# TRUST LAW REFORM: THE UNIFORM TRUSTEE ACT

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## Table of Contents



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## 1. INTRODUCTION

The Uniform Law Conference of Canada ("ULCC") promulgated the *Uniform Trustee Act* at its 2012 meeting. The Act is available on the Conference website.[1] The ULCC adopted the Act[2] as proposed in the Final Report of the Working Group.[3] While the Act includes the Comments contained in the Final Report, it does not include the introductory material contained in that Report. The latter is helpful in understanding the origin and purpose of the Act, its nature and scope, and its principal reforms. I have made grateful use of the introductory material and the Comments in this article.

By direction of the ULCC, the Act is based on the 2004 Report of the British Columbia Law Institute: *A Modern Trustee Act for British Columbia*. That Report in turn used the Ontario Law Reform Commission's 1984 *Report on the Law of Trusts* as its template. The Working Group also took into account the Saskatchewan *Trustee Act, 2009*[4] and the 2007 Symposium of the Society of Trust and Estate Practitioners of Canada (STEP), entitled "Trust Law Reform in Canada."

Like the existing Trustee Acts, the underlying purpose of the Act is to provide enabling powers to trustees to permit the efficient administration of trusts with a minimum of court involvement when trustees have not been given adequate powers in the trust instrument. However, the Act goes beyond that basic principle by also making substantive reforms to statutory and non-statutory rules when those were indicated by legal principle and modern practice. The Act also makes some important improvements to charitable trusts and non-charitable purpose trusts. The ULCC was of opinion that although the possibility of a separate statute embodying a general reform of charity law should be explored, it

1. "Uniform Law Conference of Canada", online: <http://www.ulcc.ca/en/>.
2. See "Uniform Trustee Act" (2012), online: <http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf > ("the Act").
3. See Uniform Law Conference of Canada, Civil Section, Uniform Trustee Act, "Final Report of the Working Group" (Whitehorse, Yukon, 2012), online: <http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0028.pdf > ("the Final Report").
4. *The Trustee Act, 2009*, S.S. 2009, c. T-23.01.

should take advantage of the opportunity to make some much needed reforms in that law in the Act.

It follows that the Act is not a code of trust law, but is rather an enabling and supplementary statute. It applies to trusts generally, both *inter vivos* and testamentary, but does not extend to trusts that are governed by special legislation, such as pension trusts and income trusts. Nor does it apply generally to the functions of personal representatives, which are governed by other statutes. However, in respect of compensation and passing of accounts, the Act does apply to personal representatives and substitute decision-makers.

The Act carries forward the policy of the *Uniform Trustee Investments Act* and the *Uniform Variation of Trusts Act*. Further, it supersedes the *Uniform Accumulations Act* and the *Uniform Perpetuities Act* by abolishing the rule against perpetuities and the law relating to accumulations.

I hope that the Act will be adopted quickly in the Canadian common law jurisdictions.[5] It is a very thorough and comprehensive reform of existing Trustee Acts and, to some extent, of the substantive law of Trusts. This article does not provide a section-by-section commentary, but focuses on the principal reforms made by the Act.

## 2. STRUCTURE OF THE ACT

For ease of understanding, it will be helpful to provide the structure of the Act.

Part 1 – Definitions and Application (ss. 1-4)

Part 2 – Appointment and Removal of Trustees

Division 1 – Appointment of Trustee (ss. 5-11)

Division 2 – Trustee Ceases to Hold Office (ss. 12-19)

Part 3 – Vesting (ss. 20-23)

Part 4 – Powers and Duties of Trustees

Division 1 – General Administrative Powers (ss. 24-25)

Division 2 – Duties (ss. 26-29)

5. For this reason the authors of *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. by Albert H. Oosterhoff, Robert Chambers, and Mitchell McInnes (Toronto, Carswell, 2014), quoted from and referred extensively to this Act.

Division 3 – Investment Powers (ss. 30-34)

Division 4 – Allocation of Income and Capital (ss. 35-41)

Division 5 – Distributive Powers (ss. 42-46)

Division 6 – Delegation (ss. 47-50)

Division 7 – Miscellaneous (ss. 51-56)

Part 5 – Variation and Termination of Trusts (ss. 57-61)

Part 6 – Trustee Compensation and Accounts (ss. 62-69)

Part 7 – Charitable Gifts, Charitable Trusts and Non-Charitable Purpose Trusts (ss. 70-77)

Part 8 – Additional Powers of the Court (ss. 78-86)

Part 9 – Perpetuities and Accumulations

Option 1 (ss. 87-90)

Option 2 (ss. 91-92)

Part 10 – General

Part 11 – Transitional Provisions, Repeals and Consequential Amendments (ss. 103-105)

## 3. GENERAL ADMINISTRATIVE POWERS – PART 4 – DIVISION 1

Section 24 clarifies the trustee's general administrative powers. In doing so, it amends and improves the common law. The section confers a broad definition of powers. It says that, subject to the Act and the trustee's fiduciary obligations, a trustee has the powers and capacity of an individual of full capacity in relation to the trust property vested in the trustee, as if the property were vested in the trustee absolutely and for the trustee's own use. Specifically, and without limiting this general provision, the section permits the trustee to sell or lease trust property and to borrow money for the purpose of carrying out the trust and create a security interest in trust property.

In order to provide a residence for a beneficiary, the trustee may also, with the consent of the beneficiary, purchase or rent living accommodation, or construct a residence on land that is trust property or is purchased for the construction. Further, with the

consent of a beneficiary, the trustee may appropriate, at fair market value, specific trust property in or toward satisfaction of the share of the beneficiary.

## 4. DUTIES – PART 4 – DIVISION 2

### 4.1. Duty of Care

Section 26 codifies and clarifies the trustee's duty of care and the standard of care. Subsection (1) addresses the fiduciary duty of good faith. It provides that a trustee must act in good faith and in accordance with: (a) the terms of the trust; (b) the best interests of the objects;[6] and (c) the Act. In other words, the trustee must have an honest belief that what the trustee has done or proposes to do is proper, appropriate, and in the best interests of the objects.

Subsection (2) deals with the trustee's standard of care. It states that, subject to s. 31 (which deals with the standard of care in investments), in performing a duty or exercising a power, whether the duty or power arises by operation of law or the trust instrument, a trustee must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

Subsection (3) specifically addresses the duty of care of professional trustees. This is an issue that has arisen in the cases,[7] but Canadian courts have not made a definitive ruling on the issue. So this subsection amends the common law. It says that, despite subs. (2), but subject to s. 31, if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of care, diligence, and skill that is relevant to the administration of the trust and is greater than that which a person of ordinary prudence would exercise in dealing with the property of another person, the trustee must exercise that greater degree of care, diligence, and skill in the administration of the trust.

Subsection (3) thus follows the approach in other jurisdictions

6. Section 1 of the Act defines "objects" in relation to the objects of a trust as the beneficiaries or purposes. Hence I use this term in this article, but I also use the more familiar term "beneficiaries" when appropriate.
7. See, *e.g.*, *Fales v. Canada Permanent Trust Co.* (1976), (*sub nom.* Wohlleben v. Canada Permanent Trust Co.) 70 D.L.R. (3d) 257, [1977] 2 S.C.R. 302 (S.C.C.), in which the court held that it was not necessary to decide whether a higher standard of care should be applied to professional trustees, since the trust company failed to measure up to the standard of care by any test.

that have adopted a higher standards of care for professional trustees.[8]

Clearly, subs. (3) applies to trust companies and other professional trustees, who hold themselves out to the public as having particular skill in managing trusts. However, since it refers to a trustee's profession or occupation, it can also apply to solicitors who serve as trustees.

