LAW 580

TRUSTS

LITMAN

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CHAPTER 1: INTRODUCTION

General Trust Overview

What is a trust	• Equities Brainchild • Means to an End • Evidence of Intrinsic Worth: Quebec (& much of Europe) has adopted the trust into their civil codes.
Genesis of a Trust	• Historically a conveyancing device intended to ensure o (i) that land &/or persons cared for in the **absence of owner** & o (ii) that r**eligious orders could secure property** without "ownership" • Conveyance separated management from ownership ("ownership from "use & enjoyment" or "beneficial from non-beneficial" ownership)
Definition of a Trust	• A trust is a relationship in which a person or entity, the trustee, holds legal title (almost always but sometimes equitable title) to property ("trust property" or "corpus") but is bound by a fiduciary duty to exercise control of the corpus for the benefit of either others or permissible purposes (beneficiaries), who hold beneficial or equitable title. o **Fiduciary duty:** duty of loyalty to administer the trust for the benefit of the beneficiary. Must promote the interest of the beneficiary. o **Beneficiary can be a purpose not just a person:** But only to those purposes that trust law allows • Elements: settlor, trustee, beneficiary, res, fiduciary duty & due care
Trust Language: A Primer	• In the old days there were a number of peculiar phrases that were used to create a trust. Today modern trust instruments will only say (with rare exception) • No more "to A to the use of A on trust for B" (or equivalent language) • Now "To A in trust for B" o Why does this work given the Statute of Uses? o (1) Argument: Modern language is "short form" of language that evaded the Statute – **Litman wouldn't rely on this.** o (2) Modern Trusts tend to be comprised of personalty (statute of uses had no application to personal property), have corporate trustees & involve active duties! (Statute did not execute such trusts!). Most trusts are investments. Personal property often shows as an action that is beyond the statute of uses. o **If you are going to create a trust of land, and not have a corporate trustee, and the trustee will have no duties then you need to use the old language pursuant to the statute of uses.**
Settlors ongoing role wrt the Trusts	**Settlors become strangers to a trust:** That doesn't mean that the settlor is completely irrelevant. We have a statute that sometimes makes the settlers relevant. We will come back to this. The relationship is between the trustee and the beneficiary.
Person	**Trust Creates both:**

al or Proprietary Relationships	• In personam right (to compel proper administration of the trust) • Proprietary right (tracing into hands of all but BFP for VWN) o Trustee has title and in most trusts can dispose of the property and acquire new property. However the beneficiary is invisible, you will only see a reference if they have taken the trouble to notify the world that they have an interest in this land. The courts recognize that the beneficiary has a property interest in the land or any form of trust property. We know this because if a trust disposes of property without authority (gives it to a non beneficiary) the courts have said that the beneficiaries have a personal right to compel administration but they also have the ability to bring a proprietary action to trace the property. The courts are recognizing that trust beneficiaries have a proprietary interest.
Trust Property	• Essential to existence of trust but not other fiduciary relationships (*Guerin*) • Any form of property, real or personal and either tangible or intangible (chose in action or incorporeal hereditament)
Trust Instrument	• Document creating trust and defining rights and obligations (default position is common law and Trustee Act) • Usually, formal (deed or will and contract written or oral) but some trusts can be created by oral communication o Statute of frauds doesn't apply to personal property so it can be oral. • **Trust is an incredibly flexible instrument.** • For the most part settlers are free to make their own arrangements and you can depart from statute and CL.

Classification of Trusts – By mode of creation (General Overview)

Trust Arising From Intention	Created by property owner or someone who has authority to create trusts **Express:** You express exactly what you want to create – it is an explicit trust. You don't have to use the word trust, but overwhelmingly the people do. **Implied:** Intention is there but the language isn't express Arguably "**Resulting trusts**": Gratuitous transfer of property from A to B if B is a stranger in law. The presumption would be that the property was held in trust by way of a resulting trust. That is most likely the probable intention of the owner of the property. Intention based trusts are Inter Vivos (IV) or Testamentary **The vast majority of trusts in the commercial world are these types of trusts**
Trusts arising by operation of Law	Judicially "created" to meet the ends of justice: Designed to prevent injustice. Couples who lived together for a long time and one of the parties taking all of the property with them. o **Constructive trusts – clearly arising by operation of law** o Arguably resulting trusts

Statutory Trusts	**Estate Trustee** (*s.1(a) Trustee Act)**:*** Any time a person dies without a will you will have a trust. This is because there will almost always be an executor of an administrator. Estates create trusts because the person doing the administration is a trustee. The beneficiaries are the people who are to benefit under the estate.
Deemed Trusts	Arising from legislation that deems monies collected or in existence to be held on trust (e.g., monies collected for taxes, pst, gst & income tax or vacation pay or even salaries of employees) *Financial Administration Act*, p. 2 of Statutory materials
Bare (Simple, Naked or Dry)	Trust where trustee has no duty other than to convey property on demand

The Trust Actors: Settlor, Trustee & Beneficiary

Settlor	Anyone or any legal entity who has capacity to convey property (on trust): Can be a company
Trustee	Adults or legal entities but generally cannot be in the "business" of trusteeship *(Loan & Trust Corporations Act, s. 183(1)* • Must comply with the legislative requirements to be in the business of trusteeship You have to be capable of holding property. For business you must comply with the legislative requirements pursuant to that type of business.
Beneficiary	Anyone, including companies and infants Purposes o.k., so long as they are charitable in law (not any old meritorious purpose is charitable) This is a technical concept: just because it is a good idea to do doesn't mean that it is charitable in the eyes of trust law. What if it is somewhat charitable but not totally. Charitable giving is extremely important. There is very limited scope for non-charitable purpose trusts to be operative **What a beneficiary can do:** • Bring a personal action against the trustee for breach of trust • Petition the court to get a substitute trustee • Bring a proprietary action except against a *bona fide* purchaser for value.
Overlapping Roles	Settlor may be trustee or beneficiary, trustee may be a beneficiary but can't be sole trustee and sole beneficiary • ***Williams:*** W both the settlor and beneficiary, a 3P was the trustee. **Bright line rule:** You cannot set up a trust that will trigger the doctrine of merger, legal and beneficial title are held in the exact same way by the exact same people then the trust will disappear. If it is the same people with the same interests you have merger

	• **Duality** of or **split title** is required to ward of "merger" of legal and equitable title • **You can still be trustee and beneficiary –** However legal and equitable title cannot be mirror images or else you will get a merger situation **Duality:** You can't have legal and equitable title to be the same. Trust law is set up to try and prevent people from being on the same side of the legal and equitable side.
Sub-Trust: Deviations From Full Beneficial Ownership	**Trust 1: T holds in trust for B** • **Later – B declares herself trustee for C** • **This gives a second trust with B holding in trust for C.** • This is a subtrust situation. B's declaration is that they hold their equitable title (from trust 1) on trust for. So you have B having equitable title rather than legal title. However B is converting her equitable title to something that in substance is like a legal title. Once B declares herself trustee she has converted some equitable title to something akin to legal title and therefore use and enjoyment is for C. • The first trust is called the primary trust. The trustee has legal title to the trust *Res.* B has equitable title and the right to compel the trustee to do the job properly, this is called *equitable chose in action.* C has an equitable interest in an equitable interest and an equitable chose in action. C has the right to use and enjoy the *Res* **How does this play out:** Primary trustee is negligent, so that in the administration of trust 1 there is a loss. B could sue the trustee for negligence or breach of trust. But prior to the creation of the subtrust, B doesn't have to sue the trustee. B has no duty. However, having created the subtrust, B says that the rights under the primary trust are held on trust for C. This result in B having a duty to sue for a breach under the primary trust in whatever what that it is formed. B's equitable interest held in trust for C will be exercised for C. If it is a personal trust. B has legal title when they get the money. Therefore B from time to B will have legal title to the trust for C. **This is an exception to the notion of duality of title.** **What this represents is an exception to the way that things normally work (trustee – legal, beneficiaries - equitable). This occurs in the subtrust structure.**

Aside: Tax act treats trusts unusually. Under the tax act the trust is treated as a legal entity like unto itself.

Category of Trust Based on Duty & Discretion of Their Absence

Fixed Trust	Beneficiary's interest is fixed by amount or proportion and trustee has duty to distribute • Indicate that the beneficiary will get a fixed amount
Discretionary Trust	Duty to distribute but discretion regarding how much income &/or capital to distribute or which beneficiaries receive distribution

	Class of beneficiaries have **proprietary interest** but individual who may not get either income or capital has no proprietary interest in trust assets • Beneficiaries may or may not have a beneficial interest. However all have equitable *chose in action* – ability compel trustee to exercise their discretion (***Henson)*** Powers (administrative and dispositive) Power (proprietary) = authority to deal with someone else's property. • Trustees, agents, including those with power of attorney, or mortgagees with power of sale all have powers • Administrative powers (relating to property): invest, sell or mortgage trust property Dispositive powers: to pay out trust property (absolutely or conditionally (limited purposes)) • If they have a duty then it is a trust. If they have the authority, but not the duty then it is a power, not a trust. • **A lot of trust instruments is a mixed bag.** • **For a trust you need a duty** **If there is complete discretion then you cannot however say that any individual in the beneficiary class has a property interest. You can say they may or may not get the property and therefore that person only has a *chose in action.* They can compel the trustee to exercise their duty, they can't say they have a property interest.** o This is important if the beneficiary goes bankrupt then the creditors cannot go after the property.

Historic Use of Trusts: Their Function – historic and modern use of express trusts

Historic Purposes of Trusts:

- Evade feudal burdens (taxation)
- Evade forfeiture of land by reason of treason & escheat
- Evade statutes of Mortmain that prevented religious bodies (& later corporations) from holding land perpetually
- Avoid doctrine of marital unity
- Evade creditors
- Lots of others (will making)

Modern Use of Express Trust: : Personal, including charitable trusts & Business trusts

Personal Trusts

Protective and Spendthrift	Protect assets from spendthrift habits &/or high risk activities (including marriage) Use techniques creating discretionary trusts so that individual cannot be seen to have assets. Spendthrift is beneficiary so cannot get to assets.

Provide for those who lack legal and or practical capacity	Children, dependant & non-dependant adults (***Henson)*** ***Williams:*** Highly sophisticated individuals still set up trusts
Confer posthumous control of property to trustee	Equip trustee with discretion which can be exercised posthumously in response to then existing circumstances
Confidential and Secret Trusts	Wills are public instruments once probated but trusts are private Wills can hide trusts, "to A" or "to A for trusts communicated" Trusts are not public documents. If you put all the terms of the trust in the will, then it is a public document. **Half Secret Trust:** Set out in will, we know the trustee but not the terms. • Secret trusts are usually set up for children out of wedlock, and you don't know that they are utilized.
Estate Trusts	To pay debts and distribute to those entitled by law Ongoing : "to A's children" but some < 18 years Executors are always trustees – they hold the assets in trust. Sometimes executors and administrators have ongoing responsibilities.
Charitable	**New tax incentives for this kind of giving (securities) & non-charitable purposes** Charities have trustees. This is an important body of law. New rules permit donation of securities without triggering capital gains.

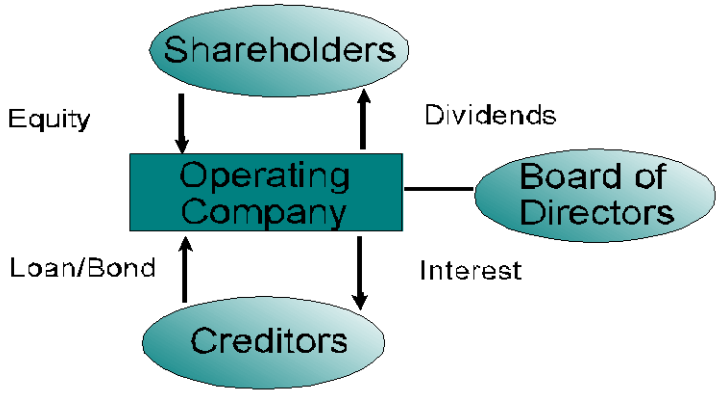
<u>Business Trusts</u>

Business Trusts	Alternative to incorporation, investment vehicle & security devices • Alternative to Incorporation (trust utilized to separate management from ownership) • By separating management (trustees) and ownership (beneficiaries) you are in essence doing the same thing as incorporation.
Business or Massachusetts Trust	Trustee holds business assets and administers them for trust unit holders (beneficiaries) • REITS (real estate investment trusts): avoids problems of co-ownership o Income tax treatment still exists for trusts • Starting a venture this way rather than incorporating can be done more efficiently with less bureaucracy
Mutual Funds	• Can take corporate or trust form. With trusts units represent % ownership in trust fund

	• Allows investor to have much more diversified portfolio than they could otherwise get
Income Trusts	• Major tax advantage (to be eliminated in 4 years) of not paying corporate tax of about 35% • Taxed at personal rate of unit holders

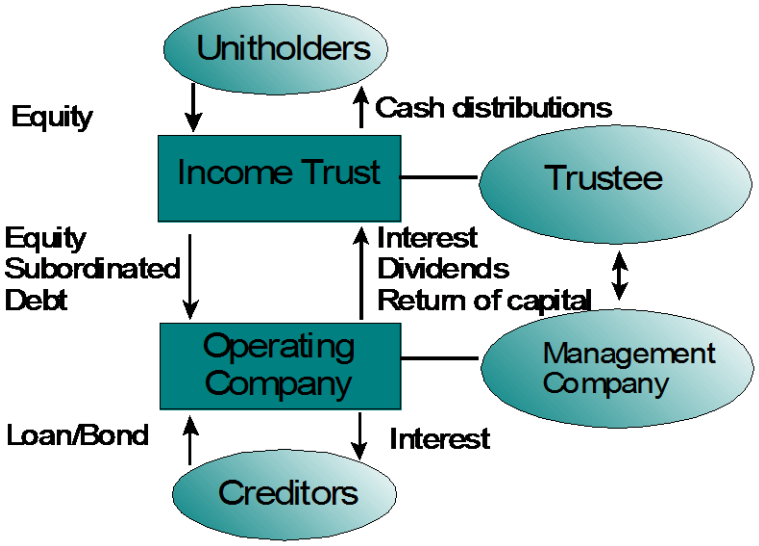
Normal Corporate Structure

Figure 4: Corporate Structure



Income Trust Structure

Figure 4: Structure of an Income Trust



Other models: Replace Operating Company with a Head trust

Legal Issues Flowing From Income Trusts

Legal Liability of Beneficiary / Investor	Creditors can satisfy obligations from trust property or trustees personally (unless there is an effective exculpatory clause) • **Trustee is liable – personally without exculpatory clause** • Basic rule is that if you are a creditor dealing with a business trust you have resorts to the assets of the trust and the trust personally to the debts. Beneficiaries must indemnify trustees for personal liability properly incurred, unless trust says no (majority view but untested) • **This is a debatable point** Legislation has recently immunized beneficiary (creating corporate like limited liability for income trusts: Albert, Ontario, B.C.) • **Only for income trusts for beneficiary to indemnify trustees**
Insolvency	Not clear that ordinary insolvency rules operate here

Other business purposes for Trusts

Shareholder Voting Trusts	Voting rights, e.g. for director slate, are contractual rights but also chose in action which can be assigned to trustee. Small shareholders often assign their small holdings to trustee who votes for a particular slate or in a particular way on other issues (takeovers, for e.g.)
Debenture Trusts	Debentures are documents that evidence debt, sometimes secured by corporate, government or business assets, sometimes not & create time specific obligations to pay back principal + interest Enforcement too expensive for (many) individual investors, hence chose in action assigned to trustee who enforces obligation to repay debt on behalf of all debenture holders who share enforcement expenses
Insurance Trusts	Business partners ensure each others lives and proceeds of insurance paid to trustee who purchases deceased partners assets on behalf of the others (rather than getting brat child of deceased partner as new partner)
Liquidation (of business) trusts	While company is going concern or flirting with insolvency, assets conveyed to trustee for sale with proceeds going to creditors and surplus back to owners
Pension Trusts	Pension funds generated by joint contributions of employees & employers and return on investment of funds These are very important. **Defined Benefit Plans:** Guaranteed payout.

