Treitel, at pp. 129-30. There is no suggestion that the parties who signed art. V in 1959 knew about the possibility of a surplus; nor can it be said that they would have agreed that it should go to the employees had they foreseen it. Indeed, the inference from the 1978 provision that surplus go to the employer suggests the contrary.

212 I am thus led to conclude that art. V, drafted in the context of a defined contribution plan, should not be read as applying to the surplus which arose under the later defined benefit plan. It follows that the 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Express Trust

213 It is argued that the surplus here in question is impressed with an express trust in favour of the employees which prevents the employer from claiming it.

214 I note initially that this argument must be distinguished from the argument based on the doctrine of resulting trust. The doctrine of resulting trust does not deal with the classic express trust, but is rather an equitable doctrine permitting those who have an interest in funds held in the name of another to recover them. In the first case we are concerned with the interpretation of terms of an express trust document; in the latter about the application of a legal (equitable) doctrine to a given situation.

215 The 1959 plan created a trust. All contributions were made subject to the trust. This did not mean, however, that all contributions were payable to the employees. Under the 1959 plan, expenses and administrative fees were payable to those who earned them, and the balance was payable to the beneficiaries. Consistent with a defined contribution plan, these were the only two classes of disbursements.

216 When the plan was changed in 1966 to a defined benefits plan, the nature of the trust necessarily changed. For one thing, the two accounts which the trustee was obliged to hold under the 1959 plan, the Employee's Account and the Company Account, no longer made sense and were necessarily collapsed. For another, the benefits payable to the employees were redefined. The trustee's former obligation to pay out the balance in the member's share of the two accounts after expenses, was replaced with a new and different obligation to pay out the defined benefits. And finally, as the fund continued to operate in its new form, there appeared a new element; the surplus which accumulated from year to year.

217 It appears that when the change was first made from a defined contribution to a defined benefit plan, no thought was given to the question of surplus. Certainly the 1966 plan made no reference to surplus. In theory, the actuarial projections should be so perfect that a surplus does not arise. But in reality, as the years passed, it became evident that a surplus was being generated. This new situation needed to be addressed. The response was the 1978 stipulation that any surplus which existed after all defined benefits and expenses had been met, was payable to the employer.

218 Against this background, we return to the obligations on the trustee. The situation, as I see it, was this. Under the 1966 plan the trustee was obliged to pay defined benefits to each entitled employee. The trustee was further required to pay all administrative expenses of the trust. In addition to these two obligations, however, the trustee, as the years passed, found itself holding a third fund which was attached neither by the obligation to pay out benefits nor the obligation to pay expenses — the accumulating surplus. The original trust documents did not contemplate this fund and gave no guidance as to what to do with it.

219 The trustee was left with the following options with respect to the surplus. Prior to the 1978 stipulation, the trustee's only option, had the question of distribution of surplus arisen, would have been to apply to the court for a ruling. Had this occurred, the appropriate ruling would have been that it go to the employer on the principles of resulting trust, for the reasons discussed below. As it happened, however, a stipulation that the surplus go to the employer was made before the question of surplus distribution arose. For the reasons discussed earlier, that stipulation was valid. It follows that the surplus goes to the employer pursuant to the 1978 amendment.

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220 It is contended that payment of the surplus to the employer constitutes revocation of a trust and that a trust cannot be revoked without express wording so permitting. This argument, however, fails because the surplus was an unanticipated development which was never contemplated by the original trust and was not addressed by any changes to the trust until 1978. The error in the respondents' submissions, as I see it, lies in assuming that the 1959 trust provisions apply to a surplus. In fact, they do not. All contributions fell into the trust, but to stop the analysis there is to beg the critical question: what was the trustee to do with the portion of the fund which became surplus after conversion of the plan to a defined benefit plan? The answer to that question does not amount to revocation of a trust, as the respondents suggest. Rather, it amounts to fulfilling the trust.

221 I conclude that the terms of the trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Resulting Trust

222 I have argued that under the terms of the governing documentation, and in particular the 1978 amendment which I consider valid, surplus contributions are returnable to the employer. If I were wrong in concluding that the documentation requires this result, the same conclusion would nevertheless flow from application of the doctrine of resulting trust.

223 Waters, *Law of Trusts in Canada* (2nd ed., 1984), at p. 299, describes the concept of resulting trust as follows:

224 The concept of resulting trust does not depend on there being an express trust in existence. However, one of its applications is in the case where residual monies not designated to a particular person or purposes arise in an express trust. Where this happens in a charitable trust, the courts will order the residual sum cy-près, among all the creditors. Where the trust is non-charitable, the sum generally reverts to the settlor: see Waters, at p. 322 [1st ed., 1974].

225 If the 1978 amendment as to surplus is invalid, these principles suggest that the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. As it turns out, the employer paid more than required for the purpose of the trust, the provision of benefits to all eligible employees. The residual sum should therefore return to the employer.

226 As noted earlier, the doctrine of resulting trust has been applied to this situation in Great Britain, with the result that surplus funds in defined benefit pension plans have been ordered paid to the employer. It has also been applied in Canada. The case of *Canada Trust Co. v. Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 [[1979] 6 W.W.R. 656] (B.C.S.C.), raised similar issues as those before us. The first question was the validity of an amendment directing that surplus should revert to the employer. Gould J. found that the attempted amendment in that case was invalid. However, he went on to hold that the surplus reverted to the employer under the doctrine of resulting trust. He stated, at p. 111:

227 My colleague seeks to distinguish this case on two grounds. He questions Gould J.'s conclusion that there could be a resulting trust in favour of the employer because of a clause in the plan providing that no amendment "shall permit any part of the trust fund to revert to or to be recoverable by the Company". But Gould J. was not talking about reversion under an amendment (having found the attempt to amend had failed), but rather about reversion by operation of law. My colleague also points to the fact that unlike the plan at bar, the plan in *Cantol* was non-contributory. But as we have seen, even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits: *Davis v. Richards & Wallington Industries Ltd.* , supra. Once the defined obligations to the employees have been paid, it is difficult to argue that the employees have an interest in the surplus on the basis of a resulting trust in their favour. It is in the nature of a defined benefit that it represents a fixed amount to which the employee is entitled from the plan. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan. Generally, this is thought to be in the employee's interest.

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228 To put it another way, once the stipulated benefit is paid, the employee is no longer a beneficiary — he or she has exhausted his or her rights under the plan. As Gould J. put it in *Cantol* , at p. 111, "all of the beneficiaries have been paid off in accordance with [the trust] provisions, and no beneficiaries remain in any of the categories". Moreover, the complications of holding otherwise appear significant. As Scott J. points out in *Davis* , supra, at p. 595, different employees contribute different amounts, and often receive benefits disproportionate to their contributions, depending on when they started working, how long they have been working, and other factors. The task of restoring to each employee his or her fair share of any surplus would be impossible. I can do no better than echo the query of Scott J. [p. 595]: "How can a resulting trust work as between the various employees inter se? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result."

Conclusion

229 I conclude that the surplus in the Catalytic plan should revert to the employer. It is not touched by art. V of the 1959 agreement, with the result that the 1978 provision for its disposition is determinative. There is nothing in the Trust Agreement which requires its return to the beneficiaries, once their stipulated entitlement under the agreement has been fully met. If, in the alternative, the 1978 provision does not settle the matter, the doctrine of resulting trust would require that the surplus revert to the employer.

230 I would dispose of the appeal as proposed by Cory J., except on the question of the distribution of surplus in the Catalytic fund, where I would allow the appeal with costs.

Appeal allowed in part; cross-appeal dismissed.

APPENDIXA

The following is an edited version of the Agreed Statement of Facts provided by the parties. The full text of the document is incorporated in the reasons of the Chief Justice of the Alberta Court of Queen's Bench.

I. History of Catalytic Plans

A. The 1959 Catalytic Plan

The 1959 Catalytic Plan was a money purchase plan which contained the following provisions:

Section V — Trust Fund

> All contributions made by the members and the Company will be paid to the Trustee to be administered subject to the provisions of the Act governing the investment of Pension Funds, and in accordance with the terms of the Trust Agreement which forms part of this plan and of which this plan is Exhibit "A".
>
> All benefits on the death or break of service of a Member shall be payable from the Trust Fund. All benefits on the retirement of a Member shall be payable as set forth in Section XV.
>
> Expenses of the Trust Fund shall be paid out of the Fund unless paid by the Company.

Section VIII — Members' Accounts

> The Pension Committee shall keep for each Member of the Plan two accounts as follows:

1. Member's Account

> Here will be kept a cumulative record of any contributions made by the Member and the interest income and capital gains and losses realized and unrealized allocated thereon in accordance with Section X.

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2. The Company Account

Here will be kept a cumulative record of the amounts allocated to the Member as follows:

(a) the Company's contribution allocated in accordance with Section IX.

(b) The interest income and capital gains and losses realized and unrealized allocated in accordance with Section X.

(c) The forfeitures allocated in accordance with Section XI.

Section XXII — Future of the Plan

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.

2. No amendment to the Plan shall operate to reduce the benefits which have occrued [sic] to the Members of the Plan prior to the date of amendment.

3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company ...

B. Trust Agreement

As contemplated by the 1959 Catalytic Plan, Catalytic entered into an agreement dated September 8, 1959 (the "Trust Agreement") with Canada Trust Company whereby Canada Trust, as trustee, was to hold, invest and administer the fund. The Trust Agreement provided:

Article I — Establishment of Trust

1. This Agreement is hereby made a part of the Plan.

2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the Plan, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the Fund hereby created and established.

3. The Trustee hereby accepts the trusts herein set out and agrees to hold, invest, distribute and administer the Fund in accordance with the provisions of this Agreement.

Article V — Modification and Termination

1. Subject as herein and in the PLAN provided, the Company reserves the Right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof.

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2. This Agreement may be terminated at any time by the Company upon at least sixty (60) days' prior written notice to the Trustee, and with its termination, or upon the dissolution or liquidation of the Company, the Fund shall be paid out by the Trustee as directed by the Company.

C. The 1966 Catalytic Plan

The 1966 Catalytic Plan changed the benefit formula from a money purchase formula to a defined benefit formula ... [E]ffective October 1, 1966 the plan provided that:

> the Company shall not less frequently than annually make such contributions as are necessary to provide the benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the provisions of The Pension Benefits Act of Ontario (Article VI).

The provisions regarding the future of the plan remained unchanged from Section XXII of the 1959 Catalytic Plan.

The money purchase portion of the Catalytic 1959 and 1966 Plans was segregated and is administered separately from the funds generated in the defined benefit plans. No surplus was or could be generated from the money purchase portion of the 1959 and 1966 Catalytic Plans.

D. The 1978 Catalytic Plan

This plan was a defined benefit plan ... [It] provided ...

Section 2 — Definitions

2.12 'Funding Agency' means the trustees, trust company or insurance company that the Company may appoint to hold and invest the Pension Fund or the Pooled Pension Trust Fund or such successor trustees, trust company or insurance company as the Company may appoint from time to time to hold and invest the Pension Fund or the Pooled Pension Trust Fund.

2.13 'Funding Agreement' means the agreement entered into between the Company and the Funding Agency establishing and maintaining the Pension Fund.

2.18 'Pension Fund' means the fund established pursuant to the Funding Agreement to which contributions are made by the Members and Company and from which retirement and other benefits under the Plan are to be provided.

Section 4 — Contributions

4.03 The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors ...

Section 17 — Amendment To or Termination of the Plan

17.01 Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

17.02 Amendment of Plan

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No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

17.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact business in Canada, in the form elected by the Members, or through the continuation of the Funding Agreement for this purpose. If the assets of the Pension Plan are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act ...

17.05 Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct. Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans ...

II. A History of the Stearns Plans

A. The 1962 Stearns Plan

On January 1, 1962, Stearns obtained a Group Annunity (sic) Policy (GA577) from the Mutual Life Assurance Company for the purpose of providing retirement benefits to its employees. No surplus was or could have been derived pursuant to this plan.

B. The 1970 Stearns Plan

Stearns established a pension plan effective January 1, 1970 for the retirement of and payment of pensions to its employees ...

As required by Article 13.1 of this plan, the Company entered into a Group Annuity Policy (GA1328) with the Mutual Life Assurance Company and a fund was established by transfer of the assets from the 1962 Stearns Plan and by contributions from the employees and the Company.

The 1970 Stearns Plan provided that:

Article I — Definitions

Fund — shall mean the Fund to be established under the Deposit Administration Policy issued by the Insurer by transfer of assets from the Prior Plan and by contributions by the Participants and the Company from which the benefits of the Plan are to be provided.

Article II — Establishment of the Plan

2.2

Prior to the Effective Date, certain Employees of the Company had accumulated retirement benefits under the Prior Plan. The Prior Plan shall be terminated 31 December 1969 and all benefits earned thereunder shall be transferred to the Plan. All benefits accrued under the Prior Plan transferred to the Plan shall become a liability of the Plan and shall be paid in

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accordance with the provisions of the Plan. Future contributions by such Employees and Employees who become eligible on and after the Effective Date shall be made under the Plan.

Article IV — Contributions

4.3

(a) The Company will contribute each year to the Fund such amounts as determined by the Actuary, which, when added to the Participant's contributions made under Section 4.1 will provide the regular benefits described in the Plan and will provide for funding in accordance with the tests for solvency prescribed by the regulations under the Pension Benefits Act.

(b) It is expressly stipulated that the Company will not make any additional contributions corresponding to or in respect of the additional voluntary contributions made by a Participant as provided for in Section 4.2 or 4.4.

Article XIII — Retirement Fund

13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

Article XIV — Amendment or Termination of Plan

14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, beneficiary's, or estate's then existing interest in the Fund;

(b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

Article 14.1(c) set out the following scheme of distribution to be instituted upon termination of the plan:

(c) If it should become necessary to discontinue the Plan, the assets of the Fund shall be used, to the extent adequate, for the following purposes ...

Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1(c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

C. Brochure ...

On June 1, 1972, Stearns issued to its employees a brochure entitled 'Employee Benefits' which provided that:

Future of the Plan.

It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. If it becomes necessary to terminate the plan at some future date, all employees would be granted 100 percent vesting, regardless of their service. No part of the assets of the fund will be available to the Company until all benefits earned under the plan to the date of termination have been paid. In the event there is a surplus

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in the fund after all benefits have been paid, it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.

D. The 1977 Stearns Plan ...

By an amendment dated January 1, 1977, Stearns amended the 1970 plan ...

The 1977 Stearns Plan contained ... the following provisions:

Article I — Definitions

1.14 Fund means the corpus and all earnings, appreciations, or additions thereon and thereto held by the Funding Agency under the Funding Agreement.

1.15 Funding Agency means the Trust Company, Trustees, Insurance Company or successors thereof as the Company may appoint to hold the Fund pursuant to the Funding Agreement.

1.16 Funding Agreement means the agreement or contract entered into between the Company and the Funding Agency establishing the Fund.

Article IV — Contributions

4.1 The Company will contribute to the fund, not less frequently than annually, such amounts which are not less than those certified by the Actuary as being necessary to provide benefits accruing during each Plan Year and to make provision in accordance with the Pension Benefits for the amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued after taking into account the assets of the Fund and such other factors as may be deemed relevant. The Company reserves the right, however, subject to the provisions of Article XIII, to pay its contributions from such surpluses as may accumulate and shall be determined in a valuation of the Funds' assets and liabilities certified by an Actuary.

4.2 Participants shall not be required to contribute to the Plan.

Article XIII — Establishment of the Fund

13.4 No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the superintendent of Pensions and except as provided in Sub-section 14.2(d) of Article XIV. No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan.

Article XIV — Amendment or Termination of the Plan

14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) no amendment, modification or termination shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, Beneficiary's or estate's then existing interest in the Fund.

(b) no amendment, modification or termination shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, Beneficiaries, or estates.

The scheme of distribution upon termination was ... contained in Article 14.2 ...

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> 14.2 Should the Plan be terminated, whether by the Company or as a result of wind-up or bankruptcy of the Company, the assets of the Fund shall be used, to the extent adequate, and subject to the provisions of the Pension Benefits Act, for the following purposes ...
>
> 14.3 Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the Company or may be used for the benefit of Participants, in such equitable manner as the Company may at its discretion determine.

E. The 1982 Stearns Plan Consolidation ...

The 1982 Stearns Plan Consolidation is virtually identical to the 1977 Stearns Plan with one important exception. Article 14.3 of the 1982 Stearns Plan Consolidation provides that:

> 14.3 Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine, so long as the surplus is distributed in such manner as to observe the maximum benefit allowed by the Department of National Revenue.

This consolidation was not registered with the Employment Pension Plans Branch and there is no Directors' Resolution authorizing it.

III. The Stearns Catalytic Pension Plans

[I]n 1983 with the amalgamation of Stearns and Catalytic, the Company instituted the two Stearns Catalytic Pension Plans ...

These plans contained ... the following terms:

Section 1 — Establishment of the Plan

> The benefits provided by this Plan, in respect of service prior to October 1, 1983, are in lieu of all and any benefits to which any person, active or retired, may have been entitled under either of these Prior Plans, and in no event shall be less than the benefits to which they were entitled under these Prior Plans.
>
> Effective October 1, 1983, the respective pension funds of the Catalytic Enterprises Plan and the Stearns-Roger Plan shall be merged and held as one fund to the benefit of members of this Pension Plan for Employees (Senior Members of Management) of Stearns Catalytic Ltd. — Construction Division.

Section 2 — Definition

> 'Pension Fund' means the fund established pursuant to the Trust Agreement to which contributions are made by the Members and the Company and from which retirement and other benefits under the Plan are to be provided.
>
> 'Trustee' means the trustees, trust company or insurance company that the Company may appoint from time to time to hold and invest the Pension Fund.
>
> 'Trust Agreement' means the agreement entered into between the Company and the Trustee establishing and maintaining the Pension Fund ...

Section 4 — Contributions

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4.03 The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors ...

6.05 Statutory Maximum Retirement Benefit

In no event shall the annual retirement benefit payable under the Plan in respect of the retirement or termination of service of a Member or termination of the Plan exceed the lesser of:

a) $1,715 for each year of the Member's Credited Service to a maximum of 35 years; and

b) 2% of the Member's average best three (3) consecutive years' Earnings multiplied by his years of Credited Service, to a maximum of 35 years ...

Section 18 — Amendment or Termination of the Plan

18.01 Continuation of the Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

18.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

18.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultant [sic] with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact an nuities business in Canada, in the form elected by the Members, or through the continuation of the Trust Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act ...

18.05 Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct.

Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.

The distribution of the assets of the fund must not result in a Member's retirement benefits exceeding the maximum indicated in Section 6.05 hereof. If any surplus remains in the Fund after all allocations have been made, such surplus shall be refunded to the Company.

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The contributions made to the Stearns Catalytic Pension Plans [were] provided to Confederation Life Insurance Company under the terms of an Investment Contract dated October 29, 1984 ...

[This contract] provided ... that:

Provision 6 — Withdrawals

6.1 Confederation Life shall make withdrawals from the Accounts in order to make payments as designated in writing by the Contractholder provided that any such withdrawal shall be for the sole purpose of making payments in accordance with one of the following conditions:

(c) Payments to the Contractholder of any certified actuarial surplus as may be approved by any provincial or federal government body having jurisdiction in the matter.

Article V Modification and Termination

1. *Subject as herein and in the Plan provided* , the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

SECTION XXII FUTURE OF THE PLAN
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1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.

2. No amendment to the Plan shall operate to reduce the benefits which have occrued [sic] to the Members of the Plan prior to the date of amendment.

3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

The appellant does not take issue with these general principles [stated in Waters] but asserts that it has reserved a power of amendment which is wide enough to entitle him to recover surplus funds. In my opinion, this proposition is simply untenable. The language of the trust agreement and the pension plan do not support such an argument. The section in the pension plan (prior to the 1981 amendment) dealing with the powers of amendment specifically affirms the irrevocability of the contributions and the fact that the members of the plan are the sole beneficiaries ...

Article V Modification and Termination

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that *without the approval of the Minister of National Revenue no such amendment shall authorize or*

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permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time , and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

... a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it. [Emphasis in original.]

The method which the board has employed [directors' resolution to allow reversion] does not accomplish the purpose for which it was intended. If this method is ineffectual, how then must the money remaining in the fund be distributed ...

The purposes of this trust simply did not exhaust the fund and the outcome here, i.e., a surplus balance of $31,163.38, was not foreseen by the respondent Dependable. The situation appears to be one where a resulting trust arises by operation of the law . [Emphasis added.]

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Bathgate et al. v. National Hockey League Pension Society et al.

[Indexed as: Bathgate v. National Hockey League Pension Society]

11 O.R. (3d) 449
[1992] O.J. No. 2168
Action No. RE 785/91

Ontario Court (General Division),
Adams J.
October 21, 1992

Pensions -- Surplus -- Language of constating documents of professional hockey players' pension plan and surrounding evidence indicating exclusive and irrevocable entitlement of players to surplus funds in plan -- Trust created with Pension Society as trustee and group annuity contract as central asset -- Future amendment to plan ineffective in authorizing Pension Society to allocate surplus to hockey clubs -- Actions of Pension Society in doing so constituting breach of fiduciary duty to players.

The applicants were former professional hockey players. They applied on their own behalf and on behalf of all player participants in the National Hockey League Club Pension Plan and Trust ("the Plan") with service under the Plan on or before June 30, 1982 for a declaration of entitlement to certain funds arising pursuant to a participating feature of a group annuity contract whereby various "experience rate credits" were paid to the National Hockey League Pension Society ("the Society"). The experience rate credit payments in question arose from contributions made to the Society between 1948 and June 30, 1982. The respondent hockey clubs and the Society took the position that the experience rate credits belonged to the clubs

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and they had acted accordingly. Some of the funds were refunded directly to certain of the clubs in 1982. Some of the funds were used by the clubs to fund a collective bargaining commitment in the mid 1980s. The remainder of the funds was used to off-set the clubs' required contributions for current service under the Plan.

The applicants submitted that the Plan was a defined contribution plan with the result that contributions could only be applied for the exclusive benefit of the participants. They submitted that all contributions were made on the basis of an irrevocable trust for the exclusive benefit of the participants and that withdrawal by or for the clubs of surplus or use of surplus by the Society to make contributions for the benefit of the clubs was in breach of the Society's fiduciary duty to the participants.

The Society was established in 1948 as a non-profit corporation under the Canada Corporations Act, R.S.C. 1970, c. C-32. Players were told when the Plan was created that the Plan was designed to provide "the maximum possible benefits and protection from the resources available". The regulations of the original Plan required compulsory contributions to the Plan by each participant as well as by the clubs. The regulations specifically defined the players' contributions. There was no equivalent definition for the clubs. The regulations provided that pension benefits were to be secured through the purchase of contracts providing for such benefits, to be held in trust by the Society and assigned to the participant at his normal pension age. The rights of the participants were expressly limited to the assets of the Society; claims against the clubs were precluded.

By 1954, it was clear that there would be funds in excess of those required for the past service benefits and the pension benefits as then defined, and a special by-law was passed by the Society declaring that there would be a distribution of those funds for the purchase of additional pension benefits. The preamble noted that "all monies paid into the Society must be used for the benefit of the participants and cannot be refunded".

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In 1966, on the advice of the National Hockey League's (NHL) U.S. tax attorney, the Plan was reorganized and its constating documents were redrafted to qualify as a "foreign situs trust" under IRS regulations. A formal trust agreement was entered into among the NHL, the six original clubs and the Society. Article 4.01 of the new Plan provided that the Plan could be amended from time to time provided "that no amendment shall deprive any Participant ... of any vested benefits to which he is entitled under the Club Pension Plan" and "that no amendment shall provide for the use of funds or assets held under the Club Pension Plan other than for the benefit of Participants ... and no funds contributed or assets of the Club Penion Plan shall ever revert to or be used or enjoyed by the League or Member Clubs until after satisfaction of all liabilities under the Club Pension Plan to Participants".

In 1969, it was agreed between the National Hockey League Players' Association (NHLPA) (which represented active players in the NHL and which was "recognized" by the owners informally and not pursuant to any labour relations statute) and the clubs that the Plan would become "non-contributory" for players and that players would cease participating on the board of directors of the Society. CC, the president of the NHL, wrote the players a letter in which he stated that an effect of the agreement between the NHL and the NHLPA was that "there will be no surplus funds available to provide dividends in the form of additional pension benefits".

The respondents contended that the Plan was a defined benefits plan, that the Society had always had a discretion in allocating surplus funds, and that, in light of the 1969 "deal" with the NHLPA, the discretion exercised by the Society in allocating to the clubs surplus funds relating to experience tax credits was appropriate.

Held, the application should be allowed.

Both the language of the regulations and the cumulative effect of all the intrinsic evidence clearly established an exclusive and irrevocable entitlement in the players to all

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excess funds in the original Plan regardless of source. The regulations also indicated a clear intent to create a trust with the Society as trustee and the group annuity contract a central asset of the trust arrangement. The Society was therefore required to act in the best interests of the beneficiaries of the pension fund.

The Society was not afforded a sufficiently broad amendment power in its regulations and by-laws to revoke the exclusive interests of the players in the experience rate credit feature of the group annuity contract. A settlor cannot revoke his trust unless he has expressly reserved the power to do so.

The original Plan was a hybrid arrangement containing both defined benefit and defined contribution characteristics. The contributions of the players were specifically set out and the economic support of the employers was specifically agreed to in separate contribution or funding agreements between the clubs, the NHL and the Society. All monies were given irrevocably and all were dedicated to the exclusive benefit of the players. All surplus funds in the Society explicitly enured to the exclusive benefit of the participant players.

There was no intent, in instituting the new Plan in 1966, to change the structural characteristics of the Plan or its administration. The reversionary language of art. 4.01 was no more than cautionary language in the event the Society was unable to allocate all the surplus to the participants. The language was insufficiently express to support the retroactive revocation of employee entitlement.