## 4.2. Conflicts of Interest

Section 27(1) and (2) codify the common law fiduciary duty of trustees regarding conflicts of interest. Subsection (1) states that a trustee must exercise the powers and duties of the office of trustee solely in the interests of the objects of the trust. Subsection (2) says that a trustee must not knowingly permit a situation to arise in which the trustee's personal interest conflicts in any way with the trustee's exercise of the powers or performance of the duties of the office of trustee, unless the trust instrument permits. This means that, as a general rule, a trustee may not profit from the trust, even if the trust itself could not have acquired the benefit.[9] Thus, for example, if the trust instrument provides that the trustee may charge for professional services in addition to compensation, the

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8. In England, see *Trustee Act 2000*, c. 29, s. 1(1), which also applies to investments, see s. 2 and Sch. 1, s. 1. In the United States, see *Uniform Trust Code, 2000*, §806, for all actions of trustees; *Uniform Prudent Investor Act, 1994*, §2(a) and (f), for investments; and *Uniform Custodial Trusts Act, 1987*, §7(b), for custodial trustees. These uniform acts have been adopted by many U.S. states. The higher standard for professional trustees has also been adopted for investments in Australia: *Trustee Act 1925* (Aust. Cap. Terr.), s. 14A; *Trustee Act 1925* (N.S.W.), s. 14A; *Trustee Act* (N.T. Consolidated Acts), s. 6; *Trustee Act 1973* (Qld.), s. 22; *Trustee Act 1936* (S. Aust.), s. 7; *Trustee Act 1898* (Tas.), s. 7; *Trustee Act 1958* (Vict.), s. 6; *Trustees Act 1962* (W. Aust.), s. 18(1). The New Zealand legislation is to the same effect: *Trustee Act 1956* (N.Z.), ss. 13B and 13C.

It is worth noting that Ontario also imposes a higher standard on paid guardians: *Substitute Decisions Act 1992*, S.O. 1992, c. 30, s. 32(8). This subsection also applies, with necessary modifications, to a paid attorney under a continuing power of attorney for property, *ibid.*, s. 38(1).

9. See, *e.g.*, *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, [1966] 3 All E.R. 721 (U.K. H.L.); *Canadian Aero Service Ltd. v. O'Malley* (1973), 40 D.L.R. (3d) 371, [1974] S.C.R. 592 (S.C.C.). There are exceptional situations in which the courts have permitted such a profit. See, *e.g.*, *Tornroos v. Crocker*, [1957] S.C.R. 151 (S.C.C.); *Peso Silver Mines Ltd. v. Cropper* (1966), 58 D.L.R. (2d) 1, [1966] S.C.R. 673 (S.C.C.).

trustee is entitled to do so. If the trust instrument is silent on this point, the trustee may not do so.

At common law, trustees are permitted to profit from the trust if all the objects have consented before the trustee entered into the conflict, or before the trustee made a profit. However, if some objects refuse their consent, or if some are incapable or unborn, the conflict rule applies. Subsection (3) recognizes this problem, by permitting an application to the court for an order permitting the trustee to act in conflict of interest or to make a profit, provided that this would be in the best interests of the objects. Subsection (4) further provides that the court has power to excuse a trustee from liability after the fact. Note, however, that, on the application of the trustee, a qualified beneficiary,[10] the Public Guardian or Trustee, or the Attorney General, the court may vary the order if additional information later becomes available, or the circumstances under which the order was made change.

### 4.3. Duty to Report to Qualified Beneficiary

The Act introduces the concept of "qualified beneficiary." The term is defined in s. 1 as a beneficiary who: (a) has a vested beneficial interest in the trust property, or (b) has delivered a notice to a trustee under s. 101 and has not withdrawn the notice. The latter refers to a beneficiary who does not have a vested interest in the trust property, but wants to be treated as a qualified beneficiary. The purpose of the concept is impose a duty to make regular reports to certain beneficiaries. There is no requirement that a qualified beneficiary be an adult but the Act provides other protections for a qualified beneficiary who is a minor.

Section 28 codifies and expands the common law duty of a trustee to provide information and accounts to the qualified beneficiaries. It requires the trustee to deliver a report for each fiscal period. For the fiscal period in which the trust was created the report must provide a statement of the assets and liabilities of the trust and their value. For all fiscal periods the report must provide: (a) a statement of the assets and liabilities of the trust and their value at the beginning and end of the period; (b) the basis for the valuation of the assets if practicable; (c) a statement of receipts and their sources; and (d) a statement of disbursements and of the payees. Further, the section requires the trustee, on the written request of a qualified beneficiary, to allow the beneficiary to inspect the source documents for the statements. Subsection (4) provides,

10. See §4.3, *infra*, for a definition of this term.

however, that the trustee is not required to disclose information in a variety of circumstances. Thus, for example, there is no duty to disclose if disclosure would be detrimental to the best interests of any beneficiary, or would be prejudicial to the trust property or the administration of the trust.

Section 29 confirms the trustee's duty to provide information to a beneficiary on request and empowers the court to order the disclosure of any information not provided by the trustee, upon such terms as the court considers appropriate.

## 5. INVESTMENT POWERS – PART 4 – DIVISION 3

Part 4 – Division 3 of the Act carries forward the policy of the *Uniform Trustee Investments Act*. The provisions of ss. 30 and 31 are largely the same as those already included in Canadian Trustee Acts.[11] Thus, s. 30 repeats the prudent investment rule by stating that, unless precluded by the trust instrument, a trustee may invest in any form of property in which a prudent investor might invest, including mutual funds and common trust funds. The section provides an option either to permit a trustee to invest in its own securities, or forbid it from doing so.

Section 31 confirms the standard of care, but also adds a provision that requires a professional trustee to exercise a higher standard of care. Hence, this conforms to the statement of the general duty of care in s. 26, discussed above. Section 32 states that a trustee is not liable for a loss if the overall investment strategy is prudent.

The power to delegate has been moved to Part 5, Division 6 of the Uniform Act, which addresses the power to delegate generally, as well as the power to delegate with respect to investments.

This Division also contains other important provisions that change the common law in very significant ways.

Section 33 abolishes the anti-netting rules. The first rule requires a trustee's decisions to be assessed on an investment-by-investment basis. The second rule states that when damages are assessed for a breach of trust, losses may not be offset by gains. In contrast, 33 provides that the trustee's investment strategy is to be assessed on

11. *Trustee Act*, R.S.A. 2000, c. T-8, ss. 2-8; R.S.B.C. 1996, c. 464, ss. 15.1-15.6, 17.1, 19, 21-23; C.C.S.M., c. T160, ss. 68-76; R.S.N.L. 1990, c. T-10, ss. 3, 6-10; R.S.N.S. 1989, c. 479, ss. 3-14; R.S.N.W.T. 1988, c. T-8, ss. 2, 3; R.S.N.W.T. (Nu.) 1988, c. T-8, ss. 2, 3; R.S.O. 1990, c. T.23, ss. 27-29; R.S.P.E.I. 1988, c. T-8, ss. 2, 3.5; S.S. 2009, c. T-23.01, ss. 24-32; R.S.Y. 2002, c. 223, ss. 2-7; *Trustees Act*, R.S.N.B. 1973, c. T-15, ss. 2-4.

an overall basis. Further, it permits the trustee to set off losses against gains resulting from a breach of trust. However, if the breach is associated with dishonesty or impropriety by the trustee, the second rule remains in effect.