	Defined Contribution Plans: We know what we put in and what we get out is dependent on how successful the trust is. Pension funds, either defined benefit or more usually today, defined contribution, usually take the form of trusts with trustees responsible for collecting contributions, investing and paying out. Lots of cases dealing with issue of who is entitled to surplus
Promoters Stock Escrow	Stock promoters, insiders, often put their shares in escrow (in trust). Some assurance that stock is not being manipulated during financing (pump and dump)
Environmental Trusts	Monies put on trust to ensure reclamation or restoration of mined, sullied or deforested site

General Points: Trust Industry

- Value of professionally administered trusts (difficult to get this info)
- 1987 $51 B, 2001 estimate $1 trillion (1000 billion) and projection to today $2 trillion & growing quickly
- And these numbers don't even consider the not inconsiderable value of trusts that are administered by non-professionals.
- Hence, trusts are a very major force in our economy and of profound importance to the security of Canadians, including older Canadians (many of which were hurt by the changes in the income trust rules)

CHAPTER 2: DEFINITION AND NATURE OF TRUST AND FIDUCIARY RELATIONSHIPS

Nature and Definition of Trust

Guerin v. The Queen, [1984] 2 S.C.R. 335

Facts: In 1957, the Masquem Indian Band surrendered valuable surplus reserve lands to the Crown for lease (75 years) to a golf course. The terms obtained by the Crown - less favorable than those approved by the Band at the surrender meeting. The band was unable to obtain a copy of the lease until March 1970. Brought an action to damages against the Crown in 1975.

Issue: Was there breach of trust by the federal government? **Won $10,000,000.**

Decision: Band's appeal allowed. There was a breach of fiduciary duty, not trust. The Crown breached that duty.

Reasons

- There exists a fiduciary duty for the Crown to deal fairly with aboriginal bands concerning their lands. A fiduciary obligation will not be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion.
- Dickson J. (Very small majority): No trust, a trust has a settlor and trust property and beneficiaries. There is always an intention. No all of the elements are present. There is not even trust corpus (trust property).
    - **1**) Aboriginal title exists – legal right from historic occupation and possession of tribal lands.
    - **2**) The nature of this title is *sui generis (Trust Like – Unique)*, the Federal Government acts as fiduciary for aboriginals concerning land.
    - **3**) The Crown owes a fiduciary duty to manage the land for the benefit of aboriginals (*i.e.*, in the most favorable manner). Nature of the fiduciary duty is *sui generis*

- **4)** The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal title. The reason for that is that the Indians' interest in land is inalienable except upon surrender to the Crown (*Royal Proclamation*).
- **5)** Fiduciary duty can be enforceable by the courts of law.
- **No trust corpus:** On surrender the Indian lands disappeared. Not a trust but still there is a fiduciary obligation
- **Litman: You need to keep an eye on what the trust property is.**

➢ Wilson:
- S.18 of the Indian Act does not go so far as to create a trust of reserve lands but it doesn't exclude the equitable jurisdiction of the courts.
- **Apon the surrender the crown became a trustee**
- **Wilson says that the subject of the trust was not the bands beneficial interest in the land but in the land itself.**
- **If justice Wilson is the trust then the Crown is the Settlor of the trust:** What we have is a contract to create a trust, the subject matter of which is crown lands. Natives give up beneficial interest if they hold it on trust.
- **Litman: Wilson is correct and the majority got this wrong:** We have trust of land. The fact that the 1st nation gave up the title is prelude to the subject matter of the trust – the land itself. Trust corpus is the land, the Crown is the settlor. They have agreed to hold land on trust for the band, then we have a contract to have a trust. The majority wanted to apply fiduciary based trust law because it is less rigid and more flexible. However, as a matter of law Litman thinks that they got it wrong.

➢ Estey
- Crown was an agent (type of fiduciary). But he didn't get into the far reaching implications of trust law.

Commentary (Litman)

- Terms of *Royal Proc* was such that the Bands could not engage with 3P's without the intervention of the Crown. In this case the terms of the surrender looks like there is a trust. The trial judge says that there was a trust and a breach of the trust.
- **Litman thinks that there was nothing sinister about the Governments motives?** Federal Court of Appeal said that it was not a true trust but a "political trust". You have legal rights in a true trust but you only have "political" rights in a political trust.
- **Case goes to SCC:**
  - SCC notes the amount of discretion – political trust. They say it is wide discretion but not unfettered and the hallmark of fiduciary relationships is the existence of discretion. Because they are true fiduciaries the discretion had to be exercised in good faith.
  - **SCC says it is not a political trust. Majority says it is not a trust but the crown is still a fiduciary**
- **Why wasn't this a true trust?**
  - Express requires a settlor, beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation.
  - Not all of these elements are present. There is not a trust corpus. **Dickson is saying that once the Indians surrendered their interest they had nothing and the crown acquired nothing that they didn't previously have.** The surrender seems to go into thin air.
  - What did the crown have before surrender: Crown underlying title.
- Key question from case: Whether surrender of Indian lands gave rise to the trust. CA yes but it was a political trust. All judges in SCC rejected approach. They concluded that the trust was real, it wasn't political. The fact that there was a lot of discretion vested in gov't was typical of fiduciary obligations. Court agrees that there is a violation of the plaintiffs rights the disagreement is on what basis.
- **Damages awarded in this case:** Significant. Why were the damages so great?
  - The figure awarded was much greater than the actual award that was given in the case
  - Large award – punitive? However the court could have awarded punitive damages, also there wasn't the type of conduct that would generate a punitive response.
  - **General rule:** you put the beneficiaries in a position that they would have been had there been no breach. Based on this principle how can we justify a large reward.
  - **If the crown wouldn't have gotten the lease:** The band may have look at other options wrt the land. The best opportunity could have been other developments (residential estate leases).

- **The court is saying that they will take the best economic option as the gage to which they will award compensation. They will make all presumptions in favor of the trust.**

Summary for modern use of express trusts: They are everywhere. Also history repeats itself with these trusts.

Fiduciary Relationships

Definition of FR	***Norberg v. Wynrib*** The essence of a fiduciary relationship is that one party exercises power on behalf of another and pledges himself or herself to act in the best interest of the other. This is different from the foundation and ambit of contract or tort. • **Fiduciary relationship has trust, not self-interest at its core. Freedom of the fiduciary is limited by the obligation he or she has undertaken** • There is a **duty of loyalty** and **dedication** in a fiduciary relationship. In a non- trust relationship you can pursue self interest. Tort law is concerned with putting reasonable limits on an actors ability to purse self interest. This application has no bearing on trust law.
Characteristics of FR	***Frame v. Smith (SCC, 1987)*** The fiduciary has scope for the exercise of some **discretion or power:** • It is almost inevitable that a trustee has some legal power and discretion. The only time that you won't have that is with a bear trust. Even then there will be some legal power. The trustees only duty is to convey property at a certain time (no discretion, but they still have power). Authority for the position that they are still a fiduciary. If you are a fiduciary you cannot act as a conflict of interest. • Usually in most trustees it is easy to find power or discretion The fiduciary can **unilaterally exercise that power or discretion** so as to affect the beneficiaries legal or practical interests • Trustees have unilateral power to exercise discretion. Beneficiaries have sought to get courts to order trustees to make certain decisions and the courts will say they have no standing on that issue. Trustees don't have to listen to the beneficiaries. • Once dispositive power is given then the beneficiaries have no say. If they make a mistake then you can sue them, but they have unilateral power. The beneficiary is **peculiarly vulnerable** to or at the mercy of the fiduciary holding the discretion or power. • It is easy to meet this requirement.
Why is the beneficiary particularly vulnerable under the Trust?	They are **subject to power of trustee**, they have no control over many important decisions made wrt the trust property. • Someone is in control of their economic worth. They are also vulnerable to bad judgment. They are vulnerable to have the trust property sold. The trustee has legal title, and to the world at large

	they have extensible ownership. **Trust law has recognized vulnerability of the beneficiary:** • Historically no limitation period for misconduct, for negligence the standard rules apply. This has changed in AB, but historically the beneficiary is considered in a vulnerable position so no limitation period. • Extremely powerful remedies are provided to the beneficiaries • CC contains a breach of trust provision. So it is criminal misconduct when trustees are fraudulent. **As a result you need people with good integrity, skill, and judgment wrt being a trustee especially depending on the type of property.**
What is the rule if a trustee improperly sells asset to purchaser to detriment of the beneficiary and then flees	The purchaser would have to know that sale of the trust assets were improper. In that case the beneficiary could go after the purchaser. If the purchaser is aware that it is an improper transaction (fraud) then the beneficiary can go after them. If they don't have notice then they are a *bona fide* purchaser and then the beneficiary will not prevail over their interest. • It is not an ordinary part of commerce for the purchaser to see the trust documents. That may be the case with a large transactions. You may insist on looking at assets, but for ordinary transactions you just do the deal. • **Because trustees have legal title, and because of the way that commerce is done the beneficiaries are very vulnerable.** **What counts as notice:** Actual knowledge, constructive knowledge, reasonable person rule, willful blindness? There is some debate about what level of knowledge is sufficient to impugn the purchaser
Difference between Trustee and Fiduciary	Consequences of being a trustee can be significant because of the remedies. SCC has highlighted this in ***Canson.*** Here one of the central issues is whether we would treat trust fiduciaries different than non-trust fiduciaries. The SCC says yes: • Trustees: "but for" test is the causation test for trusts • Breach of Fiduciary duty: It is similar but a little less harsh than trusts, standard for causation is higher. • Also there is no mitigation principles for a breach of fiduciary duty for a trust. There is no contributory negligence even if the beneficiary has actively contributed to their own loss. There is a harshness in trust law that hasn't made its way into fiduciary law.

Discretionary Trust

Summary of Key Principles

Definition of	Duty to distribute but discretion regarding how much income &/or capital to distribute or which beneficiaries receive distribution

Discretionary Trust	Class of beneficiaries have **proprietary interest** but individual who may not get either income or capital has no proprietary interest in trust assets • Beneficiaries may or may not have a beneficial interest. However all have equitable *chose in action* – ability compel trustee to exercise their discretion (***Henson)*** **<u>Discretionary Trust v. Powers</u>** Dispositive powers: to pay out trust property (absolutely or conditionally (limited purposes)) • If they have a duty then it is a trust. If they have the authority, but not the duty then it is a power, not a trust. • **A lot of trust instruments is a mixed bag.** • **For a trust you need a duty** **If there is complete discretion then you cannot however say that any individual in the beneficiary class has a property interest. You can say they may or may not get the property and therefore that person only has a *chose in action.* They can compel the trustee to exercise their duty, they can't say they have a property interest.** o This is important if the beneficiary goes bankrupt then the creditors cannot go after the property.
What is the Nature of the Beneficiaries Interest under Discretionary Trust	May be beneficial interest, but may also be something less – *Equitable Chose in Action (**Henson)***

<u>Cases</u>

Williams v. Canada (2005)

Facts: W turned $62.50 into $2.5 million. Sets up trust. W is settlor and also the beneficiary. The trust corpus is the stock. Trustees were third parties. W transferred property to a trust of which he was a beneficiary. Issue of whether taxable capital gain was realized.

Issue: Whether the transfer of property to the trust resulted in a change in legal ownership but not beneficial ownership (If no change in beneficial ownership the no capital gain realized.)

Commentary (Litman):

- Court finds that W is the sole beneficiary of the trust – this is in accordance with the trust document
- **Beneficial Ownership:**
  - The TP submits that **beneficial ownership never changed** and thus no CG liability. The court agrees based on an analysis of the ordinary meaning of the term:
  - "One recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else; esp., one for whom property is held in trust.
- In this case at the end of 21 years the trust assets were to be paid out (tax provision). It was W that would get the money. The trustee didn't have discretion to withhold the money from Williams.
- Had the trustees the power to make a distribution without the duty of the distribution then it would simply be a power because where there is no duty there is no trust
- **Need to distinguish b/w trusts, powers and discretionary trusts and look at the interests of the beneficiaries**

- **Why did this case go to trial:** Language in the trust document referring to children. So question of change of beneficial ownership. The real problem was the drafting. There is a clause that permit the trust to me amended by adding beneficiaries. No reversion clause suggesting that property is not to go back to Williams. There is also a preferred beneficiary election clause. **Crown argues that there are other beneficiaries her. Court disagrees.**
    - **Litman:** Truth of the matter is that either Williams was trying to be sneaky, or more likely the lawyer used an inappropriate precedent and used inappropriate clauses that created problems for W. This language said there were other beneficiaries.
- There were false signals that there were other beneficiaries.
- We also learn from this case that the fact that the trust could be amended doesn't change the fact that it is only the beneficiary who has beneficial interest.

Ontario (Minister of Community and Social Services) v. Henson

Facts: A money fund is established as a discretionary trust to help a woman, should she need it. The Government had a rule that they won't give public monies if the individual's assets exceeded x$. W/ trust, she doesn't qualify. (In AB, if you have non-exempt income of $850/month (trust $ included), then under AISH, you get monies reduced)

Commentary:

- As per the provisions of the will, the trustees have absolute and unfettered discretion; the respondent could not complete the trustees to make payments to her if there were not funds available to her under the *Family Benefits Act*, sufficient to meet her needs.
- As such H does not have beneficial interest as the term is used in the definition of liquid assets.
- **She is not entitled to income or capital and as a result is not a beneficiary under the trust.** Even if she were destitute she could not compel the distribution.
- **What does she have:** Chose in Action, expectancy, she could sue the trustee or compel it to do its job. They could not sue it to exercise discretion to hand over the property to you. She has a form of property (*chose in action)* but she does not have a beneficial interest in the trust
- **Is there a trust here:** Yes but H does not have a beneficial interest. There is a split between title.
- **Do beneficiaries under the discretionary trust have beneficial interest?** No not in this case.
- It would take extreme circumstances to show that there was an entitlement. That is why the courts said they don't have a beneficial interest in the trust.
- When people set up these interests and there is provincial programs to support them they set up discretionary trusts so funds are not taken into account when assessing whether the person is entitled to the trust funds.
- **Beneficiary in this case is Guelph and District Association for the Mentally Retarted**
- **Trust said that to the extend that trust generates income it should be accumulated and capitalized.** If you are required to disperse income and choose not to exercise discretion to Audry then it goes to Association for mentally retarded. So Association is a contingent beneficiary but they don't have a beneficial interest. They have a chose in action and can compel discretion.
- **However they have an interest in the residue of the estate.** Association is entitled to all the estate unless and until they disperse of the interest to Audrey. However their beneficial interest is outside of the trust – they are the residual beneficial of the estate.
- **But where is the beneficial title in the trust?**
    - ***Commissioner of Stamp Duties v. Livingstone:*** Court explores idea that you can have a discretionary trust without being able to pinpoint the beneficial interest. Dilemma is founded on a legal fallacy. In the assets themselves there is no equitable interest in a discretionary trust. So the court is saying that the truth of the matter is that you don't have to pinpoint a beneficial interest at any point of time.
    - **So in this case (*Henson)* there is no beneficial interest until the trustees make a determination that she is entitled to an allocation of income and capital. But until that allocation is made she has no beneficial interest for the purpose of the legislation.**

Schipper v. Guaranty Trust Co.

Facts: Creation of LE in trust (entitled to income and not capital). Trustees given uncontrolled discretion to encroach for wife's comfort. Absent a clause, trustees must all agree for management decisions. The majority rule applies where one, Guarantee Trust, must always be in majority. Cecile wants to increase income, but Guarantee declines wanting to preserve trust for children.

Commentary

- Determined here that trustee exercising discretion wrongfully for intention not intended by the settlor (grandkids). The testator intended first and foremost to provide for the care of this wife.
- Traditionally the courts rarely interfered with unfettered discretion of trustees. It was only done in cases of:
  - (1) *mala fides*,
  - (2) to compel discretion, and
  - (3) to break a dead lock between trustees.
- However, in modern times the courts have been more likely to visit unfettered discretion.
  - They held in this case that the trustees **did not have a pure power of appointment in relation to encroachment of capital**.
  - Rather, they had uncontrolled discretion **within the four-corners of the trust**. The purpose of the trust was to provide for the "general welfare, benefit" of the beneficiary and by denying encroachment they were not fulfilling the purpose of the trust.
- In practice, this problem can be dealt by detailed construction of the trust document. The settlor should attempt to "codify" his intentions and provide criteria for the exercise of discretion. Articulate what your dominant intention is.
- Whether income beneficiaries' assets are to be taken into account w/ encroachment requests remains a question to be answered.
- **In this case the court says there is no such thing as uncontrolled discretion. There will always be some requirements wrt exercise of discretion.**
  - This case reflects modern trend that even though the trust instrument may say that there is unfettered discretion the courts may still interfere if the discretion is being exercised improperly.
  - Trust must be exercised properly having regard to the intention of the trust
- **Litman:** Other controls on discretion:
  - **No bad faith, arbitrary,**
  - **What about a failure to exercise discretion:** If you are dealing with a trustee then they must consider exercising their discretion.
  - **She can compel them to consider exercising their discretion in good faith in accordance with the intention of the trust.**

General Points on Beneficial Interest and Discretionary Trusts:

- Difficulty wrt discretionary trusts and pure powers. Powers you are not compelled to exercise your power.