With respect to the 1969 "deal", the NHLPA could speak only for active players, given the limits on its recognition. Moreover, its agency was, without statutory support, precarious for any player who did not support it. It clearly had no mandate for or from inactive players who had contributed to the Society since its inception. The NHLPA had no authority to negotiate and the Society could not permit the retroactive diversion of the non-active players' beneficial and earned interest in all previous contributions and related funds, particularly without a commensurate corresponding benefit for

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those persons. Their exclusive beneficial interest was protected by the Society's fiduciary duty as trustee and by contractual rights arising between the participants, the Society, the NHL and the clubs. From all the evidence, it appeared that the understanding behind the deal was that the then active players would forego excess funds arising from future premium discounts in return for the clubs taking on all contributions. Accordingly, the 1969 deal did not justify the impugned actions of the Society.

For these reasons, an amendment of the Plan and trust agreement made by the Society in 1983 was ineffective in authorizing the Society to allocate to the clubs surplus funds relating to experience rate credits based on contributions made before June 30, 1982.

C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro (1989), 68 O.R. (2d) 620, 58 D.L.R. (4th) 552, 33 O.A.C. 63 (C.A.); Reevie v. Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, 25 D.L.R. (4th) 312, 11 C.C.E.L. 44, 13 O.A.C. 233 (C.A.), leave to appeal to S.C.C. refused (1986), 56 O.R. (2d) 192 n, 30 D.L.R. (4th) 767n, 72 N.R. 78n, apld

Other cases referred to

Amoco Canada Petroleum Co. v. Alberta (Superintendent of Pensions), Alta. Q.B., Cawsey J., July 16, 1992; Arrowhead Metals Ltd. v. Royal Trust Co., Pension Commission of Ontario, March 26, 1992; Askin v. Ontario Hospital Assn. (1991), 2 O.R. (3d) 641, 34 C.C.E.L. 11, 46 O.A.C. 278 (C.A.); Bidwell v. Garvey, 943 F. 2d 498 (1991), affg 743 F. Supp. 393 (D.M.D., 1990); Boe v. Alexander (1987), 41 D.L.R. (4th) 520, 15 B.C.L.R. (2d) 106, 28 E.T.R. 228 (C.A.) [leave to appeal to S.C.C. refused (1988), 22 B.C.L.R. (2d) xxx, 28 E.T.R. xxxvi]; Bonanza Creek Gold Mining Co. v. R., [1916] 1 A.C. 566, 26 D.L.R. 273, 25 Que. K.B. 170, 10 W.W.R. 391 (P.C.); C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd. (1990), 39 E.T.R. 1 (Ont. C.A.), affg (1989), 66 O.R. (2d) 535, 30 E.T.R. 202, 24 C.C.E.L. 188 (H.C.J.); Campbell-Renton v. Cayley, [1960] O.R. 550, 25 D.L.R. (2d) 512 sub nom. Re Campbell-

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Renton (H.C.J.); Canada Permanent Trust v. King Seagrave Ltd. (1986), 13 O.A.C. 305 (C.A.); Canadian Airo Service Ltd. v. O'Malley, [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206; Canadian Bank of Commerce v. Cudworth Rural Telephone Co., [1923] S.C.R. 618, [1923] 4 D.L.R. 16, [1923] 3 W.W.R. 458; Chicago Pneumatic Tool Co. Canada v. Montreal Trust Co. of Canada (1992), 41 C.C.E.L. 299 (Ont. Gen. Div.); Collins v. Ontario (Pension Commission) (1986), 56 O.R. (2d) 274, 31 D.L.R. (4th) 86, 33 B.L.R. 265, 21 Admin. L.R. 186, 16 O.A.C. 24 (Div. Ct.); Courage Group's Pension Schemes (Re), [1987] 1 All E.R. 528 (Ch. D.); Cowan v. Scargill, [1985] Ch. 270, [1984] 2 All E.R. 750, [1984] 2 W.L.R. 501; Crownx Inc. v. Edwards (1991), 7 O.R. (3d) 27, 45 E.T.R. 57 (Gen. Div.); Delgrosso v. Spang & Co., 769 F. 2d 928 (3rd Cir. 1985); Frame v. Smith, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 23 O.A.C. 84, 78 N.R. 40; Greenberg v. Meffert (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548, 7 C.C.E.L. 152, 37 R.P.R. 74, 9 O.A.C. 69 (C.A.) [leave to appeal to S.C.C. refused (1985), 14 O.A.C. 240 n, 64 N.R. 156n]; Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, 46 B.C.L.R. (2d) 382, 38 E.T.R. 275, 34 C.C.E.L. 304 (C.A.); Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 36 O.A.C. 57, 101 N.R. 239, 69 O.R. (2d) 287n; Little v. Kent-McLain of Canada Ltd., Ont. H.C.J., February 25, 1972, affd Ont. C.A., January 25, 1973; Maurer v. McMaster University (1991), 4 O.R. (3d) 139, 82 D.L.R. (4th) 6 (Gen. Div.); McCreight v. 146919 Canada Ltd. (1991), 35 C.C.E.L. 282, 40 E.T.R. 184 (Ont. Gen. Div.); Nashua Photo Ltd. v. Marshman (1992), 89 D.L.R. (4th) 592, 40 C.C.E.L. 311 (Ont. Gen. Div.); Nu-Kote Canada Inc. v. Royal Trust Corp. of Canada (1991), 4 O.R. (3d) 336 (Gen. Div.); Ontario Bank Pension Fund (Re) (1914), 30 O.L.R. 350, 19 D.L.R. 512 (C.A.); Otis Canada Inc. v. Ontario (Superintendent of Pensions) (1991), 2 O.R. (3d) 737, 40 E.T.R. 233, 34 C.C.E.L. 341 (Gen. Div.); Sinai Hospital of Baltimore Inc. v. National Benefit Fund for Hospital & Health Care Employees, 697 F. 2d 562 (1982); Sloan v. Union Oil Co. of Canada (1955), 16 W.W.R. 225, [1955] 4 D.L.R. 664 (B.C.S.C.); Sulpetro Ltd. Retirement Plan Fund (Trustee of) v. Sulpetro Ltd. (Receiver-Manager) (1990), 66 D.L.R. (4th)

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271, 73 Alta. L.R. (2d) 44, [1990] 4 W.W.R. 173, 36 E.T.R. 199 (C.A.); U.E.B. Industries Ltd. Pension Fund (Re); U.E.B. Industries Ltd. v. Brabant, [1992] 1 N.Z.L.R. 292 (C.A.); Ventra Group v. Ontario (Pension Commission) (1990), 35 C.C.E.L. 64 (Gen. Div.); Windsor Medical Services Inc. (Re) , [1971] 2 O.R. 141, 17 D.L.R. (3d) 233 (H.C.J.)

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Canada Corporations Act, R.S.C. 1970, c. C-32, Part II, s. 154
Courts of Justice Act, R.S.O. 1990, c. C.43
Labour Relations Act, R.S.O. 1990, c. L.2
Pension Benefits Act, R.S.O. 1980, c. 373 (repealed by s. 117 of and replaced by the Pension Benefits Act, 1987, S.O. 1987, c. 35 -- now R.S.O. 1990, c. P.8)
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Waters, D.W.M., "The Use of Surpluses in Pension Plans Operating in Ontario", Report of the Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 133-56

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APPLICATION for a declaration of ownership of pension surplus.

Mark Zigler and Ronald B. Davis, for applicants

Earl A. Cherniak, Q.C., and Kirk F. Stevens, for all respondents other than Manufacturers' Life Insurance Co.

Michael J. Penman and D.D. Shand, for respondent, Manufacturers' Life Insurance Co.

ADAMS J.:--This is a pension "surplus" case. The issue concerns the entitlement to funds of more than twenty five million dollars. One party submits that the pension plan in question is a "defined contribution" plan, the other party asserts it to be a "defined benefit" plan. One urges that the law of trusts should dominate, the other emphasizes the law of contract. Each point to different language in the constating documents. Both parties emphasize particular practices, events and representations over almost forty years to further support their submissions on entitlement.

The applicants are seven former professional hockey players previously employed by various of the respondent hockey clubs ("the clubs"). They bring this application on their own behalf and on behalf of all player participants in the National

Hockey League Club Pension Plan and Trust ("the Plan") with service under the Plan on or before June 30, 1982 and on behalf of their beneficiaries. The respondent, National Hockey League Pension Society ("the Pension Society" or "Society"), is a non-profit corporation without share capital incorporated under Part II of the Canada Corporations Act, R.S.C. 1970, c. C-32, by letters patent issued in 1948. It has always administered the provisions of the Plan. The respondent, Manufacturers' Life Insurance Company ("Manulife"), is the holder of a group annuity contract with the Pension Society. This application claims ownership of certain funds arising pursuant to a participating feature of the group annuity contract whereby various "dividends" or "experience rate credits" were paid by Manulife to the Pension Society. The clubs and the Society take the position that these "experience rate credits" belong to the clubs and they have acted accordingly. Some of the funds were refunded directly to certain of the clubs in 1982. Another portion of the funds was used by the clubs and league to fund a collective bargaining commitment in the mid-1980s. The remainder of the funds have been used to off-set the clubs' required contributions for current service under the Plan. The applicant players claim ownership to the funds and contest these actions. They submit the Society was obligated to allocate the monies to the applicants and those they represent in the form of enhanced pension benefits. The disputed funds include $2,900,000 (Cdn.) arising in 1982, $23,700,000 (Cdn.) arising in July 1985, and $1,146,000 (U.S.) arising in December 1985 together with accrued interest.

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PART I

The following is distilled from the voluminous record placed before the court.

1. THE ORIGINAL PLAN

The original Plan was constituted by the Society's charter, by-laws and regulations enacted by the corporation's directors. The Society's letters patent were issued on May 12, 1948. The original "members" were Clarence S. Campbell, then president of the N.H.L., together with John Reed Kilpatrick and Conn Smythe,

owners of certain of the N.H.L. clubs at the time. The Society's objects were described as being of a "philanthropic, charitable, provident and benevolent character" to undertake the purchase of "pension and/or annuity contracts, to provide for the payment of pensions and/or annuities to players, coaches, trainers, and referees employed by the National Hockey League or any of its member clubs". The letters patent explicitly provided:

> And it is further ordained and declared that the business of the said Corporation shall be carried on without the purposes of gain for its members and that any profits or other accretions to the corporation shall be used in promoting its objects.

(Emphasis added)

When the Society's by-laws came into force pursuant to a resolution dated May 20, 1948, it was provided that the members would be the president and the several governors from time to time of the N.H.L. By-law No. 3 provided that the members could elect any participant in the Plan or anyone elese to be an associate member. Pursuant to a May 20, 1948 resolution, six players, one from each of the then six N.H.L. teams, were elected associate members. The members and associate members elected annually a board of directors of five persons, two of whom were to be participants in the Plan. Player representation in the Society continued until January 1970 when mandatory direct monetary contributions by players ceased and member clubs assumed the full responsibility for directly funding the pension plan.

By-law No. 1(i) defined "Participant" as

> players, coaches, trainers and referees who are present, former or future employees of the League or any of its Member Clubs who by the Regulations are qualified to receive benefits from or through the Society.

(Emphasis added)

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By-law No. 7 gave the directors their powers including management of the business and affairs of the Society and entering into contracts for the purchase of pensions, annuities and insurance. Paragraph 2(c) of By-law No. 7 provided:

> (c) The Board of Directors shall have the exclusive powers of making, amending and repealing the "Regulations" prescribing the terms and conditions governing the eligibility for the award and payment of pensions by or through the Society, the amounts of the pensions and of pension rights of participants and other beneficiaries, and all other matters relating to pensions, annuities, allowances, insurance, gratuities or other benefits whatsoever, including, without restricting the generality of the foregoing, payments out of the National Hockey Players' Emergency Fund.

(Emphasis added)

Paragraph 8 stated:

> Amendment of By-laws:
>
> The Board may from time to time repeal, amend, or add to these By-laws, but any such change shall only take effect when confirmed by an Annual or Special Meeting of the Society, provided that such repeal, amendment or enactment shall not be enforced or acted upon until the approval thereof by the Secretary of State of Canada has been obtained.

(Emphasis added)

The Plan was first embodied in a document called the "Regulations" adopted by the Society's board of directors pursuant to their power under By-law 7(2)(c) and effective October 1, 1947. Copies of the regulations were distributed to all N.H.L. players in March 1949 in the form of a booklet containing a covering letter dated March 1, 1949 signed by Clarence Campbell and Syl Apps, a player representative. The letter indicates that the Plan was not a unilateral employer initiative; that it was designed to encourage participation in

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the game of hockey as a career; and that maximum benefits and protection were intended for the players from the resources available. It reads:

March 1, 1949.

TO THE PLAYERS OF THE NATIONAL
HOCKEY LEAGUE

It is with great pride and satisfaction that we are able at this time to announce the formal inauguration of the N.H.L. Players' Pension and Insurance Plan and to express the hope and confident expectation that it will be a great boon to the players of the League for many years to come. It will likewise serve to increase the attractiveness of our game as a career and enhance its prestige with the ever-increasing numbers of players and fans throughout the world .

It is just two years ago since your representatives first presented an outline of their ideas about the establishment of a plan of contributory pensions, and since that time many conferences and meetings have been held and much study and negotiation has been necessary to bring the plan into being. There have been many problems to solve -- financial, legal, technical, and actuarial -- which were peculiar to our particular kind of business. These were complicated further by the international aspect of the League and the resulting taxation problems. Throughout these two years you have demonstrated your confidence in the establishment of a satisfactory plan by your regular contributions to it, and your confidence has been shared by the League and its Member Clubs, which have likewise co-operated by making available immediately the sources of revenue pledged by them in support of a suitable plan .

The benefits accruing to the players are described in detail in this booklet, and it is the confident opinion of the Officers and Directors of the Society that the Plan is so calculated and designed to provide for the participants the maximum possible benefits and protection from the resources available .

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> To your representatives and to all those whose efforts and advice have contributed so much to the formulation and establishment of this Plan may we express your and our warm appreciation.
>
> Sincerely,
>
> C. Campbell -- President
>
> S. Apps -- Vice-President

(Emphasis added)

The regulations originally required compulsory contributions to the Plan of $900 per hockey season by each participant. Support was also forthcoming from the clubs but based on revenues from an annual "All Star Game" and $0.25 collected from each playoff game ticket, pursuant to a memorandum of agreement between the Pension Society and the clubs dated June 1, 1949.

(i) Society regulations

There was a layperson's guide to the formal regulations which tracked the provisions and had the following paragraph in its "Foreword":

> The Plan is a contributory, self-administered plan operated by a non-profit company incorporated especially for the purpose under part II of the Dominion Companies Act (Canada) under the name "National Hockey League Pension Society". The affairs of the Society are administered by a Board of five Directors, not less than two of whom must always be "participants" in the Plan (i.e. players who are active players and who were players and are entitled to benefits under the Plan).

Regulation 7 provided age 45 as the normal pension age but Regulation 16 permitted deferral to age 65. Regulation 8 defined the pension fund in the following terms:

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(a) All contributions made by Participants;

(b) All contributions required to be made by any Member Club of the League in respect of the services performed by the Participants during each season, including amounts paid in respect of Past Service;

(c) All other monies as may be, from time to time, paid to the Society by the League or Member Club and set aside under these Regulations for the purpose of the Pension Fund.

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Regulation 9 under the heading "Compulsory Contributions By Participants" stipulated each participant was to contribute $900 for each current season. The regulation also provided:

All contributions are irrevocable and the same may be used and dealt with only for the purposes of and in accordance with the Provisions of the Plan.

Contributions by clubs were acknowledged by Regulation 8 but were specifically defined by a separate memorandum of agreement between the N.H.L. and the Pension Society. Regulation 1 provided the regulations were subject "to all the terms, provisions and agreements of the National Hockey League Pension Society". Regulation 11 calculated pensions for current seasons in the amount of $90 monthly for each current season.

Regulation 12 also provided for the calculation of a pension based on seasons or service and arising out of a fund to be accumulated by the Society for this purpose with the "hope" that each year of "past service" would have a capital value of $400 on October 1, 1957. The explanatory booklet explained this past service benefit in terms of the financial commitment of the clubs in the partnering memorandum of agreement with the Society and stated:

From these revenues [those coming from the Clubs], it is expected that there will be an annual surplus available after making full provision for the Current Service Pensions and

> the Group Life Insurance Contract. These annual surpluses will be accumulated in a Past Service Fund and these funds will be invested until Oct. 1, 1957, at which time the Fund will be divided.

(Emphasis added)

Regulation 18 provided that pension benefits were to be secured through the purchase of contracts providing for such benefits "payable to the Participant for whose account the contract [was] purchased". Regulation 18 also made explicit reference in this regard to the Society as a trustee and provided:

> Such contract shall be held by the Society in trust and assigned to the Participant at his Normal Pension Age or at such other age as the Participant may elect to take pension benefits within the Provisions of these Regulations.

(Emphasis added)

Regulation 23 contemplated certificates of participation to be issued to players but expressly made the certificate "subject to these Regulations as well as to the terms and conditions of any Contract entered into between the Society and an Insurance Company or Annuities Branch, Department of Labour, Dominion of Canada, for the benefit of the Participant". Regulation 23 went on to provide:

> When a Participant's pension commences or he attains Normal Pension Age, whichever event is first to occur, he shall be entitled to receive from the Society the contract the Society has purchased from an Insurance Company or Annuities Branch, Department of Labour, Dominion of Canada, securing the benefits to which he is or may become entitled. Such contract shall define his rights thereunder. Under the heading "Limitation of Claims", one sees in Regulation 25 the unique intermediate role of the Society between the employees and the employers by limiting claims to the assets of the Society. Regulation 25 provided:

> 25. The rights of Participants and other persons entitled to receive any payment or benefit under the Plan shall be

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limited to the assets of the Society as existing from time to time . The Plan shall not create privity between a Member Club and a Participant or any other person entitled to receive any payment or benefit under the Plan and no right or claim of a Participant or such other person shall be asserted or made against a Member Club by reason of this Plan or any Provision or By-law of the Society and these Regulations . No right or claims shall be asserted or made by any Participant or such other person against the Society except in respect of any benefit conferred by the Plan which has become due and payable in accordance with the Provisions of these Regulations.

(Emphasis added)

Under the heading "Actuarial Review" Regulation 27 provided:

27. At intervals of not more than five (5) calendar years, the Society shall cause an inquiry to be made as to the state of the Pension Fund and the liabilities existing under the Plan by the Actuary. The Actuary shall inquire into all necessary matters and report his findings to the Society, including any recommendations he shall see fit to make. The Society shall submit such report together with any recommendation to the League.

Under the heading "Contingency Fund" Regulation 29 provides:

29. Any surplus that may arise from the operation of the Plan which is not required to meet the Actuarial liability existing under the Plan shall be transferred to a Contingency Fund until a reasonable reserve for contingencies has been provided. If in the opinion of the Society the amount of credit of the Contingency Fund at any time exceeds the amount considered sufficient for a reasonable reserve then the Society may permit the excess to be applied in reduction of further contributions to the Plan .

(Emphasis added)

And under the heading "Change or Discontinuance of Plan",

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Regulation 32 provided:

> 32. While it is the intention and hope of the League, Member Club and Society to maintain the Plan for the benefit of such present and future Players as may become Participants, nevertheless the right is reserved to change, modify or discontinue the Plan at any time by a declaration in writing to that effect, duly executed by the Society and lodged with the Member Clubs and the Plan shall thereupon be changed, modified or discontinued as the date established for that purpose by such declaration . Change or modification in the Plan shall not in itself have the effect of diverting from any Participant any benefits arising from contributions previously made by such Participant or from any contributions made by the League, Member Clubs or Society for the benefit of such Participant, but all monies will be held by the Society for the benefit of the Participant exclusively under the Regulations of this Plan.

Any change or modification of the Plan that affects any contract with an Insurance Company or Annuities Branch, Department of Labour, Dominion of Canada, shall be subject to the concurrence of such Insurance Company or Annuities Branch, Department of Labour, Dominion of Canada.

(Emphasis added)

(ii) The Society and Club memorandum of agreement of June 1, 1949

A memorandum of agreement dated June 1, 1949 between the Society, the N.H.L. and the clubs noted the involvement of the players in establishing the Society and committed the clubs to "paying to the Society the proceeds from the sources of revenue hereinafter described". Paragraphs 2, 3, 4 and 5 provided:

> 2. The League and the Member Clubs agree to provide financial assistance for the establishment and maintenance of the Plan by appropriating for and paying to the Society the proceeds from the sources of revenue hereinafter described.

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3. The League and the Member Clubs agree that they will, during the currency of this agreement, conduct annually in one of their arenas an exhibition hockey game to be known as the "All Star Game" the gross proceeds of which (after the deduction of amusement or other admission taxes if any) shall be divided as follows -- two thirds to the Society and one third for building rental .

The League and the Member Clubs agree to provide the players, officials, equipment, and promotional facilities necessary for the conduct of this game at their own expense and without charge to the Society.

4. The League and the Member Clubs agree that they will pay to the Society each year in the manner herein set out, the sum of not less than twenty-five (25) cents (less amusement or other admission taxes if any) for each admission ticket to all "Stanley Cup Play-Off Games" played in that year.

5. The League and the Member Clubs agree that the "All-Star Game" and the "Stanley Club Play-Off Games" shall, for the purposes of this Agreement, be treated as joint ventures on behalf of all of them and that the sums herein agreed to be paid to the Society shall be accumulated in the League treasury and shall be paid to the Member Clubs in the amounts determined by the Society's Actuary on the basis of the total sums required (over and above the participants' own contributions) to maintain the pensions established by the Plan for the participants employed in that year by the respective Member Clubs .

And the Member Clubs further agree that they will promptly pay in the Society the sums so received by them under this paragraph.

And it is further agreed that any surplus over the amounts paid to the Member Clubs under this Agreement shall be paid by the League to the Society for the furtherance of the objects of the Society.

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(Emphasis added)

(iii) The Manulife Group Annuity Contract (GA550)

Until 1951, the Society invested the contributions and purchased individual annuities from the Canadian Government's Department of Labour's Annuities Branch. The timely purchase of these contracts for each participant was contemplated by the regulations. At the Society's meeting of June 6, 1951, those in attendance discussed "the early conversion of the Society's liability to the players into the actual annuity to which he is entitled so as to relieve the Society of the liability and also to reduce the amount of funds for which it has a responsibility to keep invested to good advantage". However, as of April 30, 1952, the Society entered into a "participating" group annuity contract with Manufacturers Life Assurance Company ("Manulife") known as Group Annuity Contract No. GA550.

The purchase of the group annuity contract was more administratively convenient to the Society than the purchase of individual annuities. But no change was made to the Regulations to distinguish between the purchase of individual annuity contracts and the purchase of this ongoing group annuity contract. The players were members entitled to coverage under this group contract and provision 17 of GA550 required the Society "to advise the members of the terms and conditions applicable to the member and his rights and duties". While individual annuities were no longer purchased for the participants, the Society retained its previous purchases and investments. The group annuity agreement stipulated both benefits and a sliding scale for premiums according to the age of the player. Provision 5, an important provision, provided that, at the beginning of each contract year, Manulife was to determine what, if any, "discount" was to be allowed on the basic premium rates set out at tables A and B. It read, in part:

> 5. PREMIUM CALCULATIONS Tables A and B on Pages 5A and 5B hereof are the basic premium rate Tables for this contract. At the beginning of each contract year the Company shall determine a discount (if any) to be allowed on the basic

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premium rate and all purchases of annuities during such contract year be at such reduced rates.

Central to this matter, provision 20 dealt with "experience rate credits." It provided:

20. CONTRACT EXPERIENCE RATED Experience rate credits will be declared when the "experience fund" exceeds the reserves held. The experience fund is the accumulation at the Company's actual earned interest rate, including capital gains, of payments received less benefits paid and expenses incurred. Experience rate credits, when declared, will be applied against the next premium falling due under the contract.

GA550 was experience rated "one-way" in favour of the Society. Manulife was obliged to provide the benefit specified by each annuity purchased for the account of each particular player notwithstanding the overall investment experience of funds placed with Manulife. Until October 1, 1957, the Regulations provided that all pension benefits should be paid in the currency of the country in which the contributions were made. Accordingly, Manulife kept track of two funds -- the Canadian dollar fund (Group 01) and the U.S. dollar fund (Group 02). This latter fund in U.S. dollars is the source of $1,146,000 (U.S.) in issue in this matter.

(iv) Significant agreements between the clubs and the Society

For the first 10 years of the Plan's existence, the players contributed $900 per year and the clubs effectively contributed $650 per year per player through the sources of revenue. The stipulated benefit was $90 per year of service. On September 1, 1958, pursuant to a replacement funding agreement between the Society and the clubs, the clubs agreed to match the player contribution of $900 but contributions would now be the sole source of revenue to the Society to provide pension benefits, group life insurance and all administrative expenses. The agreement implemented negotiations "between the Owners-Governors and the Representatives of the Players". Paragraphs 2, 3, 4 and 5 provided:

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2. CONTRIBUTIONS BY LEAGUE AND MEMBER CLUBS

The League and the Member Clubs agree that the League will, during the currency of this Agreement, pay to the Society an amount equal to the sum total of the contributions made by all of the Player Participants in respect to the Current Service awarded to them pursuant to the Regulations. Such matching contributions shall be made in Canadian Funds.

3. CALCULATION OF CONTRIBUTIONS

The amount of the contributions to be made by all Player Participants and by the League and its Member Clubs shall be determined by the Actuaries of the Society on the basis of the awards of Current Service approved by the Board of Directors of the Society for each playing season.

4. CONTRIBUTIONS AUTHORIZED BY PLAYERS CONTRACT

The League and the Member Clubs agree that the Standard Player's Contract, entered into by the Member Clubs with their players, shall contain a provision for the automatic deduction from the salary, reserved to the player, the sum of Nine Hundred Dollar ($900.00) Canadian Funds, for each full season, (and a ratable proportion of any lesser period) in payment of the player's contribution to the Society under the Plan.