## 6. ALLOCATION OF INCOME AND CAPITAL – PART 4 – DIVISION 4

### 6.1. Duty to Act Impartially and Prudently

Division 4 contains some very important changes to the law. Section 35 confirms that this Division does not affect the common law "even hand" rule, that is, the duty of a trustee to act impartially between different classes of beneficiaries, nor the duty to invest prudently.

### 6.2. Abolition of Common Law Rules of Apportionment

Section 37 abolishes the common law rules of apportionment, known as the first and second branches of the rule in *Howe v. Lord Dartmouth*[12] and the rule in *Re Earl of Chesterfield's Trusts*.[13] These rules apply during the administration of a deceased person's estate and require trustees to convert personalty into authorized trust investments and to apportion income from the assets between income and capital beneficiaries. The rules are complex and cause much inconvenience, so all well-drawn trusts exclude them. If they are not excluded costly litigation often ensues.[14] The rules do not mesh well with the principles of total return investing, which the Act endorses in s. 40, and their abolition is therefore excellent law reform.

### 6.3. Apportionment of Outgoings between Income and Capital

Section 38 changes the common law rule that, unless the trust instrument provides otherwise, when a trust provides for successive beneficiaries, income expenses are borne by income beneficiaries, while capital expenses are borne by capital beneficiaries. This concerns the rule in *Allhusen v. Whittell*.[15] The common law rule

12. (1802), 32 E.R. 56, 7 Ves. Jr. 137 (Eng. Ch. Div.).
13. (1883), 24 Ch. D. 643 (Eng. Ch. Div.).
14. See, *e.g.*, *Lottman v. Stanford* (1980), 107 D.L.R. (3d) 28, [1980] 1 S.C.R. 1065 (S.C.C.). See also *Lauer v. Stekl* (1974), 47 D.L.R. (3d) 286 (B.C. C.A.), affirmed (1975), [1976] 1 S.C.R. 781 (S.C.C.).

presents difficulties in calculation. It is not always applied strictly[16] and it was abolished in British Columbia and Ontario.[17]

Subsection (2) gives the trustee a discretion to allocate expenses between the income and capital accounts. In doing so, they must act in a just and equitable manner, in accordance with ordinary business practice, and in the best interests of the objects of the trust. Subsection (3) provides that if the amount of an outgoing charged under subs. (2) to the income or capital of the trust is not equal to the amount paid out of income or capital in respect of the outgoing, the trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing. Finally, subs. (4) provides that if trust property is subject to depreciation, the trustee may deduct the amount from income and add it to the capital.

These provisions may cause income tax difficulties for certain trusts and destroy the roll-over protection they enjoy. Hence, subs. (1) provides that they do not apply to an alter ego trust, a joint spousal or common-law partner trust, a post-1971 spousal or common-law partner trust, and a pre-1972 spousal trust.

## 6.4. Discretionary Allocation Trusts of Receipts and Outgoings

Section 39 states that if a trust instrument expressly provides that the trustee shall hold trust property on discretionary allocation trusts, they may, in their discretion, decide when, where, how much, from which account, and to whom benefits shall be distributed. They may also allocate an amount between income and capital to recover or reimburse a payment charged to income or capital if the amount is not equal to the amount paid out of the income or capital of the trust in respect of the outgoing.

Clearly, a discretionary allocation trust cannot be a trust for the exclusive benefit of the settlor's spouse, an alter ego trust, or a joint spousal or common-law partner trust, for it would not attract the roll-over provisions applicable to such trusts.

15. (1867), L.R. 4 Eq. 295 (Eng. Ch.).
16. For a discussion of the rule and how it is applied, see Donovan W.M. Waters, Mark Gillen, and Lionel Smith, *Waters Law of Trusts in Canada*, 4th ed. (Toronto, Carswell, 2012), pp. 1089*ff*.
17. *Trustee Act*, *supra*, footnote 11, B.C., s. 10; Ontario, s. 49. See Waters, *ibid.*, pp. 1091*ff*.

### 6.5. Total Return Investment

Total return investment means the investing of assets in a way that will achieve the best rate of return without distinguishing between income and capital receipts. Clearly, this can be very advantageous to a trust. However, because the current structure of the *Income Tax Act*[18] maintains a strict distinction between income and capital, a total return investment policy is likely to be impractical for most private trusts. Thus, s. 40, which introduces total return investment, is most likely to be used only by charitable trusts and non-profit organizations for now. Nonetheless, a private trust can confer the same powers on its trustee.

The section also introduces the concept of the percentage trust, which facilitates the implementation of a total return investment policy.[19] A percentage trust is one in which the trustee must distribute a fixed percentage of the total value of the trust property in specified periods. The payments come first from the revenues of the trust in a fiscal period. Any deficiency comes from the capital. If revenues exceed the required percentage, the excess is added to the capital.

To create a total return investment trust, the creator of the trust may direct the trustee to adopt a total investment return policy and need only say that the property is held "on percentage trusts," or "on total return" to achieve that result. The percentage to be applied is the one specified in the trust instrument or, if it does not specify a percentage, the one fixed by regulation. If a total return investment policy is adopted, the trustee must determine the net value of the trust assets at the beginning of each valuation period. The valuation period is determined either by the trust instrument, or by subs. (11).

## 7. DISTRIBUTIVE POWERS – PART 4 – DIVISION 5

Sections 42-46 confer power on the trustees to pay income, or capital, or both to individuals. These are usually referred to as powers of maintenance and powers of advancement. Most Canadian jurisdictions make provision for the former,[20] but only two provide for the latter.[21] Ontario's Act contains neither

18. R.S.C. 1985, c. 1 (5th Supp.).
19. See Anne Werker, "The Percentage Trust: Uniting the Objectives of the Life Tenant and Remainderperson in Total Return Investing by Trustees" (2006), 25 E.T.P.J. 329.
20. *Trustee Act*, *supra*, footnote 11, Alberta, ss. 33-37; B.C., ss. 24, 25; Manitoba, s. 29; Newfoundland, s. 26; Nova Scotia, s. 30; Northwest

provision, so to achieve the same result, Ontario trusts must include such powers in the trust instrument. Hence, Division 5 is welcome reform.

Division 5 does not apply to an alter ego trust, a joint spousal or common-law partner trust, a post 1971 spousal or common-law partner trust, and a pre-1972 spousal trust, for reasons already mentioned. However, the trust instrument may expressly provide otherwise.

## 8. DELEGATION – PART 4 – DIVISION 6

The trustee's power to delegate powers and duties is severely restricted at common law.[22] When the prudent investment rule was adopted by the Canadian common law jurisdictions in the 1990s, the power to delegate was broadened in the context of the investment of trust funds. The Act now broadens it further for trustee duties and powers generally. However, it draws a distinction between administrative and distributive powers for this purpose.

Section 47 provides that a trustee may appoint an agent within or outside the province to exercise any power or perform any duty in the administration of the trust. These are administrative powers and duties. However, s. 47 also says that a trustee may not delegate a discretion to distribute or transfer trust property to a beneficiary.

Further, s. 48, which confers the power to delegate authority with respect to investment of trust property that a prudent investor might delegate in accordance with ordinary business practice, the trustee must determine the investment objectives of the trust and exercise prudence in establishing the terms and limits of the authority delegated and in acquainting the agent with the investment objectives. These duties cannot be delegated. A trustee is liable for a loss in the value of the trust property caused by an agent only if the trustee is in breach of these duties. The section also states that investment in a mutual fund, a common trust fund, or a similar pooled fund is not a delegation of authority.