Beneficiaries ability to terminate a discretionary trust

Saunders v. Vautier

Infant, once they reached age of majority (but not age under trust) he sought to bring the trust to an end. He succeeded. The had capacity, the trust property was exclusively his and he had reached the age of majority

Commentary:

- **When push comes to shove dealing with an adult of capacity we favor beneficial ownership over trust intention.**
- **Rules in S&V:**
  - **Adult**
  - **Capacity**
  - **Absolutely entitled to trust assets**

Henson could not have invoked this rule because she was not absolutely entitled to the trust assets. However, ***Williams*** could have.

In AB the CL is now a matter of history. We have introduced legislation that have changed the ground rules for this: **S.42 *Trustee Act* – You also need to get permission from the court, it isn't enough to satisfy the S&V requirement**

S.42 provides protection for trust property against beneficiary itself: What about third parties and Creditors?

In Ontario S&V applies

Creditors and 3rd parties ability to get hands on trust assets

They can go after the interest because it is a form of property. Also the beneficiary has an equitable interest (beneficial) that could be sold.

Henson could sell her chose in action, ***Williams*** could easily sell trust assets.

You can sell trust property in theory, you can offer it as security for a loan. It is a form of property. *Henson's* property would not be good security but *William's* would.

How do you protect trust property for beneficiaries who find themselves in financial trouble or who may be spendthrifts? – Protective Trusts

Protective Trusts

Trying to get assets out of direct control of the beneficiaries, and protect trust property so that creditors cannot get their hands on it. The trust document will try to prevent any sales of property but also that creditors cannot get their hands on the trust assets.

Brandon v. Robinson (UK)

Commentary:

- You cannot restrain even an equitable interest in property
- Property may be given to a man, until he shall become bankrupt. If the property was given to the sons it must remain subject to the incidents of property; and it could not be preserved from the creditors unless given to someone else
- Also, if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, a disposition to a man, until he shall become bankrupt, and after his bankruptcy is over, **is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it**.
    - It that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited.
- **Creditors of bankrupt beneficiary may exercise their claims against beneficiary's trust interest, notwithstanding settlor's intention to establish spendthrift trust**
- **Creditors win in this case**

Broadway National Bank v. Adams (US)

Facts: Defendant owes plaintiff debt. P trying to reach through the trust to obtain the debt. A had trust fund created for his benefit by the will of his brother. Will said that the trust funds should remain free from the inheritance or control of his creditors.

Issue: Whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors.

Commentary:

- No policy reasons to disallow restraints on alienation. **Assets in trust in this case are not reachable until paid to beneficiary.**
    - The only ground that it can be held to be against public policy is that it defrauds the creditors of a beneficiary.
- By creation of a trust the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation. Neither the principal nor the income is at any time inalienable
- **If the intention of the founder of a trust is to give to the equitable life tenant a qualified and limited, not an absolute, estate in income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity.**
    - Key point is that it is not an absolute right to the income by the beneficiary
- **Creditors Argument:** Investing man with apparent wealth misleads creditors, and induces them to give credit.

- **Reply:** Creditors have no right to rely on the property and give credit on the basis of an estate, which by the instrument creating it is declared to be inalienable by him and not liable to debts. If you don't feel comfortable don't lend the money.

- **Creditor loses in this case**
- **Problems in this case:**
  - Clog on commerce: Bank has transactional cost to look at trust
  - Involuntary creditors: Compromised by life by negligent driving of spendthrift, they have assets and you can't reach them.

What is the difference b/w these two cases: ***Adams*** (US) recognizes spendthrift trusts and ***Brandon (***UK) says that you cannot have spendthrift trusts. You cannot restrain alienation on property – it is invalid in law and equity.

Equity follows the law: This is a maxim, there are exceptions. Equity doesn't follow law in US but it does in Canada and the UK.

Fundamentally the difference b/w these two cases is a philosophical question. From a doctrinal point of view you cannot create spendthrift trusts **but that doesn't mean that you can't protect the property**

We allow the creation of <u>protective trusts</u>: Mechanism for protective trusts are interesting:

- **Make discretionary trust** – beneficial doesn't have a beneficial interest but rather a chose in action. Because there is no entitlement there is nothing of value for the creditors to execute.
  - If the $ is remitted to the son, upon remittance then the creditors can go after that money if it is still there.
- **Beneficial interest in beneficiary endures "until" there is an attempt to alienate or execute:** If you create a determinable interest then you have successful created a protective trust. Beneficiary no longer has an interest in the property upon the triggering of the determining event. Interest comes to an end on bankruptcy and a third party then has the interest
- **Often these two are tied together.** Discretionary with determinable language to third party.

So property can be protected but not via a spendthrift trust.

There is US case law about after exercise of discretion before money is obtained can creditors step in and seize the money, and the cases in the US say yes.

In the US spendthrift trusts are OK – *Adams :*

CHAPTER 3: CLASSIFICATION OF TRUSTS

<u>Classification by Creating Event (General Points – See Individual Sections)</u>

Express Trust	Intentional, someone wanted to create. Explicit intention. **Precatory trust**: Means "wish" or "desire" it is language of hope, wish or desire. Sometimes this language is interpreted as creating an obligation. This is a matter of interpretation on a case by case basis. Occasionally courts say that language that appears to create a moral obligation also creates a legal obligation. This is an express trust – and is called a **precatory trust.** It is an intention based trust
Statutory Trust	Arise by operation of law.

Constructive Trust	Also arise by operation of law – imposed by the courts. Debate on the basis for the construction of such trusts:
	• *Waters:* all constructive trusts respond to unjust enrichment. SCC has adopted view that constructive trusts are "remedial" and there are no factual prerequisites.
	• *Oakley:* may justifications for constructive trusts
	• *Elias:* three functions which constructive trusts fill:
	  o Perfection of an intention to dispose of property
	  o Reparation of loss
	  o Restitution of unjust enrichment
	• ***Pieters v. Beblow:*** CT is a remedy for UE (unjust enrichment)
	
	SCC has said that CT lies at the heart of UE. There is a very close connection between the two concepts. Courts have also said they would give CT to correct **wrongful conduct** even if there is no UE.

Resulting Trust	Also arise by operation of law. Comes from Latin verb "to jump back". Occurs when you convey property to someone but have not fully conveyed the beneficial interest.
	
	Example: A pays for property but directs that the seller convey title to his neighbor, B. Unless there is evidence that A intended to make a gift to B, B will hold on a resulting trust for A.
	
	Other Examples:
	o ***A gratuitously transfers property to B (B stranger in law)***
	  • Presumption is that B holds on trust for A. Equity presumes bargains not gifts as between strangers
	  • Here it would be up to B to convince the court that A gave gift
	  • Presumption would be resulting trust, not advancement, B would have burden to proof to show gift
	o *A buys house using her money and conveys to herself and two others who are strangers in law*
	  • This is situation in ***Brown***
	  • Unexplained transfer of property, presumption is that if it is to stranger then they hold on trust for A.
	  • It is a rebuttable presumption, B & C can demonstrate a gift but if they don't convince then resulting trust
	o *Trust to remit income to T from a fund to B*
	  • Nothing is said about capital. In order to remit income you have to transfer the property to the trustee. Trust only provides for disposition of income to B.
	  • Trustee hold on resulting trust for settlor the capital interest of the property
	  • They are resulting trustees of the capital for the settlor they are trustees of the income to the beneficiaries
	  • If you fail to dispose of beneficial interest in part of whole who ever it is transferred t holds as resulting trust
	o *$10,000 to T in trust for A, $5000 upon reaching 19, $5000 on reaching 21*
	  • Noting is said about the income – what about the interest
	  • At CL the trustees would hold the income as a resulting trust for the settlor
	  • However that has changed as a result of legislation
	  • **S.32 *Trustee Act:*** Changes this situation from resulting trust to trust of income and capital for A. It basically says that if you create

	a trust any disposition includes income except to the extent that income is expressly withheld. Because of this the income follows the capital o $10,000 conveyed to T on trust for A but only if A attains 25 years and marries • If they attain 25 years and marries then the property will not revert back • The resulting trust occurs later, in contingent trusts, resulting trusts arise after the fact. Resulting trusts were always seen as "implied trusts" but it was not always made clear whether they were implied in the sense that they were created by genuine but unstated intention, or implied in the sense that they were created by operation of law. • **It is clear that they are implied in the sense that they arise by operation of law** • **However intention is relevant as they never arise contrary to the intention of the seller** **Chambers:** Resulting trust arises by operation of law where there is: • A transfer of property • An *Absence* of intention that the transferee should take a beneficial interest. Intention is relevant in that it can prevent the trust from arising; but it does not create the trust.

Purpose Trusts

Definition - General	A trust can be created to benefit **people** or to benefit a **purpose.** **Purpose trust:** no person can say that they are a beneficiary, in the technical sense, of the trust. No person or persons can claim to be beneficial or equitable owners of the trust property. Generally only intentionally created trusts will be purposes trusts.
Validity of Purpose Trusts	**If you try to promote a purpose then things get a lot stickier.** **Trusts for a purpose are only clearly valid if it is a charitable trust:** There is a very technical meaning to this term. We will look at these in more detail **First consideration: Is the trust actually a purpose trust?** • A trust for A's children to be used for their educational purposes o **The answer is no:** The primary purpose is to benefit children not a person. You can have educational purpose trusts, but usually the people are not specifically identified. • **So always ask yourself if it is a purpose trust or is it for individuals:** If primary purpose if to benefit individuals then you don't have problems associated with purpose trusts

Definition of Objects: When a trust is created, objects must be certain so that the trustees will know their duties

- **Trust for people:** people are objects
- **Trust for persons:** persons who will be beneficiaries are objects
- **Trust for purpose:** Object is purpose

Purpose trusts (non-charitable) are invalid at CL because of the beneficiary principle: This means that you need someone who will enforce the trust. You need a beneficiary. There are bizarre exceptions: Anomalous purpose trusts:

- Big exception is charitable trusts: it is not really an exception because the AG is in charge of enforcing charitable trusts, so we didn't want the beneficiary principle from precluding them from operating

Re Denley's Trust Deed

Facts: Settlor wished to create a non-charitable purpose trust (recreation or sports ground for ee's of company). Trust document provided that if 75% subscribed or the land wasn't required for a sports ground, or if company was liquidated then the land would go to a named hospital. The validity was questioned.

Commentary:

- Court upheld the trust by saying **there were individuals w/ a sufficient interest to be given standing to apply to the court for trust enforcement**.
    - The court calls their interest **tangible and direct** even though they don't have an equitable interest.
- Denley says that **in certain circumstances, non-charitable purpose trusts are enforceable.**
- As it is a private trust and not a charitable one, it is clear that however it is regarded, the individuals for whose benefit it is designed must be ascertained or capable of ascertainment at any given time
- **Judgment call if this is a real purpose trust.** It may be just a trust for present ee's and if so then there is a perpetuities problem. Court held that it is a purpose trust.
- **Why is it a valid trust even though it is a purpose trust?**
    - Because it is a purpose trust we run into the no beneficiary problem
    - Practical solution: There are people interested in enforcing trust even if they are not beneficiaries. These are the ee's of the company. They will get a direct benefit. They are interested b/c they will receive a tangible and direct benefit.
    - Where the ee's can directly benefit in a tangible way they have *locus standi* and as such can appear before the court and enforce the trust.
- Mischief that the beneficiary principle tries to deal with is out of play
- **Based on this judgment if you see a purpose trust you need to look to direct and tangible interests**
    - However if you look to S.20 of the *Perpetuities Act:* It address the non-charitable purpose trusts situation: Trust for a specific non-charitable purpose, that creates no equitable interest in a specific person.
    - **Litman: Thinks that the *Denley* trust is caught by this provision.** This section says that these trusts can take effect as powers and not trusts. If this section were operative in this case then the trustees are not trustee but rather donees in a power of appointment. They have discretion (subject to CL exercising of discretion) to use money, but they don't have to. It is turned into power. Power is valid to the extend that it is exercised within 21 years
    - **So essentially if you get a non-charitable purpose trust don't worry about the beneficiary principle, it is valid as a power that can be exercised for 21 years.**
    - **So we have legislatively created some scope for non-charitable purpose trusts.**
- **This is modern approach to the purpose trust – it is upheld:** Recognize that the ee's have a sufficiently tangible interest in the trust in order to give them *locus standi*.
- **Problems related to certainty of objects:** How do you tell that trust money is being used for proper purposes. The court said it isn't a problem – the test for certainty is powers of appointment and in this case they pass with flying colors.
- **Case gives some spectrum for non-charitable purpose trusts that had not been in existence.**

Modern trend is to recognize the non-charitable purpose trusts: S.20 of the *Perpetuities Act* says that if you have an unenforceable non-charitable purpose trust then it is valid as a **power** for 21 years:

- A non-charitable purpose trust is valid for 21 years and it takes form as a power
- This is a trust with no enforceable equitable interest that would be invalid at CL and converts it into a valid power of appointment that will be valid for 21 years.
- There is further language in S.20 that the court has discretion to not do that if it would serve the purposes of the settlor.
- At the end of the 21 years the property results back – **it is a resulting trust, if the section were applicable then the company would have only conveyed the assets away for 21 years and the company would have the assets back.**
- **What can you do to roll over beyond the 21 years:**
    - Set up second trust
    - Not sure that you can automatically roll over – and set up a secondary trust that is going to automatically take effect over s.20.
    - Section says they will tolerate non-purpose trusts but only for 21 years.

Question: Is the *Denley* approach overtaken by S.20: If Denley is alive then you can create perpetual enforceable non-charitable purpose trusts:

- In Denley the trust is enforceable because the ee's have an interest and it is tangible and therefore they have *locus standi* but Litman thinks they don't necessarily have an **equitable interest**
- So the Denley trust is a specific non-charitable purpose trust that creates no enforceable equitable interest in a specific purpose

R. v. Wood

Facts: Testator gave his estate to the "Edmonton lodge of the Theosophical Society", an unincorporated association, for its "religious, literary and educational purposes"
Issue: Validity of the gift to the society
Commentary:

- Gift was clearly intended to be for the benefit of an unincorporated organization – at least certain of its purposes.
    - **Court finds it was intended to take effect as a trust and not as an absolute gift**: Absolute words that are followed by express provisions
- A purpose trust, unless it is charitable fails:
    - It violates the rule against perpetuities
    - Lacks a beneficiary
    - Element of uncertainty or indefiniteness
    - May be a delegation of testamentary powers
        - Will makers should accomplish their own powers and not transfer will making powers to someone else
        - **Courts have rejected this point – they clearly allow delegation.**
- A charitable trust will be upheld notwithstanding the lack of a beneficiary or the violation of the rule against perpetuities, and by definition has sufficient certainty for the court to administer it.
- **S.20 *Perpetuities Act:*** prevents the trust from being "void for uncertainty or for any other cause" by construing it as a power.
    - **Objects of a power must be certain**
    - In this case there is a **linguistic uncertainty** which vitiates the gift as distinct from the difficulty of ascertaining the existence or whereabouts of members of the class which can be appropriately dealt with on an application for directions
    - This disposition lacks the necessary specification because of the practical impossibility in interpreting "religious, literary and educational" in relation to the various objects of the society.
        - Conjunctive use of the word "and"
        - **Court is saying that the expression creates sufficient certainty as to know that a proposed use of money comes within, or is outside, the purposes of the trust.**

- **S.32 *Wills Act:*** There is valid charitable trust for those activities of the society, which are properly construed as the "advancement of education". The executors may use the moneys only for purposes which so qualify and are free to apply for advice and directions accordingly.