And the Member Clubs agree that they will make the deductions at regular intervals during the playing season and pay the amounts so deducted to the Society for the credit of the Player from whom the deduction was made.

5. REFUND OF CONTRIBUTIONS

It is further mutually agreed that when for any reason a Player is entitled to a refund of his contributions and such refund is made to him with or without interest there shall be credited to the League and the Member Clubs an amount equal to such refund and interest which credit shall be applied in

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the payment of contributions due or accruing due from the League and the Member Clubs.

Between 1957 to 1964, the stipulated benefit rose to $180 per year of service. As of October 1, 1964 this amount was raised to $300 per year for each season played with players being required, pursuant to the Regulations, to contribute $1,500 and the clubs, pursuant to a further replacement memorandum of agreement with the Society of October 15, 1964, being required to match that contribution. The wording of the latter document was similar to its predecessor agreement.

(v) Surplus distribution to 1967

By the early 1950s it became evident the Society would have sufficient funds in its surplus account to provide both past service benefits for participants who had service prior to the inception of the Plan and for additional pensions to participants who played in the N.H.L. during the first 10 years of the Plan's existence. These additional funds were generated mainly from premium discounts contemplated by provision 5 of the GA550 and non-vested contribution forfeitures. A "Special Society By-law" was passed in 1954 regarding the disposition of this "potential surplus". The by-law stated:

SPECIAL BY-LAW
RE: DISPOSITION OF POTENTIAL SURPLUS

Whereas by the Regulations of the Society all monies paid into the Society must be used for the benefit of the participants and cannot be refunded;

And whereas the current service benefits payable to the participants under the Regulations are fixed as a specific percentage of the participants' own contributions;

And whereas by the Regulations certain benefits were established in respect to "past service" if funds are available for the purpose on October 1, 1957;

And whereas the Society has already in its treasury funds

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substantially in excess of the amount required to discharge all its liability in respect to the "past service" of all participants, and it seems probable that a substantial additional surplus will be accumulated by October 1, 1957, when the Plan wil have been in operation for ten years;

And whereas it appears desirable to establish the basis upon which such additional surplus shall be distributed to the participants;

Therefore, it is resolved:--

1. That as soon as practical after October 1, 1957 the Directors of the Society shall take steps to determine the amount of any surplus available for distribution to the participants after making due provision for

(a) All current service benefits earned by all participants to that date;

(b) All liability for past service benefits for participants established by the Regulations;

(c) All other liabilities of the Society;

(d) A Reserve Fund of Sixty Five Thousand Dollars ($65,000) to support the continued operations of the Society.

2. The Directors shall also take steps to determine the total amount of current service earned by all continuing participants during the first ten years of operation of the Plan. The service of players who have ceased to be participants by reason of death, voluntary withdrawal or other termination of their status as participants shall not be included in this calculation.

3. The total amount of surplus available as established in paragraph 1 hereof shall then be divided by the total number of years of earned current service as established in paragraph 2, and the resulting figure shall be the amount of surplus which shall be made available for the

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purchase of additional pension benefits for each continuing participant in respect of each year of current service with which he has been credited.

4. The sums credited to any participant under paragraph 3 shall be limited to the proportion of entitlement as provided in the Regulations for partial vesting in case where the ultimate total earned service of the participant is less than five years. The amount of any abatements under this paragraph shall form part of the revenue of the Society.

5. The Reserve Fund established in paragraph 1(d) namely, Sixty Five Thousand Dollars ($65,000) shall be included in the calculation of the surplus available for distribution to participants under paragraph 1 but shall not be distributed until such time after October 1, 1957 as the Society shall have accumulated a further net surplus of like amount and the said Reserve Fund shall constitute a charge in favour of the participants designated under paragraph 2 hereof on any net surplus earned by the Society after October 1, 1957. Such net surplus shall be made available for the purchase of additional pension benefits for participants and in the proportions as determined under paragraph 2 hereof.

A certificate, or other evidence of the right to these additional benefits, shall be issued to the participants entitled thereto as soon as practical after October 1, 1957, and no disposition of any surplus earned by the Society after that date shall be made or undertaken until such certificates have been settled in full by the purchase of the additional pension benefits represented by them

The minutes of the Society's meeting of directors of October 1, 1954 at which the by-law was approved went on to state:

It was further agreed that to minimize the risk of subsequent amendment of rescinding of this By-Law with the object of depriving the participants of the "first ten years" of the benefits intended for them under the By-Law that the Annual

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> Meeting should be asked to pass a resolution declaring in general terms the intent and purpose of the By-Law and declaring that no action should be taken hereafter in defeasance of it.

At the conclusion of the first ten years of operation of the Society and pursuant to the Special By-law, a surplus distribution was made to all players who played during the period based on their years of service. The net dividend paid after October 1, 1957 was $310,243 representing $315 for each year of service awarded to all continuing participants during the first ten years of the Plan.

The Eleventh Annual Report of the Society dated 1958 contained a reference to a legal opinion on surplus ownership. While the legal opinion cannot be found, the excerpt from the Annual Report reads:

> The Board of Directors secured a legal opinion as to who owned the balance of that surplus and what could be done to dispose of it. The opinion received was that this surplus belonged to all of the "Participants" and that the money could only be disbursed to provide additional pension benefits for the "Participants" on an equitable basis.

Subsequent to the first ten years of the Society's existence, a review of the Plan was conducted by an independent insurance company and distributed to the participants. One feature of the Plan noted was the dedication of all contributions to the exclusive benefit of participants. In this respect, the review read:

> After vesting, no circumstances or contingency can deprive the Participants or his dependents of the value of the League's contributions on his behalf.

In 1958 the regulations were amended to provide for three-year "all or none" vesting and that all monetary provisions be in Canadian dollars. For each of the two subsequent five-year periods after 1957 (in 1962 and 1967) the Society again passed special by-laws allocating the accumulated surplus funds

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to participants. In October 1962 it was determined there was a surplus of $257,879 which resulted in a "dividend" of $560 per year of current service for players with service between October 1, 1957 and April 30, 1962. While in essentially the same form as its predecessor, the 1962 Special By-law added the following paragraph to its preamble:

> And whereas the players are the only participants entitled to share in the said surplus.

In 1967, a Special By-law in the same form dealt with the period 1962 to 1966 or four years instead of five because the new Club Pension Plan and Trust Agreement ("the new Plan") became effective for the 1966-67 season. As a result, a "dividend" of $857.93 per player per year of service with respect to the period 1962-66 was allocated by further pension benefits under the original Plan. An additional benefit per player per year of service of $591.73 was allocated with reference to surplus earned in the period October 1, 1966 to April 30, 1967 and pursuant to art. 3.12 of the Club Pension Plan and Trust, a provision which codified the surplus allocation procedures of the special by-laws enacted pursuant to the original Plan.

2. THE NATIONAL HOCKEY LEAGUE CLUB PENSION PLAN AND TRUST

At its January 25, 1966 meeting, the directors of the Society, on advice of the N.H.L.'s United States tax counsel, determined it was necessary to formally establish the Plan as a "foreign situs trust" in order to comply with U.S. tax laws. According to the Society's Directors Minutes, this necessitated amending the letters patent of the Society to permit it to enter into a trust agreement with the clubs:

> . . . which would contain substantially the same provisions as the Society's current regulations and that this trust agreement would be administered by the Society in substantially the same manner as it has administered the plan heretobefore.

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(Emphasis added)

Mr. James Ford, the Society's auditor, was mandated by the Society to instruct Mr. Marcus Grayck, the U.S. tax attorney who gave the opinion, to draft the trust agreement. As the above minutes indicated, it was not the object of this exercise to change the underlying assumptions which had informed the regulations and the Society's treatment of pensions up to that point in time. Grayck simply recommended the Plan be reorganized and its constating documents redrafted to qualify as a "foreign situs trust" under IRS regulations. Accordingly, a formal trust agreement was entered into in February 20, 1967 among the N.H.L., the six original clubs and the Pension Society and, thereafter, the Plan was known as "the National Hockey League Club Pension Plan and Trust". It was retroactively effective to October 1, 1966.

Article 3.01 of the new Plan required each participant to contribute $1,500 per playing season to the Society. Article 3.05 required the clubs to do the same. In turn, the Society continued to be obligated to buy every April 30 a contract pursuant to art. 3.07-3.11 for each participant who had played at least three seasons which would provide a pension benefit of $300 per year at age 45 for each season played.

Article 3.12 required the Society, as trustee, to allocate surplus funds to the players at five-year intervals as done in the past. It provided:

> 3.12 As of April 30, 1967, the Trustee shall allocate surplus funds, if any, among the accounts of participating Players, Protected Players or Accommodation Service Players who had been Participants at any time since the effective date of the Club Pension Plan. Thereafter, at five year intervals, the Trustee shall allocate surplus funds, if any, among the accounts of participating Players, Protected Players and Accommodation Service Players who had been Participants at any time since the immediately prior allocation of surplus funds . The surplus funds shall be allocated so that an equal amount of such funds will be credited for each Current Season of Current Games completed by a participating Player,

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participating Protected Player or participating Accommodation Service Player. The Trustee shall purchase for each participating Player, participating Protected Player or participating Accommodation Service Player, for whom a contract is to be purchased pursuant to S 3.07 and S 3.08, a contract providing such additional pension benefits, commencing at Normal Pension Age, as is purchasable with the surplus funds allocated to the account for such Player, Protected Player or Accommodation Service Player.

(Emphasis added)

Article 1.11 defined a participant in these terms:

-- a Player, Protected Player, Accommodation Service Player -- who is entitled to receive benefits under the Club Pension Plan.

Article 3.24 set out a participant's entitlement as follows:

3.24 When a Participant for any reason, excepting death, ceases to be a Player, Protected Player, Accommodation Service Player, Staff Employee or Trainer and in the sole judgment of the Trustee his occupation is no longer that of a Player, Protected Player, Accommodation Service Player, Staff Employee or a Trainer, he shall be entitled to one of the following benefits:

(a) If at such time he is not a Participant for whom a contract was purchased under 3.07, 3.08 or 3.09, he shall be entitled to repayment of total contributions made by him, together with interest thereon, as credited by the Trustee from time to time. Such amount shall be payable within thirty (30) days from the later of the date on which the withdrawal occurs as determined by the Trustee, or, of the date of cessation of his employment with a Member Club or Clubs. Payment as aforesaid shall satisfy all his rights and claims and those of any person claiming through or under him against the Trustee or the Club Retirement Fund held by the Trustee under this Club Pension Plan.

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(b) If at such time he is a Participant for whom a contract or contracts were purchased under 3.07, 3.08 or 3.09, he shall be entitled to receive paid-up pension benefits, under such contract or contracts, commencing at his Normal Pension Age.

Article 3.28 provided:

The Trustee may make payment of the benefits provided for in 3.20, 3.22, 3.23 and 3.24(b) by assigning to the Participant the contract that had been purchased for him.

Article 4 was styled "Amendment and Termination". Articles 4.01 and 4.03 provided:

4.01 The League and the Member Clubs may amend the Club Pension Plan at any time or from time to time by an instrument in writing delivered to the Trustee, provided, however,

(1) that no amendment shall increase the duties or liabilities of the Trustee without its written consent;

(2) that no amendment shall deprive any Participant, former Participant or any beneficiary of any vested benefits to which he is entitled under the Club Pension Plan;

(3) that no amendment shall provide for the use of funds or assets held under the Club Pension Plan other than for the benefit of Participants, former Participants or their beneficiaries, and no funds contributed or assets of the Club Pension Plan shall ever revert to or be used or enjoyed by the League or Member Clubs until after satisfaction of all liabilities under the Club Pension Plan to Participants, former Participants and beneficiaries.

4.02 Any amendment of the Club Pension Plan that affects any contract shall be subject to the concurrence of the insurance company or Annuities Branch, Department of Labour, Dominion

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of Canada, as the case may be.

4.03 The League and the Member Clubs may terminate the Club Pension Plan at any time by an instrument in writing delivered to the Trustee, provided, however, that if the Club Pension Plan shall be terminated, each Participant, former Participant or beneficiary shall be vested with all rights to the contracts or contributions held for his benefit and the Trustee shall execute all necessary papers so that the contracts or contributions will belong to the person for whose benefit it was held free and clear of the Club Pension Plan, except as may be otherwise provided in 4.04.

(Emphasis added)

Article 6.11 set out "exclusive benefit" language in favour of employees but again as with art. 4.01(3) above, there is for the first time a suggestion of possible diversion to the clubs of any part of the assets of the Plan. It provides:

6.11 Under no circumstances shall any part of the corpus or income be used for, or diverted to, purposes other than for the exclusive benefit of the employees of the Member Clubs, or their beneficiaries until after satisfaction of all liabilities to such employees and their beneficiaries.

It will be recalled surplus funds which had accumulated in the original Plan from 1962-64 were distributed in 1967, as was the surplus earned in the period of October 1, 1966 to April 30, 1967 under the new Plan. This was all part of the regular distribution of "dividends" to participants or players every five years and these funds were due essentially to the premium discounts arising under provision 5 of GA550. However, because the new Plan became effective October 1, 1966, the fifth year of this allocation was distributed pursuant to art. 3.12.

A very small part of the funds distributed in 1967 was apparently due to an experience rate credit under provision 20 of GA550 from Manulife in the amount of $38,000, of which $30,382 was allocated under the original Plan in respect of 1962-66 and $7,618 was allocated pursuant to the new Plan.

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These funds appear to have been co-mingled with the other funds being allocated at the time.

3. THE NHLPA AND THE EQUITY FUND

In the late 1960s the players in the League formed a new association called the National Hockey League Players' Association ("NHLPA"). Before this, of course, there had been owner/player discussions, consultations and negotiations concerning many matters including pensions. In September of 1968 the NHLPA was apparently "recognized" by the owners, "so long as it [continued] to represent over two-thirds of the active players in the National Hockey League" (emphasis added). The owners were entitled to inspect and validate the authorization of the NHLPA by the players. This recognition did not purport to be pursuant to the Labour Relations Act of Ontario, R.S.O. 1990, c. L.2, nor pursuant to the labour laws of any other jurisdiction where the NHL was active. Indeed, formal negotiated agreements do not appear to have occurred until the mid 1970s. When they did appear, however, recognition continued to be limited to active or present players.

In this same year (1968), the player representatives on the Society's board of directors requested that the Society invest generally in equities. At a meeting held on November 18, 1968, a compromise was agreed to whereby the Society's surplus account would be invested in equities. The resulting fund, called the "Equity Fund", was created. These monies were invested with the National Trust Company as trustees.

4. THE 1969 OWNER-PLAYER MEETINGS AND CHANGES TO THE PENSION PLAN

In 1969 it was agreed between the NHLPA and the clubs that as of September 1969 the Plan would become "non-contributing" for players and only the clubs would make the required financial contributions to the Society. The players agreed to cease participating on the board of directors of the Pension Society although their role as observers would be considered. They also agreed not to make any additional requests with regard to benefits or television revenues for a three-year period. There

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is no mention, in the pertinent minutes of the Player/Owner Council recording this agreement, of the players agreeing in the future to forego all excess pension funds regardless of source. The combined minutes of the Player/Owner Council for the June to August, 1969 meetings which deal with the agreement read:

> 2. Pension Plan
>
> The Owners have agreed to assume the entire cost of funding a Pension Plan which will provide each eligible player $300 for each year of service, payable for life, commencing at age 45 and guaranteed for a period of 10 years. The Owners will provide, in addition, the present or equivalent group life insurance, including total and permanent disability and dismemberment to the extent of $50,000.
>
> In view of the assumption of this obligation, the Player representation on the Board of Directors of the Pension Society shall cease. The Owners undertake to furnish such satisfactory evidence of the fulfillment of this obligation, annually. The Players agree to execute such amendments to the Pension Society Constitution and By-Laws as may be requisite for those purposes.
>
> The Owners have further agreed to extend the benefits of the Pension Plan to all players on the protected list of 18 Players in the year in which they are protected. The Players agree that no additional benefits will be requested prior to the June 1972 meeting of the Player-Owner Council. In addition, the Players agree not to make any additional requests with regard to television revenue, prior to that date.

However, Clarence Campbell wrote to all NHL Players in November of 1969 under the caption "Re: Supplementary Pension". The apparent purpose of the letter was to recommend that players continue to use $1,500 for pension purposes and take advantage of their tax exemption in this amount by contributing to an approved registered retirement savings plan. In so doing, he reviewed at least his understanding of the effect of the

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agreement between the NHL and the NHLPA and had the following to say about "surplus funds":

> Previously the Member Clubs and their players had made matching contributions to the Pension Society up to the amount of $1500 each to provide the guaranteed pension and such dividends (in the form of additional pension benefits) as could be generated from the surplus funds. . . .
>
> As a result of this Agreement two important changes have occurred of which you should be reminded:--
>
> 2. There will be no surplus funds available to provide dividends in the form of additional pension benefits because the obligation assumed by the Member Clubs is to provide the guaranteed annual pension only -- $300 per year of NHL service payable at age 45 .

(Emphasis added)

On December 15, 1969, the executive director of the NHLPA, Mr. Alan Eagleson, reported to the players in these terms:

> REPORT TO ALL PLAYERS
>
> I have now completed a full tour of all members of the Association and I would like to thank all of you for your interest and attendance at those meetings.
>
> The following is a short review of the matters that were discussed at the meeting with you.
>
> 1. The Pension Plan
>
> The owners now make the total contribution to the plan. There no longer will be a $1,500 per annum deduction as the player's contribution to the plan. The plan provides each player $300 per year, for each year of service, payable for life, commencing at age 45, and guaranteed for a minimum period of 10 years. The owners will provide the present or equivalent life insurance on each player. The pension

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benefits extend to all players on the protected list of 18 players in the year in which they are protected, whether they play in the National Hockey League or not.

Since the plan is now non-contributory, each player has the right to place the sum of $1,500 per annum in a Registered Retirement Savings Plan, and have that amount tax deductible. (For 1969, the deductible amount is $750 since half of the pension contribution was made.) You must make your contribution by February 28, 1970.

2. Mutual Fund

As explained at the meeting, we have incorporated Sportsmen's Mutual Fund Limited. We expect to have a very qualified Board of Directors appointed very shortly. We also will attempt to have the fund registered as a "registered retirement savings plan" so that the contributions will be tax deductible to the extent of $1,500 per year.

Further information on the proposed fund will be made available immediately after the All-Star Game in January 1970. Each player will have until February 28, 1970 to decide on his tax-deductible contribution. Every player will be able to purchase any further fund units he wishes.

An important and detailed reference is made to the agreement in the minutes of the Pension Society's directors meeting of January 12, 1970. This is the last meeting with players on the Society's board of directors and where their advisors and representatives were also present. These minutes, in part, read:

AGREEMENT BETWEEN OWNERS AND PLAYERS' ASSOCIATION
RE FUNDING OF PENSION PLAN

Before discussing the subject matter of the Agenda the President reviewed the terms of the Agreement between the Owners and the Players' Association which resulted in the assuming by the Owners of the full cost of the guaranteed

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pension of $300 per year of service payable for life commencing at age forty-five (45) and guaranteed for ten (10) years. He pointed out that in view of the assumption of this obligation it had been agreed by the Owner-Player Council that the Player Representation on the Board of Directors of the Pension Society shall cease.

All Directors of the Pension Society has been provided previously with a copy of an excerpt from the Minutes of the Owner-Player Council Meetings which dealt with this subject and all agreed that this reflected accurately the Agreement that had been reached.

ADDITIONAL DISTRIBUTION OF PENSION BENEFITS

Mr. Ford reported that since the last distribution of dividends (October 1, 1967) negotiations have been taking place with the Manufacturers Life Insurance Company for rate improvements both with respect to current and future annuity purchases and also with respect to those already purchased.

With respect to the negotiations for an improved pension-cost relationship it was reported that a savings of approximately $65,000 from previously provided costs was realized and that this amount is a proper addition to surpluses appearing in the Financial Statements of the National Hockey League Club Pension Plan and Trust and the National Hockey League Pension Plan as at April 30th, 1969. Since these surpluses are in the main a result of reduced purchase costs of contracts purchased as of April 30th, 1968, and as of April 30th, 1969, it was stated that they accrue for the benefit of those Participants whose contracts were purchased on those dates. Therefore, in keeping with the Auditor's recommendation, it was moved by Mr. N.V. Ullman, seconded by Mr. W.L. Bush, Jr., and approved unanimously that these surpluses totalling approximately $370,000 after adjustments for any Loss or Profit resulting from liquidation or valuation of the Equity Fund, and increased by interest by interest earnings to October 1st, 1969, be distributed to those Participants for whom contracts were purchased on April 30th, 1968, and April 30th, 1969, in the proportion that

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current service contracts purchased for each Participant bear to total current service contracts purchased in each of those years; and further, that any additional surpluses which may develop hereafter from these contracts shall be distributed on the basis of the same formula as the surpluses developed applicable to the years ended April 30th, 1968, and April 30th, 1969.

It was reported further that in addition to improvement in current purchases the Manufacturers Life Insurance Company has agreed that by reason of the improvement in earnings' projections and relaxation of Government reserve requirements it will release to the Society from reserve generated from annuity contracts purchased to and including April 30th, 1967, the following amounts:

Canadian Funds	$412,793.00
United States Funds	$224,343.00.

After a brief discussion it was moved by Mr. N.V. Ullman, seconded by Mr. J.D. Cullen and approved unanimously that the portion of funds released by Manufacturers Life Insurance Company from reserves applicable to players' contracts be distributed in the form of a uniform percentage increase in the amount of their individual annuity contracts purchased to April 30th, 1967, with respect to annual current service awards; and further that any future distribution of dividends as the result of additional releases against players' contracts by the Manufacturers Life Insurance Company be distributed on the same basis. For the purposes of this distribution the U.S. Funds portion will be converted to Canadian dollars and those whose contracts were purchased in Dominion of Canada Annuities will be entitled to share in such distribution on the same basis as if their Dominion of Canada Annuities for current service had been underwritten under the Manufacturers Life Insurance Contract.

DISTRIBUTION OF EQUITY FUND

A discussion took place with respect to the liquidation and distribution of the Equity Fund. It was pointed out that no

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further surpluses will be built up with respect to pensions awarded for service after April 30th, 1969, as the result of the Agreement by the Owners to fund fully the guaranteed portion of the Pension Plan and it was the recommendation of the Auditor that the Equity Fund be liquidated at this time.

After consideration it was moved by Mr. A.B. McDonald, seconded by Mr. E.M. Ost Jr., and approved unanimously that the value of the Fund be computed at the earliest possible time permitted under the Trust Agreement with National Trust Company and that the president be authorized to execute and sign the necessary documents for the purpose of winding up the Equity Fund, and that the profit or loss realized from this valuation shall be credited to or charged against the dividends to be distributed in connection with the annuity contracts purchased in each of the years ended April 30th, 1968, and April 30th, 1969, in proportion to the amounts invested for each of these years in the Equity Fund.

AMENDMENTS TO NHL PENSION SOCIETY BY-LAWS

The President reviewed the By-Law Amendments to produce the following results:

(a) Chance of By-Laws 3(a) and (b) to eliminate Associate Members representing Players of Member Clubs. It was indicated that consideration will be given to providing for a Player Representative on the Board of Directors on some non-voting basis

(b) Change of By-Law 4(d) to provide for a quorum of eight Members for any Annual or Special Meetings of the Society; and change of By-Laws 4(f) to provide for a quorum of four Directors for Meetings of the NHL Pension Society Directors.

(c) Change of By-Law 5 to provide for a Board of Directors consisting of seven Members.

(d) Change of By-Law 6(b) to restore the voting power of the President.

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AMENDMENTS TO THE TRUST AGREEMENTS

It was pointed out that a number of Amendments would be required for both Trust Agreements to reflect the changes in the Plan brought about as the result of the decision of the Owners to provide the full amount of the contributions in respect to the pensions of players and NHL Officiating Staff.

After a brief discussion it was moved by Mr. E.M. Ost, Jr., seconded by Mr. W.L. Bush, Jr., that the President, the Auditor and the Society's Actuary take the necessary steps to amend the Trust Agreements and procure the required authorization for these Amendments from the Internal Revenue Service (U.S.) and the Quebec and Canadian Governments and that the President be authorized to sign the necessary documents on behalf of the Society; and, further, that steps be taken to eliminate the provisions dealing with the payment of premiums of the Group Insurance from the National Hockey League Club Pension Plan and Trust.

(Emphasis added)

These decisions, in the same form, were confirmed at the January 19, 1970 meeting of the members of the Pension Society. Under the heading "Distribution of Equity Fund" the president made the observation that "no further surpluses will be built up".

The equity fund first appears in the financial statements for the year ending April 30, 1969 as an asset with a book value of $161,355. At the January 1970 meeting, the Society decided the Equity Fund should be valued and the gain or loss on the investment should be used to either increase or decrease the dividend on those annuities that arose from Manulife's premium discount of approximately $370,000. The 1970 financial statements show this was done and, in fact, there was a loss of $36,405 charged to the surplus account with respect to service prior to April 30, 1969. The 1970 financial statements also indicate, with the exception of $80, all the money in the surplus account was distributed in the form of additional

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annuity purchases from Manulife. The decision to liquidate the investment in equities was not, however, carried out right away. Only in 1975 was the investment converted into term deposits. After April 30, 1969 when the plan ceased to be contributory, changes in the value of the investment were charged to service.

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5. REVENUE CANADA AND THE ONTARIO PENSION COMMISSION

By 1964 the stipulated benefit was $300 annual pension per year of service commencing at age 45 and actuarially exceeded the maximum pension payable under the Revenue Canada rules for non-contributory defined benefit plans set out in Circular 71-4, i.e., $1,715 at age 60 for each year of service. Apparently to maintain the registration of the Plan with Revenue Canada, it was formally registered as a "defined contribution" or "money purchase plan". It was emphasized each club made a defined contribution to the Society each year for every participant in its employ based on a Manulife group annuity schedule. The Plan was also certified to the Pension Commission of Ontario to be a money purchase plan.