Section 49 makes detailed provision for the selection of an agent. It also permits an agent to sub-delegate. The overarching principle throughout is the rule of prudence. Further, s. 50 permits the appointment of an attorney by power of attorney for a maximum period of 12 months. This is a significant change in the law, since

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Territories, ss. 27, 28; Nunavut, ss. 27, 28; Prince Edward Island, ss. 39, 40; Saskatchewan, ss. 38-40; Yukon Territory, ss. 30, 31; New Brunswick, s. 14.

21. *Trustee Act*, *ibid.*, Manitoba, s. 32; Prince Edward Island, s. 40.
22. A leading case is *Speight v. Gaunt* (1883), 9 App. Cas. 1 (U.K. H.L.).

appointment by an attorney can currently be done only if the trust instrument permits it.

## 9. MAJORITY DECISIONS – PART 4 – Division 7

It is well-known that, unless the trust instrument provides otherwise,[23] trustees of a private trust must act and make all decisions jointly.[24] That is, their decisions must be unanimous. This can cause problems when trustees disagree and can lead to deadlock.

Section 53 changes the law by providing that for trusts created after the section comes into force, trustees may act by majority. A dissenting trustee may deliver a written statement of dissent to the others, but must join with the majority in carrying out the decision, unless the decision is unlawful. The dissenter will not be liable for a loss or breach of trust arising from the decision.

Section 54 further addresses the case of a trustee who abstains from participating in a decision because of a conflict or potential conflict of interest. The abstainer is deemed not to be holding office for the purpose of determining whether the decision is made by a majority or unanimously.

## 10. VARIATION AND TERMINATION OF TRUSTS – PART 5

The provisions of Variation of Trusts legislation[25] and the rule in *Saunders v. Vautier*[26] are well-known. But the Act makes important changes in these laws.

Section 57 defines "arrangement" as a variation, resettlement, or termination of a trust, as well as a variation, deletion of, or addition

23. For an example of a trust which permitted decisions to be made by a majority, see *Ballard Estate v. Ballard Estate* (1991), 79 D.L.R. (4th) 142, 3 O.R. (3d) 65 (Ont. C.A.), leave to appeal refused (1991), 83 D.L.R. (4th) vii (note), [1991] S.C.C.A. No. 239 (S.C.C.).
24. Trustees of a charitable trust can act by a majority: *Re Whiteley*, [1910] 1 Ch. 600 (Eng. Ch. Div.).
25. *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463; *Variation of Trusts Act*, R.S.N.S. 1989, c. 486, as amended by S.N.S. 2011, c. 42, s. 6; R.S.O. 1990, c. V.1; R.S.P.E.I. 1988, c. V-1; R.S.N.W.T. 1988, c. V-1; R.S.N.W.T. (Nu.) 1988, c. V-1; R.S.Y. 2002, c. 224; *Trustee Act*, *supra*, footnote 11, Alberta, s. 42; Manitoba, s. 59; New Brunswick, s. 26; Saskatchewan, ss. 49-51.
26. (1841), 4 Beav. 115, 49 E.R. 282 (Eng. Rolls Ct.), affirmed (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.).

to the powers of a trustee. The addition of resettlement and termination are very important clarifications and extensions of the power to approve an arrangement. Various cases have held that the court lacks the power to resettle a trust under the existing legislation.[27] And cases have also held that the court does not have a general power to terminate a trust, but may only make such an order if the trust instrument contains an express or implied power to that effect.[28] The Act does not, of course, confer a general power to terminate a trust, but it does confer a power to terminate in accordance with its provisions on variation and termination.

Under the rule in *Saunders v. Vautier*, the beneficiaries can terminate the trust if all have full capacity and agree, but they cannot vary the trust.[29] Section 59, coupled with the expanded definition of "arrangement," changes this by providing that a variation takes effect without court approval if all the beneficiaries have full capacity and agree.

Section 60 clarifies the existing legislation regarding variation and termination of trusts. However, it goes further. Subsection (5) provides that the court may approve an arrangement on behalf of a person who has capacity to consent but refuses to consent. There are situations in which a beneficiary refuses to consent to an arrangement, even though the arrangement is advantageous to all. So this is a major change in the law. But it is subject to some important restrictions. Subsection (6) provides that the arrangement must: (a) not be detrimental to the pecuniary interests of the dissenter; (b) a substantial majority of the beneficiaries, representing a substantial majority of the beneficial interests in the trust property based on the value of those interests, have consented, or the court has approved the arrangement on their behalf; and (c) not approving the arrangement will be detrimental to the administration of the trust and the interests of the other beneficiaries.

I believe that this is a very helpful provision, but I think it is too

27. See, *e.g.*, *Re Holt's Settlement* (1967), [1968] 1 All E.R. 470, [1969] 1 Ch. 100 (Eng. Ch. Div.); *Re Ball's Settlement Trusts*, [1968] 1 W.L.R. 899, [1968] 2 All E.R. 438 (Eng. Ch. Div.); *Re Harris* (1974), 47 D.L.R. (3d) 142 (B.C. S.C.). The Alberta and Manitoba statutes do contain a power to resettle: *Trustee Act*, *supra*, footnote 10, Alberta, s. 42(4)(b); Manitoba, s. 59(4)(b).
28. See, *e.g.*, *Re Gaydon*, [2001] N.S.W.S.C. 473 (New South Wales S.C.); *Lomas v. Rio Algom Ltd.* (2010), 99 O.R. (3d) 161, 2010 ONCA 175 (Ont. C.A.); *Mayer v. Mayer* (2014), 98 E.T.R. (3d) 104, 2014 BCCA 293 (B.C. C.A.).
29. See Donovan Waters, "Does the Rule in *Saunders v. Vautier* Include the Power of Beneficiaries to Vary the Terms of the Trust?" (2013), 33 E.T.P.J. 78.

strict. It is also likely to be productive of litigation because of the adjective "substantial." In my view the court ought to be able to cut the Gordian knot in such situations. It would be able to do so if para. (b) were changed to say:

> (b) 50 percent or more of the beneficiaries who represent 50 percent or more of the beneficial interests in the trust property have consented, or the court has consented on their behalf.

Alternatively and preferably, the Act could adopt the similar provision in the revised *Variation of Trusts Act* of Nova Scotia, which came into effect on July 23, 2013.[30] Section 3(4) of that Act says that the court may approve an arrangement on behalf of dissenters of full capacity if the arrangement is not detrimental to their pecuniary interest, and not approving the arrangement would be detrimental to the interests of the other beneficiaries.

Subsection (7) further provides that the court may approve an arrangement on behalf of a charitable organization that is legally incapable of consenting on its own behalf, or for a charitable purpose or a non-charitable purpose that is currently recognized by law[31] or that was created for a quasi-public purpose.

With respect to the rule in *Saunders v. Vautier*, it is well-known that the policy of the rule is to favour the right of the beneficiary to whom an absolutely vested interest has been given to enjoy the property. The rule became part of the law in all common law countries. However, it is not part of the law of the United States. The policy in the United States is to favour the interests of the maker of the trust. Hence a beneficiary cannot terminate a trust in a *Saunders v. Vautier* situation in that country.

It is clear that the drafters of the *Uniform Act* did not want to go in that direction. Nor did they adopt the Alberta and Manitoba model. Under their variation of trusts legislation a trust cannot be terminated even if all the beneficiaries are of full capacity and consent, except with the court's approval.[32] I believe that the *Uniform Act* is sound law reform.