Commentary Litman:

- Gift was for specific purposes so you have to look at whether this is a gift that is impossible to a non-legal entity. Is this an attempt to make a purpose trust? What is going on here?
- **When you make a gift to an unincorporated non-charitable association then there are 4 ways to construe the gift**
    - Gifts to members as of the date of the gift
    - A gift to members present and future
        - Here you are going to run into perpetuities problems
        - At common law this would not be a valid gift. Under our statute a gift to present and future members could be safe. Most modern jurisdictions have a statute that operates on a wait and see basis and they cut it off at a certain time.
    - A gift to members subject to contractual responsibilities they have entered into
        - This is a deceptively straight forward statement you can't make a gift to a non-legal entity.
        - What this is a description to the coffers of the association. It is an accretion to the property that belongs to the association.
        - How does association hold its property: In most associations there is executive w/ treasurer who has title to bank account, signs leases, etc. The treasurer and or executive have legal title.
        - The associations tend really to operate as trusts – they don't say this but they operate it. The executive owns it in accordance with rules and regulations of associations. Contractual responsibilities are described by rules of the association
        - This really is only different than 1 & 2 because it implicates the rules of the association.
        - So this is accretion to the property of the association to be used in accordance of its rules
        - **Court says no to this possibility because the purposes of the society are broader than the purposes earmarked for the particular gift – so it is not merely an accretion.**
    - Money is dedicated to a trust for purposes.
- **It is a matter of interpretation wrt which of these 4 points will be adopted in a gift to an unincorporated non-charitable association.**
- **Operation of the trust depends on how it does in S.20:** Must focus on the language of S.20 – "specific non charitable purpose trust"
    - Obiter: Particular as opposed to general – this is a possibility that the section may require specific trusts
    - Nothing in the section eliminates the requirements of certain of objects of the trust. In this case those objects are the purpose of the trust.
- **Summary: You still need to worry about certainty and the possibility that specificity is required.**
- **Effect of S.32 of the *Wills Act:*** If a testator leaves property in trust or by outright gift for a charitable purpose that is linked conjunctively or disjunctively in the will with a non-charitable purpose and the non-charitable purpose is void for uncertainty or for any other cause, the charitable trust is valid and operates solely for the benefit of the charitable purpose.
- **Charitable purpose trusts are OK:** You can bring a proposal to the courts wrt certainty (what the settlor would be happy with)

Very often purpose trusts are there for human and public enhancing purposes. However they are often being struck down

Review on this point (non-charitable purpose trusts): relevant law now is S.20 of the *Perpetuities Act.* However certainty of purpose is still a relevant barrier to such trusts becoming powers as a result of the act.

Classification by Trustee's Duties

Contrast of discretionary trust v. fixed trust.

Bare Trust: Trustees only duty is to transfer the trust property to the beneficiary. Remedial constructive trusts and usually bare trusts.

CHAPTER 4: RESULTING AND CONSTRUCTIVE TRUSTS

Resulting Trusts

Definition: Presumption when legal title to property is vested in someone other than the person who provided the purchase money

Is assessing the potential of a resulting trust, need to be aware of the Presumption of Advancement (Gifts) particularly in the context of a parent-child, husband wife situation

Resulting Trusts: Also arise by operation of law. Comes from Latin verb "to jump back". Occurs when you convey property to someone but have not fully conveyed the beneficial interest.

- **Example:** A pays for property but directs that the seller convey title to his neighbor, B. Unless there is evidence that A intended to make a gift to B, B will hold on a resulting trust for A.
- **Other Examples:**
  - A gratuitously transfers property to B (B stranger in law)
    - Presumption is that B holds on trust for A. Equity presumes bargains not gifts as between strangers
    - Here it would be up to B to convince the court that A gave gift
    - Presumption would be resulting trust, not advancement, B would have burden to proof to show gift
  - A buys house using her money and conveys to herself and two others who are strangers in law
    - This is situation in ***Brown***
    - Unexplained transfer of property, presumption is that if it is to stranger then they hold on trust for A.
    - It is a rebuttable presumption, B & C can demonstrate a gift but if they don't convince then resulting trust
  - Trust to remit income to T from a fund to B
    - Nothing is said about capital. In order to remit income you have to transfer the property to the trustee. Trust only provides for disposition of income to B.
    - Trustee hold on resulting trust for settlor the capital interest of the property
    - They are resulting trustees of the capital for the settlor they are trustees of the income to the beneficiaries
    - If you fail to dispose of beneficial interest in part of whole who ever it is transferred t holds as resulting trust
  - $10,000 to T in trust for A, $5000 upon reaching 19, $5000 on reaching 21
    - Noting is said about the income – what about the interest
    - At CL the trustees would hold the income as a resulting trust for the settlor
    - However that has changed as a result of legislation
    - **S.32 *Trustee Act:*** Changes this situation from resulting trust to trust of income and capital for A. It basically says that if you create a trust any disposition includes income except to the extent that income is expressly withheld. Because of this the income follows the capital
  - $10,000 conveyed to T on trust for A but only if A attains 25 years and marries
    - If they attain 25 years and marries then the property will not revert back
    - The resulting trust occurs later, in contingent trusts, resulting trusts arise after the fact.
- Resulting trusts were always seen as "implied trusts" but it was not always made clear whether they were implied in the sense that they were created by genuine but unstated intention, or implied in the sense that they were created by operation of law.
  - **It is clear that they are implied in the sense that they arise by operation of law**
  - **However intention is relevant as they never arise contrary to the intention of the seller**
- **Chambers:** Resulting trust arises by operation of law where there is:

- A transfer of property
- An *Absence* of intention that the transferee should take a beneficial interest.
    - Intention is relevant in that it can prevent the trust from arising; but it does not create the trust.

Standing v. Bowring

Facts: Widow (88) transferred stocks into joint name of herself and her godson. It was made intentionally with the knowledge that she could not revoke. He did not know about the transfer and no consideration was provided. Later she tried to compel him to discharge his interest (she got married two years later). He declined to concur.

Issue: Are there any grounds upon which the court can make B re-transfer back the stock

Commentary

- Resulting trust is only a presumption and the court will not undermine a gift intention w/ a presumption. It doesn't matter that the donee didn't know of the gift, there's a presumption of acceptance. Shares are generating interest and she is entitled to that interest while godson gets the shares.
- **Only trust which is consistent with the evidence is a trust to pay her the income for the shares fore the joint lives of herself and the Defendant**
    - Trusts are neither created nor implied by law to defeat the intentions of donors or settlers; they are or implied or are held to result in favor of donors or settlers in order to carry out and give effect to their true intentions, expressed or implied.
- **He holds dividends on resulting trust for her** b/c there is no evidence of a gift of income, just a gift of right of survivorship.
    - She never intended to dispossess herself of the income during her lifetime.
    - **Nothing is said about the income – only the capital (shares)**
- **These days however one would want to be explicit if the income was to be a resulting trust:**
    - **S.32 Trustee Act:** Income would automatically go unless there is an express disposition of the income (provision in trust). At that time the CL said you needed an express indication of the intention to give a gift including income
    - **This sections seems to overturn the result.**
- There is a subtle argument that the gift is only a gift of the right of survivorship of the shares. **This is a chose in action.** The only significance is that it has interim economic value. You could make a gift to the right of survivorship of the chose in action. **The argument that one could make to get around S.32 of the trustee act is to say it is not a gift of the shares but a gift of the right of survivorship.**

MacQuarrie v. Barber

Facts: This case situation is common with elderly parents. M had son investing her money, **he predeceases her leaving sister as sole survivo**r. The money was invested in CSB that were registered jointly in the names of the mom, the daughter and the son. Will said that residue of estate goes to kids *Per Stirpes. Per stirpes* means $ is to be distributed through family lines of each child. The son's children (grandsons) are claiming their *per stirpes* distribution but the daughter said she's survivor of JT and all interest goes to her children.

Issue: Are the CSB's subject of a resulting trust and thus form part of the Estate of the deceased. Was the intention that the bonds remain hers but held in the joint names of the children in order to assist in dealing with them, particularly if she should become incapacitated.

Commentary:

- Daughter is arguing that there is a presumption of advancement and therefore, since she is the last survivor (her brother died) then the bonds are hers and do not form part of the estate of the deceased mother.
- **Presumption of resulting trust:** Deceased property used to purchase the bonds.
- **Presumption of Advancement (Gift):** Arises in transactions between parents and children
    - M did not intend a gift to either of her children but instead intended that the bonds and income there from would remain available for her continued use and benefit.
    - Court found M did not intend to divest herself of beneficial interest in $ and that herself and her 2 children were trustees for her. Presumption of Advancement does not apply. Deceased was continually concerned, if not paranoid, about bonds in question
- **Court finds that CSB's are subject of a resulting trust in favor of the beneficiaries of the estate of Mom.**

- **Case demonstrates that if there if evidence then you rely on the evidence. True intention was to provide kids access to the funds just in case they were needed to take care of the mom in here old age.**
- **What if there was no evidence:** Gift applies when mother transfers $ to wife or children. The court seems to be sympathetic to extend to presumption in a sympathetic way. So it seems that this would be a resulting trust in the context of the mother. Presumption of resulting trust should be applied in a gender neutral way beyond the common law.
- **CL:** Women transfer to kids (RT); Men to children (Gift).
- **Court says however gender neutral interpretation –** so start with gift and context can take it to a resulting trust.
- **It doesn't take much for the court to find that no gift was intended**

Brown v. Brown (NSW SC, 1993)

Facts: Mrs B and two sons purchased a home. All three contributed to the purchase price but **legal title was placed in the name of the two sons.** Eventually she moved into nursing home. Sons made improvements to house, and purchase surrounding properties. **Sell parcel of land (including part of original lot) for in excess of $600,000.** At that time Mrs. B claimed to first become aware that title to the property was in the name of the two sons alone. Sons asserted she had no legal interest in it. Mrs. B brought action claiming she was a beneficial part-owner of the property to an extent in proportion to her contribution to the original purchase price (in proportion of 2125 to 4800).

Issue: resulting trust v. presumption of advancement in context of joint purchases. Mrs B seeks presumption of resulting trust proportionate to her contribution to the purchase price of land.

Commentary

- **Start with presumption of resulting trust** because legal title to property is vested in someone other than the person who provided the purchase money
- **Presumption of advancement can rebut the presumption of resulting trust:** Equity assumed that the proper inference is the contrary of that giving rise to an implied or resulting trust. The assumption is not that the trust arises but rather that one party intended to benefit the other and that the latter was intended to have both beneficial and legal ownership of the property in question.
    - **Classic Case:** relationship between a father and a child
    - Mother and child historically has not given rise to PoA in Aussie
    - In US presumption of advancement applies to both father and mother context
- **Facts of case and objective circumstances rebut a presumption of advancement**.
    - Mrs. B did not intend to made a gift (or loan) to her sons. So basic presumption of resulting trust is applied.
    - Where a widowed mother, of modest means, makes a payment of substantially the whole of her assets to contribute to the purchase of real estate, and legal title to the real estate is vested in her adult, able bodied sons, the facts seem to point against the presumption of advancement

1978 SCC (Rathwell v. Rathwell)

presumption of advancement has ceased to embody any credible inference of intention in the modern age. Statement made in context of property dispute b/w parties in a CL relationship.

Case law seems to be suggesting that it will extend notion of presumption of advancement and resulting trust to gender neutral terms: In both of these cases we see that there was intent to make the transfer for intention other than a gift

Important part of presumptions is that they are rebuttable. Courts want to look at the evidence before making any determinations.

Where are we now: 1978 in ***Rathwell*** SCC said not to presume gift. But trend in lower courts to expand the scope of gifts by making it gender neutral. What does this mean?

- Court is being really technical – advancement means obligation to provide for wife and children. No such obligation to provide, freedom of testation, and statutory rights. No underlying obligation to make gift

- **Litman does agree with this: Fundamental Question is what presumption should be when parents gives $ to child**

- **So what do we presume:**
  - Rathwell says doesn't make any sense to presume a gift
  - What is important is the intent of Mom. So empirical question is what do parents intend?
  - In Rathwell their may have been an alternative agenda, no law of UE, no property separation, arguments that were being made was that in both marriages and CL relationships, all of the presumptions were gifts. Rathwell didn't agree
- **Legislation now that we shouldn't presume gift – even between married partners:**
- **Courts continue to deal with these problems:**
  - ***Mehta Estate:*** Husband has good $, in happy marriage. Trying to income split, so he transfers assets to wife. They both die in an airplane accident. Each had a will and each said if spouse doesn't survive by 30 days then estate goes to parents. Question of where the assets went (the ones that were transferred to her) . No kids so her parents get all of it. His parents don't like this and so they litigate. Judge says that SCC says don't presume gift, not resulting trust. Therefore those assets are help by her estate on trust for him. Lower court says resulting trusts – assets owned by him and she didn't survive her by 30 days. CA says presumption of advancement still applies.

Statutory Considerations to Take into Account:

- ***S.36 Matrimonial Property Act:*** In making a decision under this act, the court shall not apply the doctrine of presumption of advancement to a transaction b/w the spouses in respect of property acquired by one or both spouses before or after marriage
  - **This is not saying you ignore it if it is a real gift – you just don't rely on the presumption. Don't apply presumption generally**
  - **Statement qualified by S.36(2):** Property taken in name of both spouses as joint owners is presumed to be beneficially owned by both so presumption of gift will apply. $ deposited in financial institution in name of both spouses is deemed to be beneficially owned by both

Hypothetical (Matter is actually being heard in Court right now): Finance A has $80,000 equity in a $200,000 home. A transfers to B (wife) under arrangement that she pays off the balance of the mortgage. She said she would do that provided that she got title. They are now getting divorced and the property is worth $300,000.

- Husband argument, resulting trust for his portion of contribution ($80,000) Statute doesn't say presumption of advancement. He says that he gets $80,000 off the top (property is exempt from division) and then he gets 50% of the $220,000.

So for the purpose of an example remember the concept of in *Rathwell* and also the effect of the Statutes.

Macleod v. Macleod (Nova Scotia TD, 1983)

Facts: The plaintiff's owned property, they subsequently went bankrupt. The defendant, a brother by adoption was implored to purchase the property so that the plaintiffs could remain in possession, which they did. They were to make the mortgage payments and to refinance in their own name after a year, the plan assumed that the defendant would not be out of pocket.

Commentary:

- **Position of Plaintiff (Original Owners):** Property was purchased and held by the defendants in trust for the plaintiffs
- **Position of Defendant (New Purchasers):** They are the true purchasers and owners who only agreed to "consider" a resale to the plaintiffs if certain conditions were met by the plaintiffs within a period of one year.
  - **Court position on one year agreement:** Understanding that if all costs were met by the plaintiffs within a period of one year and the plaintiffs were able to refinance the costs of the purchase (so as to release the defendants from liability for the mortgage and bank loan) then the defendants would consider making a conveyance to the plaintiffs.

- The court looked at the conduct and the intentions of the parties to conclude **that an express trust was created even though no trust language was used.**
    - Court look beyond the NSF cheques and found that the plaintiffs have made all payments of principle and interest on the mortgage and all interest payments on the bank loans
- **What the parties contemplated was if fact an implied trust for conveyance which is considered an express trust**.
- In the alternative the court said a resulting trust could be found.
    - **Resulting trust created because the arrangements made by the parties were <u>analogous</u> to the case in which the purchase price is advanced by one party and title placed in the name of another**
    - This is not a constructive trust b/c the conclusions reached follow from what the parties actually intended.
- **To establish a resulting trust there must be:**
    - (a) a transfer
    - (b) it is gratuitous
    - (c) stranger at law
    - (d) absence of evidence of intention.
- The mere fact that the conveyance came from a third party, the receiver, does not preclude a resulting trust. Since the defendant was not to be out of pocket, **the court characterized the defendant as the plaintiff's agent in obtaining the mortgage, therefore it was gratuitous**. In the alternative the court argued that a constructive trust could be used to remedy an unjust enrichment.