Accordingly, the Plan was registered with Revenue Canada, the Pension Commission of Ontario and the applicable authorities in the United States as a fully insured defined contribution plan. In other words, in order to obtain registration without filing full actuarial valuations, the Society agreed to maintain the Plan on the basis that each employer made fixed contributions and the Pension Society, in turn, purchased pensions through an insurance contract exclusively with such contributions. In a memorandum dated December 11, 1981 the Society's actuary indicated the advantages of the Plan, funded through the Manulife group annuity contract, included:

(a) It can easily meet the requirements of being at the same time a defined-contribution plan and a defined-benefit plan. In order to meet these requirements, plans using other funding vehicles would have to follow a more conservative strategy which may increase the contributions by as much as 50% and 60% in the short

run.

(b) It guarantees that, except for a failure of the insurance company, benefits will be paid independently of market performance or the ability of the plan sponsor to contribute additional amounts.

(c) It guarantees that, after a premium is paid, there can be no further contributions required in respect of the service for that reason. With other funding vehicles there is a possibility of the experience deficits in future years due, for example, to market performance which would need to be funded by the then participating clubs.

(d) It automatically eliminates the possibility of conflicting legislation between Canada and the United States concerning the funding of experience deficits.

(e) A certificate is issued by the insurer to the employee thereby providing him with more security psychologically.

(Emphasis added)

6. THE FIRST RESTATEMENT OF THE CLUB PENSION PLAN AND TRUST AGREEMENT (1972)

The amendments of the Club Pension Plan and Trust Agreement contemplated in the minutes of the 1970 meetings of the Pension Society were drafted by Marcus Grayck, the U.S. attorney who drafted the new Club Pension Plan and Trust Agreement. Mr. Ford, the League's accountant and vice-president of finance, appears to have instructed him in a document dated June 17, 1971. It reads, in part:

Funding

Commencing and effective for the 1969-70 season, owners agreed to pay for the full cost of the guaranteed pension of

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$300.00 P.A. for full season award, whatever it may be. As a consideration, the players agreed through their association to surrender any interest in any surpluses which may develop through actuarial error or otherwise . In effect, the cost to the clubs is the net amount required to fund the pensions awarded, plus interest on pensions of previous years for which annuity contracts had not been purchased, less any investment earnings or appreciation. A slight revision to the funding principle was introduced to the effect that no credit would be given for service in any one year where less than ten games entitlement had occurred. However, any such service under ten games would be recorded. At such time as total service awards, including recorded but not awarded service equalled or exceeded one year (70 games) all service would be awarded and funded in full.

Staff and Trainers

Staff -- Conditions remain the same for this classification (but new definition will be necessary due to managers and coaches removed from class). Employee and employer continue to be liable for one half each of the cost. However, more than half of League Clubs are currently paying the employee cost as well.

Trainers -- Commencing 1969-70 season, full cost of trainers pension is paid by club.

Managers

Coaches -- A new classification created based $3,000.00 per annum paid by Club for pension on money purchase basis

Surplus -- Due to full funding by club of Trainers and Coaches pensions only Staff has any interest in Surplus Account.

Changes were contained in a restated trust agreement dated December 5, 1972 with an effective date of May 1, 1969. The delay was caused by the time taken to deal with tax and other authorities. Pursuant to the document, contributions were no

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longer required from players commencing October 1, 1969 and the clubs contributed an annual defined contribution per player in accordance with the Manulife Schedule attached to the 1972 Trust Agreement and revised periodically. In regard to pension contributions, 3.09 required:

> With respect to each playing Season commencing on October 1, 1969 and thereafter, each Member Club shall contribute -- for each of its players who is a Participant during such Playing Season -- an amount determined applicable to him in accord with the annexed Appendix A (for such Playing Seasons).

(Emphasis added)

In respect to pension benefits, s. 3.21 provided:

> With respect to a Playing Season commencing on October 1, 1969 and thereafter, for each. Participant who is a Player, Protected Player or Accommodation Service Player and for whom a contract is to be purchased pursuant to s. 3.15 and s. 3.16, there shall be purchased a contract providing him with an annual pension benefit commencing at Normal Pension Age, equal to the amount of annual pension benefit purchasable by the contributions specified in s. 3.09 or s. 3.10, as the case may be, for each unit of awarded credit for a sufficient number of League Games to comprise a Current Season.

With respect to "surplus funds", s. 3.22 provided:

> As of April 30, 1969, the Trustee shall allocate surplus funds, if any, among the accounts of participating Players, Protected Player or Accommodation Service Players who had been Participants at any time since the effective date of the Club Pension Plan. For each of the next two (2) annual periods, the Trustee shall allocate surplus funds, if any, attributable to such period among the accounts of participating Players, protected Players and Accommodation Service Players for whom contracts were purchased, pursuant to s. 3.15 and s. 3.16, during such period. The surplus funds for any period shall be allocated so that an equal amount of such funds will be allotted for awarded credits received by a

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participating Player, participating Protected Player, or participating Accommodation Service Player -- whose account is allocated a portion of that period's surplus funds -- for a Current Season of Current Games. The Trustee shall purchase for each participating Player, participating Protected Player or participating Accommodation Service Player, for whom a contract is to be purchased, pursuant to s. 3.15 and s. 3.16, a contract providing pension benefits commencing at Normal Pension Age, as is purchasable with the surplus funds allocated to the account of such Player, Protected Player or Accommodation Service Player.

(Emphasis added)

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7. EXPERIENCE RATE CREDITS FROM MANULIFE

The Pension Society's annual financial statements began in 1954 to include a statement of surplus account. During the 1950s and 1960s surplus funds arose from discounts on premiums, interest on the Society's direct investments made with the contributions by and for players whose pensions had not yet been vested and "forfeitures" (i.e., employer contributions for players who failed to meet the vesting requirements which, pursuant to the February 4, 1958 funding agreement, were to be used to reduce the clubs' current service costs after October 1, 1957).

The first "experience rate" credit declared by Manulife, as previously mentioned, was a relatively de minimus amount of $38,000. It was entered into the statement of surplus accounts for the year ending April 30, 1968 in two amounts: one of approximately $30,000 to the balance at credit April 30, 1967 under the old Plan and $8,000 to the new Plan for the year 1966-67. These statements indicate the $38,000 was allocated to purchase additional annuities in the distributions of surplus required to take place as of April 30, 1967 pursuant to the Special By-law and pursuant to s. 3.12 of the Club Pension Plan and Trust Agreement for 1966-67.

However, a second experience rate credit declared by Manulife was much more significant in size and did not appear in the

statements of surplus account in the financial statements. As indicated in the extracts from the minutes of the January 1970 Pension Society meetings, Manulife agreed to "release to the Society from reserves generated from annuity contracts purchased up to the including April 30, 1967 the sums of $412,793 (Cdn.) and $224,343 (U.S.)". It was agreed at those meetings that these monies would be distributed "in the form of a uniform percentage increase in the amount of their individual annuity contracts purchased to April 30, 1967". Thus, the funds were distributed through Manulife to everyone who had participated since the inception of the original Plan from 1948.

On April 20, 1971 Manulife's assistant group actuary, B.R. Newton, wrote to J.D. Ford, vice-president of finance of the Society, to advise yet another sizeable experience rate credit of "at least" $271,268 would be credited to the Society's account as of January 1, 1971. This experience rate credit was also attributable to all premiums paid to January 30, 1967 and was not reflected in the Society's books as surplus. It was distributed directly by Manulife to purchase additional annuity benefits for players with service prior to January 30, 1967.

Accordingly, these two sizeable experience rate credits were distributed not in accordance with the previous practice dealing with "surplus" under the Special By-laws and under s. 3.12 of the 1967 Club Pension Plan and Trust Agreement. The monies, as well, were not held in the Society's surplus account. Indeed, the credit was not referrable to a previous five-year period but to all funds invested under GA550 from its inception in 1952. Thus, the Society distributed the credits as a uniform percentage increase to the amount of the individual annuity contracts purchased for "Current Service" up to April 20, 1967. The Society also took part of the credit generated under GA550 to enable those early players whose annuities were purchased from Dominion of Canada Annuities to share in the distribution as if their annuities had been purchased from Manulife. The Society, therefore, allocated these experience rate credit funds to purchase additional benefits for a vested player for whom annuities had been bought under the Plan since its inception, whether they were participants or former

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participants who had reached normal pension age and were receiving their pensions, and regardless of whether their annuities had been purchased from Manulife.

Through the 1970s no further experience rate credits were paid by Manulife although rates of return on the funds paid to Manulife ought to have generated credits. Apparently, the increased reserve requirements established by Manulife for current service in the 1970s due to the expanding number of clubs and participants precluded any monies being paid out. However, the Society was not satisfied with what it believed to be an overly conservative approach to the reserve and, from at least the mid-1970s, Manulife and the Society conducted discussions regarding the appropriate experience rate credits to be paid under the group contract. There was conflicting intrinsic evidence relating to this period.

The Club Pension Plan and Trust, like the original Plan, provided that the Society would purchase individual annuity contracts for players at the end of each season on a basis proportional to the number of games in a hockey season with which a player was credited. For cost considerations and reasons of administrative efficiency, the Pension Society continued with Group Annuity Contract 550 and the entitlement of each player to rights under the Plan was monitored. Each year the Society would pay to Manulife the aggregate cost required by the previously mentioned schedule of contributions. Once the Society made these contributions to Manulife, Manulife would invest the amount and keep track of the investment experience of the Plan's assets in its hands.

Until July 1971, Manulife apparently monitored the investment experience of these funds generally in order to determine the experience rate credit or the degree to which the Plan's assets exceeded the amount required to meet its liabilities; including the present value of future liabilities to players for qualifying seasons. However, beginning in July 1971 Manulife began to determine separately the experience rate credit due to service before and after April 30, 1969. A letter in July 1971 from Manulife to the Society's actuary, Mr. Cooke, of the Wyatt Company, with a copy to Mr. Ford, refers to discussion

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"regarding the problem of allocating experience credits between players and owners". It was proposed that a new 04 account for all purchases of pension effective on or after April 30, 1969 would be opened and this new sub-billing would be "experience rated separately to produce experience credits available to owners as reduction in premium". However, the purchases of pension arising from the recent experience credits previously mentioned, and which were noted to be "all attributable to the players", would remain as purchases under GA550-01. The players were unaware of these internal procedures and correspondence.

In a December 23, 1976 reporting letter concerning the discussions with Manulife to J.D. Ford by Yvon Chamberland who had replaced Mr. Cooke, Mr. Chamberland expressed dissatisfaction with the Manulife position and used an earlier observation which Mr. Ford had apparently made. In this report he wrote:

> We are not satisfied that these points are sufficient especially since, as you pointed out yourself, older participants are paying for the newer ones through forfeited dividends. We have asked Manulife to calculate dividends on each year's premiums separately, and to review again their investment expense charge.

(Emphasis added)

In a typed memorandum to file dated August 17, 1976, Mr. Chamberlain made the following entries as information communicated to him by Mr. Ford:

> 5. There is some question as to what to do with an experience refund. Mr. Ford feels that under a money purchase plan such a refund should be used to purchase additional pensions.
>
> 6. Manulife has not paid experience refunds for some time.
>
> . . . . .
>
> 10. The plans provide full portability after 3 years.

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> Dividends on paid up contracts should revert to the NHL.

(Emphasis added)

A handwritten and undated memorandum authored by Mr. Chamberland but reflecting, in some of its content, a temporal relationship to a letter written by him to Manulife dated December 23, 1976 appears to bear on similar issues. It reads:

-- consistent release of surplus each year.
-- earliest possible release of cash dividend.
-- maximum (minimum contingency reserves)
-- knowledge of how determined and advice
-- fair basis ability to withdraw surplus for earlier years without having to finance later years
-- minimum
-- known basis
-- surplus belongs to pensioners and beneficiaries for post-69.
-- releasing reserves equitable benefits to participants.

Finally, in a letter to Mr. Chamberland dated May 30, 1977 from Mr. G.R. Burger of Manulife, it is stated:

> (5) Active life reserves reduced by 6% on the 04 sub-group to represent a 6-1/4% interest rate versus 5-1/2% previously.
>
> We have also shown the values for the two closed sub-groups, namely, 01, 03 (Canada) and 02 (US). We will agree to release an experience rate credit equal to one-third of the excess of the fund over the reserve. The experience credit will go towards improvement of the paid-up benefits on the respective groups.

The discussions with Manulife resulted in an agreement in 1982 for a release to the Pension Society of an experience rate credit of $2,993,262 calculated as of June 30, 1982. However, the allocation of that credit was preceded by formal agreements between the NHL and NHLPA for 1975 and 1981 and a second restatement of the new Plan and Trust in 1977 to implement

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bargained changes to the plan and (primarily) changes with respect to non-player club employees.

In 1975, the clubs and the NHLPA, through more formal collective bargaining, raised the pension benefit from $500 to $750 per year, per season of service and raised the related contributions. One half of the increase was to be funded by the NHLPA from its share of proceeds from international hockey games and tournaments such as the Canada Cup. However, if the proceeds from international hockey were not sufficient, the agreement provided the clubs were ultimately responsible. The collective agreement made reference to the pension plan by stating:

> 13.01 The Clubs shall continue in effect for players during the term of this Agreement the existing National Hockey League Pension Plan as described in the NHL Club Pension Plan and Trust . . .

The second restatement effective December 17, 1977 preserved the same basic features of the Plan for players.

On August 1, 1982 the NHLPA and the League entered into another collective agreement raising the pension benefit from $750 to $1,000 per year of service and raising the related required contributions. There is some evidence suggesting the NHLPA believed the annual cost of the Plan to the clubs to be in the order of $3,000 per player whereas in fact the actual cost to the NHL was considerably less.

In the fall of 1980, Manulife indicated to the Society it was willing to release an experience rate credit on the basis of one of two methods of calculation. There had been little activity in the Society from the mid 1970s until the early 1980s when Mr. Chamberland began to meet with success in his negotiations with Manulife. After further negotiations, he finally recommended the previously mentioned settlement to Kenneth Sawyer, secretary-treasurer of the Society, and the person who had by that time replaced Mr. J.D. Ford. Mr. Sawyer had been appointed treasurer of the League in 1980. He became secretary-treasurer of the Society in 1981. In 1982 he assumed

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the additional NHL post of vice-president, finance and, thereafter, vice-president, administration.

Clarence Campbell had also been succeeded by John Ziegler Jr. in 1976 with the result that by 1980 there were two new people at the helm of the NHL directing the actions giving rise to this matter. Mr. Sawyer accepted Mr. Chamberland's recommendation in May 1982. The agreement with Manulife, as noted, called for an experience rate credit of $2,993,262 calculated as of June 30, 1982. Of this amount, $1,663,021 was attributed to Group 01, 03, the Canadian dollar fund, with respect to service prior to April 30, 1969. The remainder arose from service after that date which was to be tracked in the 04 fund. The issue of an experience rate credit for Group 02 service with U.S. based clubs to October 1, 1957 was left outstanding. The payment of these monies did not occur until September 1982.

In January 1981, and as negotiations with Manulife were coming to a head, Mr. Sawyer sought the legal advice of Marcus Grayck on what could be done with the credit which the Society would be receiving. Mr. Grayck concluded that funds resulting from past participant contributions should be allocated to participants or their beneficiaries and, with respect to funds arising from employer contributions, the Pension Society had "carte blanche". The Society's board of directors passed a resolution on December 9, 1982 proposing that funds referable to the clubs' contributions would be allocated to the clubs in proportion to years of employer contributions. Participants would be allocated funds referable to their contributions and such funds would be used to purchase additional pension benefits for these players.

By letter dated July 22, 1982, Mr. Chamberland, on Mr. Sawyer's instructions, applied to the Pension Commission of Ontario ("PCO" or "Commission") without notice to any of the participants to allocate the experience rate credit that had been determined. The Commission approved the withdrawal of funds and did not require notice to the participants or the NHLPA. The PCO had been told that "at least $1 million" would be allocated to participants. September 15, 1982 was the date

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of receipt of the funds from Manulife. In fact, $915,398 was allocated to participants to improve their pensions. The money allocated to the clubs was not totally withdrawn. Contributions to the Plan for the years 1976-81 were kept by Manulife in a separate account Group 05. $808,038 arising from this account was left in the Society to be applied to the Plan's administrative costs. $469,841 referable to contributions made by the six original clubs prior to April 30, 1969 was actually refunded to them. Essentially the balance was used by the Society to pay for contributions which the clubs would otherwise have had to make for the 1981 and 1982 seasons.

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8. FIRST AMENDMENT TO THE 1977 SECOND RESTATEMENT

The board of directors amended their resolution of December 9, 1981 on December 10, 1982 in the form of an administrative refinement basing distributions of that portion of the experience rate credit going to participants in proportion to their relative death benefits. Then on December 9, 1983 the Pension Society, the NHL and the clubs executed the first amendment to the 1977 Trust Agreement or second restatement. The amendment purported to be retroactive to January 1, 1982 and contained a new art. 3.51 which, for the first time, specifically allocated "present and future surplus amounts" to the clubs with the exception of funds allocated to participants based on their own contributions. The amendment provided:

> 3.51 Present and future surplus amounts arising from Contracts are to be allocated by the Trustee, pursuant to rules and regulations adopted by the Trustee, between and Member Clubs, Central Hockey League and Participants in the proportion Participants' contributions and non-Participants' contributions bear to total contributions used for the purchase of such Contracts. Surplus amounts allocated to Participants are to be credited by the Trustee, pursuant to rules and regulations adopted by the Trustee, among Participants whose contributions were used to purchase such Contracts and amounts credited to a Participant are to be used to purchase additional pension benefits for such Participant. Surplus amounts allocated to the Central Hockey League are to be returned to the Central Hockey League.

Surplus amounts allocated to the Member Clubs are to be used to reduce Member Club contributions to the Club Pension Plan, pursuant to rules and regulations adopted by the Trustee.

In 1982 the League and the NHLPA negotiated a new collective bargaining agreement apparently not executed until November 1, 1984. It raised the pension benefit to $1,000 per year of service as of the 1979-80 playing season.

9. THE "ONE-SHOT" EXPERIENCE RATE CREDIT, THE THIRD RESTATEMENT (1986), AND THE NHLPA

Both Manulife and the Pension Society wished to avoid repeated lengthy negotiations to determine further experience rate credits on the monies being held. Accordingly, they entered into negotiations to settle the basis for calculating a "one-shot" experience rate credit that would be, in effect, a present valuation of the experience rate credits expected to arise on existing contributions in the future. On January 18, 1985 Mr. Chamberland recommended acceptance of Manulife's offer of a one-shot payment of $21,300,000 calculated as of November 30, 1984 with respect to all of the funds under GA550 with the exception of the 02 fund which was subject to a separate subsequent calculation of $1,064,000 as of January 1, 1985. Mr. Sawyer, on behalf of the Pension Society, and after again receiving similar advice from Mr. Grayck on ownership, accepted the offer on February 26, 1985.

No future benefits would be purchased under GA550 after May 15, 1985 and no future experience rate credits would be released. A non-participating group contract was established to purchase benefits on or after June 30, 1983 for Plan participants who were not receiving pensions as of May 15, 1985. The benefits of such participants under GA550 were cancelled and the settlement value rolled into this group annuity. Other non-participating group annuity contracts were set up to receive the 01, 03 and 02 funds. The one-shot dividend was invested with Manulife pending its allocation. On February 5, 1986, the Club Pension Plan and Trust was restated for a third time. Article 3.14 reproduced the previously

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enacted art. 3.51 with respect to allocating "surplus" by contribution source and this time art. 3.22, which allocated surplus funds to the participants, was repealed. The 1986 restatement continued the Plan as a "defined contribution" arrangement where contributions were used to purchase annuity contracts equal to the amount of annual pension benefit purchasable by the contributions specified pursuant to art. 3.00. Authority for this change was not actually given by the NHL board of governors until September 1987.

In 1986 the League and the NHLPA entered into negotiations to "amend" their collective agreement dated November 1, 1984 and they arrived at an amending agreement on July 25, 1986. The NHLPA was aware of the one-shot experience rate credit and sought to obtain benefits from it for present players for whom it was recognized. The resulting memorandum of agreement created a "security package" for players playing in hockey seasons commencing in 1986. It provided a "senior player benefit" for players who had played more than 400 games and reached that level after 1986. The memorandum required the use of a portion of the one-shot credit allocated to the NHLPA and a portion of the credit allocated to the clubs for this purpose. It was hoped this benefit would amount to $250,000 for each player on his fifty-fifth birthday assuming a long-term interest rate projection of 10% per year. The parties also agreed to "convert" the Pension Plan into a pure defined contribution plan. Paragraph 7 of the amending agreement of July 25, 1986 dealing with the Pension Plan stated as follows:

> 7. Pension Plan. All benefits already vested under the existing pension plan shall be unaffected by the Agreement. Beginning with the 1986/1987 season. Member Clubs shall make annual contributions (subject to the existing provisions of the CBA for NHLPA contributions of 25% thereof from the proceeds of International Hockey, if available, which shall continue to be effective) of $4000 (Canadian) for each player who had played 70 games (with games not played because of illness or injury counting as games played for this purpose) and proportionately reduced contributions for players who have played less than 70 games. This contribution shall be increased to $5,000 (Canadian for the 1988/1989, 1989/1990

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and 1990/1991 seasons. The amounts contributed shall be held in trust and administered and invested by persons designated by the NHLPA. If required by law, the administration and investment of such funds shall be shared by persons designated by the NHL and, in any event, the NHL shall be entitled, at its option, to such participation. Benefits shall be vested when a covered player has played 210 games in which case the shorter vesting period shall be applicable to all players. Games played prior to the 1986/1987 season shall be counted for the purpose of determining whether benefits have vested. If possible, annuities purchased for players whose benefits had not vested prior to the 1986/1987 season shall be cancelled and the surrender values transferred to their accounts under NHLPA administered defined contribution plan.

On December 8, 1986 the Club Plan was restated a fourth time retroactive to July 1, 1986 purporting to effect this agreement. The formal collective agreement is dated June 1, 1988.

The actual distribution of the "one-shot" experience rate credit was determined as of June 30, 1987. The total value as of that date was $28,550,000. Of this amount, $25,854,000 was attributable to contributions under the Club Plan and its predecessor the original Plan. Of this $25,854,000, $5,273,000 was attributed to the contributions made by retired participants. Of this $5,273,000, 75% was apparently used to provide additional benefits for player participants on the same basis the 1982 dividend was allocated, i.e., on the basis of relative death benefit values as of April 30, 1969 for service prior to that date and on the basis of the player participant's actual voluntary contributions thereafter. That left $20,581,000 allocated to club contributions. Of that amount, $1,372,000 consisted of funds attributed to the NHLPA's share of proceeds from international hockey. This amount and a further $10,800,000 were used to fund the Senior Players' Benefit for current players achieving 400 games after 1986. The remaining $8,271,000 was left in the Plan and has been used to meet the clubs' current service costs.

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The $915,398 allocated to retired participants in 1982 and the 75% of $5,273,000 allocated to them in 1987 were calculated on the assumption that mandatory and voluntary contributions of participants prior to April 30, 1969 were 51% of the total contributions. The NHL now concedes this calculation for both allocations was in error because it did not take into account that matching contributions only began in 1958 and that, prior to that date, the clubs contributed approximately $640 per year in comparison with individual player contributions of $900. The NHL agrees it must rectify this error.

The retired participants were notified of their pension improvements in November 1988. No reasons or particulars were given to them. No mention was made of the release of experience rate credits by Manulife. Instead, participants like Gordie Howe and Carl Brewer received the following form letter dated November 21, 1988 bearing the signatures of the NHL's president and the NHLPA's executive director.

> As a result of the negotiations between NHLPA player representatives and NHL owners, we are pleased to be able to advise of an increase in your pension. Although the agreement was reached in August of 1986, it has only been in the last 90 days that the final approvals from all Government authorities (Canada, Ontario, U.S.A.) have been obtained. We hope this helps in making your Christmas even merrier.
>
> Yours very truly,
>
> R. Alan Eagleson
> John A. Zeigler, Jr.

PART II

1. THE APPLICANTS' SUBMISSIONS

The applicants are all former players and are either pensioners or deferred pensioners. The 1982 and 1985 experience rate credit payments by Manulife to the Pension Society arose from contributions made to the Society between 1948 and June 30, 1982. They submit that during this period of time, the

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regulations, the Special By-laws, the 1967, 1972 and 1977 Trust Agreements and the 1970 Pension Society minutes all required allocations of surpluses arising from these contributions to the participants in the form of increased pensions. They submit the Society unlawfully appropriated the experience rate credits for the benefit of the clubs and entered into improper amendments to the trust documents to justify the actions complained of. The applicants rely on ss. 2(c), 9, 18 and 32 of the 1948 regulations; on arts. 3.12, 4.01, 6.10 and 6.11 of the 1967 Trust Agreement; on arts. 3.21, 3.22, 3.46, 4.01, 6.10 and 6.11 of the first restatement of the Trust Agreement. Essentially, the applicants submit that all contributions were made on the basis of an irrevocable trust for the exclusive benefit of the participants.