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30. Footnote 25, *supra*.
31. That is, the maintenance of a grave or tomb, the erection of a monument over a burial place, and the provision of food and shelter for specific animals. See s. 74, Comment on subs. (3). This is discussed further in §12.3, *infra*.
32. See *Trustee Act*, *supra*, footnote 11, Alberta, s. 42; Manitoba, s. 59.

## 11. TRUSTEE COMPENSATION AND ACOCUNTS – PART 6

For the purpose of this Part, s. 62 defines "trustee" to include an executor or administrator of the estate of a deceased person, a substitute decision-maker, and a testamentary guardian. The reason is obvious. Such persons have similar rights and obligations with respect to compensation and accounts and ought, therefore, to be treated like trustees.

For this reason, it might have been desirable to include administrators *pendente lite* (estate trustees during litigation in Ontario) in the list. They are also entitled to compensation and are liable to account. Some cases have held that the principles used to determine compensation for trustees and personal representatives, derived from the compensation provisions of the several Trustee Acts, apply also to estate trustees during litigation.[33] Others hold that the compensation is to be determined in accordance with the legislation that authorizes the appointment of administrators *pendente lite*,[34] since the language differs from that governing the entitlement of trustees to compensation.[35] However, the new British Columbia *Wills, Estates and Succession Act*[36] provides expressly that such an administrator "is entitled to reasonable compensation under the *Trustee Act*[37] or as otherwise determined by the court." Even when courts apply the compensation principles used for trustees to administrators *pendente lite*, they will typically adjust the amount of the compensation because the duties of an administrator *pendente lite* are often less onerous than those of a regular personal representative (estate trustee in Ontario).[38] If the Act were made to apply also to the administrators *pendente lite*, the legislation authorizing the appointment of such administrators would have to be amended as well.

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33. See, *e.g.*, *Re McLennan Estate*, 2002 CarswellOnt 4153, [2002] O.J. No. 4716 (Ont. S.C.J.), at para. 22; *Church v. Gerlach* (2009), 48 E.T.R. (3d) 316 (Ont. Div. Ct.); *Re McLennan Estate* (2002), 48 E.T.R. (2d) 59 (Ont. S.C.J.); *Hinkson v. Canada Permanent Trust Co.*, (*sub nom.* Re Harmes Estate) [1948] 3 D.L.R. 526 (Sask. C.A.).
34. For example: *Estates Act*, R.S.O. 1990, c. E.21, s. 28. *Cf. The Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 19.
35. See, *e.g.*, *Wright v. Canada Trust Co.* (1984), (*sub nom.* Re Wright) 10 D.L.R. (4th) 481 (B.C. S.C.), affirmed (1985), (*sub nom.* Re Wright) 21 E.T.R. 80 (B.C. C.A.).
36. S.B.C. 2009, c. 13, s. 103(2(c).
37. *Supra*, footnote 11, s. 88.
38. See, *e.g.*, *Church v. Gerlach*, *supra*, footnote 33, at para. 14.

Section 64(1) and (2) restate and clarify the current statutory provisions governing trustee compensation,[39] but subsec. (2) goes on to permit a trustee who has professional skills and has rendered services to the trust, apart from those generally associated with the office of trustee, that required the exercise of those professional skills, is entitled to charge fees at reasonable rates for those services if reasonably necessary for the purpose of carrying out the trust. This is a helpful clarification, since the question whether a solicitor-trustee may charge legal fees as well as compensation seems to arise regularly. Case law makes clear that "double dipping" (*i.e.*, being paid twice, as a lawyer and as an executor, for the same work) is impermissible. But it does permit a solicitor trustee to charge the estate legal fees for professional services and claim compensation for trustee services.[40]

Section 64(3) adds that trustees are not presumed to be entitled to equal compensation. Subsection (5) provides a list of factors the court may consider in determining a trustee's compensation. It is not novel, since the court typically takes these factors into account now.[41] However, the list is a useful *aide memoire*.

An important change is contained in subs. (6), which provides that a trustee may make an application for the determination of compensation even if the trust instrument provides for compensation. Thus, the court can vary the compensation provided in the trust instrument if it is unreasonably low. However, subs. (7) provides that the court cannot vary a contract regarding compensation between a settlor and trustee that is not part of the trust instrument.

Section 65 also introduces an important change. At common law a trustee is not generally permitted to take interim compensation without court approval. This principle has been criticized.[42] Section 65 permits a trustee, without court approval, to take interim compensation.[43] It says that a trustee may take payment out of the

39. *Trustee Act*, *supra*, footnote 11, Alberta, s. 44; B.C., s. 88; Manitoba, s. 90; Nova Scotia, s. 62; Northwest Territories, ss. 49-53; Nunavut, ss. 49-53; Ontario, s. 61; Prince Edward Island, s. 31; Saskatchewan, ss. 52-53; Yukon Territories, s. 49; New Brunswick, s. 38.

40. See, *e.g.*, *Krentz Estate v. Krentz* (2011), 66 E.T.R. (3d) 132, 2011 ONSC 1653 (Ont. S.C.J.), additional reasons (2011), 69 E.T.R. (3d) 193, 2011 ONSC 4375 (Ont. S.C.J.).

41. See, *e.g.*, *Laing Estate v. Laing Estate* (1998), (*sub nom.* Laing Estate v. Hines) 167 D.L.R. (4th) 150, 41 O.R. (3d) 571 (Ont. C.A.).

42. See, *e.g.*, the remarks of Misener J. in *Re William George King Trust* (1994), 113 D.L.R. (4th) 701, 2 E.T.R. (2d) 123 (Ont. Gen. Div.), at para. 12.

43. A term that is to be preferred to the meaningless, but commonly used term,

trust property in an amount that, in the trustee's opinion, is fair and reasonable compensation for services rendered to the trust, if there is at least one beneficiary of full capacity who has a vested beneficial interest in the trust property. The trustee must notify the qualified beneficiaries of the interim compensation and those beneficiaries have opportunity to contest the payment taken by the trustee.[44]

Section 66 further provides that a trustee may reimburse herself out of the trust property for expenses incurred by the trustee in the administration of the trust. This is like s. 23.1(1) of Ontario's *Trustee Act*,[45] which allows the trustee to pay expenses from the trust property, or pay the expenses personally and recover a corresponding amount from the trust property. Indeed, this is also the common law rule.[46] However, I believe that s. 66 is too restrictive. It speaks only of reimbursement, not of paying expenses directly from the trust property. Further, section 66 does not carry forward the provisions of s. 23.1(2), which provide that the court may afterwards disallow the payment or recovery if of opinion that an expense was not properly incurred in carrying out the trust.

The failure of s. 66 to provide that the court may afterwards disallow all or part of the payment or recovery if of opinion that the expense was not properly incurred in carrying out the trust is a strange omission. This is so especially because s. 68 provides that if the trustee's compensation as finally determined by the court is less than the interim compensation taken by the trustee, the trustee must restore the difference.[47] It is also somewhat surprising that the

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"pre-taking." The latter is rather like the unfortunate term used by the funeral industry: "pre-planning." The term "interim compensation" is not actually used in s. 65, but is used in the section's heading.