Commentary (Litman)

- Plaintiff arguing for "trust for conveyance" that is conditional on meeting their obligations
- Defendants say that if they do all that they will "consider" conveying the property to them
- **This case shows you how one set of facts can be analyzed as creating different trusts**
- **Defendants holding title for the plaintiffs and if conditions were met their should have been a trust for conveyance**
- **Argument for Resulting Trust: Purchasing $ Resulting Trust**
    - A buys property and arranges for B to hold title then B holds on resulting trust for B.
    - Arrangement was such that Defendants borrowed money and lent to the plaintiffs.
    - It is a "purchase price" resulting trust. The defendants were lending the $ they borrowed to the plaintiffs. They got title to secure the obligation of the plaintiffs to pay them back. Defendants wanted the asset in their name until they paid them back.
    - **This is a subtle application of the doctrine of resulting trust.**
- Could also argue UE and a constructive trust but courts don't go down that path

Clark Drummie & Company v. Ryan

Facts: Husband and wife bought their first home in 1978. Both were working and both contributed to its acquisition and maintenance, including the mortgage payments. In 1984, they sold the house and brought another with the proceeds from the first house. **They each contributed half of the down payment, half mortgage and half interest expenses**. The wife took title in her name alone b/c the husband was a lawyer and they believed this would protect the house from possible future creditors of the husband. The law firm that employed the husband fired him when they discovered that he had stolen from them and their clients. They obtained judgment against the husband and also took an assignment of a judgment that a client had obtained against the husband. The law firm brought an action against the husband and wife for a declaration that the wife held title to the house upon a resulting trust as to a half interest for her husband and for an order directing that the house be sold and the judgment debt paid out of proceeds. The wife was unaware of her husband's defalcations. Since being fired he had not been gainfully employed, and there was no evidence to show whether he used the stolen moneys to pay the mortgage payments.

Commentary:

- A non-owning spouse can claim an interest in property by way of a resulting trust if he or she is able to establish such a trust by reason of common intention or contribution.
- Trial judge agrees that there is a resulting trust. He transfers the property into her name. Finding of fact that there was a resulting trust. Then however the judge has to decide whether to permit immediate enforcement. Judge has discretion to stay the enforcement proceedings

- ***Civil Enforcement Act S.5:*** Gives judge discretion to stay the enforcement proceedings
- Mrs R pleads estoppel
- **Factors that persuade the court not to order the sale of the house:**
  - Mrs R knew nothing of the thefts
  - She earned half the $ that went into the acquisition and operation of the house
  - 3 children in the house
  - Functioning family
  - Mr R paid the equivalent $ he contributed.
- **Wife's determination to keep her family together in that house is admirable and should receive some equitable consideration**
  - Court doesn't want to penalize Mrs. R for husbands criminal activity
- **Court said that equitable remedy is to give the wife the opportunity of purchasing her husbands interest at a time when she should be more ready financially to do so.**
  - Law firm is to be paid by R when youngest child reaches majority, if necessary the property may be seized at that time.
  - R's interest in the house if frozen
- **We only have the trial judge decision: CA says that there was no resulting trust, they reverse and say that it was a gift. There was an intent to make a gift and therefore it was hers. So there was nothing for the creditors to go after.**

Vanderwell

Tax planning scheme. Independent gift to royal college of physicians and surgeons. Tax scheme to make the cost of the gift as cheap as possible. He transfers the shares to them as a gift but attaches all sorts of conditions that results in the shares being ultimately returned. Condition of gift that he can buy the shares back. **Court looks through and says the college didn't really have beneficial ownership – they held it on resulting trust for him. So when dividend is declared, V has to pay tax on it. It was a control thing. The college didn't really have control. They used resulting trust analysis to determine control.**

Clark v. MacInnis

Example similar to ***Macleod.*** Plaintiff who had made a down payment towards the purchase of realty had his statement of claim struck out on the basis that there was no allegation in the statement of claim that the down payment made by him was made in his capacity as a purchaser. **The court held that without this allegation there could be no resulting trust. Resulting trust doesn't apply unless you advance $ as a purchaser**

Rebutting the Presumption of Advancement: Illegal Purpose Trusts

If you make a gift of property because you are being prudent, but you are worried that you will eventually get into a risky business there is not a violation of any fraudulent conveyances statute. If it was then incorporating could be construed as violating the fraudulent conveyances statute. However if it is a gift and you split up with your wife you are out of luck subject to matrimonial property legislation

However it is a different situation if you are trying to evade creditors. Transfer is void if you transfer to evade creditors (*Fraudulent Purposes Act)*

Fraudulent Conveyance Act: Prohibits transfers accompanied by an intent "to defeat, hinder delay or defraud" creditors and declares such transfer to be void.

Interesting problem is however when the husband tries to get money back, although the trust was set up with illegal purposes

This is an area that the courts apply the presumption of advancement, but if you are trying to rebut it with illegal purposes then the court won't help you

So if you want to rebut the presumption of gift you have to come with clean hands.

- ***Scheuerman:*** If you try to evade creditors you don't have clean hands, end of story. This is a strict approach adopted
- **Another approach (Anglin J.):** it does matter whether at the time of the transfer whether the property was within the creditors reach. If it wasn't illegal at the time of the transfer then it was not an illegal purpose trust.

Scheuerman v. Scheurerman (SCC, 1916)

Facts: The respondent husband transferred property to his wife to **hide it from creditors**. Transfer is made so that house is in wife's name. Wife sells house at profit. Husband claims that property was his and residue of the purchase price was in vendee's hands. At the time of the transfer the property, unknown to the parties, was exempt. Under the laws of AB a house and building occupied by an execution debtor and the lot or lots on which they are situate are exempt from execution to the extent of $1500. The creditors were subsequently paid.

Commentary

- **Respondent (Husband) Position:** House purchased by him, built by his own labor, transfer made to wife was made with understanding that she would hold property as trustee for him.
- **Appellant (Wife) position:** She held property as trustee, but intention of both parties in making transfer was to conceal from creditors the fact that he was an owner. At the time of transfer the creditors has recovered judgment against the husband.
- **Key factor in this case:**
    - **Evidence that shows that presumption of advancement is rebutted (intention not to give a gift) is the same evidence that shows that the transfer was make to cloak the property from the creditor.**
- If the transfer was made to mislead creditors it would be void under the *Statute of Elizabeth.*
- **You cannot rebut the presumption of advancement through the aid of an illegal transaction that he was a party to.**
- **Trial decision:** Respondent won b/c nothing had been in execution of the unlawful purpose. By law of AB a house and building occupied by an execution debtor and the lot or lots on which they are situated are exempt from execution to the extent of $1500.
    - **Argument by respondent:** Property at time of transfer was < $1500 value therefore it could not be an illegal transfer since this was exempt from creditors, thus the presumption of advancement should be rebutted. The *Statute of Elizabeth* only applies to properties that the creditors are entitled by law to have applied to payment of claims
- **SCC holds: Appeal allowed**
    - If any part of the debt was still unpaid after the value of the property rose beyond $1500 the presumption would be that the creditor is prejudiced.
    - **In these circumstances it is impossible to say the creditor was not prejudiced.**
    - **Onus on respondent to show that creditor not prejudiced.**
    - **The respondents case necessarily rests on an arrangement which it is fully disclosed appears to be fraudulent.**
- **Anglin (Dissent):** Law penalizes fraudulent act not intent. Don't speculate on value of property to find creditor prejudice. Transfer is lawful. **Letter of law interpretation.**

Commentary (Litman):

- Judges, all but one, say you can't get property back but for different reasons:
    - Duff, as long as you didn't injure creditors you can get property back
    - You must show that on the facts that the creditors were not impaired, on the facts of this case he could not prove this.
- Obiter by Idlington: **He seems to suggest that it matters who you are transferring to.** If you are transferring to your brother with view to evading creditors and the heat is off and then you go to get the property back. Here you are trying to enforce resulting trust. If you are trying to enforce resulting trust then illegality doesn't matter because you don't rely on the illegality to prove the case. **You must be relying on the purpose to give rise to the resulting trust.**

- **This is adopted by the majority of the HoL in *Tinsley v. Milligan***

Between *Scheuerman* and *Goodfriend* the case law is all over the place (as is the judgment in *Scheuerman)*

Goodfriend v. Goodfriend (1972, SCC)

Facts: Swingers Case – exchange of spouses for sexual purposes. Sometime prior to October 1966 the husband had received a letter threatening a suit against him for "**alienation of affections (**Husband of women who had affair sues man)" as a result of an extra-marital relationship that was known to his wife. As a result of the decision in ***Kungl v. Schiefer*** no action will lie for alienation of affections, and in the circumstances, no possible basis could have been imagined for an action for enticement. The husband did not treat the letter seriously but his wife kept urging him to consult a solicitor. Finally he permitted his wife to consult a solicitor, and she later informed him that the solicitor had advised that the farm property on which the couple resided be conveyed to the wife and that the husband's securities should be transferred to the United States, all of which would protect these assets from execution in regard to the threatened suit. On 13th October 1966 the husband transferred the realty in question to his wife. The consideration in the land transfer tax affidavit was shown to be $1 with the explanation for the transfer being "Husband transferring to wife". He did not however take any further action to protect the other property and securities in his own name, all of which had substantial value. Thereafter the parties lived together until February 1968 when they separated. **The plaintiff husband sought a declaration as against his wife that he was the beneficial owner of the lands transferred to her**. The trial Judge refused the relief sought and the plaintiff husband appealed. The Court of Appeal for Ontario, reversing the trial Judge, granted judgment in favor of the plaintiff, [1971] 1 O.R. 411, 15 D.L.R. (3d) 513. The defendant appealed further.

Decision: Resulting trust, presumption of advancement rebutted. **Husband was beneficial owner of the lands**

Commentary:

- Per Laskin J. (Judson and Hall JJ. concurring)
  - In the instant case the wife had persuaded the plaintiff that he should make the gratuitous transfer to her because she, rather than he, thought that he might be sued successfully to judgment, but in fact he was in no such jeopardy.
  - On such a view of the facts the wife **could not rely on the presumption of advancement to retain the land.**
  - The plaintiff was entitled to say that he was misled by his wife in making the transfer.
  - There was no basis in any principles of illegality to taint him into forfeiture of his land.
- Per Spence J. (Pigeon J. concurring)
  - Where a person transfers his property into another's name gratuitously, a resulting trust in favor of the grantor is created and the transferee must prove, in order to retain title, that a gift was intended by the transferor.
  - When, however, the relationship between the transferor and transferee is husband and wife, or father and child, there is a presumption of advancement.
  - The presumption of advancement of such a conveyance from husband to wife may be defeated upon the evidence and the resulting trust restored.
  - **Evidence of an illegal contract or scheme will not be received to rebut the presumption of advancement, the court enforcing the equitable doctrine that the plaintiff must come into court with clean hands.**
    - However this rule must not be applied in the circumstances of the instant case where there was **no evidence of creditors or that any creditor was defeated, hindered or delayed by the transfer**.
  - **The rule prohibiting adducing evidence (to rebut the presumption of advancement), of a contract or scheme to defeat, hinder or delay creditors will not bar such evidence when the scheme was never carried out by actual defeat or delay of creditors**.
  - The mere intent to delay, hinder, or delay creditors, alone, is insufficient to bar the evidence.
- **Distinction from *Scheuerman:***
  - In this case there were no actual creditors, only the fact that the she thought she would be sued
  - No intent on behalf of the husband to violate the law against any judgment creditor
  - In that case the creditors were actually prejudiced. Only argument that they weren't was that at the time of the conveyance the land was only worth the exempt value
- Presumption of advancement is readily rebuttable, the sole question being the intent with which the transaction took place.
  - Transaction for illegal purposes (evade) creditors will not rebut presumption

- However in this case there was no proof that he had creditors or that any creditor was defeated, hindered or delayed by the transfer

Commentary (Litman)

- What was feared was an action in law that doesn't exist. Spence and Pigeon (minority) are saying that he onus is on the wife to show that the creditors were prejudiced. This is different from Duff
- Laskin (majority) takes a very different approach "an affront to the public conscience" approach. Basically he says were are ok to exercise discretion and in this case because he just gave in to her persistent demands.
- The old approach left the parties the way the court found them – this approach is to **weigh the equities**. Look at who is more responsible. Laskin thinks that wife is more responsible.
- **What we see is that the courts will exercise discretion.**
- Instead of a simplification of the existing law we have an added layer in that the courts will exercise discretion and will weigh the equities.

Tinsley v. Milligan (1994, H.L.)

Facts: Female lovers. They met when T (Appellant and Plaintiff) was 19 and M (Respondent and Defendant) was 38. T moved in w/ M at 9, Fitzhamon (belonging to Mrs. Slater). M was running a B&B. T was nominal housekeeper and M did the managerial work. Bank and building accounts were placed in T's name, but regarded as joint property. 9, Fitzhamon was eventually purchased and put into T's name. Two years later the house was sold and new house (141, Thomas street) was purchased with the proceeds, again it was registered in T's name. Shortly thereafter they had a fight. T moved out and M remained in the property. T divided money in bank account into equal shares. 6 months later T brings an action against M claiming possession and asserting ownership of the entire house. M (defendant) wanted house be sold and counterclaimed for order of sale. She also sought a declaration that the property was held by T on trust for the two of them in equal shares. **Illegality Factor in Case:** M for a number of years made false claims to the DSS for benefits of one kind or another. Money used from false claims paid into the bank accounts (jointly owned). T also perpetrated fraud against DSS. Having the 141 Thomas house in T's name helped to perpetrate the fraud by M against DSS. However fraud played only a small financial part in the acquisition of the equity in the house which is now in dispute. **Issue:** Whether the claim of the respondent to an interest in the property in question is **defeated by reason of frauds practiced on the Department of Social Security**.

Commentary:

- **The public conscience test**: weighing consequences of granting vs. refusing relief.
  - The HofL finds test too vague and won't apply it. Inconsistent with numerous authorities.
  - Different approach from *Goodfriend*—more pressure now for court to use technical/doctrinal approach.
- Test creates imponderability which can be good b/c is means flexibility. **Majority recognizes Milligan's interest and enforces it despite bringing in illegality/fraud.**
  - It seems particularly harsh not to assist M to establish here equitable interest in the house where not only was T implicated in precisely the same fraud on the DSS but the fraud in question can be regarded as relatively minor and indeed all too prevalent, and the respondent has readily confessed her wrongdoing to the Department and has made amends to them.
- When Milligan gave Tinsley $, presumption of resulting trust arises. The onus is then on T to retain ownership and rebut presumption.
- **The court doesn't care about illegality b/c M doesn't have to rely on it (very technical)**. This rule is out there as a matter of law, but Litman doesn't like it.
  - M as defendant simply plead the common intention that the property should belong to both of them and that she contributed to the purchase price: she claimed that in consequence the property belonged to them equally. To the same effect was her evidence in chief. Therefore Miss Milligan was not forced to rely on the illegality to prove her equitable interest.
  - **Only in reply and the course of Miss Milligan's cross examination did such illegality emerge**: it was Miss Tinsley who had to rely on that illegality
- Presumption of advancement does not arise in this case
- **H of L provides for rule that the presumption of advancement will still be rebutted if there is an illegal purpose but the person doesn't have to rely on that legal purpose: The plaintiff is entitled to recover if they are not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.**

- **Application to case:** M established a resulting trust by showing that she contributed to the purchase price of the house and there was a common understanding between M & T that they owned the house equally. The illegality only emerged at all because T sought to raise it. No evidence in the case to rebut the presumption of resulting trust raised by M.

Commentary Litman:

- This is simply a case of enforcing a resulting trust – the court is asked to adopt the Canadian approach. Look at the equities but the court rejects that notion
- The majority says that there is no problem, the illegal purpose behind the transfer is totally irrelevant in that M is not relying on the rationale for transferring the property in making her case. She is simply saying that she made a gratuitous transfer to a stranger in law and she wants to enforce the trust. **The majority of the court goes for this and says the way that it should be.**
- **Clean Hands Doctrine:**
    - Trying to discourage people from using trusts to hide property, if that is what we had in mind we shouldn't care if structural transaction gives rise to gift or resulting trust.
- Result of case is probably the same as the reasoning from Laskin in ***Goodfriend*** but the reasons that get to that result is different

SO WHERE ARE WE AT THIS POINT?

- It is clear that we have a discretionary approach
- An important element is whether creditors have been injured
- If we take a discretionary approach then the kind of factors from ***Tinsley*** are important
    - Degree
    - Illegality by transferor
- It seems that the somewhat uncertain state of the law should be a deterrent to irrational people. In that you may lose your property given the discretionary approach.

THE US APPROACH TO THIS:

- Hard line approach: the only way to discourage behavior is take a hard approach

Failure to Exhaust the Subject Matter of Express Trust (Resulting Trusts)

Resulting trusts involve gratuitous transfers: They can also arise when you transfer the property and fail to give it all away.

Resulting trusts are not meant for live: Clearly when trusts fail we get resulting trusts

Example: You are named as beneficiary in will, but you tell them how to use money. Before you communicate how to use the money the settlor dies. This is a secret trust and that trust has failed. Once trust is transferred a resulting trust (for estate) results in that you don't know who the beneficiary is.