In support, the applicants submit that the Pension Society, as trustee, was obliged to act exclusively for the benefit of the Plan beneficiaries and could not benefit the clubs. It is submitted the Pension Society was established as an independent trustee not as a mere custodian for the employer and that trustees of pension trusts are subject to the same rules as trustees of other trusts. The applicants submit that the clubs are not, in any sense, owners of the pension fund assets and resulting surplus and have no claim to these funds. Accordingly, withdrawal by or for them of surplus or use of surplus by the Society to make contributions for the benefit of the clubs was in breach of the Pension Society's fiduciary duty to the participants and was unlawful. In this respect reference was made to D. Waters, Law of Trusts in Canada, 2nd ed. (1984), p. 710; C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro (1989), 68 O.R. (2d) 620, 58 D.L.R. (4th) 552 (C.A.), at p. 634 O.R., pp. 565-66 D.L.R.; Collins v. Ontario (Pension Commission) (1986), 56 O.R. (2d) 274, 31 D.L.R. (4th) 86 (Div. Ct.), at pp. 285-86 O.R., pp. 97-98 D.L.R.; and Bidwell v. Garvey, 943 F. 2d 498 (1991), affirming in part 743 F. Supp. 393 (D.M.D., 1990). It is no answer, submit the applicants, for the Pension Society as trustee and the clubs as one of the settlors of the trust to claim they were implementing their understanding of agreements reached with the NHLPA in allocating dividends from Manulife to the clubs and amending trust agreements. To the extent these amendments affect the rights of beneficiaries not

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represented in collective bargaining or negate the fundamental obligations under the trust, the amendments are void and unenforceable: see Sinai Hospital of Baltimore Inc. v. National Benefit Fund for Hospital & Health Care Employees, 697 F. 2d 562 (1982), at p. 567.

The applicants further submit that the Pension Society could not bestow a pecuniary benefit on the clubs by virtue of the restrictions contained in its letters patent and section 154 of the Canada Corporations Act pursuant to which it was incorporated. In this respect, it is contended the actions of the Society, in using the experience rate credits to benefit the clubs and in making amendments to trust documents to permit "pecuniary gain" to its members by payments of surplus to the clubs, are invalid and ultra vires the capacity of a not-for-profit corporation under the Canada Corporations Act . For this proposition, reliance was placed on Bonanza Creek Gold Mining Co. v. R., [1916] 1 A.C. 566, 26 D.L.R. 273 (P.C.), at pp. 583-84 A.C., pp. 283-85 D.L.R., and Canadian Bank of Commerce v. Cudworth Rural Telephone Co., [1923] S.C.R. 618 at p. 629, [1923] 4 D.L.R. 16 at p. 25 (per Duff J.).

The applicants contend the Plan has always been a "defined contribution plan" with the result that contributions could only be applied for the exclusive benefit of the participants on whose behalf such contributions were made. The applicants emphasize the Plan has always required defined contributions and has expressly provided that such contributions be used exclusively for the benefit of the participants. The applicants point out that in defined contribution plans surpluses generally accrue to plan members as they have the risk of reduced pensions due to inflationary losses, while employers bear no risk. By having bound themselves to a "defined contribution" regime for the purposes of satisfying regulatory agencies such as Revenue Canada and the Pension Commission of Ontario, the applicants submit that the Pension Society and the clubs cannot now be heard to claim this was merely a "facade" and that the Plan is really a defined benefit plan. In support, I was referred to Canada Permanent Trust v. King Seagrave Ltd. (1986), 13 O.A.C. 305 (C.A.); McCreight v. 146919 Canada Ltd. (1991), 35 C.C.E.L. 282, 40 E.T.R. 184 (Ont. Gen. Div.),

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at p. 296 C.C.E.L., pp. 197-98 E.T.R.; and Re U.E.B. Industries Ltd. Pension Fund; U.E.B. Industries Ltd. v. Brabant, [1992] 1 N.Z.L.R. 292 (C.A.) at p. 300. The applicants also submit that where an employer must make a defined contribution, there is no implied authority for the employer to take "contribution holidays" and reduce its future pension costs out of surplus. C.U.P.E., Local 1000 v. Ontario Hydro, supra, at p. 632 O.R., pp. 563-64 D.L.R., and Delgrosso v. Spang & Co., 769 F. 2d 928 (3rd Cir. 1985), at p. 935, were relied on for both this proposition and the principle that all such contributions under the Plan accumulated exclusively to the benefit of the beneficiaries.

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It is further contended that if there is any ambiguity in the Plan documents as they stood in 1982 and 1985, these documents must be interpreted "contra proferentum" the interests of the party which unilaterally prepared them: see McCreight v. 146919 Canada Ltd., supra, at p. 304 C.C.E.L., pp. 205-06 E.T.R.

Generally, the applicants submit the NHL Pension Plan is an irrevocable trust established for the exclusive benefit of the participants and, as such, no use of the assets or reversion of them to the clubs is permissible. Since its inception, it is submitted, the Plan required irrevocable contributions to the Pension Society to be held in trust for pension purposes and for the exclusive benefit of the participants. Having completely alienated their interests in the contributions, the clubs could not later claim a refund or credit in respect of excess contributions. Subsequent amendments or changes inconsistent with the original irrevocable trust are said to be invalid and unenforceable. The applicants rely heavily on Reevie v. Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, 25 D.L.R. (4th) 312 (C.A.), at pp. 600-01 O.R., pp. 317-18 D.L.R., leave to appeal to the Supreme Court of Canada refused 1986), 56 O.R. (2d) 192 n, 30 D.L.R. (4th) 767n; C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd., a judgment of the Ontario Court of Appeal, delivered October 25, 1990, 39 E.T.R. 1 at p. 4, affirming (1989), 66 O.R. (2d) 535, 30 E.T.R. 202 (H.C.J.); Sulpetro Ltd. Retirement Plan Fund (Trustee of) v. Sulpetro Ltd. (Receiver-Manager) (1990), 66 D.L.R. (4th) 271, 73 Alta. L.R. (2d) 44 (C.A.), at p. 281 D.L.R., p. 55 Alta.

L.R., and Re Courage Group's Pension Schemes, [1987] 1 All E.R. 528 (Ch.D.).

More specifically, the applicants submit the 1983 amendment permitting the actual use of surplus monies by the Pension Society to pay for club contributions otherwise owing under the trust agreement is invalid and ultra vires because the amendment was: (a) contrary to the nature of the irrevocable trust of the original Plan and as continued by the Club Plan as outlined in the Reevie, Sulpetro, White Farm and Brabant decisions; (b) contrary to the 1970 minutes of the Pension Society whereby an express commitment was given with respect to future releases of experience rate credits from Manulife; (c) made in December 1983 after all the contributions giving rise to the 1982 and 1985 surplus releases had been made; (d) contrary to the letters patent of the Society and s. 154 of the Canada Corporations Act, Part II; and (e) made by the Pension Society on its own behalf and on behalf of the NHL and the clubs when it had no authority to do so from the clubs or the NHL. The applicants submit that because they are entitled to the benefit of all contributions made on their behalf and to the vesting of all contracts and contributions made on their behalf on the termination of the pension plan, they have a beneficial interest in the surplus arising from the contributions made on their behalf as set out in Reevie , supra, and in Little v. Kent-McLain of Canada Ltd., judgment of the Ontario High Court, released February 25, 1972 at p. 4, affirmed without reasons, Ontario Court of Appeal, January 25, 1973.

It is the applicants' submission the Pension Society had to act impartially and even handedly among beneficiaries and, on that basis, the experience rate credits had to be allocated to the participants on whose behalf contributions were made. The Society's failure to so act is explained, in the applicants' view, by the fact that since 1970 all the Society's directors have been appointed by the clubs and have been owners, employees or agents of the clubs. While in their capacity as trustees and directors of the Pension Society, these persons were required to set aside their own personal interests and act exclusively for the benefit of the Plan beneficiaries. It is

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submitted they ignored their fiduciary obligations through a series of actions or omissions whereby their duties to the beneficiaries were subordinated to their interest in benefiting the clubs. In this respect reference was made to Cowan v. Scargill, [1985] Ch. 270 at pp. 286-87, [1984] 2 All E.R. 750 at p. 760; Boe v. Alexander (1987), 41 D.L.R. (4th) 520, 15 B.C.L.R. (2d) 106 (C.A.), at p. 527 D.L.R., p. 113 B.C.L.R.; Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14; Frame v. Smith, [1987] 2 S.C.R. 99 at pp. 135-36, 42 D.L.R. (4th) 81 at pp. 98-99; and Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592 at pp. 607, 610-18, 40 D.L.R. (3d) 371 at pp. 382, 384-89.

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It is the applicants' position that, in light of the obvious uncertainty surrounding entitlement to the experience rate credits, the Pension Society ought to have notified the participants of its intentions regarding the monies and sought the advice or direction of a court pursuant to the Trustee Act, R.S.O. 1990, c. T23, s. 60(1). The applicants submit that this is further evidence of the Pension Society's consistent failure to have regard to the welfare of the participants and that confidence in the trust can only be restored by the appointment of a new trustee pursuant to s. 5(1) of the Trustee Act.

The applicants stress the absence of any written understanding between the NHLPA and NHL in 1969 whereby the players gave up entitlement to experience rate credits in return for the clubs shouldering all the contributions to the pension plan. In support of the unlikeliness of such an agreement, they point out the actual cost of full contributions was not that great. They also emphasize the uniqueness of this pension plan structure with its defined contribution and defined benefit characteristics and the annual purchases of individual annuities which in practice became a single group annuity contract with participating features. They also point out that the pension arrangement was always insured by Manulife, removing any downside risk from the clubs.

It is therefore submitted this case bears no resemblance to cases like Hockin v. Bank of British Columbia (1990), 71

D.L.R. (4th) 11, 46 B.C.L.R. (2d) 382 (C.A.); Askin v. Ontario Hospital Assn. (1991), 2 O.R. (3d) 641, 34 C.C.E.L. 11 (C.A.); and Crownx Inc. v. Edwards (1991), 7 O.R. (3d) 27, 45 E.T.R. 57 (Gen. Div.). The applicants observe that Mr. Campbell retired in 1977 and the Pension Society held no meetings for several years after that until Yvon Chamberland started to meet with success in his negotiations with Manulife. At that point, new NHL personalities in the form of Mr. Zeigler Jr. and Mr. Sawyer reactivated the Pension Society; sought cursory legal opinions from Mr. Grayck; and went about wrongly appropriating the large amount of monies now available to them, fully aware of a possible dispute over the ownership of these funds. Upon the reactivation of the Pension Society board meetings, the Pension Society board of directors and the board of governors of the NHL were one and the same and acted accordingly.

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It is also submitted that the contributions made on behalf of the players were in the nature of "deferred compensation" and, consistent with the terms of the trust, such monies and the benefits they purchased belong to the participants. A central benefit was group annuity GA550 with its participating feature. Great emphasis was placed on the fact that the actual timing of the contested amendments was after the players had "earned" the entitlements claimed in this application.

In summary, the applicants emphasize three hallmarks of the Plan which they say fundamentally support the preceding submissions. First, the Plan is an irrevocable trust. Secondly, the Plan fixes employer liability to contributions. Thirdly, the only way the Society as trustee could protect the participants against the adverse impact of inflation was by the utilization of the experience rate credit funds to purchase additional pension benefits on their behalf.

2. THE RESPONDENTS' SUBMISSIONS

As a general matter, the respondents contend the Pension Society has always had a discretion in allocating surplus funds and, in light of the 1969 "deal" with the NHLPA, the discretion exercised by the Society in 1982 and 1985 was appropriate. The respondents see the group annuity contract as simply a vehicle

employed by the Society, in its discretion, to provide the Plan's specified benefits. Accordingly, GA550 is not in itself a benefit of the Plan or something in which the participants have a beneficial interest.

More specifically, the respondents submit that the constating documents must be construed as a whole and in light of all relevant surrounding circumstances for the purpose of determining how surplus may be applied in an ongoing private pension plan. Further, where pension benefits have been the subject of bargaining, the "deal" struck between an employer and its employees is of critical importance in determining the entitlement of plan members and the plan's treatment of surpluses. While trust principles are admitted to be relevant to the maintenance of a pension fund in order to sustain the pension benefits provided for by a plan for the class of all of its members and relevant to the disposition of surplus on plan termination, such principles are not relevant to the uses to which surplus may be applied in an ongoing plan and cannot be used to define the pension entitlement of individual members.

It is submitted that until its conversion to a "true" defined contribution plan in 1986, the plan in question has only entitled its player participants to a defined benefit. The letters patent of the Pension Society only required the Society's funds to be applied to the Society's basic purpose: to provide pension and other benefits to League and club employees. The respondents submit that when construed as a whole, the letters patent, the by-laws and the regulations gave the Society a wide discretion to utilize surplus. The fact that the Society exercised its discretion to periodically distribute surplus to all continuing participants at five-year intervals to increase their benefits, did not detract from the Society's power to decide at a later date that surplus, which had subsequently arisen from annuity purchases under the original Plan, could be attributed to players and clubs in proportion to their contributions and that the clubs' share could be applied to their current obligations to new generations of players.

The respondents submit that while the Club Plan, effective as of May 1, 1966, continued the practice of allocating surplus to

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continuing participants at five-year intervals pursuant to art. 3.12 of the 1967 Club Pension Plan and Trust Agreement, nothing in that Plan prevented the amendment of this provision so long as no player was deprived of any benefits to which he had become entitled. When as of April 30, 1969 the Plan no longer required mandatory player contributions, art. 3.22 of the first restatement modified art. 3.12 to provide that the last such distribution was as of April 30, 1969. Further, it is submitted that nothing in the amending provisions of art. IV prevented the later amendment to the Club Plan through art. 3.51 of the first amendment to the second restatement to attribute future surpluses to clubs and players in proportion to their contributions even if such surpluses arose from service prior to April 30, 1969.

The respondents place heavy emphasis on Mr. Campbell's letter of November 1969 with respect to surplus arising from service after April 30, 1969. It is the respondents' submission that Campbell's letter to all the players and the January 1970 minutes of the Pension Society's board unequivocally state that no surplus would be available to provide additional benefits for players for service after April 30, 1969. It is submitted that the NHLPA never took issue with this understanding, an understanding implicit in the nature of a non-contributory defined benefit plan. The subsequent history of collective bargaining between the clubs and the NHLPA, it is argued, confirms that the Plan was a defined benefit plan and the clubs' only obligation was to provide the defined benefit.

With respect to the general approach in construing and interpreting constating documents of private pension plans, the respondents rely on Maurer v. McMaster University (1991), 4 O.R. (2d) 139, 82 D.L.R. (4th) 6 (Gen. Div.), at pp. 144-45, 150 O.R., pp. 11-12, 17 D.L.R.; Otis Canada Inc. v. Ontario (Superintendent of Pensions) (1991), 2 O.R. (3d) 737, 40 E.T.R. 233 (Gen. Div.), at pp. 748-49 O.R., pp. 246-47 E.T.R.; C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro, supra, at p. 634 O.R., pp. 565-66 D.L.R.; and Askin v. Ontario Hospital Assn., supra, at p. 658 O.R., p. 30 C.C.E.L. With respect to the submission that trust principles have only a limited application in pension surplus cases, the respondents rely on

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Crownx Inc. v. Edwards, supra, at p. 38 O.R., pp. 68-69 E.T.R.; Otis Canada Inc. supra, at p. 752 O.R., pp. 250-51 E.T.R.; Maurer, supra, at p. 155 O.R., p. 22 D.L.R.; Hockin v. Bank of British Columbia, supra, at pp. 19-20 D.L.R., pp. 391-92 B.C.L.R.; and D.W.M. Waters, "The Use of Surpluses in Pension Plans Operating in Ontario", Report of Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 133-156. For the proposition that a pension plan created or modified in the context of collective bargaining should have its constating documents interpreted in light of the bargain struck between the parties, the respondents rely on Ventra Group v. Ontario (Pension Commission) (1990), 35 C.C.E.L. 64 (Ont. Gen. Div.), at p. 69. The respondents also rely on Re Ontario Bank Pension Fund (1914), 30 O.L.R. 350, 19 D.L.R. 512 (C.A.), at pp. 362-63 O.R., pp. 513-14 D.L.R., for the proposition that the letters patent of the Pension Society did not create a trust, and on Re Windsor Medical Services Inc., [1971] 2 O.R. 141, 17 D.L.R. (3d) 233 (H.C.J.), for the argument that nothing in the letters patent or the Canada Corporations Act prevented the Pension Society from restoring unneeded or surplus funds contributed by clubs of the NHL to those same clubs.

In submitting that the original Plan was a defined benefit plan, reference is made to Regulations 10 and 29. It is pointed out the regulations were never amended to provide for surplus distribution. Instead, surplus distributions occurred outside of the parameters of the regulations, pursuant to "Special By-laws" of the Society enacted from time to time in connection with the actuarial reviews required by Regulation 29. It is further submitted that the special by-laws recognized the inherent right of the Pension Society to distribute surplus in its discretion by attempting to impose "a moral burden" on any future board of directors that might be of a mind to undo the effects of the special by-law in order to dissuade it from doing so. It is submitted that nothing in the regulations, or elsewhere, obliged the Society to purchase annuities with an experience rate credit feature and that any surplus arising from this feature was at the discretion of the board of directors of the Pension Society as was surplus arising from premium discounts.

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The respondents also point out that the quinquennial distributions provided for the purchase of additional annuity benefits in favour of the continuing participants on the allocation date and were not intended to give every player who had ever met the vesting requirements and his beneficiaries a share in the surplus in the Plan on an ongoing basis as it was accumulated. It is emphasized that Regulation 32 provided the Plan could be changed, modified or discontinued as long as such change or modification did not in itself have the effect of diverting from any of the participants any benefits arising from contributions made by the participants or made on their behalf.

The respondents point out that Regulation 32 did not state each participant could not be deprived "of the benefit of contributions" made by him or on his behalf. The Plan, therefore, could be amended as long as a participant was not deprived of those defined benefits to which he had become entitled under the regulations. Further, By-law 7(2)(c) gave the board of the Pension Society the power of amending and repealing the terms and conditions governing the eligibility for the award and payment of pensions, "the amount of the pensions and of pension rights of participants and other beneficiaries and all matters relating to pensions, annuities [and] ... other benefits whatsoever". Accordingly, even if the constating documents of the original Plan amounted to the creation of a trust, there was an express reservation of a right to amend and therefore a right to revoke: Crownx Inc., supra, at p. 40 O.R., pp. 70-71 E.T.R.; Maurer, supra, at p. 152 O.R., p. 19 D.L.R.; Hockin, supra, at p. 19 D.L.R., pp. 390-91 B.C.L.R.; and Campbell-Renton v. Cayley, [1960] O.R. 550, 25 D.L.R. (2d) 512 sub nom. Re Campbell-Renton (H.C.J.), at pp. 552-53 O.R., pp. 513-14 D.L.R., are relied on in this respect.

The respondents similarly argue that the Club Plan provided for a defined benefit. In this respect, the respondents refer to art. 3.11 (an explicit money purchase arrangement for team executives), art. 6.05 (making reference to solvency standards), art. 3.20 (requiring the payment of specific

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benefits) and arts. 4.01 and 6.11 (making reference to the possibility of reversion of funds to the clubs on the termination of the Club Plan). In regard to the latter two provisions, it is submitted the acknowledgement of the possibility of reversion of a part of a pension fund's corpus or income to the employer after satisfaction of liabilities to plan members is only compatible with a defined benefit plan as quoted in Nu-Kote Canada Inc. v. Royal Trust Corp. of Canada (1991), 4 O.R. (3d) 336 (Gen. Div.), at p. 342, and Chicago Pneumatic Tool Co. of Canada v. Montreal Trust Co. of Canada, a judgment of the Ontario Court of Justice (General Division), released March 24, 1992 [now reported at 41 C.C.E.L. 299].

The respondents also rely on Crownx, supra, at pp. 40-41 O.R., pp. 70-71 E.T.R., for the proposition that an exclusive benefit clause such as art. 6.10 does not convert a defined benefit plan into a defined contribution plan and does not prevent an employer from obtaining a reversion of surplus on termination. It is submitted the scope of the amending power is limited only to interference with vested benefits and that "vested benefits", read in the light of the structure of the document as a whole, cannot be taken to include a right to surplus except in so far as such surplus has been allocated pursuant to art. 3.12 and annuity contracts purchased with such funds. Otherwise, the possibility of reversion or utilization of surplus by the clubs contemplated in art. 4.01(3) would be meaningless. It is submitted art. 4.03 does not provide the players are entitled to a defined contribution and the investment growth thereon.

Central to the respondents' argument is that art. 3.12 of the 1967 Club Pension Plan and Trust Agreement did not confer any rights to surplus as it accumulated. It is submitted that if the Club Plan had intended to confer rights to "surplus" as it accumulated, the whole concept of surplus would have been dispensed with and the Plan would have been structured on a defined contribution basis. It was, therefore, open to the Society to amend art. 3.12, the surplus distribution provision, in any manner that it wished, so long as art. 4.01(2) was respected and participants were not "deprived of vested benefits" already allocated to them. Therefore, the decisions

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taken by the Society in 1981 and 1982 to attribute surplus to its source and to allow the clubs to apply surplus to current costs embodied in art. 3.51 of the first amendment to the second restatement, did not deprive any participant of any "vested benefit to which he was entitled" and, therefore, were valid amendments.

In any event, the respondents submit nothing in the 1967 Club Pension Plan and Trust Agreement prevented the clubs and players from agreeing that any surplus generated from the clubs' contributions for service after April 30, 1969, when the players no longer had to make mandatory contributions, should be allocated to the clubs for whatever purposes consistent with the objects and purposes of the Society. It is submitted the amendments to and restatements of the Club Plan after that agreement must be construed in light of that agreement with the NHLPA; in light of Mr. Campbell's letter of November 1969; and in light of the minutes of the board of directors meeting of the Pension Society of January 12, 1970 where it was pointed out no further surplus was to be built up with respect to pensions awarded for service after April 30, 1969 as a result of the agreement by the owners to fund fully the guaranteed portion of the pension plan.

It is further pointed out the collective bargaining agreements contain no indication whatsoever that players would be entitled to surplus from any source. That a portion of the surplus from the "one-shot" experience rating credit was allocated to the NHLPA in 1986 to provide for the senior players' benefit in the fourth restatement, it is argued, was purely a matter of collective bargaining. There was no obligation to allocate any of the surplus allocation to the NHLPA. With respect to the registration of the Plan with both Revenue Canada and the Pension Commission of Ontario as a "defined contribution" plan, the respondents submit that a court is still obligated, in determining the nature of a plan, to construe the constating documents in light of all available and relevant evidence. In this respect, the respondents submit the device of "contributions" graded according to a player's age was merely to ensure technical compliance with Revenue Canada's ceiling on benefits and that both Revenue Canada and

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the Pension Commission of Ontario were aware the Plan was designed to produce a defined benefit.

In summary, therefore, it is submitted the Pension Society was only obligated to provide a defined benefit in accordance with the Plan documents. The utilization of a group annuity with a participating feature was the Society's choice and at its discretion. The Pension Society was not contractually obligated to purchase the group annuity contract that it did and the participants have no legal interest in that group annuity contract or its participating feature. Since 1970 the trustees of the Pension Society and the governors of the League have been one and the same and this was the nature of the deal made between the players and the owners in 1969 when the players voluntarily resigned from the board of directors. In the respondents' view, the applicants are coming forward today because they wish they had made a different deal in 1969.

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PART III

1. INTRODUCTION

These kinds of cases have been coming before our courts with regularity over the last decade. Underneath the legal language of contract and trust and the technical parsing of so-called "constating" documents lurk social and economic issues of considerable complexity: see generally, Report of the Task Force on Retirement Income Policy ("the Lazar Report"), vol. 1, "The Retirement Income System in Canada: Problems and Alternative Policies for Reform" (1979). The economic security of the aged is of fundamental interest to any society and policies have been put in place to encourage Canadians to plan for their eventual retirement from active employment. In this respect, social security policy contemplates that public funds will be made available only to provide the bare minimum of protection, making private pension plans a central policy mechanism for the protection of our aging population. However, pension plans are not required by law and, where they exist, need not take any particular form, presumably in deference to freedom of contract.

Once in place, however, pension plans have been subject to increasing public regulation in order to insure their financial integrity. For example, at the time this matter arose the Pension Benefits Act, R.S.O. 1980, c. 373, as amended, and R.R.O. 1980, Reg. 746, as amended, were operative in Ontario. But Ontario regulation has not dealt directly with the ownership of those funds said to be "surplus" to a plan's needs. This legislative silence bears testimony to the public policy complexity associated with fixing only one of the labour market parties with ownership.

The general contours of competing claims to these funds illustrate the difficulties policy-makers face. Employers point to "defined benefit" language in plan documents and to the fact that interest rates over the last two decades have produced funds from contributions considerably in excess of those now required to pay for the promised benefits. Having to honour these pension promises regardless of investment experience, employers readily see themselves entitled to any excess funds. Had the employees wanted ownership of excess funds, it is argued they should have negotiated "defined contribution" or "money purchase" plans, thereby submitting themselves to the investment risk. Instead, they opted for the security of a specific benefit guaranteed by their employer.

Trade unions and employees, in response, point to the absence of explicit ownership language in favour of employers; to the fact pension contributions, whether made by employees or employers, effectively constitute employee wages; and that the high interest rates which have made the surplus funds possible have, at the same time, eroded the value of the promised benefits. From this perspective, employee advocates submit that worker ownership is at least as reasonable a contractual implication as employer ownership and that employee ownership, in contrast to an employer windfall, is more consistent with the fundamental public policy objective of providing for the aged: see generally Bernard Adell, "Pension Surpluses and the Law: Finding a Path for Reform" Report of the Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 209-51.

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Ontario legislators have not resolved this debate, possibly because of the uncertain impact of an unqualified acceptance of either view. For example, to legislate employee ownership generally may make defined contribution plans less attractive to employers and reduce the incidence of these plans in the future to the disadvantage of employees who want this form of pension security. But if these plans were entered into in the first place without any anticipation by employers of surplus and with employer contributions long since expensed, then a surplus may be more in the nature of a windfall and its loss ought not to discourage the future use of such plans. Which view is correct?