44. It is interesting to note that legislation in Ontario permits a guardian of property or an attorney under a continuing power of attorney to take annual compensation from the property managed by her in accordance with the prescribed scale, subject to the any provisions regarding compensation in the power of attorney. They may also take a greater amount if the Public Guardian and Trustee consents or, if the Public Guardian and Trustee is the guardian or attorney, if the court approves. See *Substitute Decisions Act, 1992*, *supra*, footnote 8, s. 40. The prescribed rate is currently three percent on capital and income receipts, three percent on capital and income disbursements, and three-fifths of one percent on the annual average value of the assets as a care and management fee. See O. Reg. 26/95, s. 1.
45. *Trustee Act*, *supra*, footnote 11. For a comparable provision, see *ibid.*, Saskatchewan, s. 43.
46. See Albert H. Oosterhoff, "Indemnity of Estate Trustees as Applied in Recent Cases" (2013), 41 Adv. Q. 123.
47. See further *ibid.*

Act did not adopt s. 23.1 of the Ontario Act, or the comparable provision of the Saskatchewan Act, referred to above, instead.

## 12. CHARITABLE GIFTS, CHARITABLE TRUSTS AND NON-CHARITABLE PURPOSE TRUSTS

### 12.1. Charitable Trusts

As mentioned in §1, the ULCC was of opinion that while a separate uniform act on charities should be considered, it should meanwhile take advantage of the opportunity to achieve much-needed improvements in the law of charitable trusts.

That is what s. 70 does. It varies the court's *cy-près* power. The section confers broad power on the court to vary charitable gifts and charitable trusts if the court is of opinion that: (a) an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust or gift, or (b) a variation of the trust or gift would facilitate the carrying out of the intention of the settlor or donor.

Subsection (4) states that it is irrelevant whether the charitable intent of the settlor or donor was general or specific, except that if the trust or gift expressly provides for a gift over or a reversion in the event of a lapse or other failure of a charitable purpose, the gift over or reversion may take effect, if otherwise valid. The subsection and the Comment to the section make the incorrect assumption that, at common law, the court can use the *cy-près* power only if the donor or maker of the trust had a general charitable intent. That is true only for cases of initial impossibility or impracticability, for then the property is not yet vested in charity unless there is such a general charitable intent. In cases of supervening impossibility or impracticability, provided that the property is devoted exclusively to charity so that no one else has an interest in it, there is no need to look for a general charitable intent,[48] because then the property is already vested absolutely in charity.[49] Regardless, this is a welcome reform.

Section 72 empowers the court to authorize the sale of specific

48. Some cases do hold, incorrectly, that a general charitable intent is required also for a supervening impossibility or impracticability. The point is discussed in *Boy Scouts of Canada, Provincial Council of Newfoundland v. Doyle* (1997), (*sub nom.* Boy Scouts of Canada v. Doyle) 149 D.L.R. (4th) 22 (Nfld. C.A.).

49. See *Re Faraker*, [1912] 2 Ch. 488; *Re Butler Estate* (2007), 32 E.T.R. (3d) 108 (N.L. T.D.), reversed in part (2008), 41 E.T.R. (3d) 210 (N.L. C.A.).

property held upon a charitable trust when it can no longer be used advantageously for the charitable purpose or should for any other reason be sold.

## 12.2. Informal Public Appeals

Section 71 addresses problems that may arise when funds are raised by public appeal for a non-charitable purpose and there is a surplus. Typically, the public appeal makes no express provision for the disposition of the surplus. If it does not and the funds cannot be returned to the donors by way of resulting trust because the donors cannot be identified, the surplus can be paid into court where it may languish indefinitely.[50] Section 71 provides for the disposition of the surplus. This section is unnecessary in jurisdictions that have enacted the *Uniform Informal Public Appeals Act*.[51] It provides for the disposition of such surplus funds.

The court has power to make orders with respect to the distribution of surplus funds raised for a charitable purpose.[52]

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50. This is what happened in *Bowman v. Official Solicitor*, usually referred to as *Gillingham Bus Disaster Fund*, [1958] Ch. 300 (Eng. Ch. Div.), affirmed [1959] Ch. 62 (Eng. Ch. Div.). The mayors of three English towns organized a public appeal to raise funds to defray the funeral expenses of a number of cadets, who were killed in a road accident, and to assist the injured boys. There was a surplus because the bus company's insurers settled the case against them. The court found that the donors could not be identified. Hence the surplus could not be returned to them under a resulting trust. So the court ordered the money to be paid into court. The fund languished in court for 42 years. In 1992 some of the survivors made an inquiry into the matter and brought the existence of the fund to the attention of the Treasury Solicitor. The Treasury Solicitor concluded that the basis of the court's decision was that the funds were *bona vacantia* and authorized their *ex gratia* distribution among the 17 survivors of the accident (Treasury Solicitor, Press Release, 1 September 1993). Each received slightly more than £400. The aftermath of the case was the subject of a report in the *Guardian*, December 4, 1993. See also *Re British Columbia Charitable Gaming Funding Society* (1998), 57 B.C.L.R. (3d) 1 (B.C. S.C.), additional reasons 1998 CarswellBC 2241 (B.C. S.C.), additional reasons 1999 CarswellBC 76 (B.C. S.C.).
51. Uniform Law Conference of Canada Civil Section, "Status Report of the Working Group on a Uniform Informal Public Appeals Act" (Halifax, Nova Scotia, August 2010), online: <http://www.ulcc.ca/images/stories/2010_pdf_en/2010ulcc0006.pdf>. Nova Scotia enacted similar legislation by N.S. 1968, c. 61, s. 1. See now *Trustee Act*, *supra*, footnote 11, s. 52. It applies to both charitable and non-charitable purposes.
52. See, *e.g.*, *Re Young Women's Christian Assn. Extension Campaign Fund*, [1934] 3 W.W.R. 49 (Sask. K.B.).

## 12.3. Non-charitable Purposes

The Act distinguishes between two kinds of non-charitable purposes: (a) a purpose that can constitute a trust; and (b) a purpose that cannot, but must be regarded as a power. The former are dealt with in s. 74, the latter in s. 76.

Section 74(1) defines a "non-charitable purpose trust" as a trust created under subs. (2) or a trust created under s. 75(3)(b), (d), or (f). I shall discuss the provisions of s. 75 below.[53]

Subsection 2 states that a person may create a trust that: (a) does not create an equitable interest in any person, and (b) is for a non-charitable purpose described in subs. (3).

Subsection (3) states that for the purposes of subs. (2)(b), a non-charitable purpose is one that is recognized by law as capable of being a valid object of a trust, or is: (a) sufficiently certain to allow the trust to be carried out; (b) not contrary to public policy; and (c) in relation to one or more of: (i) purposes for which a society my be incorporated under legislation governing societies; (ii) the performance of a function of government in Canada; or (iii) authorized by regulation. The Comment to subs. (3) makes clear that the language "recognized by law as capable of being a valid object of a trust" refers to objects such as the maintenance of a tomb, erection of a monument over a burial place, and provision of food and shelter for specific animals, all of which the law now recognizes as being valid objects of a trust. Thus, this provision confirms the validity of what are often referred to as "anomalous purpose trusts." This is important reform. The several Perpetuity Acts[54] direct that non-charitable purpose trusts must be interpreted as powers and limit their duration to a maximum of 21 years, and it has been unclear since the enactment of those provisions whether they also apply to the anomalous cases.[55]

Subsection (4) provides that a non-charitable purpose trust may exist indefinitely.

Subsections (5)-(9) confer a jurisdiction on the court that is similar to the *cy-près* jurisdiction the courts have with respect to charities. It enables the court to vary, or add to the terms of a non-charitable purpose trust, direct that the property be held on a substitute purpose that is consistent with the intention of the

53. In §12.4, *infra*.

54. *Perpetuities Act*, R.S.A. 2000, c. P-5, s. 20; R.S.N.W.T. 1988, c. P-3, s. 17; R.S.N.W.T. (Nu.) 1988, c. P-3, s. 17; R.S.O. 1990, c. P.9, s. 16; R.S.Y. 2002, c. 168, s. 20; *Perpetuity Act*, R.S.B.C. 1996, c. 358, s. 24.