If title to property goes to trustees under conditions that create a legal problem then the trust will fail. When this happens the trustee has title to property that they hold on trust for the settlor (resulting trust).

Once trustee has title to property and the trust fails it is a resulting trust

Similarly if the trust comes to an end and there is still trust property, then there is a resulting trust

Re Gillingham Bus Disaster Fund Bowman & Others v. Official Solicitor

Facts: In 1951 a column of cadets marching along a Gillingham road was struck by a motor vehicle, leaving some cadets injured and killing others. The mayors of three surrounding towns promoted a memorial fund "to defray the funeral expenses, care for the boys who may be disabled, and then such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine." After the primary object had been met,

there was still a substantial amount left in the fund which had been contributed by both known and anonymous benefactors. Application was made to the court to determine what should be done with the remainder.

Commentary:

- Failure to exhaust trust matter. What to do w/ excess matter most of which was anonymously contributed?
- Had this been a charitable trust, then left over ⇒ *cy pres* (as near as possible to the original purpose).
    - Trustee would have come back to court saying purposes were accomplished for this purpose, how about other purposes ? – the court would make a decision on this.
- **If the donees are known, $ reverts back to them under resulting trust**.
    - Settlor did not part with his money absolutely but only to the intent that his wishes, as declared by the declaration of trust, should be carried out.
    - There is no reason to show that the rule does not follow b/c some of the donors (smaller ones) are anonymous
- **Important thing for case:** look out for resulting trust
- In the case the court provided the money to go to the survivors.

Constructive Trusts

Arise by operation of law: court will recognize a CT b/c it would be unjust for person with title to property to keep it. They arise "in the interest of good conscience'

Current Law in Canada wrt CT:

- **Historical UK:** CT arose in difference situations. Situationally based CT that responds to correct misconduct. Litman thinks that they arise also to prevent misconduct or to deal with potential misconduct.
- **Situation Based CT:** Not really a theory b/c there is no clear pattern to determine when the CT will arise. A whole bunch of cases that provide for CT
    - ***Soulos:*** History is still part of our law. Even though we have adopted the US approach (principled approach) we still have to be aware of UK cases where CT arises.
- **Situations where CT has arisen in UK case law:**
    - Improper profit by trustee or other fiduciary
        - Taking trust assets and making a profit
        - Self Dealing: if trustee buys assets from trust, order to transfer them back to the trust
        - Sales agent: gets a bribe or discount, that bribe is held on CT for principal
        - Using confidential information to get an unauthorized benefit (***Lac Minerals)***
    - Receipt of trust property by 3rd party who is not a BFP for V without notice
        - If you buy property who is not BFPV without notice, but if you aren't (not paid enough, have notice, unauthorized or improper transaction) then will hold on CT for beneficiary of trust
    - Surplus arising from sale by mortgagee under a power of sale
        - Holds on CT for mortgagor (borrower)
    - Specifically enforceable K of Sale
        - Unique trust were seller until closing day can enjoy property but doesn't have all the rights (can't go out and destroy the property)
        - There is a duty of conveyance as per the K
        - As soon as the K is entered into to buy house then you protect interest by caveating title.
        - The only reason you can caveat is b/c you have acquired beneficial interest
    - K to not revoke mutual or joint will
        - If survivor attempts to use property inconsistent with joint will or distribution scheme then the court will say that on death of husband assets are held on CT for intended beneficiaries of joint distribution scheme.
    - Inheritance through wrongdoing
        - These are the cases where one joint tenant kills another or beneficiary under life insurance K kills the insured, the law says you can't benefit from the wrong, you hold on CT for whoever it entitled to the claim.
    - Prevention of equitable fraud

- Denning came up with this. Equitable fraud means obtaining property unconscionably this is a very broad range. It is considered to be a very subjective standard for raising and keeping constructive trust. Courts were complaining that courts had refused to recognize UE forms.
- These are broader than UE based CT, they are rare but you will see it from time to time

Sometimes the courts are taking about the liability of constructive trustees (not constructive trusts). In those cases they are not saying there is a CT, they are saying that as a matter of law these people should be treated as trustees.

- **<u>When does this happen?</u>**
  - Example is the executor *de son tort:* Someone who isn't an executor (isn't named in someone's will) with authority
  - Since all executors are trustees then all EDST are all TDST
  - This will occur in an estate situation where family members help out with the administration of the estate. They take control of the assets, start to liquidate them, doing things that are the responsibility of the trustee
  - If you are doing things that trustee does they you have to meet the standards of a trustee
- A constructive trusteeship may give rise to similar liability as CT, but it may give rise to breach of trust
- **It also arises where a 3rd party benefits from or participates in a breach of trust.**
  - Who does this: financial institutions make money when there is a breach of trust.
  - Who participates: those institutions and professionals – lawyers, accountants, etc
  - They can be found liable as constructive trustees.

US Approach to CT: It is a remedy, one of several remedies to UE. English CT idea is based on ownership. Underlying ownership is in the beneficiary. In UE the theory is not based on ownership but is based on obligation. The CT secures the obligation to convey property to another – to correct the UE. Because if you don't convey then you will be UE, so you have an obligation to convey the property to someone else. It is b/c there is a duty to convey property that you have a CT. The obligation to convey is the genesis of the CT. The obligation to convey is designed to prevent UE.

What is the significant in the difference b/w UK and US approach: UK has a lot less situations where UE will arise.

Canadian law grew up in UK tradition but in a series of cases (*Murdock, Rathwell)* there was an increasing consensus that Cdn law should adopt UE as a basis for CT. Most of the cases are married couples or co-habitants.

- ***Murdock:*** UE claim unsuccessful
- ***Rathwell:*** Almost successful
- ***Petkies:*** It is allowed

As a result of these case we see UE as a basis for CT, and also the creation of matrimonial property legislation. Judiciary pushed legislature.

Even though most of the cases are family, it has broad application to a business context. It is a very important body of law.

It is a remedial device: as a result it is not really a true trust, there is no intention and the law does not require fiduciary administration. The idea of CT is to convey the property – not to manage for the benefit

What happens in the interim before the conveyance? If you are CT for partner in home, she has 100% beneficial interest in home, can you ignore that tenants in basement aren't paying rent, can you rent out to tenants who will trash it. Answer is no, there are basic obligations that are trust like.

Historically CT were situational, the US has a UE model of CT but the UK has rejected that model. However in Canada we impose CT as a remedy for UE.

Property Theory: interest to exclude the world at large – CT is not concerned with this.

In a CT you don't have a trustee with FD – the duty is one of conveyance, as a result they are like trustee in a resulting trusts.

There are express trusts that look like CT's: Bare trusts

It is fair to say that the negative – restrictive duties that a trustee has probably apply however in a CT.

- Self dealing: Very often in family cases you will have A holding on trust for himself and wife. When CT is declared often the resolution of that CT is the purchase of the asset. If it is the trustee that is purchasing it they have to understand that as a trustee they are involved in self-dealing, they have to move themselves to fair dealing and get it fully appraised, etc.
- No indication in the case law that there is positive duties other than the duty to convey.

UE aspect of CT: Focus of *Peters v. Beblow*

1) Is there UE?

a. Elements

i. Enrichment

ii. **Corresponding Deprivation:** You are better off looking at this from the perspective of a contribution. If there has been a contribution then they have been deprived of something.

1. ***Clifford Olson***: Mass murderer case. In early period of his incarceration a lot of the deceased kids had not been found. Authorities entered into deal with him that they would give him $100,000 if he told authorities where the bodies were. Families sued for $100,000 on the basis of UE, on the basis that they were deprived. The court held no causal link. What is necessary is a proximate link. If anyone was deprived it was the Queen because the govt provided the money.

iii. **Absence of Juristic Justification for Enriched Person to Keep it:** Any reason that is relevant to the retention of the property by the party that is enriched or any reason which favors the transmission of the property to the party that is deprived.

1. Really the question is who is the onus on.
2. What will happen in a natural case you will have the plaintiff make justification that property should go to them and defendant will stay that the property should stay as it is
3. It seems that the best way of approaching this is that once you have an enrichment and deprivation and correspondence b/w the two you have a *prima facie* case of UE (similar analysis as a resulting trust).
4. Some cases is that the onus is on the defendant to justify the retention but the language is cloudy and some cases say that the onus is on the plaintiff
5. **On a principled basis you say the onus is the defendant to come up with a reason to keep the property.**
6. **Juristic Justification Test is where most public policy analysis arises:** Very often the arguments made at that stage of analysis is a gift was made, treat it as a gift, treat it as part of a give and take of an intimate relationship. If you recognize UE then you will commercialized a non-commercial relationship – **these arguments have been rejected (recipe for feminization of poverty).** Property based arguments are being rejected
7. If you ask parties going into relationship whether if the relationship would break up what would you intend: You would expect the wealth to be redistributed. So notion of gift (from women to man) is not that persuasive.
8. The other argument in ***Peter v. Beblow*** is that matrimonial property legislation was only for couples legally married. Ultimately the court held that there is nothing in matrimonial property that ousts CL property principles in areas that are not regulated by the statute

2) If there is UE then what is the remedy?

a. **Damages or Compensation to correct and UE:** Personal
    i. They are the preferred way to go – it is always cleaner and property is not tied up
    ii. What if you had enough cash but were bankrupt. Court suggests sensitivity wrt CT funds that may have impact on creditors
    iii. ***Lac Minerals v. Corona:*** Sopinka Ordering personal relief against a defendant who is bankrupt is inadequate. CT may be better for a bankrupt person.
b. **Equitable Lien:** Proprietary – However the courts have generally not resorted to this remedy. This remedy would have to be registered against the title. The W would have to use civil enforcement proceedings to execute against home. This remedy protects interest if she registers it and eventually leads to CT. You can get everything that you get with EL through CT and more.
c. **Constructive Trust:** Proprietary – immediately provides a duty to convey. It is an order to convey. CT secures the duty to convey because it gives rise to equitable interest in the property. Then the person can register it with land titles.
    i. Ordered if personal relief is inadequate. In this case it was because an order for personal relief would have given nothing (Peter didn't have money)
    ii. Requirements:
        1. **Inadequacy of relief** for personal damages: person wont be paid (bankrupt, no assets), can also have this because of special attachment to property.
        2. There must be a **nexus** (connection) b/w the plaintiff's contribution and the particular property: Here we are dealing with restitution. In the UE analysis the focus is a transfer of wealth or economic value, there is no talk of specific property. With remedial we shift our conceptualization to look at the property.
            a. There have been cases were UE and remedial analysis get muddled (***Davidson)*** but what the court forgot is that they have already concluded that there is UE. If you cannot connect it to property then the conclusion should be it is a damages case.
            b. Question of whether we can trace contribution to a certain property: Contribution must be **direct and substantial**
                i. It can be very indirect in terms of substantial the idea is that we will not impose CT on contributions that are not very substantial. It was to be sufficient so that it is a meaningful remedy. In terms of substantial contribution in a global sense we are not given any clear guidelines
        3. **Duration of Relationship:** more likely to get CT where it is a long term relationship rather than a short term one.
        4. **Tracing the Contribution into the Home: Sufficiently direct contribution to the asset:** Judgment in ***Peters*** disagrees – Majority says yes (unless a special justification for waving that requirement, Minority no)
            a. **McLaughlin (Majority) Special Rule:** Needs special rule but the court should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to he special circumstances.
            b. However at p.80 she says the better approach is to trace the contribution into the "family assets" of which the home was simply one. So you don't have to trace contribution into a particular asset as long as you can show it is in the "family assets"
    iii. **Value Received v. Value Survived analysis:** VR is what P provided to B. VS is what is left of which P provided to B. So if you are going to make an award wrt title it should be based on what is still there. At the end of the day there is no way of tracing what is survived in the property.

The reality is that we don't have specific rules so everything that we see in this case can be applied in a commercial context. The core idea of the family assets doctrine otherwise known as the "swollen assets" doctrine. The core case that gave rise to this idea is ***Chase Manhattan Bank*** **–** here the plaintiff made a double payment to the defendant pay (millions of $), the bank goes under the Plaintiff says UE. There is no way that the P can show exactly where that money is. We know it is in there somewhere in the same way that **Peter's** contribution is somewhere in **Beblows** assets. The court said that yes, banks assets are swollen and ordered the payment back to the plaintiffs hands.

Peter v. Belbow

Facts: CL relationship. W moved in with 4 her 4 kids. H had two kids already. Relationship for 12 years. W was housewife, and cared for kids. Cooked, cleaned, took care of house and garden, Made substantial improvements to the yard, was not paid for any of her work. W worked part time as cook after first year of relationship (6 hours a day at $4.50 an hour), received unemployment benefits in winter months. H asked her to live with him b/c he needed someone to take care of the two kids. Eventually the H got abusive and the marriage broke up. Action that H was unjustly enriched over years that she worked in the home without payment. She sought to have a constructive trust imposed on her behalf wrt property, or in the alternative monetary damages as compensation for labor and services.

Issue: Whether the provision of domestic services during 12 years of co-habitation in a CL relationship is sufficient to establish the proprietary link which is required before the remedy of constructive trust can be applied to redress the unjust enrichment of one of the parties of the relationship

Commentary:

- **Majority: McLachlin (LaForest, Sopinka, Iacobucci):**
  - Law of Unjust enrichment prior to case (***Pettkus v. Becker, 1980, Sorochan v. Sorochan, 1986***, ***Rathwell v. Rathwell, 1978****, SCC):* Need:
    - Enrichment
    - Corresponding Deprivation
    - The Absence of any juristic reason for the enrichment
  - Potential remedies for UE
    - Monetary: Payment for services – *Quantum Meruit*
    - Constructive trust to property: Only to arise where the monetary damages are inadequate and where there is a link between the contribution that founds that action and the property in which the constructive trust is claimed.
  - **Majority holds that three elements necessary to establish a claim of UE are made out in this case**
    - **Benefit;** Housekeeping and child care services
    - **Deprivation:** No compensation for services
    - **No juristic reason:** No pre-existing obligation b/w the parties to justify the deprivation
  - **Determining juristic reason for enrichment:** Fundamental concern is legitimate expectation of parties
    - Was the benefit a valid gift, or statutory obligation
    - Did the plaintiff submit to, or compromise the defendants honest claim
    - Does public policy support the enrichment
  - **Court finds that there is no logical reason to distinguish housekeeping services from other contributions**
    - Home based services are of great value to other spouse.
  - Just because unmarried couples don't legislatively have the right to claim an interest in the matrimonial assets on the basis of contribution to the relationship doesn't mean the court should not the equitable doctrine or UE to remedy the situation.
  - **Monetary Judgment v. Constructive Trust:**
    - Difficult aspect in case
    - In order for a CT to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link b/w the service rendered and the property in which the trust is claimed.
    - A minor or indirect contribution is insufficient
    - Where a claim is for an interest in the property, one must determine what portion of the value of the property is attributable to the claimant's service
    - **Test for determining proper remedy for UE:**
      - Determine whether monetary award is insufficient and whether nexus b/w contribution and property has been made out
      - If yes, then plaintiff is entitled to the proprietary remedy of CT
      - In looking at whether monetary award is insufficient court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions.
      - Value of trust is determined on "actual value of matrimonial property" the "value survived approach"
  - **Court holds that house reflects a fair approximation of the value of the appellant's efforts in the family**

assets.

- **Cory (concurring minority, LD, Gonthier):**
  - CT can apply to CL relationships
  - Person cannot be expected to forego compensation or an interest in the property in return for contributions made merely because that person loved the other person in the relationship. There need not be any evidence of a promise to marry or to compensate.
  - "Spousal services" given by one party to the other in the relationship should be taken as being given with the expectation of compensation absent evidence to the contrary.
  - The nature and duration of the relationship, as well as the contribution made, should be considered.
  - Relief in the form of a personal judgment or property interest should adequately reflect the fact that the unpaid services of one party to the relationship enhanced the income earning capacity and the ability of the other to acquire assets.
  - In a family relationship, the contribution need not be directly linked to a specific property in order to permit the imposition of a constructive trust. This remedy need not be as rigorously limited in a family situation as it is in a commercial context because the expectations of the parties in the two situations are very different. The constructive trust accords well in a family situation in that the parties to the relationship expect to receive on dissolution of the relationship not a fee for services based on market value but rather a fair share of the property or wealth accumulated through joint effort. The grant of a constructive trust may be inappropriate, however, where the rights of *bona fide* third parties would be affected
  - In a quasi−marital relationship where the rights of third parties are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. The decision as to which property (if there is more than one) should be made the subject of a constructive trust is also a discretionary one. It too should be based on common sense and a desire to achieve a fair result for both parties.
  - Situations may occur where an award for a monetary sum may be the most appropriate remedy. A number of considerations exist:
    - (a) whether the plaintiff's entitlement is relatively small compared to the value of the whole property in question;
    - (b) whether the defendant is able to satisfy the plaintiff's claim without a sale of the whole property in question;
    - (c) whether the plaintiff has a special attachment to the property in question;
    - (d) what hardship might be caused to the defendant if the plaintiff obtained the rights flowing from the award of an interest in the property.