The response has been legislative silence, leaving the courts to proceed on a case-by-case basis as courts do. Indeed, because courts are institutionally not as well equipped as legislatures to sort out all the social and economic policy implications of such difficult issues, incrementalism has been reinforced. Sweeping judicial pronouncements have been few. Instead, painful attention has been paid to fact and documentary language, all in a search for some indication of "ownership" intent to funds often not foreseen at the time the language in question came into force. Unsurprisingly, the cases are not all easily reconciled and considerable academic commentary has been provoked. Compare R.P. Austin, "The Role and Responsibilities of Trustees in Pension Plan Trusts: Some Problems of Trust Law", T.G. Youdan, ed., Equity, Fiduciaries and Trusts (1989); D.K. Hanscom, "A Surplus of Uncertainty: The Question of Entitlement After Hockin" (1990-91), 10 Estates & Trusts Journal 258; and B. Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", Report of the Task Force on Inflation Protection for Employment Pension Plans, Vol. 2, Research Studies (1988), pp. 209-251, with D.W.M. Waters, "The Use of Surpluses in Pension Plans Operating in Ontario", Report of the Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 133-56, and R.E. Scane "Legal Position in Ontario on Withdrawals of Surplus", Report of the Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 157-79.

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In many respects the instant case is a microcosm of this larger context. The NHL sees the Plan as providing a defined benefit and emphasizes that since 1970 the Plan has not required player contributions. The players point to the defined contribution language of the constating documents and the long standing practice of the Pension Society in allocating "excess funds" to the exclusive benefit of the participants. The players also stress the law of trust to accommodate their reliance on inherently long term pension promises. The NHL draws on the law of contracts to provide the legal flexibility to accommodate the alleged "deal" of 1969 and the collective bargaining outcome in 1986. The applicants complain of their substandard pensions and the economic plight of journeymen players who gave their best years to a game that now provides dramatically increased salaries to today's players. The NHL draws attention to the unusual nature of a pension available at age 45 and to the fact that players have the opportunity to start new careers upon retirement from hockey. Should the player defer taking his pension until age 65, the NHL asserts the resulting pension is not far off those provided by conventional plans.

I have been guided foremost by the language of the formal documents and by the parties' conduct, statements, and representations to each other. I have also kept in mind that the context in which pension promises are made is one of employment: see Otis Canada Inc. v. Ontario (Superintendent of Pensions), supra, at p. 752 O.R., pp. 250-51 E.T.R. Not only are pension promises long term in nature but consideration for them is furnished every day by work. This can result, as a matter of employment or contract law, in the earning of pension rights independent of the law of trusts: see, for example, Sloan v. Union Oil Co. of Canada (1955), 16 W.W.R. 225, [1955] 4 D.L.R. 664 (B.C.S.C.). Finally, I have been aided by the case law and literature urged upon me by the parties.

2. THE ORIGINAL PLAN

This case does not involve the unilateral institution of a plan by an employer with the assistance of a typical custodial trustee. These employers negotiated with representatives of the

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players in the late 1940s to create a plan of contributory pensions in order to increase the attractiveness of hockey as a career and to enhance its prestige throughout the world. These are the words used in 1949 to describe the purposes of this plan. The players were also told by Mr. Clarence Campbell, as president of the League, and their own representative, Mr. Syl Apps, that the clubs too were making available a "source of revenue pledged by them" and that the Plan was designed to provide "the maximum possible benefits and protection from the resources available".

These are strong words which appear to contemplate the full utilization of all revenues for the exclusive benefit of players involved in a professional sport which needed to attract world class talent. The players were obviously concerned about devoting their early adult years to a game which would necessarily abandon them in mid-life without training for any other line of work. Indeed, the rationale underlying the senior players' benefit indicates even today's players at their salary levels continue to have this concern. Thus, the phrase "maximum protection", as used in 1949, is easily understood to embrace ownership of all monies paid into and arising out of the pension fund.

The very creation of the Pension Society in the form of a "non-profit" corporation is further evidence of an intent that all monies paid into this worthy venture were intended for the exclusive benefit of the players. Paying money into a non-profit corporation is not a typical method to insure the return of "excess" funds. Rather, the use of a non-profit corporation is more consistent with a definitive dedication of funds to a strategically important human resource initiative by the League, the clubs and the players: see P.A. Cumming, "Corporate Law Reform and Canadian Not-For-Profit Corporations", 55th Annual Meeting of the Canadian Bar Association (Richard De Boo Ltd., 1973), p. 24. In other words, whether or not the applicants are correct as a matter of law that a non-profit corporation is unable to return surplus funds to founding interests without violating its eleemosynary charter provisions and the Canada Corporations Act, the use of a not-for-profit corporation does evidence an intent to

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dedicate all income funds to the advancement of the interests of the players. The notion that any of the funds were intended to be returned either directly or indirectly to the clubs is not obvious when one has regard to the structure employed to achieve the laudatory purposes represented to the players on March 1, 1949.

The Society's presence also allowed the NHL and its clubs to distance themselves from this uncertain venture and, thereby, to limit or preclude liability other than for their pledge of revenue contained in the independent memorandum of agreement. From this perspective, therefore, any "upside" arising from the utilization of pension funds by the Society seems more reasonably intended for the players who had been promised maximum protection from the resources available.

Turning to the content of the Society's regulations, is there language present rebutting any assumption of exclusive player ownership which might otherwise arise from what was said to the players in 1949 and from the not-for-profit corporate vehicle employed? Is there language in the original Plan clearly limiting the players to a defined benefit and providing to employers a reversionary or ownership interest in all excess funds? One must also, of course, be on the look-out for languages which would permit an amendment to the Plan to this effect.

Regulation 8 of the original Plan defines the pension fund in terms of all contributions by the players and all contributions required to be made by member clubs in respect of services performed by the players. The reference to services rendered is language reinforcing the employment context of the pension arrangement and the argument of an annual earning of contributions and related pension rights whatever they might be. Regulation 9 defines participant contributions and then provides that "all" contributions are irrevocable. Because of the location of this latter language, the respondents have argued that only the players contributions were specifically required to be irrevocable. In response, the players point to the characterization in Regulation 8 of the clubs' support as "contributions" and the fact that Regulation 9 stipulates

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that "all contributions" are irrevocable. There is also the difficulty of identifying a rationale for why only the players' contributions would be irrevocable.

The regulations specifically define the players' contributions. There is no equivalent definition for the clubs. The clubs' support is left to be specified in independent agreements negotiated between the Pension Society and the clubs. The only language providing for the recapture of the clubs' previous economic support is found in those agreements from 1958 onward where the recapture is limited to previous employer contributions for players who failed to meet the five- or three-year vesting requirement and the use of such recaptured contributions is confined to an offset against payments for current service. Employer support being dealt with in a separate agreement, language in the regulations to guard against employer revocation was neither necessary nor appropriate. Indeed, in contrast to revocable contributions, the first agreement between the Society and NHL provided that all excess funds arising from the clubs' support would be paid by the League to the Society to support the Society's purposes. Accordingly, while I accept the respondent's argument that Regulation 9 appears confined to player contributions, as its heading suggests, this does not mean the clubs' support was intended to be revocable. The applicants' contributions were dealt with by Regulation 9 and the clubs' contributions were irrevocable as a result of generally unqualified written agreements. In effect, those latter payments were made in the same way as any irrevocable payment by employers for services rendered.

Regulation 9 specifically defines the players' contributions. In turn, the June 1949 memorandum between the Society, the League and the clubs defined the sources of economic support emanating from the clubs. While the Society's actuary was to determine the total sums required of the clubs to maintain the pensions established by the Plan, all monies generated from the defined sources of revenue were to be paid into the Society. Similarly, while the 1958 and 1964 successor support agreements make reference to all contributions being determined by actuaries, this language is preceded by specifically defined

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employer contributions. Such language is not typical of defined benefit plans. What is similar, however, is Regulations 10, 11, 13 and 17 which specifically define a monthly benefit of $90 for each season a player is engaged and its method of payment. Thus, the original Plan has unusual hybrid characteristics unlike all of the cases relied upon by the respondents.

Regulation 12 goes on to provide specifically for the use of excess revenue from the clubs to fund a past service benefit. Here we see the anticipation of annual surplus arising, in this instance, directly from the clubs' financial support and yet these monies are dedicated to the benefit of the players. This provision is more consistent with a general player entitlement to excess funds than the other way around.

Regulation 18 envisages the annual purchase of individual annuity contracts for each player to secure specific pension benefits. These contracts were to be held by the Society in trust for each participant. In fact, it became more convenient for the Society to purchase a group annuity contract and this annuity contract came with features which had the potential for generating monies in addition to the specified benefits. The respondents argue the Society entered into the group annuity contract at its sole discretion and merely as an underlying vehicle to provide the benefits specifically promised. Thus, they submit the players are only entitled to the specific benefits promised and have no beneficial interest in the group annuity contract and its participating features.

It is difficult, however, to see the GA550 contract as any more a discretionary "vehicle" than the individual annuities which originally were intended to be purchased. In fact, individual annuity contracts were purchased for the first few years. The general intention of the constating language was to "secure" by the present purchase of contracts the benefits promised over the fullness of time and to do so by an explicit trust mechanism. The bipartite Pension Society ultimately chose to carry out this intent by purchasing one group annuity contract with premium discount and participating features. It strikes me as more reasonable to discern an implicit intention

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that the Society was also to hold GA550 in trust both to secure the benefits promised and as an asset for the benefit of the players in accordance with its terms. To accept the respondents' submissions would require me to find an intent to abandon the security and trust concepts of Regulation 18 merely because it was administratively more convenient for the Society to buy one group annuity contract. Accordingly, I find the more reasonable implication from Regulations 18 and 23 to be that these provisions apply mutatis mutandis to GA550. Regulation 23 reinforces this implication by binding the participant to the terms of any contract entered into between the Society and an insurance company.

Regulation 25 limits player claims to the "assets" of the Society and precludes claims against the clubs. I have concluded GA550 is such an asset. This provision also undercuts a general argument that because the clubs opened themselves to liability under the original Plan by promising or guaranteeing the specified pension benefits, they ought to reap the benefit of an investment policy employed to produce the benefits. Further, it reinforces the view of the Society as a "stand alone" entity dedicated exclusively to the welfare of the players and that the players have access to all of the Society's assets.

Regulation 27 provides for five-year actuarial reviews. Annual contributions by the clubs, therefore, are not required by the regulations to be solely the product of annual actuarial advice as is so often the case in a defined benefit plan. Rather, the actuarial reviews provided for in the regulations seem more directed to the overall soundness of the Plan and Society. While there is no explicit relationship in this regulation between these reviews and the Society's practice of allocating premium discount surplus to the players by the purchase of additional annuities on a five-year basis, there is a reference to actuarial liability in Regulation 29 with respect to ascertaining the existence of surplus. Actuarial involvement, as set out in the regulations, is therefore in the context of deploying surplus rather than in the defining of regular employer contributions. Even in the clubs' first funding agreement with the Society where there is mention of

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the role of the Society's actuary in determining the sums required to maintain the pensions established for the players, the memorandum goes on to specify the League will pay all surplus over these amounts to the Society for furtherance of its objects. Similarly, the two subsequent club agreements with the Society, which also make reference to actuaries, specify the League will "match" the player contributions specifically defined in the regulations.

Regulation 29 expressly provides the Society with a discretion to permit excess funds to be applied in reduction of further contributions. This language contemplates the existence of additional funds quite unlike a defined benefit plan. Nevertheless, the respondents submit that the offset against required contributions contemplated by Regulation 29 is exactly what the Society permitted the clubs to do in the 1980s with at least some of the funds in question. In other words, while the provision may not directly support the return of monies by the Society to the six founding clubs in 1982 and the more than $10 million allocated to the senior player benefit, the respondents submit it does support the contribution holidays taken by the clubs in the 1980s notwithstanding this was at a time when only the clubs were making contributions.

Regulation 29 exists in a set of regulations which, when originally enacted, assumed player contributions. In fact, the regulations only defined player contributions. The clubs' financial support was specified in detail by independent agreements with the Society. Moreover, the first of these external agreements explicitly contemplated excess funds and yet directed their payment by the League to the Society. The successor agreements specified employer contributions and specifically provided only one occasion when such previous economic contribution could be used to off-set the clubs' promised ongoing support. This was with respect to players who did not meet the then vesting requirements of the Plan.

As the respondents successfully argued the reference to "all contributions" in Regulation 9 did not include contributions by the clubs, it appears equally reasonable to view Regulation 29 aimed at the potential suspension of only those contributions

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specifically defined in and by the Plan, i.e., participant contributions. Club support, on the other hand, was defined by the subject to the terms of the written agreements between the Society, the League and the clubs which, after 1958, contained their own quite limited off-set provision. This meaning of Regulation 29 is also supported by Regulation 32 which provides "all monies will be held by the Society for the Benefit of the Participant exclusively under the Regulations of the Plan". It is difficult to give meaning to this requirement of exclusivity and at the same time hold that Regulation 29 permits the suspension of the clubs' financial support required by independent agreements. Accordingly, I find Regulation 29 speaks only to participant contributions and is, itself, discretionary.

Any doubts over or ambiguity in the meaning of Regulation 29 must also have regard to the administration of the Plan and to explicit representations made concerning employee ownership of excess monies. Regulation 29 and its relationship, if any, to the clubs' claim of ownership or of a discretion in the Society to use excess funds to offset club contributions, therefore, must be considered against the practice of premium discount allocation from the inception of the original Plan and against representations made to the players in special by-laws and Society reports. GA550 contained Provision 5 providing for the determination of a discount on the basic premium rate whereby all purchases of annuities during the year would be at reduced rates. It was also expected there would be surplus revenues provided by the League and its member clubs. Indeed, these latter funds were explicitly intended to be accumulated and invested until October 1957, at which time the resulting fund would be divided in the form of a past service benefit for players.

By 1954 the combination of premium discounts and employer financial support made it clear there would be funds well in excess of those required for the past service benefit and the pension benefits as then defined. Therefore, a special by-law was passed by the Society declaring there would be a distribution of these funds for the purchase of additional pension benefits. Importantly, the first paragraph of the

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preamble noted: ". . . all monies paid into the Society must be used for the benefit of the participants and cannot be refunded".

In 1957, this by-law distributed $310,243 by way of enhanced pensions to the participants as defined. Sizeable amounts were again distributed by special by-law in 1962 and five years later in 1967. These latter by-laws were in the same form with the added paragraph: ". . . the players are the only participants entitled to share in the said surplus".

These representations are clear and unequivocal. They are also supplemented and reinforced by the 1958 Annual Report of the Society reciting the conclusion of a legal opinion that excess money could only be disbursed to provide additional pension benefits for the participants on an equitable basis. To the same effect is the report of the independent insurance company retained to review the Plan about the same time. This report noted that, after vesting, the participants could not be deprived of the League's contributions under any circumstance or contingency. Not only do these public representations, made early in the life of the Plan when memories and understandings were fresh, clarify the intent of the regulations if clarification is needed, the participants continued to work and provide services to the clubs after they were made. In this sense, they amount to contractual commitments by the clubs through the Society to all excess monies. These commitments (and monies) thereafter accrued with the continuing efforts of the players in rendering services to the clubs: see Sloan v. Union Oil Co. of Canada, supra.

The respondents, however, submit that the "special" by-laws evidence that the distributions were made at the sole discretion of the Society and not pursuant to any legal entitlement of the participants to the surplus funds. They also point to the minutes of the October 1, 1954 meeting of directors indicating a concern the special resolution might be rescinded. They ask how there could be any legal entitlement if in 1954 the board was concerned about a later rescinding of its wishes.

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The first special by-law was passed several years before it would actually take effect and, thus, there was a risk its precise terms could be rethought. This was the occasion of the first distribution of excess funds to the participants and the regulations did not dictate to the Society the precise form and timing of the distribution set out in the 1954 special by-law. The manner and timing of distribution, in contrast to entitlement, was a matter for the Society in light of its fiduciary and contractual duties. Importantly, there was no repetition of this concern when, in the future, there was a temporal correspondence between the making and the implementation of the special by-laws in 1962 and 1967.

While the use of special by-laws reflects the absence of an explicit surplus distribution regulation, this omission may simply reflect a reluctance to codify a precise distribution scheme until the existence of funds became predictable and greater experience was gained with their deployment. Indeed, the new Plan did codify an explicit distribution scheme based upon this previous experience. Accordingly, I cannot accept the respondents' submissions concerning the inferences to be drawn from the use of the special by-laws in the face of the clear and unequivocal content of those by-laws, the additional representations to the players in the Society's reports and the subsequent codification of the practice in the new Plan. In my view, these representations and practices concerning excess funds confirm, clarify and independently establish player entitlement. The symmetry between what was represented to players in 1949 by Messrs. Campbell and Apps and what was again said and done in carrying out the objects of the Society is pronounced and in stark contrast to the position the respondents take today.

The last material regulation is Regulation 32 previously mentioned in regard to its exclusive benefit language. This regulation also reserved the right to change, modify or discontinue the Plan at any time and the respondents rely on this language for claiming a right in the 1980s to revoke any contingent interest the participants might have had in the funds in question. Does Regulation 32, on its face, provide such a fundamental power? The provision does not contain

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explicit language of retroactive revocation. By retroactive, I mean the revocation of the players' interests long after they had furnished their services to the clubs and long after the underlying contributions had been made. In fact, this regulation provides that any change or modification cannot have the effect of diverting from any participant "any benefits arising from both his own contributions or from contributions of the League, Clubs and Society".

The respondents, however, argue the reference to benefits is a reference to the defined benefit in Regulation 11 and the use of that term therefore distinguishes between benefits and contributions. However, the regulation speaks of "any" benefits and excess funds are as much a benefit arising from contributions as the additional pension benefits these funds purchased from time to time. Moreover, the phrase "any benefits" exists in a sentence which goes on to stipulate "all monies" will be held by the Society for the exclusive benefit of the participants. Thus, it seems unreasonable to give "any benefits" the narrow interpretation advocated by the respondents and, in any event, the excess funds in question are monies held by the Society.

Similarly, it strikes me as unreasonable to hold Regulation 32 was intended as a source of power for the retroactive revocation of exclusive employee entitlement to all excess funds where employee services have already been rendered and particularly without clear language to that effect: see Greenberg v. Meffert (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548 (C.A.). Thus, I read Regulation 32 as explicitly prohibiting any amendment which would divert monies held by the Society for the exclusive benefit of the participants. In other words, it prohibits precisely what the applicants complain about.

Alternatively, if there is any ambiguity in Regulation 32, it is resolved by the practice and content of the special by-laws and by the other representations made to the players in the Society's reports. These same practices and representations effectively restrict the use of Regulation 32 even if it was thought to be a clear repository for the power claimed by the

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respondents. Representations were made to players concerning their entitlement to these funds by the Society whose board of directors was partly composed of club representatives. The players continued providing services to the clubs after these representations were made and, thereby, irrevocably earned such entitlement. The only contingencies were the timing and precise form of distribution to the players.

Reference was also made by the respondents to the Society's amendment powers set out in its general by-laws. By-law 7 allows for the repeal or amendment of and the addition to by-laws. In any view, this provision is also insufficiently express to support the retroactive revocation of an exclusive employee entitlement to all excess funds in an ongoing employment context where services have already been rendered. In any event, and alternatively, this power was contractually fettered as in the case of Regulation 32 by the representations of the exclusive player ownership and the players rendering of services in the face of such representations.

In summary, both the language of the regulations and the cumulative effect of all the intrinsic evidence clearly establish an exclusive and irrevocable entitlement in the players to all "excess" funds in the original Plan regardless of source. I have come to this conclusion essentially by reference to the "plain meaning" of the regulations and, alternatively, through a contractual analysis based on the various representations to the players. The players provided their services up to 1966 on the basis of their represented entitlement to all such monies, with the contractual result that this entitlement was irrevocably earned upon the expenditure of their efforts. This latter conclusion is reinforced by the defined employer contributions which, in the circumstances, are reasonably characterized as deferred wages.

However, these regulations, viewed in the context of this same evidence, also indicate a clear intent to create a trust with the Pension Society as trustee and GA550 a central asset of this trust arrangement. The language of the co-settlors in respect of their financial support is imperative in the form of Regulations 9, 32 and the agreements between the Society, the

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League and the clubs. The subject matter or the trust property is certain in the form of defined financial contributions, surplus funds and annuity contracts. In the latter regard, the term "trust" is explicitly employed. Finally, the objects of the trust are certain as described on the founding of the Society, in its charter and regulations and as pronounced from time to time. The authorities establish there is no magic in the word "trust". An intention to create a trust may be conveyed by words which, when reasonably construed, imply an intent to create a trust in the circumstances: see D.W.M. Waters, Law of Trusts in Canada, 2nd ed. (1984), pp. 18 and 109. A formal trust agreement or deed is not necessary. The language of the original Plan is in marked contrast to the limiting language relied upon by Justice Cawsey in Amoco Canada Petroleum Co. v. Alberta (Superintendent of Pensions), a judgment of the Alberta Queen's Bench, released July 16, 1992, in finding a plan and annuity contract did not constitute a trust.

The Pension Society was therefore required to act in the best interests of the beneficiaries of the pension fund. In this respect, Vice-Chancellor Sir Robert Megarry in Cowan v. Scargill, [1985] Ch. 270 at p. 290, [1984] 2 All E.R. 750 at p. 763, has stated:

> I can see no reason for holding that different principles apply to pension fund trusts from those which apply to other trusts. Of course, there are many provisions in pension schemes which are not to be found in private trusts, and to these the general law of trusts will be subordinated. But subject to that, I think that the trusts pension funds are subject to the same rules as other trusts. The large size of pension funds emphasises a need for diversification, rather than lessening it, and the fact that much of the fund has been contributed by members of the scheme seems to me to make it even more important that the trustees should exercise their powers in the best interests of the beneficiaries. In a private trust, most, if not all, of the beneficiaries are the recipients of the bounty of the settlor, whereas under the trusts of a pension fund many (though not all) of the beneficiaries are those who, as members, contributed to the

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funds so that in due time they would receive pensions. It is thus all the more important that the interests of the beneficiaries should be paramount, so that they may receive the benefits which in part they have paid for.

This view accords with that of the Ontario Court of Appeal expressed in C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro (1989), 68 O.R. (2d) 620 at p. 634, 58 D.L.R. (4th) 552 at pp. 565-566, where Mr. Justice Robins, dealing with the Ontario Hydro Pension Fund which also lacked a formal trust deed, stated:

> Moreover, in my opinion, the assets of this fund are plainly trust assets to be held and administered by the corporation for the purpose, as s-s. 20(1) specifies, of paying members of the plan benefits by way of pensions or superannuation allowances and allowances upon their death or disability. The contributions of the employees and Hydro, when received by Hydro in its capacity as administrator of the fund, are trust funds in its hands which are to be invested in accordance with the Act and used exclusively for the beneficiaries of the plan. A surplus constitutes an asset "in or credited to the fund" which forms part of the fund (s-s. 20(2)) and is subject to the trust. The corporation is not the owner of the fund. As trustee, it is not entitled to utilize the fund's assets or surplus assets for its own purposes in the absence of some provision of the Act permitting it to do so.

Reference can also be made to Reevie v. Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, 25 D.L.R. (4th) 312 (C.A.), leave to appeal to the Supreme Court of Canada refused (1986), 56 O.R. (2d) 192n, 30 D.L.R. (4th) 767 n; C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd., a judgment of the Ontario Court of Appeal, delivered October 25, 1990, 39 E.T.R. 1, affirming (1989), 66 O.R. (2d) 535, 30 E.T.R. 202 (H.C.J.); Canada Permanent Trust v. King Seagrave Ltd. (1986), 13 O.A.C. 305 (C.A.); McCreight v. 146919 Canada Ltd. (1991), 35 C.C.E.L. 282, 40 E.T.R. 184 (Ont. Gen. Div.); Sulpetro Ltd. Retirement Plan Fund (Trustee of) v. Sulpetro Ltd. (Receiver-Manager) (1990), 66 D.L.R. (4th) 271, 73 Alta. L.R. (2d) 44 (C.A.);

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and Little v. Kent-McLain of Canada Ltd., a judgment of the Ontario High Court, released February 25, 1972, affirmed without reasons by the Court of Appeal, January 25, 1973; and Arrowhead Metals Ltd. v. Royal Trust Co., a decision of the Pension Commission of Ontario dated March 26, 1992.

Of particular interest are the views recently expressed by the Pension Commission of Ontario itself in Arrowhead Metals Ltd., where at pp. 13-15, the Commission reviewed the appropriateness of applying the law of trusts to pension plans. While it has been expressed by some commentators that the application of ancient trust law to the relatively recent invention of pensions is to be regretted, Ontario's expert regulatory body in the pension area does not share that view. (See, for the critical view, R.E. Scane, "Legal Position in Ontario on Withdrawals of Surplus", Report of the Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 157-79.) In this respect, the Commission observed:

> The Applicant submits that "common law trust principles have limited application to cases such as this one". This line of argument has its origin in Hockin et al. v. Bank of British Columbia et al. (1990), 46 B.C.L.R. (2d) 382 (B.C.A.) where it was said (at p. 391) that ". . . some of these standard attributes of a trust are attenuated or even nonexistent. Operatively, the plan is the dominant document to the trust is ancillary to the plan with the trustee functioning, as will be seen, more akin to a stakeholder than strictly a trustee". The reasoning was quoted with approval in Otis, supra, and the recent case of Crownx Inc. v. Rick Edwards et al., (unreported decision of Blair, J., released November 27th, 1991 (O.C.G.D.)). This line of reasoning, in short, suggests that a pension plan is pre-eminently a contractual arrangement and the pension trust is ancillary thereto. This is an inversion of the normal paramountcy of equity and is based on the premise that the pension trust is more akin to a purpose trust than to a traditional trust.
>
> Purpose trust are trusts for which there is no beneficiary; that is, they are trusts where no person has an equitable

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entitlement to the trust funds. Funds are deposited in trust in order to see that a particular purpose is filled; people may benefit, but only indirectly. That is precisely why the law has been so chary about accepting the validity of purpose trusts. They were said to offend "the beneficiary principle". That is, there was no person who could go to court and complain if the trustee failed to properly perform. The only exceptions, historically, to the rule against purpose trusts had been for charities and animals. Charities were exempt because the Crown, through the officer of the Attorney General would oversee the execution of the trust thereby preventing abuse and insuring that the trust was performed.