55. See Donovan Waters, "Non-charitable Purpose Trusts in Common Law Canada" (2008), 28 E.T.P.J. 16.

original settlement, or if it cannot do so, order that the trust property be returned to the settlor or the settlor's personal representative.

## 12.4. Imperfect Trust Provisions – Charitable and Non-charitable Purposes

The law has always insisted that a charitable trust must be wholly charitable, and further that non-charitable purpose trusts, subject to a few exceptions, are void. Hence, if the objects of the trust are partly charitable and partly non-charitable, the entire trust is void. Thus, for example, a trust for "objects of benevolence or liberality,"[56] or for "charitable or benevolent ... objects",[57] is void. There are three exceptions to this rule: (a) if the charitable purpose can be severed from the non-charitable purpose, the former will be valid;[58] (b) if the main purpose of the trust is charitable, ancillary purposes that are not charitable will not cause the trust to fail;[59] and (c) if the trust is not *prima facie* charitable, but the trustee is a charity or is a person whose work is generally charitable, the gift may be held to be charitable.[60]

To address the problem this principle causes, some Canadian jurisdictions have enacted legislation to provide relief.[61] However, it has been criticized for a number of deficiencies.[62] The Act seeks to address these deficiencies and also makes provision for non-charitable purposes.

Section 75 provides that a trust is not void simply because the objects of the trust consist of a charitable and a non-charitable purpose. In those circumstances the trustee may apply to the court

56. *Maurice v. Bishop of Durham* (1805), 32 E.R. 947, 10 Ves. Jr. 522 (Eng. Ch. Div.), affirming (1804), 32 E.R. 656, 9 Ves. Jr. 399 (Eng. Ch. Div.).
57. *Chichester Diocesan Fund & Board of Finance Inc. v. Simpsons*, [1944] A.C. 341, [1944] 2 All E.R. 60 (U.K. H.L.) — the *Diplock* case; *Re Loggie; Brewer v. McCauley* (1954), [1955] 1 D.L.R. 415, [1954] S.C.R. 645 (S.C.C.).
58. See, *e.g.*, *Re Butler Estate* (2007), 32 E.T.R. (3d) 108 (N.L. T.D.), reversed in part (2008), 41 E.T.R. (3d) 210 (N.L. C.A.).
59. See, *e.g.*, *Re Laidlaw Foundation* (1984), 48 O.R. (2d) 549, 18 E.T.R. 77 (Ont. Div. Ct.), affirming (1983), 48 O.R. (2d) 549 at 552, 18 E.T.R. 77 at 81 (Ont. Surr. Ct.). Contrast *Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10 (S.C.C.).
60. See, *e.g.*, *Touchet v. Blais* (1963), 40 D.L.R. (2d) 961, [1963] S.C.R. 358 (S.C.C.).
61. See *Law and Equity Act*, R.S.B.C. 1996, c. 47; Manitoba *Trustee Act*, *supra* footnote 11, s. 91; *Wills and Succession Act*, S.A. 2010, c. W-12.2, s. 35; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 30.
62. See Waters, *et al.*, *supra*, footnote 16, pp. 800*ff*.

and the court may make various orders. These include the power to separate the charitable and non-charitable purposes if that is practicable and to direct that the charitable purposes take effect as a charitable trust and the non-charitable purposes take effect as either: (a) a non-charitable trust under s. 74; or (b) be construed as a power and take effect under s. 76. If it is not practicable to separate the two purposes, the court may order either: (a) that the purposes become a separate non-charitable purpose trust under s. 74; or (b) must be construed as a power and take effect under s. 76. In this case the court may also make an order separating other objects from the original trust. Finally, if it is not practicable to separate any objects of the trust, the court may order that the trust take effect as either: (a) a non-charitable purpose trust under s. 74; or (b) be construed as a power and take effect under s. 76.

Subsection (5) provides that if the objects of a trust consist of a charitable purpose linked conjunctively or disjunctively with a purpose that is non-specific and indefinite, such as "benevolent," "worthy," or "philanthropic," the trust takes effect as a charitable trust. This provision, thus, reverses cases such as *Chichester* and *Loggie*.[63]

## 12.5. Non-charitable Purpose Trust Construed as a Power

Section 76 deals with dispositions that purport to create non-charitable purpose trusts, but which cannot be treated as such under s. 74. Such a disposition does not create an equitable interest in any person, but if it is for a specific non-charitable purpose it may be construed as a power to appoint. The power may be exercised for a maximum period of 21 years. This section is an updated version of the provision in the Canadian Perpetuities Acts that require such dispositions to be construed as powers of appointment.[64] Section 76 includes an alternative provision for provinces that do not have such a provision.

## 12.6. Specific Charitable Purposes

In its decision in *Re Christian Brothers of Ireland in Canada*[65] the Ontario Court of Appeal held that property held by a trustee or a charitable corporation upon discrete and specific charitable

63. See the *Chichester* and *Loggie* cases, *supra*, footnote 57.
64. See *Perpetuities Act*, *supra*, footnote 54.
65. (2000), 47 O.R. (3d) 674, 33 E.T.R. (2d) 32 (Ont. C.A.), leave to appeal refused (2000), 191 D.L.R. (4th) vi, [2000] S.C.C.A. No. 277 (S.C.C.), reconsideration / rehearing refused 2002 CarswellOnt 1770 (S.C.C.).

purposes that are distinct and separate from the property held for the general purposes of the trust or corporation is not exempt from execution. Thus, according to the case, if torts have been committed in the context of the general purposes of the trust or corporation, a judgment against the trustee or corporation can be satisfied also from the property held upon discrete and specific charitable purposes. The case caused much concern in the chancery bar and was the subject of many comments and articles. This unfortunate decision was reversed by statute in British Columbia.[66]

Section 77 carries forward the policy of the British Columbia statute. However, the section makes clear that property held for a specific charitable purpose is exigible if the judgment against the trustee or charitable corporation is based on liability incurred by the trustee or corporation in relation to the specific charitable purpose. Section 77 also makes clear that it is retroactive.

## 13. ADDITIONAL POWERS OF THE COURT – PART 8

Part 8 confers a number of additional powers on the court. Of particular interest are the following.

### 13.1. Relieving a Trustee from Liability for Breach of Trust

Section 81(2) repeats the provision contained in most Trustee Acts that permits a court to relieve a trustee or former trustee from personal liability if the trustee or former trustee has acted honestly and reasonably and ought fairly to be excused for a breach of trust.[67]

Subsection (3) provides that, subject to subs. (4), an exemption clause in a trust instrument is effective, according to its terms, to relieve a trustee of liability for a breach of trust. This is welcome reform, since the case law is inconsistent on this point.[68] However, subs. (4) states that the court may declare an exemption clause to be ineffective to relieve a trustee from a breach of trust if the conduct

66. See *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59.
67. *Trustee Act*, *supra*, footnote 11, Alberta, s. 41; B.C., s. 96; Manitoba, s. 81; Newfoundland, s. 32; Nova Scotia, s. 64; Northwest Territories, s. 30; Nunavut, s. 30; Ontario, s. 35; Saskatchewan, s. 45; Yukon Territory, s. 33; New Brunswick, s. 42.
68. See, *e.g.*, *Poche v. Pihera* (1983), 6 D.L.R. (4th) 40, 16 E.T.R. 68 (Alta. Surr. Ct.); *Armitage v. Nurse*, (1997), [1998] Ch. 241, [1997] EWCA Civ. 1279 (Eng. C.A.), leave to appeal refused [1998] Ch. 264. See also *Re Wilson*, [1937] 3 D.L.R. 178, [1937] O.R. 769 (Ont. C.A.); *Baskerville v. Thurgood* (1992), 46 E.T.R. 28 (Sask. C.A.).

of the trustee has been so unreasonable, irresponsible, or incompetent that, in fairness to the beneficiary, the trustee ought not to be relieved by the exemption clause.