Waselenko v. Touche Ross Ltd.

Facts: The plaintiffs paid monies to Swertz Bros. as a down payment for a pre-fab home. The company subsequently went into receivership with the home only partially completed. CIBC claimed the house as a secured creditor. The plaintiff's counter that by the way of a constructive trust, they had a proprietary interest in the home and therefore it does not form part of the bankrupt.

Commentary:

- UE—(a) enrichment of down payment, (b) a corresponding loss, (c) absence of a juristic reason to allow the enrichment?
- The jurisdic reason is the issue in this case.
  - The receiver argues that the terms of the contract are the juristic reason, title was intended to stay in the hands of Swertz Bros. The K is not a K for the sale of goods, but rather a building contract concerned essentially with the performance of Services and incidentally with the supply of material. Therefore the plaintiffs have no property interest in the house until actual delivery of the house
  - **The court says that intention doesn't matter and that CT is imposed irregardless of the intention of the parties**
- **Intention in K:** House would pass to the appellants (W) as the house was being constructed or manufactured.
- **Fiduciary obligations arose from the circumstances of the present case and the relationship of the W and S.**
- **Court allows proprietary claim to the extent of the amount of the purchase price they have contributed and to the same extent receiver is compelled to hold the property as a constructive trustee for the applicants**

- The rights of the applicants acquired under the agreement cannot be denied them by virtue of the intervention of the bank in placing S into receivership

- **Remedial CT arises by operation of law and does not allude to intention**

Commentary (Litman)

- There is a correspondence b/w deprivation and enrichment. For juristic justification the onus is on the receiver.
- **The court says that you can trample the parties mutual intentions with a constructive trust. It seems to be an erroneous idea.**
- **If the judge is correct then it creates enormous uncertainty CT can be ordered under basis that the intention doesn't matter**
- This analysis is wrong. It is an interesting fact situation
- Rationalization of this case is that only legal title passed to Swertz brothers.
- The proprietary nexus may be more of a shame than anything because of family asset analysis
- The court saves W investment with CT. Litman disagrees with case – **It was clearly contemplated in the K that the property was not W's – this goes specifically against the terms of the K. Court said you could ignore the K because CTs are not about intention**
- W doesn't get court to declare a CT until after the insolvency, but the court recognizes that the CT predates the time it is recognized- **it dates back to the unjust enrichment (act retroactively)**

Rawluk v Rawluk (not in materials)

- The obligation to convey predates the declaration of a CT.
- "The beneficial interest is from the beginning when the person has been wrong. The CT arises as soon as the situation that requires restitution arises, when the duty to make restitution arises. Does not arise only when declared by the CT."
- So, in a matrimonial situation it arises as soon as there are contribution and no justification for retention.
- **With a CT the obligation arises when money or contribution is made and nothing is given back to the person making the contribution**

Kimwood Enterprises Ltd. v. Roynat Inc.

Facts: Stitz sold shares in 6 companies to Balkan (B). B with these companies formed Capital III Control Corp (C3) Stitz sell their interest to Kimwood Corp – who stands in place of S as the vendor of the companies. S knew that they were being audited by CRA, wrt taxes owing on corporations. Told C3 that if additional taxes were assessed then purchase price would be reduced by appropriate amount. Purchase price of shares is $950,000, subject to a reduction of the tax reassessment. $500,000 of K's money to be held on trust by Kimwood to secure payment of the reduction of the purchase price.. On reassessment the moneys were to go to C3 but were paid from trust account directly to CRA. On reassessment $ paid out of trust to CRA. It was then found out that an excessive amount had been paid and CRA provided refund cheques. Instead of replenishing the trust fund, the cheques were made payable to the companies which had been sold. C3 borrowed substantial sums of $ from CIBC. Roynat loaned $500,000 to C3 via debenture. Loans by Roynat and CIBC in default and C3 goes into receivership. Proceeds of the refund cheques from CRA are being claimed by the secured creditors of C3. **So in essence refund cheques should have gone back into trust w/ Kimwood but were made payable to C3.**

Commentary:

- $ belonged to K, the tax liability was overpaid and the excess should be returned to the trust fund. Although the cheques were made payable to C3 all the equity is with K. The law ill imply a trust in favor of K.
- You can't use CT to undermine security in commercial setting. Otherwise commercial lenders would never loan $ if court could go back and re-award $.
- Found CT in this case pursuant to *Underhill's definition:*
    - In every case, were the person in whole real or personal property is vested at law has not the whole equitable interest therein, he is *pro tanto* a trustee fo that property for the persons having such equitable interest
- C3 secured creditors lose though b/c they are *pro tanto* trustees of the $ for persons holding the equitable interest.
    - At the time the $ was acquired, they had no idea the $ belonged to someone else.

- When loans were made it was not contemplated by anyone that the security would include property belonging in equity to K rather than the debtor

Commentary (Litman)

- Litman wants us to put this in Peters and Beblow terms.
- They argue that if B had borrowed money from a bank they should have had priority over P in that case – it was leant on security of the home and registered.
- Cs argue that there is no prior registered interest.
- BUT, in this case the Ct. says, when you define the property that forms a security interest, it does NOT include those owned on benefit to another party. It includes property beneficially owned by the DEBTOR, but not that beneficially owned by OTHER PARTIES.
- It is beneficially owned by K because that was the understanding from the very beginning. It was owned on trust for the vendor unless used to pay the taxes.
- **This came outside of the security interest and it was never intended that the $ would go to the creditors**

McDiarmid Lumber Ltd v. CIBC

Facts: McDiarmid mistakenly sent a cheque to the wrong supplier (Wescott) which was subsequently deposited with CIBC. The supplier subsequently went bankrupt and money was applied to a secured interest.
Issue: When a borrower deposits money is has received by mistake, and to which it has absolutely no entitlement, is its creditor, a bank which has no notice of the mistake of the lack of entitlement, obligated to return those monies to the paying party.
Decision: M's claim is dismissed, CIBC was not unjustly enriched.
Commentary:

- You can't use CT to undermine security in commercial setting. This is the prevailing approach in this area.
- The gratuitous transfer of $ to BC Lumber should have been a resulting trust. But trust $ were deposited into an overdraft account and CIBC is a BFP for value
- **Absence of juristic reason analysis:**
  - In the absence of any indication as to the impropriety of the deposit, CIBC has every right to credit to the depositors debt.
  - What the appellant (CIBC) must show is that there is a juristic reason for the funds to come into their hands: The juristic reason is the debt owed by Westcott to CIBC. There is no suggestion that this debt was other than enforceable at the time. **CIBC had a legally enforceable right to take the money from Wescott's account**

Commentary (Litman)

- **Bank does get to keep the money. What's the juristic reason**?
  - Judge says that the debt and the arrangement and the lack of notice combined to make the juristic reason. This is commercially acceptable.
- Discussion: It really seems like there should be a trust here.
- Judge essentially says that the bank is not at fault.
- These two cases conflict – we have to analyze both lines of authority and decide which we prefer.
- Cts. Are very careful about trust claims against bankrupt estates.
- Remember – **onus is on the D to prove there is a juristic reason** – is "it's not my fault" enough? Litman thinks that it is not.
- But there are dangers in allowing CTs to constantly trump creditors
- **The reason that the $ are not being argued under RT is that you can't trace the $**

Bedard v. Schell

Facts: The plaintiff and the defendant cohabited for 18 years. Wife sues Husband. Action begins before the H's bankruptcy The plaintiff claimed half interest in the property by way of constructive trust. The defendant subsequently went bankrupt. One of the procedural rules of the *Bankruptcy Act* is that you need the court's permission to proceed with an action. If, however, the action is based on a resulting or express trust you do not need permission. This is because trust property belongs to the beneficiary not the bankrupt and never becomes part of the estate to be administered by the trustee in bankruptcy. You do need the permission of the court however for CT.
Commentary:

- Unlike express and resulting trusts, a constructive trust does not come within the parameters of s.47(a) b/c **it's a remedy—it does not come into existence until it is judicially declared**.
- s.47 exists w/ relation to claims that can be identified and separated from the other property of the bankrupt**. In CT claims, that property is not identifiable until the court imposes the trust.**
- **SCC has utilized the constructive trust simply as a remedy to right a wrong:** It is not a substantive legal institution
- **Court provided leave to continue her action in respect of her claim based on constructive trust.**

Commentary Litman

- She sues based on express trust, RT, and CT.
- H goes bankrupt, and under bankruptcy act you need the permission of the court to continue with the proceedings unless you are proceeding based on trust.
- This is because if you have a TRUST claim you can lift the assets out – they are actually yours anyways.
- Does she need permission to proceed? **Judge says you DO need permission for the CT claim** (none of the other ones).
- Judge says this because it is mainly **a remedy**, and because the bank. Act is concerned with property that can be identified and segregated at the time of the bankruptcy.
- Judge says with an express trust you can identify the assets, same with resulting trust – clear gratuitous transfer. BUT, the CT doesn't necessarily point to specific assets. Litman says sometimes you can, but you don't need it for a CT.
- Judge says therefore you need the permission of the court, because you may not know what assets had been produced by the contribution.
- **CT is not regarded as a trust. Court is questioning whether this is a true trust or merely a remedy. This is not the kind of action contemplated that said trust actions can proceed without the leave of the court**

Soulos v. Korkontzilas

Facts: K, a real estate broker, entered into negotiations to purchase a commercial building on behalf of S, his client. The vendor rejected the counteroffer but "signed it back". The vendor advised K of the amount it would accept, but instead of conveying this information to S, K arranged for his wife to purchase the property, which was then transferred to K and his wife as joint tenants. S brought an action against K to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the community. He abandoned his claim for damages because the market value of the property had decreased from the time of the purchase by K. The trial judge found that K had breached a duty of loyalty to S, but held that a constructive trust was not an appropriate remedy because K had not been "enriched". The CA reversed the judgment and ordered that the property be conveyed to S subject to adjustments

Decision: SCC dismissed the appeal – property should be conveyed to S.

Commentary:

- UE is just an organizing principle for a CT (one legitimate basis).
- Situational Trust: Good Conscience CT
- CT conditions:
    - D must be under equitable obligation (broader than but usually fiduciary
    - Assets in D's hand must have resulted from deemed or actual agency activities (don't use agency literally
    - P must show a legitimate reason for seeking a proprietary remedy
    - Must be no factors which would render the imposition of a CT unjust in all circumstances of the case (jurisdic reason)
- Fiduciary profits have been viewed as UE.
- Sopinka:
    - Expanding CT beyond UE will cause uncertainty, but his analysis causes uncertainty. Says we must maintain integrity of equitable obligations by deterring certain conduct. Argues we should award punitive damages instead of a proprietary interest.

Commentary (Litman)

- Soulos wants to buy a house. K is a real estate agent and is therefore in a classic fiduciary duty.

- K is clearly in breach of his duty as he buys the very asset that his principal wants.
- The problem is that the market value of the real estate goes down – now there is no unjust enrichment – the agent actually lost money. So the Ss arguably have more money now as a result of the vile betrayal.
- They appear to be suing on a matter of pride – apparently it's good status to own a building in which there is a bank.
- So, the CT isn't really a good remedy, is it? There is a remedy called accounting principle, but it doesn't really apply – it allows for the return of unauthorized profits etc.
- Well, there's compensation – but that also implies a loss.
- TJ, as a result, says, sorry – but you didn't lose anything.
- CA, however, says yes, there is a CT – they order conveyance of the bank, although with adjustments.
- ** Take away – a CT is NOT just a remedy for UE – we will recognize the other institutional types of constructive trust – breach by fiduciary is one.
- Ct. says that the idea of good conscience is the organizing theme of CT. CTs are used to promote good behavior.
- We need to protect: Fiduciary relationships, and to condemn wrongful acts, and we can never allow fiduciaries to be immunized from their legal responsibilities by a falling market. Nothing immunizes this.
- The big problem here is uncertainty – outlines case law and different situations about where a CT applies – the over arching principle is that you can impose a CT to repudiate unconscionable conduct.
- Litman says it will be hard to come up with a situation that falls outside this big principle.
- **a series of criteria (pg. 110) that could keep this area of law from getting too subjective.**
    1) D must be under equitable obligation
    2) Assets in the hands of the D must have come from agency obligations in breach of equitable duty
    3) P must show a legitimate reason for seeking proprietary remedy, either personal or to ensure that others like D are faithful to their duties.
    4) No factors that would render the imposition of the CT unjust (interest of intervening creditor)
- Sopinka's Dissent:
    - A finding of CT is a finding of law
    - It is an exceptional remedy.
    - No case in which a Canadian court has imposed a CT that cannot be explained by UE.
    - The majority approach is just substituting one kind of uncertainty for another.
    - Says the deterrence issue won't deter, and says that punitive damages would be a better remedy (but first there has to be an award, right?)
- Take away: **The points made by the majority – situational CTs still alive in Canada, UE as well, and the over-arching good conscience principle.**

Martin Commercial Fueling

K for sale of House. K entered into. Creditor registers interest prior to the sale going through (conveyance of property). Court finds that CT saves the interest of the buyer in the house.

- **When a Court finds the CT, it is a way of telling a party to convey to the party that has the beneficial interest**
- **The CT beneficiary (purchaser) trumps the judgment creditor**
- **Basic rule is that if you have a K for the sale of land, upon completion of that contract there is a retroactive CT going back to the date that the K was entered into (signing of K).**
- Trust is clearly a unique form of trust – the vendor in a K of sale of land prior to closing continues to have a beneficial interest in the land and in the home (live there and enjoy it). If there is a tenant in the basement it is the vendor who is entitled to the $. It is however a trust and it constrains the vendor from dismantling the premise. This would be a breach of trust
- Any attempt to resell the land despite the contract would be a breach of trust.
- It is a unique type of trust relationship – the big question is what are the priorities between the purchaser and a judgment creditor for the vendor
    - Purchaser has equity, maybe equitable interest, but not registered prior to the judgment.
    - How do you reconcile this to the **Torrens registry system – if you had a second purchaser and they registered title (caveat) they will be prevail**
    - **The key to this is found at pg 120:** The judgment creditor is not paying $ and relying on the title. The judgment creditor is like a volunteer and the land titles is about protecting a BFPV.

- **So all the judgment creditor had interest to is 1/3 of the proceeds of the sale.**
- The statute (***Court Order Enforcement Act)*** mirrors the principle
    - Look at the part that is italicized on 121.

"Constructive" (fictional) Trusteeship

Liability of 3rd Parties for breach of fiduciary duties.

Air Canada v. M&L Travel Ltd.