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The bench mark difference between a "traditional" trust and a purpose trust is that the indirect beneficiaries of a purpose trust can never gather together and call for the trust property on the basis of the principle in Sanders v. Vautier (1981), 4 BEAV. 115; affd. CR. and PH. 240; Den J.A. Ch. 354 as they are not, in the eyes of equity, the owners of the property; in contrast, the beneficiaries of a trust, so long as they are sui juris and together absolutely entitled to the trust property, can determine the trust and call for the trust property. The application of this principle is precisely what had been going on in the pension surplus cases to date. Where employers are found to absolutely parted with ownership rights over the trust fund and the plan has been wound up, the plan beneficiaries have obtained a court declaration of their rights and called for the trust funds (subject to compliance with the Act and Regulations). Are all these cases improperly decided? Can it be said that pension trusts are not created for the direct benefit of persons? Surely that is the very reason for their existence. Can it be said that there is no one with equitable entitlement to the funds such they can go to court to ensure that the trust is performed? Again, the answer to that question must surely be "no". People are clearly direct beneficiaries of pension trusts. Pension trusts are established not to effect some purpose, such building a recreation centre, but to provide money on a regular basis to retired employees. It misconceives both the nature of a purpose trust and of a pension trust to suggest that pensions

are for purposes, not persons. It is important to recognize that the characterization of pension trusts as purpose trusts results in the pension text, a contract, taking precedence over the trust agreement. That is, in making common law principles of contract paramount to the equitable principles of trust law. It is trade law that where common law and equity conflict, equity is to prevail. In light of that rule, it seems inappropriate to do indirectly that which could not be done directly. Moreover, to hold that the terms of the contract (i.e. plan text) prevail, will be to effectively eliminate the rights of two interested groups, namely, deferrers and retirees, neither of whom remain as parties to the contract when they cease employment.

The Ontario courts, with the recent exception of a very few cases such as those mentioned in the beginning of this section, have found equitable and trust principles flexible enough to resolve these matters; we see no need to depart from them now and inject uncertainty into an area of law which has only recently taken shape.

Trust law responds to the long gestation of pension arrangements and accommodates the welfare of former employees who often lack any other effective means to protect their interests. However, I do not understand Vice-Chancellor Sir Robert Megarry or the Ontario Court of Appeal in Ontario Hydro to be saying the dynamic nature of labour markets and the presence of collective bargaining should be ignored. Trust law, in this modern context, must accommodate and be responsive to key differences between the traditional settling of a trust and the ongoing administration of a pension plan in a changing economic environment. But employers, trade unions and trustees must also appreciate the central importance of pension arrangements to all employees and be vigilant of the dependent interests engrained in these plans.

I have found in the circumstances of this case that as a matter of ordinary interpretation the Pension Society was not accorded a sufficiently broad amendment power in its regulations and by-laws to revoke the exclusive interests of the players in the experience rate credit feature of Group

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Annuity Contract 550. This same conclusion also arises as a matter of trust law and even less effortlessly given the protection the law of trusts affords beneficial interests.

In Reevie v. Montreal Trust Co. of Canada, supra, the Ontario Court of Appeal dealt with a plan and trust agreement where the plan, like this one, provided that all contributions were irrevocable and to be used only for the exclusive benefit of the members. The trust also precluded diversion for purposes other than for the exclusive benefit of the employee members of the plan and their beneficiaries. In considering the propriety of a subsequent amendment under a general amendment power allocating a surplus to the employer, Mr. Justice Zuber on behalf of the court outlined the applicable principles in these terms at pp. 600-01 O.R., pp. 317-18 D.L.R.:

> At the centre of this dispute lies the simple fact that the funds in dispute are trust funds. The settlors of the fund were the employer (Canada Dry Limited) and the employees. The pension plan and trust agreement provide that the contributions were irrevocable and that the beneficiaries of the trust were the members of the pension plan (i.e., the employees, spouses, etc.).
>
> The consequences that flow from these premises are clearly stated in Waters, Law of Trusts in Canada, 2nd ed. (1984), at p. 291:
>
> > A settlor cannot revoke his trust unless he has expressly reserved the power to do so . This is a cardinal rule, and it involves two important concepts. The first is that the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration had been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of "restricted transfer". So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene

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> once the trust has taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer.

The appellant does not take issue with these general principles but asserts that it has reserved a power of amendment which is wide enough to entitle him to recover surplus funds. In my opinion, this proposition is simply untenable. The language of the trust agreement and the p ension plan do not support such an argument. The section in the pension plan (prior to 1981 amendment) dealing with the powers of amendment specifically affirms the irrevocability of the contributions and the fact that the members of the plan are the sole beneficiaries (see s. 11.1).

Mr. Brown put considerable emphasis on the fact that this pension plan was a defined benefit plan. It was argued that once those defined benefits were paid, the members had no further rights and, therefore, there must be a power in the employer to deal with the surplus funds. With respect, this argument does not accord with the facts. While the plan continues to operate, a surplus will simply afford a cushion against years during which the funds performs poorly, or, it may lead to the reduction of future contributions. If the plan in discontinued, other considerations will arise. In this case, the plan itself provides that on discontinuance the surplus be distributed to the members (see s. 11 of the 1973 restatement of the pension plan). The defined benefits are the defined pension benefits and do not limit these specific additional rights .

In my respectful view, in 1981, Canada Dry Limited had no power to unilaterally amend the pension plan and thereby partially revoked the trust to provide for repayment of surplus funds to itself .

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> The appellant next argues that even if the 1981 amendment cannot provide for repayment of funds to the settlor, it is at least effective in eliminating the employees' rights to the surplus. I disagree. Prior to the 1981 amendment, the members of the pension plan had a beneficial interest in surplus funds if the plan was discontinued. By purporting to eliminate this interest, the employer was attempting a partial revocation of the trust.

(Emphasis added)

In my view, Reevie cannot be distinguished save that the original Plan in the facts at hand is obviously more in the nature of defined contribution plan than was the plan in Reevie. Reference should also be made to White Farm Manufacturing, supra; King Seagrave Ltd., supra; McCreight , supra; Sulpetro Ltd., supra, at p. 281 D.L.R., pp. 55-56 Alta. L.R.; and Little, supra, at p. 7, and Ralph E. Scane, "Legal Position in Ontario on Withdrawals of Surplus", Report of the Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 157-179, at p. 170.

Reevie, supra, the respondents point out, was a termination case and even it seemed to approve of an off-set of surplus against further contributions. However, in Reevie this latter observation was obiter and it has since become clear no reasonable distinction can be drawn between the appropriating of a surplus by a direct withdrawal and the taking of a so-called "contribution holiday". The latter course of action is simply an indirect method of withdrawing surplus funds: see Ontario Hydro, supra, at p. 634 O.R., pp. 565-66 D.L.R.; Sulpetro, supra, at p. 280 D.L.R., p. 54 Alta. L.R., and Bernard Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", Report of the Task Force on Inflation Protection for Employment Pension Plans, vol. 2, Research Studies (1988), pp. 209-251, at p. 242. Moreover, I have already found the clubs restricted in the original Plan to those off-sets against contributions specifically provided for in their agreements with the Society. Accordingly, it is not open to the respondents to submit that a contribution holiday

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is distinguishable from a withdrawal. Indeed, the respondents acknowledged the similarity of withdrawals and contribution holidays by noting the monies actually refunded to the six original clubs in 1982 merely postponed the time at which they would again have to make contributions.

Unlike the cases relied upon by the Respondents, the exclusive entitlement of the participants to all excess funds is also not lacking in common sense given the content of the original Plan. As noted earlier, in a defined benefit plan it has been said there is nothing improper or unexpected in attributing surplus to an employer required to make up any shortfall in funds should contributions prove insufficient to generate the promised benefits. In other words, the "downside" liability of the employer buttresses its claim to surplus where funds are more than sufficient. Most often the employer's contributions in this type of plan are determined, not by an agreed schedule of contributions, but solely by an actuary. When the actuary has been overly conservative by requiring the employer to contribute more than is necessary to achieve the promised benefits, it has appeared reasonable to permit a recapture of excess contributions: see Askin v. Ontario Hospital Assn. (1991), 2 O.R. (3d) 641, 34 C.C.E.L. 11 (C.A.), at p. 651 O.R., pp. 22-23 C.C.E.L.; Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, 46 B.C.L.R. (2d) 382 (C.A.), at p. 21 D.L.R., pp. 392-93 B.C.L.R.; Maurer v. McMaster University (1991), 4 O.R. (2d) 139, 82 D.L.R. (4th) 6 (Gen. Div.), at p. 155 O.R., p. 22 D.L.R.; Crownx Inc. v. Edwards (1991), 7 O.R. (3d) 27, 45 E.T.R. 57 (Gen. Div.), at p. 41 O.R., pp. 71-72 E.T.R.; Otis Canada Inc., supra, p. 751 O.R., pp. 249-50 E.T.R.; and Nashua Photo Ltd. v. Marshman (1992), 89 D.L.R. (4th) 592, 40 C.C.E.L. 311 (Ont. Gen. Div.).

All of the cases relied on by the respondents, therefore, dealt with pure defined benefit plans where the employer was liable for defined benefits, where the employer contributions were not specified in the Plan but rather required to be made on the advice of an actuary and, generally, where contributions had not been made to the exclusive and irrevocable benefit of the employees. The original Plan, however, is a hybrid

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arrangement containing both defined benefit and defined contribution characteristics. The contributions of the employees or players were specifically set out and the economic support of the employers was specifically agreed to in separate contribution or funding agreements between the clubs, the League and the Pension Society. All monies were given irrevocably and all were dedicated to the exclusive benefit of the players.

Furthermore, Regulation 25 limits the rights of participants and other persons entitled to receive any payment or benefit under the Plan to the assets of the Society. This regulation specifically provides there shall be no privity between a member club and a participant and no right or claim may be made by the participant against a member club. The regulations do not base club contributions solely on annual actuarial reviews. Surplus is also specifically contemplated in several provisions and, in those instances, is allocated to the benefit of the participants. Finally, representations of exclusive employee entitlement to all pension funds and the administrative practices for the Plan all favour employee ownership.

In my view, this structure of the original Plan and its administration over twenty years brings it within the ratio of the Ontario Hydro case as explained by Mr. Justice Carthy at p. 651 O.R., p. 23 C.C.E.L. of Askin v. Ontario Hospital Assn., where His Lordship stated:

> To repeat for clarity, the ratio I take from the Ontario Hydro case is that, if a specific calculated contribution is mandated by statute or by the plan itself, it is an indirect use of the trust funds to apply surplus to meet that obligation. The intended ratio of the present case is that, where the specific method of calculation is not mandated, it is inoffensive in accordance with statutory authorization and normal actuarial practice to consider a surplus as one factor in the calculation of the contribution.

The original Plan, it should be pointed out, was the product of negotiations with player representatives. The stipulation of employer contributions makes evident that the employers and

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employee representatives were bargaining over the cost of the pension plan and not just agreeing on benefits. This buttresses the applicants' claim that the contributions of the clubs, as opposed to the defined benefits, amount to deferred wages. In turn, this supports their claim to all benefits arising from such contributions. In this respect, under the heading "What do the Parties Bargain Over: Pension Benefits or Pension Costs?" Professor Bernard Adell in his study "Pension Plan Surpluses and the Law: Finding a Path for Reform", supra, at p. 235 draws the following relationship between "total compensation bargaining" and pension "surplus" entitlement:

> Employers claim that what they negotiate with their employees, in the case of a defined benefit plan, is not the amount of money which the employer will pay into the plan (the cost of the pensions), but rather the amount of benefits which will be paid out. On this reasoning how much or how little the employer puts into the plan is entirely the employers affair, as long as enough comes out at the other end to provide the employees with the promised level of benefits.
>
> The employee response is that even if it is only the level of benefits that is agreed to in writing, what employers and employees actually bargain over, implicitly if not explicitly, is that cost of employer contributions to the plan. Although that is particularly true for unionized employees, the argument runs, it is also true for unorganized employees. When an employer agrees to fund a certain level of pension benefits, what it is really agreeing to do is to divert from employee wages the amount which is thought at the time to be necessary to pay for that level of benefits. Because the employees, through foregone wages, have paid for the full amount of employer contributions, they are entitled to whatever those contributions have produced. What is still the clearest available account of the process of union-employers bargaining over pensions was offered in 1964 by an American scholar, Professor Merton C. Berstein:
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> > Unions and employers often are quite specific in equating employer pension plan contributions with employee wage

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compensation. Unions demand increases of X cents per hour in money wages and Y cents per hour in fringe benefits, including pension plan contributions. Employers respond with counter offers in precisely the same terms. Fact-finding boards report the bargaining proposals of both in the same fashion. The bargaining of the large unions and large employers is most explicit on this point because both sides have the technical assistance to translate fringe costs, including pension plan contributions, into costs per hour. This "translation" is necessary because many plans such as those in the steel and automobile industry, are expressed in terms of benefit scales and the costs must be derived actuarially.

The parties bargain on all labour compensation elements in terms of the total cost of the package which is divided among direct money wages and several fringe items. Considerations of equity and strategy shape the parties' demands, and they agree upon division of the package among the various elements. One seasoned negotiator [Arthur Goldberg, general counsel of the CIO at the time] described the process in this fashion:

> The union and management come to the bargaining table with some appraisal of how much money there is in the "kitty" for an increase. The appraisals are, naturally, different. But it is the total cost of improvements which provides the framework within which the union and management bargain. If the 5 cents, for example, does not go into a health fund, it can go into a wage increase or to extra holidays or double time for overtime on Saturdays. That is what collective bargaining is all about.
>
> . . . . .

Of course, smaller employers and unions are less well equipped to translate pension/employee. But, although they must do the job only approximately, or even leave the job of translation undone, the understanding is that pension costs (contributions) are part of the wage bill which are given and taken in lieu of direct cash wages or other items

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of compensation.

Applying Professor Bernstein analysis to the specific question of entitlement to surplus funds, Professor Stein has recently said:

> . . . in substance the employer and union are negotiating about what goes into the plan at least as much as they are negotiating over what will come out. And if the union and employer turn out to have been mistaken about a benefit's cost, the employer claim to any resulting surplus hardly seems stronger than would a claim to cash wages actually paid to employees during the term of the collective bargaining agreement negotiated under a mistaken belief that inflation would continue a pace during the agreement's duration.
>
> . . . . .
>
> The analysis can be extended even to non bargained for plans, since all plans exist in a common economy and might be presumed to create similar types of benefit expectations in employees. But here the considerations are more complex and the employer's position more supportable, for at least two reasons. One, the above analysis is based on the reasonable bargaining expectations of union and employer, and not only on the expectations of individual employees. And two, an employer may have a freer hand in selecting actuarial methods and modulating contribution rates when the plan is not negotiated.

With respect to the question of risk, the original Plan expressly removed the clubs from open-ended exposure. However, even in a typical defined benefit plan the question of risk is complex. In this respect, Professor Adell, supra, at pp. 238-39 has stated:

> The question risk is even more difficult, in part because the risks which employers and employees take on under defined benefit plans are so different and so hard to compare. Employers take most of the risk that the pension will not have enough in it to pay the promised level of nominal

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benefits when they fall due. Employee risk in that regard is largely limited to situations of employer bankruptcy. On the other hand, employees face the very substantial risk that the real value of the benefits promised to them will have declined greatly by the time these benefits are paid.

Although many defined benefits plans are structured to provide some protection against inflation, many are not, and most employees and retirees simply do not have the bargaining leverage to insist on substantial periodic improvements to their pension entitlements. Nor do most employees have the resources to amass large retirement savings on their own. Even the average industrial wage, let alone the much lower earning on which a large proportion of the work-force must get by, seldom permits the accumulation of much in the way of capital reserves.

Employers are given a tax exemption for pension plan contributions, and funds in pension plans are allowed to accumulate tax free. The reason for those tax concessions is to encourage the setting aside of pension funds for plan beneficiaries and to enable those funds to grow to a level at which they can provide adequate retirement income security for the beneficiaries. The object is not to enable employers to accumulate assets for their own use.

To summarize then, the original Plan constituted a trust whereby the defined contributions of both the players and the clubs were irrevocable and held by the Pension Society as trustee for the exclusive benefit of the participant players. The settlors did not reserve unto themselves or the Pension Society a sufficiently express power of revocation of the beneficial interest of the participant players in those funds. All surplus funds in the Pension Society explicitly enured to the exclusive benefit of the participant players. The terms of the Plan in the context of its administration over almost a twenty-year period make this ownership of excess funds clear. The Manulife group annuity contract with its premium discount and experience rate credit features was as much an asset of the trust as the individual annuity contracts. The only right of the clubs to any reversion of contributions was expressly

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confined in the clubs' contribution agreements to an off-set against current contributions by an amount equal to that refunded to any player who failed to meet the vesting requirements of the Plan.

3. THE CLUB PENSION PLAN AND T
RUST

The reason for instituting the Club Pension Plan and Trust in 1966 ("the new Plan") was solely to comply with certain United States tax laws apparently requiring the formal establishment of the Plan as a "foreign situs trust". There was no intent to change either the structural characteristics of the Plan or its administration as evidenced by the minutes of the meeting of the board of directors at which authorization was given. This being the case, the respondents' emphasis on the reversionary language in art. 4.01(3) and art. 6.11 in aid of their claim is, in my view, inappropriate. This language did not exist in the original Plan and, if the respondents' submissions concerning their meaning are accepted, is completely at odds with the fundamental structure of that plan and the earlier representations of exclusive and irrevocable employee entitlement.

Group Annuity Contract GA550 evidences a common intent between plans by being continued as an asset of the pension arrangement in the same form and having the same relationship to the express terms of the new Plan as it did under the original Plan. Fixed contributions continued to be required by arts. 3.01 and 3.05 for both participants and clubs. The Society continued to be obligated to purchase a contract for each participant pursuant to arts. 3.07-3.11. Article 3.12 made explicit what had been implicit under the original Plan. The Society as trustee was expressly obligated to allocate surplus funds among the accounts of participating players at five-year intervals. Article 4.03 provided on termination that each participant, former participant or beneficiary was vested with all rights to the contracts or "contributions held for his benefit". Article 6.11 contained "exclusive benefit" language.

Article 3.12 also illustrates that the Society saw surplus

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funds at this time in terms of its previous experience. The three previous distributions of surplus to the players' accounts had arisen primarily from premium discounts pursuant to provision 5 of GA550. This is apparent from the wording of art. 3.12 which requires the Society as trustee to allocate surplus funds among the players who had been participants at any time since the immediately prior allocation of surplus funds. This limitation only makes sense if the surplus is thought to arise from premium discounts in relation to contributions during the preceding five years. Experience rate credits, on the other hand, are defined by provision 20 to arise out of the total fund of monies held by Manulife when the "experience fund" exceeds the reserves held. Accordingly, anyone who had contributed to the funds held by Manulife would have an interest in the excess. At the time of drafting art. 3.12, however, surplus had arisen essentially pursuant to Provision 20 of GA550. Article 3.12 is therefore indicative of the continuation of the original Plan's treatment of surplus but the new Plan left implicit the exclusive entitlement of participants to other excess funds such as experience rate credits.

Against the backdrop of this language and the clear intent of all concerned in creating the Club Pension Plan and Trust, I find the reversionary language of arts. 4.01 and 6.11 to be no more than cautionary language in the event the Society was unable to allocate all the surplus to the employees. This language is insufficiently express to support the retroactive revocation of employee entitlement in accordance with the holding in Reevie, supra. Alternatively, because the interest of the players in any surplus was an earned or vested contractual right by them providing services in light of explicit representations of their exclusive entitlement, employee entitlement to surplus was both a vested benefit within the meaning of art. 4.01 and an existing liability pursuant to art. 6.11.

In any event, if the intent of arts. 4.01 and 6.11 was to provide for reversion of surplus funds to the clubs on termination, the attempt was ineffective because of the initial failure of the co-settlors and the Pension Society to reserve

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such a fundamental power of revocation in the original Plan with GA550 as its central asset. The creation of the new club Plan with its express trust agreement did not provide an opportunity to revoke the original trust. In McCreight v. 146919 Canada Ltd., supra, an original trust made in 1962 provided for amendments by the employer but contained an absolute prohibition against amendments authorizing any part of the corpus or income for use other than the exclusive benefit of members and beneficiaries. In 1984, the original trust was replaced by another which made the prohibition on such amendments subject to the provisions of the pension plan. The original pension plan had provided that all contributions made by the employer were irrevocable and, together with all contributions made by members, could only be used exclusively for the benefit of members and their beneficiaries. However, in 1978, the plan was amended to include a new provision stating that, if any monies remained in the plan's funds after termination of the plan and after satisfying any liabilities of the plan, the excess was to be returned to the employer.

The plan was further amended in 1981, whereby the provisions dealing with contributions for the exclusive benefit of members and their beneficiaries and those dealing with withdrawal of contributions on discontinuance of the plan were made subject to the 1978 amendment providing for a reversionary interest in the employer. The new trust agreement also provided that nothing in it was to be construed to give any employee beneficiary or legal representative any right, title or interest in or to any assets, profit earnings or accretions to the trust fund. In holding the amendments to the plan and the completely new trust agreement ineffective in so far as they purported to confer an interest to the employer in the trust fund, Mr. Justice Isaac (as he then was) at pp. 294-95 C.C.E.L., p. 196 E.T.R., declared the following statement of principle which has application to the present case:

> Like Zuber J.A. in Re Reevie, supra, and Montgomery J. in C.A.W. Local 458 v. White Farm Manufacturing Canada Ltd. (1988), 66 O.R. (2d) 535, 24 C.C.E.L. 188, 30 E.T.R. 202, C.E.B. & P.G.R. 8067 (H.C.), additional reasons at (1989), 66 O.R. (2d) 535 at 542, 31 E.T.R. 252 (H.C.), aff'd (1990), 39

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E.T.R. 1 (Ont. C.A.), I am of the respectful opinion that the language of the original trust agreement and of the 1962 pension plan does not support the respondents' contention. The power to amend which these documents contain does not include a power to revoke the trust. Re Reevie, supra , instructs that the power to revoke must be express. In this case, I have searched diligently for the express reservation of a power to revoke, but the search was in vain.

In Re Reevie, the Ontario Court of Appeal was presented with essentially the identical arguments presented here and in very similar circumstances. There, as here, the plan was funded both by the employer and the employees, and the benefits were defined.

He continued at p. 296 C.C.E.L., p. 197 E.T.R., to state:

On the authority of Re Reevie and in reading art. 14-3 of the 1962 plan in the context of the whole of art. 14 and other provisions in that plan, I conclude that art. 14-3 did not empower General Bakeries to make amendments in the 1978 and 1981 plans which had the effect of revoking the trust in whole or in part so as to confer upon itself entitlement to the surplus remaining in the plan upon its termination. The decided cases upon which the respondent relies, already cited and both of which I have read, do not detract from this conclusion because their factual basis were different from those under consideration here.

Also confirmatory of exclusive employee entitlement is the continuing defined contribution language of the new Plan and the representations to Revenue Canada and the Pension Commission of Ontario by the Pension Society's actuary. From its inception, the Club Pension Plan and Trust was registered with Revenue Canada and the Pension Commission of Ontario as a defined contribution plan. The respondent has argued this was a matter of form only and that in substance the plan was a defined benefit plan. In effect, the court is being asked to ignore the formal characterization of the Plan to two important regulatory bodies. Dealing with a similar argument, Mr. Justice Isaac in McCreight, at p. 296 C.C.E.L., pp. 197-98 E.T.R.,

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stated:

> Counsel for the respondent also contended that the provision in the 1962 pension plan for irrevocability of contributions was included to satisfy the registration requirements of the Department of National Revenue, which imposed this requirement as a sine qua non [sic] of deductibility of contributions, and that the amendments were made in response to circulars issued subsequently by the same department. I am equally unable to accept this contention since I am bound by the unreported decision of the Ontario Court of Appeal in King Seagrave Ltd. v. Canada Permanent Trust Co. [now reported at (1986), 13 O.A.C. 305, C.E.B. and P.G.R. 8017 (C.A.), leave to appeal to S.C.C. refused (1986), 69 N.R. 160 (note), 16 O.A.C. 240 (note) (S.C.C.)] to hold "that tax considerations cannot alter the structure of the trust so as to deprive the beneficiaries of their residual rights".

In Re U.E.B. Industries Ltd. Pension Plan; U.E.B. Industries Ltd. v. Brabant, [1992] 1 N.Z.L.R. 292, the New Zealand Court of Appeal was even more to the point in responding to a similar argument. It stated at p. 300:

> It may be that this quite stringent limitation reflected tax considerations at the time, but if so that would do nothing to detract from the binding nature of the limitation. On the contrary a binding legal limitation may have been as essential to ensure tax advantages: compare Mills v. Dowdall [1983] N.Z.L.R. 154. It is the actual terms of the trust that matter, not what motivated their adoption.

I am of the same view. The Plan on its face is reasonably characterized as a defined contribution plan. The contributions were fixed by the Plan and Trust. Article 3.12, with its mandatory language, bears testimony to the continuation of the players' exclusive and irrevocable entitlement to surplus funds although only explicitly dealing with the type of surplus that had been experienced up until the inception of the new Plan (i.e., premium discounts). The new Plan's amendment powers make reference to the players' exclusive benefit and prohibit

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reversionary changes. The amendment powers in arts. 4.01, 4.03 and 6.11, therefore, are insufficiently express to authorize the fundamental change contended for by the respondents: see Reevie, supra; White Farm Manufacturing, supra; Sulpetro Ltd. Retirement Plan, supra; and Re Courage Group's Pension Schemes, [1987] 1 All E.R. 528 (Ch. D.).