### 13.2. Contribution and Indemnity

Section 82 clarifies the common law of contribution and indemnity. It confers power on the court to determine the amount of the indemnity or contribution. The court may also, exempt a trustee from the obligation to contribute to a loss or to indemnify another trustee.

### 13.3. Beneficiaries Instigating a Breach of Trust

Section 83 implies that if all the beneficiaries of a trust are legally competent, they can authorize a breach of trust by the trustee. However, if the trustee commits a breach at the instigation of one or more, but not all of the beneficiaries, the court may order the instigators to contribute to or indemnify the trustee.

The court may also order that all or part of the beneficial interest of the instigators be used to contribute to or indemnify the trustee.

## 14. PERPETUITIES AND ACCUMULATIONS

The Act provides for the abolition of the rule against perpetuities and the law relating to accumulations. This is very welcome reform indeed. These rules have outlived their usefulness and are no longer necessary in today's economy.[69]

The common law rule against perpetuities continues to apply in New Brunswick, Newfoundland and Labrador,[70] and Prince Edward Island.[71] Other jurisdictions replaced the common law rule with a remedial statute.[72] Some jurisdictions have already abolished the rule against perpetuities.[73]

The English *Accumulations Act, 1800*[74] was never received law of

69. See Waters, *et al.*, *supra*, footnote 16, p. 379.
70. Newfoundland and Labrador does have a perpetuities statute, but it applies only to employee benefit trusts: *Perpetuities and Accumulations Act*, R.S.N.L. 1990, c. P-7.
71. Prince Edward Island also has a perpetuities statute, but it merely changes the perpetuity period: *Perpetuities Act*, R.S.P.E.I. 1988, c. P-3.
72. See *Perpetuities Act*, *supra*, footnote 54.
73. Manitoba: *The Perpetuities and Accumulations Act*, S.M. 1982-83-84, c. 43, s. 3; see now C.C.S.M., c. P33, s. 3; Saskatchewan: *The Trustee Act*, *supra*, footnote 11, s. 58; Nova Scotia: *Perpetuities Act*, S.N.S. 2011, c. 42, s. 3. In Yukon, the *Perpetuities and Accumulations Act 2001* repeals the rules against

the Atlantic Provinces or of Ontario, but it was received law in the four Western provinces and the three territories, and, perhaps, in Newfoundland. However, it was nonetheless enacted in New Brunswick[75] and Ontario,[76] as well as in British Columbia.[77] The legislation was subsequently repealed in Alberta, British Columbia, Manitoba, New Brunswick, and Saskatchewan.[78] It is therefore well to abolish these rules.

Part 9 provides two options. The first applies to jurisdictions that have not reformed the rule against perpetuities and the law relating to accumulations. The second applies to jurisdictions that have done so.

## 15. GENERAL – PART 10

### 15.1 Ability to Have a Child

Section 93 addresses the question of a person having the ability to have a child at some future time. This is a familiar provision, since it appears in Perpetuities statutes.[79] This provision was incorporated by reference in s. 65 of Ontario's *Trustee Act*.[80] Both section 93 and Ontario's section 65 are restricted to the administration of a trust. Perhaps a more general provision regarding the ability of a person to have a child at some future time that is not restricted to perpetuities and the administration of a trust ought to be enacted.

### 15.2. Contingent Beneficiary Entitled to Income

At common law, most contingent interests are not entitled to the intermediate income generated between the date the trust is created

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perpetuities and the *Accumulations Act 1800*, 39 & 40 Geo. 3, c. 98 (U.K.), but it has not yet been proclaimed.

74. *Ibid.*
75. *Property Act*, C.S.N.B. 1903, c. 152, ss. 2 and 3, see now R.S.N.B. 1973, c. P-19, ss. 1 and 2.
76. *Accumulations Act*, R.S.O. 1990, c. A.5.
77. *Accumulations Restraint Act*, R.S.B.C. 1897, c. 2, re-enacted as the *Accumulations Act*, S.B.C. 1967, c. 2.
78. *Perpetuities Act*, S.A. 1996, s. 24; S.B.C. 1975, c, 53, s. 24, see now B.C. *Perpetuity Act*, *supra*, footnote 54, s. 25; *The Perpetuities and Accumulations Act*, S.M. 1982-83-84, c. 43, s. 2, see now C.C.S.M., c. P33, s. 2; S.N.B. 1997, c. 9, ss. 1, 2; *Trustee Act 2009*, *supra*, footnote 11, s. 59.
79. *Perpetuities Act*, *supra*, footnote 54, Alberta, s. 9; Ontario, s. 7; Northwest Territories, s. 8; Nunavut, s. 8; Yukon Territory, s. 9; BC, s. 14.
80. *Trustee Act*, *supra*, footnote 11, s. 65.

and the vesting of the interest.[81] Section 94 changes this rule by providing that a beneficiary who is entitled to a contingent interest in trust property is entitled to income earned from that interest before the interest vests, subject to any other person's interest in the income.

### 15.3. Ability to Make Assumptions on Receiving Notice of a Trust

Section 95 addresses the position of a third party who receives notice of the existence of a trust merely by the production of a document evidencing the appointment of a trustee, that a trustee has ceased to hold office, or the vesting of property in a trustee. Absent circumstances or information that would raise doubts in the mind of a reasonable person about the sufficiency of a trustee's authority or the propriety of a transaction with a trustee, such a third party is entitled to assume that the trustees are exercising their authority properly.

### 15.4. Purchaser with Notice of Defect Takes Subject to Trust

In contrast, s. 96 provides that a purchaser for value, a secured party, and any other person who has received an interest in or a claim on trust property takes subject to the terms of the trust if, at the time of the acquisition of the interest the person received notice that the trustees lacked a power they purported to exercise with respect to the trust property or that they acted in breach of trust.

## 16. CONCLUSION

The *Uniform Trustee Act* is a thorough and comprehensive reform of existing trust legislation. It reforms, clarifies, and adds to

81. See, *e.g.*, *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261 (Eng. C.A.), at p. 269; *Oliver v. Fitton*, [1947] 2 All E.R. 162 , at p. 166; *Re Gillett*, (*sub nom.* Re Gillett's Will Trusts, Barclays Bank Lt. et al v. Gillett) [1950] 1 Ch. App. 102 (Eng. Ch. Div.). However, a residuary bequest that is contingent does carry the intermediate income, while a future vested residuary bequest does not: *Watson v. Conant*, [1963] 1 O.R. 416 (Ont. C.A.), affirmed [1964] S.C.R. 312 (S.C.C.); *Re Major* (1969), [1970] 2 O.R. 121 (Ont. H.C.). See further Raymond Jennings and John C. Harper, *Jarman on Wills*, 8th ed. (London, Sweet & Maxwell Limited, 1951), pp. 1021-1022; Ontario Law Reform Commission, *Report on the Law of Trusts* (Toronto, The Commission, 1984), pp. 321-323.

the powers conferred by existing statutes. It also effects desirable and much needed reforms to a number of common law rules.

Therefore, I hope that it will be enacted speedily in the several Canadian common law jurisdictions.