Also helpful is the case of Little v. Kent-McLain of Canada Ltd., supra, where this court observed that had a purported amendment to a plan not been passed and had the plan been discontinued for whatever reason, the members would have had a vested and exclusive interest in all of the plan's assets without exception and to the complete exclusion of the company. Previous to such discontinuance, the interest of the employees was a "contingent" one but the only contingency was that the plan, in fact, be discontinued. In considering the effect of that "contingent interest" on an amendment purporting to divert excess funds to the employer, Addy J. declared the amendment ineffective. In this respect, he wrote at p. 2:

> I have held that those rights to the whole of the assets of the Trustee are contingent only upon the Plan being discontinued. They are not contingent upon the whim of the employer who may at any time decide to withdraw any part of the Fund. Therefore, even under the context of the amendment itself they are preserved, since they are contingent rights and would fall normally under the expression "any rights". One might even go further and state that, at the time of the passing of the resolution, the discontinuance of the Company's plan had passed from the realm of mere contingency to certainty.

Similarly, I do not accept the applicants' exclusive interest in all excess funds, even if characterized as contingent, was intended to be at the whim of either the Pension Society or the clubs. The Society had a discretion over the timing and precise formula for distribution of the funds but not over the issue of entitlement or ownership.

4. THE 1969 "DEAL"

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The respondents submit that a "deal" between the League and the newly formed National Hockey League Players Association ("NHLPA") in the summer of 1969 allocated all excess funds to the clubs in exchange for the clubs shouldering all future contributions. The respondents contend the Applicants now see this to have been a "bad deal" and wish they had made another.

Before examining these submissions, some understanding of the NHLPA and of the timing of its formation is useful. The players and their representatives had bargained with management since at least the 1940s. Indeed, the players were responsible for the initiation of the original Plan and there were player representatives on the Society's board of directors from the beginning. However, in 1967 or 1968 the NHL "recognized" the NHLPA, led by its executive director Alan Eagleson, as the representative of all "active" players so long as the association represented two-thirds of these present players. This act of recognition did not purport to be a formal recognition under the applicable labour legislation of the day nor was it immediately followed by the negotiation of formal collective agreements. Illustrative is the very "deal" the respondents rely on which was documented in an almost cursory manner through what were known as Owner/Player Council minutes of meetings. Even the more formal collective bargaining which has ensued ignores many of the key requirements of modern labour legislation.

In 1968, and presumably at the urging of the NHLPA and its executive director, the player representatives on the Society's board of directors requested the Society to invest generally in equities. The compromise was to invest existing surplus funds in equities. This initiative was known as the "Equity Fund" and was administered by National Trust. Essentially, the funds consisted of the premium discounts which had given rise to the earlier surplus allocations. A very small part (i.e., $38,000) of the 1967 surplus allocation appears to have been an experience rate credit. But its de minimus size seems to explain why it attracted the same treatment as provision 5 funds. No experience rate credits appear to have been part of the Equity Fund.

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With respect to the 1969 discussions between the NHL and the NHLPA, and NHLPA could speak only for "active" players given the limits on its recognition. Moreover, its agency status was, without statutory support, precarious for any player who did not support it or who ceased doing so. But it clearly had no mandate for or from inactive players who had contributed to the Society since its inception and on whose behalf the League and the clubs had made contributions. Furthermore, the only surplus that had been dealt with prior to this agreement and after the inception of the NHLPA was the money in the equity fund which had arisen from the premium discount feature of GA550. Other than the equity fund, there was no other accumulation of such funds. In this sense then, funds from premium discounts were expected to be generated in the future and essentially in relation to future contributions.

The respondents argue that in 1969 the newly formed NHLPA and the NHL agreed the clubs would shoulder all of the contributions to the pension plan in return for the players (1) withdrawing from the governance of the Society; (2) relinquishing all claims to surplus from any source; and (3) refraining from any additional requests for benefits or television revenues for a period of three years. There is no documentation the bargain included item 2 in the June to August 1969 Owner/Player Council minutes. In those minutes, only items 1 and 3 are mentioned and these minutes appear to be the mechanism by which the parties recorded their understandings at the time. They are also the basis against which the parties made arrangements for the agreement's implementation at the January 12, 1970 meeting of the Society's board of directors.

However, the respondents rely on Clarence Campbell's later letter to the players in November of 1969. In this letter, he advised players to make RRSP contributions because there would be no further surplus funds available to provide dividends in the form of additional pension benefits. According to Mr. Campbell, the clubs' only obligation was to provide a guaranteed annual pension of $300 per year of NHL service payable at age 45.

But Mr. Campbell's letter must be considered in the context

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of all the surrounding facts. There is the history of allocating only surplus funds from premium discounts. The fragmentary and vague recollections of those people who filed affidavits do not indicate an awareness of the possible payment of experience rate credits at the time of the agreement. There is also the absence of any mention of surplus in the Owner/ Player Council minutes. Against this background, Mr. Campbell's unilateral letter is ambiguous in so far as the respondents' claim Mr. Campbell was referring to experience rate credits. In any event, the letter must be considered against all the other evidence relating to this agreement. By this I mean the letter is only one piece of evidence and needs to be weighed against the conduct of the parties and the minutes of the meeting of the directors of the Pension Society on January 12, 1970, the last meeting of the Society with players on the board of directors.

The minutes of the January 12 meeting explicitly distinguish between surplus arising from reduced purchase costs of contracts purchased as of April 30, 1968 and as of April 30, 1969 (i.e., GA550 provision 5) and monies released by Manufacturers Life Insurance Company by reason of the improvement in earnings projections and the relaxation of government reserve requirements (i.e., GA550 provision 20). The former funds were to be distributed to particular participants for the two years ending April 30, 1969. The latter funds were to be distributed in the form of additional annuity contracts to all for whom annuity contracts had been purchased to April 30, 1967. The minutes then went on to provide "any future distribution of dividends as a result of additional releases against players' contracts by Manufacturers Life Insurance Company be distributed on the same basis". In other words, the premium discounts were capped as of April 30, 1969 but "any" future releases pursuant to the experience credit feature would be allocated in the same manner as the 1969 release.

Indeed, this intent was carried forward by two large experience rate credit distributions made exclusively to players in 1970 and 1971. It was also incorporated into the first restatement of the Club Pension Plan and Trust dated

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December 5, 1972. In this latter document, new art. 3.22 purports to implement the deal and refers only to the allocation of surplus funds for the next two annual periods "attributable to such period" among the accounts of participating players. The applicants argue that because the provision goes on to state the surplus funds for "any" period are to be allocated in the manner provided for by the section, it does not intend to limit the allocation of surplus (whatever its source) to the participants for "the next two annual periods". In my view, "any period" means in either of the two annual periods leading to 1969 and is not a reference to future periods beyond 1969. However, the phrase "attributable to such period" clearly indicates that art. 3.22 is dealing only with surplus attributable to premium discounts pursuant to Provision 5 of GA550 because only these monies can be said to be attributable to a particular period. Experience rate credits arise out of all previous contributions and therefore are allocated across all players who have participated in the Plan from its inception.

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While the Club Pension Plan and Trust, like the original Plan, does not deal explicitly with experience rate credits, I have already found an intention that the participants were to continue to have an exclusive and irrevocable interest in all such "excess" monies. Confirmatory of this implicit entitlement was the practice of the parties in 1969, 1970 and 1971 allocating these credits exclusively to the players. This conduct was in turn consistent with the language of irrevocability and exclusiveness found in the original Plan, with the representations to the same effect in the special by-laws and reports, and with the express intent of the parties that the Club Pension Plan and Trust intended no structural change in substance or practice. Accordingly, without express language to the contrary, the only 1969 agreement which the evidence supports is one whereby the players agreed to forego monies arising from future premium discounts generated by GA550. In 1969 this is what the parties (and Mr. Campbell) meant when they used the term "surplus".

An agreement foregoing future premium discounts in return for full funding by the employer could reasonably be taken into

account by the Pension Society as trustee in administering and allocating such surplus funds: see Ventra Group v. Ontario (Pension Commission) (1990), 35 C.C.E.L. 64 (Ont. Gen. Div.). In 1969 the NHLPA was representing the players who would otherwise have been making future contributions and for whose benefit premium discount surplus would have been allocated. These players were also the participants on whose behalf recently accumulated surplus had been placed in the equity fund. Thus, the bargain struck principally affected those players, i.e., generally their future premium discounts arising from future contributions made on their behalf.

However, while pension plans should be capable of balanced change, they cannot be changed at whim. In this latter regard, what the NHLPA had no authority to negotiate and what the Pension Society could not permit was the retroactive diversion of the non-active players' beneficial and earned interest in all previous contributions and related funds, particularly without a commensurate corresponding benefit for these persons. Their exclusive beneficial interest was protected by the Pension Society's fiduciary duty as trustee and by contractual rights arising between the participants, the Society, the League and the clubs having regard to what had been previously said about ownership and the purpose of the new Plan: see Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14.

When the NHL and the Pension Society acted on December 9, 1983 by executing the first amendment to the then 1977 Trust document or second restatement, art. 3.51 did not distinguish between club contributions made before and after 1969. However, if Clarence Campbell had been referring to all excess funds regardless of when their source was contributed, one would have expected him to be clear on the status of excess funds arising from contributions already made and for which services by the players had been previously rendered. It is in no way self-evident that because all contributions were to be made in the future by the clubs, they suddenly had an entitlement to funds arising from their pre-1969 contributions. Yet the structure of art. 3.51 purports to reach back and allocate to the clubs all monies arising from their contributions made

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prior to 1969 notwithstanding that those contributions had been made to the exclusive benefit of the players.

Had this been part of the 1969 deal, one would have expected an explicit reference by the parties and by Mr. Campbell to this significant feature. In fact, how the detail of art. 3.51 arises from even Mr. Campbell's letter was never adequately explained by the respondents and is a further indication why his letter cannot be taken at face value. The respondents emphasize the Applicants did not produce an official from the NHLPA to support their interpretation of what happened in 1969 but neither did the respondents. The applicants are not the NHLPA and it is the respondents who are asserting a fundamental change was negotiated with the NHLPA despite the absence of any contemporaneous written agreement recording such a crucial accord and affecting so many. If there was any onus with respect to establishing the detail of changes intended in 1969, it was an onus shouldered by the respondents. The affidavit evidence filed by the respondents did not further their position given the quality of the affiants' recollections and the general absence of corroborating written documentation.

An agreement allocating all excess funds by source of contribution was clearly not arrived at in 1969. Such an agreement cannot be taken from Mr. Campbell's letter nor from art. 3.22 in the first restatement of 1972 which was the most contemporaneous attempt to incorporate the so-called deal into the Club Pension Plan and Trust. Rather, the content of the 1969 agreement must be distilled from a combination of (1) the Owner/Player Council minutes of 1969, (2) the January 12, 1970 minutes of the Society's board of directors, (3) the actual practice of allocating experience rate credits in 1970 and 1971 following the deal, (4) the correspondence to the players from Mr. Campbell and Mr. Eagleson, and (5) art. 3.22. From all of this material, I can only infer an understanding that the then active players would forego excess funds arising from future premium discounts (i.e., what they, in 1969, equated with the term surplus or dividend) in return for the clubs taking on all contributions. The cost to the clubs of these additional contributions, I might note, was not the $1,500 each player had been contributing.

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Provision 5 had always been a part of GA550 and it was what primarily generated the previous surplus funds. As a benefit, it was also kept current by periodic distributions referred to as dividends. Indeed, the fact that art. 3.12, which refers to surplus, is obviously confined to premium discounts also illustrates that the parties equated this source with the notion of surplus or dividend. The 1969 deal spoke only to the future and for this reason concerned only the active players represented by the NHLPA who would benefit from the new non-contributory feature of the Plan. For this reason, as I previously mentioned, a trustee such as the Society could reasonably conclude the new arrangement to be in the overall interest of the players affected.

This is an example of the law of trusts accommodating the fiduciary duties of trustees to the modern context of pension plan administration. On the other hand, had the NHLPA actually agreed to what the respondents claim was negotiated, the Pension Society would clearly breach its fiduciary and contractual duties on purporting to implement it. The NHLPA did not represent the inactive players who had an interest in these monies. There is no reasonable benefit flowing to them from the alleged deal but there are clear disadvantages. These disadvantages violate the applicants' earned contractual and beneficial rights to all excess funds on contributions previously made on their behalf. In other words, while I do not accept the NHLPA made the agreement claimed by the respondents, if they had done so it would not have bound the applicants and been legally implemented by the Society in any event.

I also see no basis for concluding the clubs "at least" obtained entitlement to all excess funds arising from contributions made after 1969. The evidence does not bear this agreement out and it is not for a court to fashion an arrangement the parties might have made. Accordingly, the 1969 "deal" does not justify the contested amendment and Club Pension Plan and Trust does not contain a sufficiently express amendment power to alone support such a fundamental change.

5. THE FIRST AMENDMENT TO THE SECOND

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The Pension Society's actuary, Mr. Chamberland, had been discussing with Manulife since the mid 1970s the issue of experience rate credits. The evidence led by both the applicants and the respondents with respect to this period did not further their respective positions on entitlement given its uncertain and often conflicting nature. But by the early 1980s, it had become apparent that very significant funds were going to be available from this feature of the group annuity. The seeking of a legal opinion at this time and the perceived need for art. 3.51 are indications of the NHL's awareness of possible controversy over the ownership of these funds. Indeed, if the "deal" in 1969 had been as alleged by the NHL and Pension Society, one would have expected art. 3.51 to have been enacted along with art. 3.22 in 1972. This, in my view, is further evidence the respondents did not believe they had obtained access to these credits in 1969.

Not only are the events of 1969 insufficient justification for this amendment, the respondents cannot fall back on the Club Plan as initially constituted in 1966 in light of my earlier finding there was no intent at that time to permit the allocation of excess monies to the clubs. In the original Plan, these funds were explicitly provided to be irrevocable and for the exclusive benefit of the participants. It was not possible for the Pension Society or the co-settlors to revoke this arrangement in 1966 in so far as earlier contributions are concerned nor, as I have found, was it their intent to revoke this arrangement for the future with the creation of the Club Plan and Trust. Further evidence of the continuity in intent between the two plans is the continuation of GA550 from 1952 to the time of this contested amendment and the parallel practices of the Society with respect to excess funds under the two instruments. Article 3.12 explicitly conveyed the new Plan's intent with respect to excess funds and, as determined earlier in this opinion, arts. 4.01, 4.03 and 6.11 are insufficiently express to support the fundamental change the respondents purported to make. Accordingly, there is no authorization in the Club Pension Plan and Trust for the revocation of the participants' interest in excess funds as provided for by new

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art. 3.51 executed December 9, 1983, whether the source of contributions was made before or after 1969.

Alternatively, and as matter of contract, I am satisfied the Society, the League and the club fettered any rights they did have to rely on the Club Plan by representations of the purpose of the new Plan and by their failure to revoke explicitly their earlier representations of exclusive participant entitlement. By waiting until they did, the Society, the League and the clubs waived or contracted away any right to revoke the beneficial interest of participants in surplus funds arising from contributions previously earned and made as of January 30, 1982 on an irrevocable and exclusive basis.

I am not persuaded, however, that art. 3.51 is invalid simply because of a delay in the NHL's formal ratification and my decision does not turn on this submission of the applicants.

6. THE 1986 COLLECTIVE AGREEMENT

It is also no answer for the respondents to point to the 1986 collective agreement with the NHLPA whereby some $10 million of the experience rate credit funds were allocated by the clubs to NHLPA for the purposes of establishing a senior player benefit. The reference to pensions in previous NHLPA agreements had simply continued the pension plans as previously constituted. The applicants are seven retired professional hockey players who bring this application on their own behalf and on behalf of all player participants with service under the Plan on or before June 30, 1982. When the NHLPA negotiated with the NHL in 1986 it was representing only active or present players and the NHL and NHLPA had no power to extend the NHLPA's authority to former players without their consent. Accordingly, all or the vast majority of persons on whose behalf this application is brought had not authorized the NHLPA to act on their behalf and therefore they were not being represented by the NHLPA in 1986. Yet, monies to which they were exclusively entitled were used by the NHL and NHLPA to fund a benefit of little or no value to these former players. Not only did the NHLPA represent only active players on that occasion, the Pension Society had trust, contractual and fiduciary duties to ensure that the beneficial

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interest of former players in these funds was protected. Obviously, no one else was concerned about these people.

The participation of the NHLPA in these funds also appears inconsistent with an agreement having been made by it in 1969 foregoing any right to such funds. Why was the NHLPA not reminded about the "bad" deal it had made in 1969 when it claimed such a sizeable share? It seems the respondents only wish to remind the applicants of the alleged "bad" deal. Thus, there is no reasonable collective bargaining justification open to the Society, the League and the clubs for allocating $10 million from the applicants to fund a senior player benefit restricted to players who have played more than 400 games but who reach that level after 1986. In coming to this conclusion, I am not forgetting the NHLPA's contributions from international hockey. In my view, they were made irrevocably and exclusively to the benefit of the participants and are to be treated like all other contributions.

Had the NHLPA been representing the applicants and had it been a trade union subject to the duty of fair representation under the Ontario Labour Relations Act, I fail to see how it would have honoured its duty in the circumstances. However, the apparent moral shortcoming in the NHLPA's conduct captured by its executive director's participation in the November 21, 1988 "Merry Christmas" letter to former players, should not be confused with the association's then limited mandate. Moreover, the NHLPA was not a party to these proceedings and, accordingly, it is not appropriate to say more.

The one-shot credit the Pension Society negotiated with Manulife related to contributions which had been made up to and including June 30, 1982. The board of directors of the Pension Society as trustee, regardless of who was actually on the board, had fiduciary, trust and contractual duties obliging it to protect the welfare of the participants. The League and the clubs were subject to related contractual duties. The negotiation of a collective bargaining deal does not, in itself, obviate these duties. In Sinai Hospital of Baltimore Inc. v. National Benefit Fund for Hospital & Health Care Employees, 697 F. 2d 562 (1982), the United States Court of

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Appeal for the 4th Circuit had to deal with the argument that trustees of a pension plan were obligated to implement a collective bargaining deal negotiated between a group of employers and a trade union. In rejecting this argument, Mr. Justice Sprouse stated (at p. 567):

> The Hospitals also insist that when the surplus in the fund developed in 1980-1981, it was the duty of the Trustees to use the surplus to reduce the future contributions of the Hospitals. The contrary is true. The sole duty of the Board of Trustees was their fiduciary duty to consider the welfare of the employees. The decisions are uniform that the duties of trustees of employee trust funds are owed to employee beneficiaries of the trusts, not to the parties to the collective bargaining agreements creating or sustaining them. See Amax, supra; NRB v. Construction and General Labourers Union Local 1140, 577 F. 2d 16, 20n. 6 (8th Cir 1978), cert. denied, 439 U.S. 1070, 99 S. Ct. 839 59 L. Ed. 2d 35 (1979). . .

In any event, even if a properly authorized and reasonably balanced collective bargaining change to an otherwise irrevocable pension commitment can be honoured (as I have upheld with respect to the premium discount issue), the 1986 agreement falls far short of the type of justification necessary.

Finally, the fact that the original Plan and Club Pension Plan and Trust did not explicitly address the excess funds attributable to experience rate credits in no way defeats the trust. As Mr. Justice Montgomery held in C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd., supra (at p. 541 O.R., p. 210 E.T.R.):

> While counsel for the respondent conceded the intention to create a trust, he argues that since surplus was not addressed there was no certainty with respect to it and the trust must fail. There never is certainty with respect to the yield on any trust fund, yet that has never caused the trust to fail.

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It is also argued that there was never an intention to give away a surplus.

In my view, the fund created by the settler was a trust fund. The resulting surplus is a part of that trust fund. There are no uncertainties, in my view, that would vitiate the trust.

A trust fund was created in 1950 for pension purposes. The 1950 agreement was amended and restated in 1974. The trust lived on and the corpus remained and was under continual administration.

The respondent further argues that a windfall for employees results if they get the surplus. O'Brien J. [46 O.R. 2 (2d) 667, 10 D.L.R. (4th) 287, 27 B.L.R. 46], affirmed on appeal, rejected that argument in Reevie, supra . I, too, am not convinced that the employees' claim should be disallowed as a windfall at the expense of their employer.

In my view, the surplus is part of the trust fund and enures to the benefit of the employees. The application is allowed.

7. THE SOCIETY AS A NOT-FOR-PROFIT CORPORATION

The applicants have also submitted the not-for-profit nature of the Society precluded a return to the clubs of these monies either directly or indirectly in the form of contribution holidays. While I agree the Pension Society, as an ongoing not-for-profit corporation, was precluded by its charter and s. 154 of the Canada Corporations Act from allocating "profits" to the clubs, this in itself does not determine the applicants' entitlement given the Society is not a charitable organization: see P.A. Cumming, supra, at p. 24, and D.J. Bourgeois, The Law of Charitable and Non-Profit Organizations (1990), p. 7. Even if all the monies in question had to be returned to the Society on this basis, the question of ownership of these funds would have to await the Society's dissolution. On dissolution, the not-for-profit nature of the Society would not, in itself,

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establish the applicants' entitlement: see P.A. Cumming, supra, at p. 31. Further, it does appear a non-profit corporation may use surplus funds to "reimburse" members or to reduce fees in subsequent years: see D.J. Bourgeois, supra, at p. 7. In my view, the wording of the Society's letters patent does not strengthen the applicant's position in this regard other than what I said previously in section one of this part. Accordingly, no order is available to the applicants on this basis.

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8. EQUITY FUND

I also find the clubs properly accounted for these funds. The applicants are not entitled to the order requested in this respect because the equity fund consisted entirely of premium discount surplus which was the subject matter of the 1969 agreement.

PART IV

For all of these reasons, the purported amendment to the 1977 second restatement on December 9, 1983 was ineffective in authorizing the Society to allocate to the clubs surplus funds relating to experience rate credits based in any way on contributions made before June 30, 1982. The Plan documents neither support nor permit the amendment. The amendment is inconsistent with representations made to the applicants by the respondents over the life of both plans. There is no adequate collective bargaining justification which might, nevertheless, validate the amendment. Accordingly, all distributions made pursuant to this amendment were ineffective. These monies belong to the applicants in so far as they arise from experience rate credits relating to contributions made as of June 30, 1982. The respondents will be directed to return or reimburse all such monies subject to this application together with interest to the Society. The Society will be directed to allocate the funds to the applicants and those they represent by way of enhanced pension benefits in accordance with the principles of the two previous significant distributions of experience rate credits, as appropriately modified to meet current circumstances.

The applicants have asked for the removal of the trustee. Such an order is typically reserved for acts of dishonesty or where a court cannot be confident its directions will be followed. I do not feel the respondents require this harsh remedial response: see D.M.W. Waters, Law of Trusts in Canada, 2nd ed. (1984), pp. 682-87. On the other hand, I am very concerned the respondents did not apply for directions beginning some ten years ago. The approval of the PCO on an application without notice to the applicants in no way responds to this concern. The applicants are beneficiaries who have been put to great expense and effort in pursuing this matter against "their" trustee. In the circumstances, the assets of the trust ought not to bear the primary brunt of this litigation. Costs, accordingly, will be on a solicitor-and-client basis.

The application is allowed. It is declared that:

(a) All excess Plan funds arising from experience rate credits relating to contributions made up to and including June 30, 1982 are to be allocated exclusively among the applicable participants to purchase for them additional pension benefits;

(b) The Pension Society was not authorized to allocate or pay any excess funds to the clubs or to use excess funds to finance obligations of the clubs to the Pension Society where those funds arose from experience rate credits relating to on contributions made up to and including June 30, 1982;

(c) The Pension Society was, and is, required to allocate all excess funds arising from experience rate credits even-handedly among beneficiaries and could not allocate such funds which arose from contributions made before June 30, 1982 to persons who were not trust beneficiaries at that time;

(d) All amendments to the Plan and trust documents permitting allocation of excess funds contrary to the foregoing declarations are invalid.

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It is ordered that:

(1) In accordance with para. (5), an accounting be made of all excess funds arising from experience rate credits which have not been allocated exclusively to the participants;

(2) In accordance with para. (5) the clubs jointly and severally forthwith reimburse the Pension Society for all excess funds arising from experience rate credits paid to them or to others on their behalf by the Pension Society contrary to the foregoing declarations or used by the Pension Society to make pension plan contributions on their behalf contrary to these declarations, together with interest thereon, to be credited to the participants exclusively for the purposes of purchasing additional pension benefits;

(3) In accordance with para. (5), the Pension Society forthwith allocate to the participants for the purchase of additional pension benefits such funds still held by the Society which ought to have been previously allocated to the participants in accordance with the foregoing declarations;

(4) The Pension Society, forthwith upon receipt, allocate to the participants for the purchase of additional pension benefits those funds to be reimbursed by the clubs pursuant to para. (2);

(5) There be a reference forthwith to a master or a person agreed to by the applicants and respondents to determine the actual amount of excess funds, assets and earnings thereon together with interest arising from experience rate credits relating to contributions made up to and including June 30, 1982 and the manner and timing of distribution of such funds in the form of purchases of additional benefits in favour of participants or their beneficiaries under the Plan and in what amounts to such persons in accordance with paras. (1), (2), (3) and (4);

(6) The applicants will have prejudgment and post-judgment

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interest against the clubs jointly and severally, calculated at the rate of investment return by plan assets or the rate of interest pursuant to the Courts of Justice Act, R.S.O. 1990, c. C.43, whichever is greater, which monies are to be allocated to the participants in accordance with the applicable preceding paragraphs; and

(7) The applicants shall have their costs on a solicitor-and-client basis payable jointly and severally by the clubs.

The remainder of the applicants' costs shall be payable by the Society out of the funds which are subject to this application in order that they be fully indemnified for the costs incurred in pursuing this matter.

Application allowed.

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