Facts: Appellant (Vallaint) is one of two directors of a closely held corporation (travel agency) which contracted with the respondent to sell Air Canada tickets. Directors M & V. M ran day to day affairs. Passenger sales agency agreement was entered into between M&L and AC – allowed ML to receive blank airline ticket stock from AC and it issue tickets directly to the public. Funds collected from sale were to be held in trust by ML and paid twice a month to AC. ML set up trust accounts for funds collected for AC, but these accounts were never used. Funds from all sources including general operating profit and AC trust funds were put into general operating account. This was account that deducted operating expense, interest on the line of credit, V's personal loan payments, and Martin's salary. Dispute b/w M & V and V thought M misappropriating the funds. Changes locks, and stopped payment on all cheques and withdrawals. Bank wouldn't allow transfers to pay AC because of conflicting instructions from M & V. Bank withdrew large amount from account ($15,184) to satisfy the demand note owed to it by M & V. AC sued ML and M & V personally for the funds that were owed to it.
Issue: Was relationship between M&L and AC one of a trust relationship, and also if yes, then under what circumstances can the directors of a corporation be held personally liable for breach of trust by the corporation (constructive trusteeship). Also can non-segregation of funds still give rise to trust arrangement?
Commentary:

- It is clear that there is a trust relationship b/w ML & AC and actions of ML were in breach of trust: Object of trust is respondent airline, subject matter if the funds collected for trust sales
    - Non segregation of funds can give rise to trust relationship. Segregation is not necessary—**absence of segregation does not undermine existence of a trus**t although it is a duty of the trustee.
    - Must **look at intent** (one of the 3 requirements) to determine whether trust was created. Then courts **look at whether there was any contemplation that monies could be used for personal use**.
        - Intention to create a trust was met
        - Absence of right to use $ for personal use is existence of the trust
    - Then look at whether there was **express right to co-mingle**.
        - If there is, trust isn't necessarily undermined (i.e. giving retailer permission to mingle deposit w/ other funds).
        - It doesn't necessarily negate at trust – even though you are acquiescing to a breach of the trust
        - But, as trustee you have duty to at least preserve that amount of $ in the account.
        - However you could not allege breach of trust for co-mingling because you expressly provided that you could.
    - **Even though there is clearly an absence of a provision preventing co-mingling – the duty not to co-mingle is merely a duty. If there is a trust then you cannot co-mingle – this is a breach of the trust**
    - Indication that trust exists: supervision of trustee by beneficiary. Usually this doesn't happen, usually you don't get supervision and control by a beneficial. What the court is saying is that AC was interested in money, it is theirs and their supervision shows that the trust is in existence.
- **Big issue in the case is whether M & V can be personally liable:** Trust is b/w AC & ML – so they would have to be constructive trustees. Two general bases upon which stranger to trust can be liable as Constructive Trustee:
    - *Trustees de son tort:*

- Such persons take on themselves to act as such and to possess and administer trust property. Will be liable only if they commit a breach of the trust while acting as a trustee, liable for negligence, conflict of interest, misappropriation -
- **Not applicable to present case because M & V did not personally take possession of trust property or assume the office or function of trustees – they were agents for the corporation, not in their personal capacity.**

- *Knowing Receipt:* one in receipt and chargeable with trust property
  - **Not applicable because it requires the stranger to have received trust property in his or her personal capacity –** finding of fact by trial judge that M & V did not personally control funds in present case (corporate control)
- *Knowing Participation in a breach of the trust: "Knowing Assistance"*
  - This brings up two issues:
    - **Degree of knowledge of stranger (Similar to MR)**
      - Actual knowledge, recklessness or willful blindness
      - If created by statute then deemed to know, if by K then will depend on familiarity with K
      - No constructive knowledge because "want of probity" is not enough to bind the strangers conscience
        - Constructive knowledge is "knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry"
      - **Here V had actual knowledge of the breach of the trust and was in any event willfully blind or reckless**
      - **What do you have to know knowledge of:** That you are dealing with a trust, trust that is being breached in the sense that the trustee was taking an undue risk.
      - **Court said only Constructive knowledge – remember that this is for fault based liability (this is different in *Citadel)***
    - **Nature of the breach of trust (Similar to AR)**
      - This is not the conduct of the third party but the act of breaching the trust
      - There are two lines of authority about the kinds of breach of trust:
        - Any breach of trust
        - Only fraudulent and dishonest
      - **Court holds that you must look at if breach was fraudulent and dishonest – this is conduct of trustee**
      - Relevant description of fraud is "taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take". This best describes whether strangers conscience is sufficiently affected to justify the imposition of personal liability.
      - **In this case the trust was directly caused by conduct of M & V.**
      - **Remember that in either case the trustee will be liable but it would be unfair to hold agents liable for questioning bosses instructions for matters that do not involve dishonesty. This would indirectly impose trusteeships on agents.**
      - **There are problems with this:**
        - M&V are *de facto* trustees – they are the only ones that can intervene it is a legal fiction that ML is trustee
        - The notion that you put agents in difficult position may apply in some circumstances (secretary of trustee) however many bosses would appreciate if agents intervened
        - Litman is not convinced but this is clearly the law of Canada – it is only when there is a fraudulent and dishonest breach.
      - **What is meant by dishonesty or fraud?**
        - Breach involves the trustee taking what he or she knows if an undue risk – this is test
        - Extreme negligence should be something that you know.

        - It is likely that this is a reasonable person (objective test) but it is not entirely clear.
    - **On the facts of the case was the breach an undue risk that they shouldn't been taking:** Yes, the bank could come in and take the money
    - **WRT AR:** It seems that conduct can be any form of assistance provided that breach is dishonest or fraudulent
    - **On facts what was their participation:** Creating crisis, putting money in the general account, inducing the breach. Also they failed to take the money out when they new or should have known that the bank was getting nervous and the bank had privileges to take out the money.
- **McLachlin (concurring judgment):** Standard for knowledge was subjective, as found by Iacobucci, however it is not necessary to decide whether in some cases and objective test might suffice as knowledge. She prefers to leave that question to a case that squarely addresses it.
    - **Various provincial appellate courts have said that objective knowledge may be satisfactory**

Commentary (Litman)

- Most of the judgment is obiter – however because of ***Citadel*** this case is gospel
- When talking about liability for knowing assistance we are talking about fault based liability. UE may not be fault based liability. For constructive trusteeship the remedy is an award of damages. Personal liability for misconduct this is not CT.
- The kind of knowledge has to involve some sort of "want of probity" – This occurs when the third party knows that there is a trust and the trustee is engaged in conduct that is so risks that the trustee knows that the conduct shouldn't be engaging in.
    - Actual Knowledge of improper conduct – actual knowledge that trustees are taking undue risk
    - **Courts said that constructive knowledge is not enough. Courts have said however that if you are willfully blind to the requisite knowledge, or recklessly indifferent to the knowledge that takes you into the improper conduct.**
    - Truth of the matter is that being willfully blind or being recklessly indifferent to the trust means that subjectively you don't know so in fact it is a type of constructive knowledge. You have to be careful with the language here. That type of constructive knowledge can give rise to liability
    - What won't give rise to liability is the other type of constructive knowledge that means you are just not being prudent – it doesn't involve impropriety.
- **On facts of case there was no question that M & V knew that there was a trust. It was foreseeable that if you put trust funds into bank account that you have overdraft and make the bank nervous then the bank will scoop up the money, you are taking a risk you shouldn't take. Also the fact that M & V got a personal benefit from putting $ in the account the courts infer from that some level of knowledge.**
    - As a matter of knowledge the mere fact that you will get a benefit doesn't mean you know everything you need to know to be liable – the court is making an inference here.
    - McLauchlin says that we are going way to far here – straight forward case – know that there was an improper breach – no need to comment on constructive knowledge.

The court in Citadel says that liability from benefiting from a breach of trust if simply based on UE. So you can have constructive knowledge.

Citadel General Assurance Company v. Lloyds Bank Canada

Facts: Citadel (C) is AB based insurance co. C's business operations involved another AB corporation, Drive On (DO). DO sold consumer life, casualty and unemployment insurance to auto dealers. Premiums were collected by auto dealers at time vehicle was sold and remitted to DO. After collecting premiums DO paid commission and settled any current claims under policy and balance was remitted monthly to Citadel. Also from 1979 to 1987 no written agreement b/w DO and C. DO started banking with Lloyds bank (L) in 1986. In 1987 DO used only 1 bank account with L for all purposes. Only action in account was collection of insurance premiums for transfers to parent International Warranty (IW). Bank aware that insurance premiums being deposited. DO was often in overdraft on account and IW told L to transfer funds b/w IW and DO accounts to cover the overdrafts. DO and C meet in 1987 to discuss business relationship. It is agreed that C not DO will settle insurance claims, so monthly premiums payable to C increase substantially. C finds out that DO is

depositing funds in general account not trust account. IW tells L to transfer all funds from DO account to IW at end of business day. DO defaulted in payments to C in 1987, new arrangements are made and DO agrees to pay C by way of promissory note. IW & DO ceased to operate and C sued for outstanding amount payable ($633, 622.84). C brings action against Bank for outstanding insurance premiums. At trial C wins, but loses on appeal
Issue: Are respondent banks liable as constructive trustees for the breach of trust committed by one of their clients
Commentary:

- No doubt the existence of trust relationship b/w DO and C – repayment arrangements did not amount to revocation of the trust, DO's actions were in breach of trust
- **Three ways that stranger to trust can be liable:**
  - *Trustee de son tort*
    - Not applicable as L never assumed the office of the trustee
  - *Knowing assistance in fraudulent or dishonest design on part of trustee*
    - Not applicable because **no knowledge component, recklessness or WB, bank only had constructive knowledge**
    - **Bank "shut its eyes" –** the court looks like it is finding that there is willful blindness.
  - *Knowing receipt: Stranger who is in receipt and chargeable with trust property*
    - Two types of cases
      - **Knowing Dealing:** Strangers to trust who receive trust property lawfully and not for their own benefit but then deal with property in manner inconsistent with trust
      - Strangers to trust who **receive trust property for their own benefit** and with knowledge that the property was transferred to them in breach of trust.
        - **This type is applicable to the case: brings up two issues:**
          - **Nature of receipt (bank says we didn't receive)**
            - Must make distinction b/w receiving funds for own **benefit** and receiving funds as agent of trustee. Here the **bank received a benefit b/c of the reduction in the overdraft of one of its customers**. So bank received trust funds for own benefit and use.
              - Both overdrafts but for the most part IW
            - Bank tried to argue that deposit was a loan, but this is not accepted by the court because a debt obligation is a *chose in action* therefore property over which one could impose a trust.
              - So bank argues that as loan it is a credit in DO's favor and transfer is merely transfer of credits that had incidental effect of reducing overdraft
              - *Chose in action* was subject to statutory trust in Citadel's favor, as well as constructive trust.
            - Analyze form perspective of UE:
              - Enrichment, deprivation
          - **Degree of Knowledge (bank says we didn't receive knowingly)**
            - Two lines of authority, one that says no constructive knowledge, that other that allows a lower threshold of knowledge in knowing receipt cases
            - **Court says it makes sense to have different thresholds of knowledge for knowing assistance and knowing receipt.**
            - **Knowing assistance:** concerned with furtherance of fraud, and so there is a higher threshold of knowledge required of the stranger of the trust – constructive knowledge is excluded
            - **Knowing receipt:** There should be lower threshold of knowledge required of the stranger of the trust, more is expected of the recipient, who, unlike the accessory is necessarily enriched at the plaintiff's expense. As such constructive knowledge (knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability.

- **The type of knowledge is constructive and if the bank fails to make the appropriate inquiries then it will have the constructive knowledge.** It is the lack of inquiry which render the recipients enrichment unjust

- In this case the **bank should have taken steps in the form of reasonable inquires to determine whether the insurance premiums were being misapplied**. By failing to make the appropriate inquiries the Bank had constructive knowledge of Drive On's breach of trust
    - Bank knew that premiums collected by CO were payable to plaintiff insurer.
    - **L had knowledge of the nature of the funds and so daily emptying should have been "very suspicious"**
    - By failing to make reasonable inquiries the Bank had "constructive knowledge"

Commentary Litman:

- Insurance act deemed the monies to be trust monies. *Insurance Act* provides that there is a statutory trust.
- There was an argument that citadel waived the trust arrangement. C got DO to sign promissory note, this was argued as waiver. But the court rejects – if you are a beneficiary under the trust you can secure the assets in any way you wish.
- **Big Question:** Clearly no liability for participation (Knowing assistance) the AR was satisfied (they shifted trust monies into accounts that are not trust accounts) they clearly are involved in a breach of trust, the problem relates to the level of knowledge they had
- **Constructive K is sufficient for knowing receipt cases. It is reasonable to give rise to liability in receipt cases we are not imposing liability for misconduct, but rather to give back someone else's property. It is really a matter of restitution. If the bank doesn't have to give it back then we have UE.**
- **Issue wrt restitution:** Laforest says that knowledge is irrelevant. The banks conscience was affected because they had constructive knowledge. However some commentators (Birks) argue that there can be UE irregardless of knowledge. Recipient of third party funds who is enriched gives rise to UE b/c party didn't consent to it, now because 3P knew that funds were misdirected.
    - **Birks says what is critical is that there was no intention to make payments back by L to C.** L has benefit it is unjust for him to keep it. Birks is saying that defendant can take special defences (BFPV) even though you are buying something in breach of trust then OK if BFPV and the 3P can keep it.
    - **Laforest doesn't accept Birks analysis. Says that Birks is talking about unjust deprivation not UE. In other words no consent to the transfer this is unjust deprivation and the test as to whether you have to give it back is UE.**
    - **What makes it UE is that you knew or should have known that you were getting funds**
- **UE analysis of case (laforest):**
    - There is enrichment
    - There is unjust corresponding deprivation
    - If there is no knowledge (either actual or constructive) then the enrichment is not unjust – it is unjust deprivation, and you don't get a remedy at all. If the bank didn't know then it is entitled to keep the money in the account (Birks doesn't agree)
- **Litman on Laforest:** It is a thin argument to say that UD is not UE. He thinks that Birks is right. If Birks is right then in the CIBC case (wrongful payment) then CIBC has to give up the money. What is important is not your knowledge but whether you got fund that weren't yours.
- **This discussion is obiter.**
- **Summary:** No misconduct for receipt based liability but need a level of knowledge (lowest level) but at least some knowledge.
- **Tracing:** In tracing there is no knowledge requirement. The only requirement in tracing is that you can identify the property. Equity says you can trace into a mixed account, CL says that you can't. Laforest is saying that another body of law with relief and that is the law of tracing. The recipient of traced money cannot defend themselves by saying "I don't know". However with tracing once you loose your ability to trace that is the end of tracing remedy.
- We completed our examination of knowing receipt. Knowing receipt occurs when a third party benefits from a breach of fiduciary duty and has actual knowledge that the benefit derived was a product of breach of trust or such knowledge is attributed to him or her because an honest and reasonable person would have acquired such knowledge. In the *Citadel Insurance* case, La Forest doubted Professor Birks suggestion that unjust enrichment occurs even if the defendant didn't actually or constructively know that the benefit was derived through breach of trust. La Forest said that Birks was labouring under a misapprehension that unjust deprivation equates to unjust enrichment. La Forest pointed out that where a tracing remedy is utilized the defendant is liable to return traceable property irrespective of

whether he or she had knowledge, actual or constructive, of enrichment. But tracing and unjust enrichment liability are separate legal doctrines. For emphasis he points out that because liability in tracing is proprietary, once property is untraceable, tracing law, unlike unjust enrichment law, provides no personal remedy.

CHAPTER 5: THE ESSENTIALS OF A TRUST

The Three Certainties

Knight v. Knight:

1) Certainty of **Words –** Can also be characterized as certainty of **intention** to create a trusts
2) Certainty of **Subject Matter**, and
3) Certainty of **Objects**

Certainty of Words (intention)

Certainty of Intention to Create A Trust

- It should be clear to you that equity is concerned with substance, not form. Hence, even words of suasion, precatory words, are capable of creating a trust.
- Prima facie, they don't have this effect, but close scrutiny of the context in which they are uttered or written can tilt the balance in favor of such a trust.

It is clear that ordinarily the language for creating a trust is unmistakable. There mere fact that you use the word "trust" doesn't mean that you get a trust and the same is true vice versa.

Nicoll v. Hayman

Facts: In a testamentary document, the testatrix **left money to her daughter** "in full confidence that she will dispose of the same in accordance with the wishes I have expressed to her". **The daughter died** without disposing of the funds.

Issue: Does the $ belong to the daughter beneficially (to her heirs) or is there resulting trust back to the testatrix?

Commentary:

- Important point in this case is missing, namely the nature and language of the testatrix's communication to Mrs. Sutherland, which communication she deliberately kept secret.
- Court is of opinion that **there was a trust**, and an imperative duty was placed on her to carry out the terms of the trust, the particular beneficiaries of which Mrs. Sutherland saw fit to disclose.
    - Money to be applied to benefit of someone other than S (institution or charities), if it was for S alone then words expressing full confidence wrt disposal would be useless
- Trustee is not at liberty to suppress the evidence of a trust and thus destroy the whole object of its creation, in fraud of the beneficiaries.
- **Result is that the money should fall for distribution as part of the residue.**
- **Dissent:**
    - Words not sufficient to create a trust there was express language in the rest of the will that made trusts to make certain discretionary gifts.
    - Words created no obligation whatever but were merely precatory words

Commentary (Litman):

- It is clear here that the relationship amongst the siblings is less than ideal from a parental point of view. Ultimately there is a fight as to where this $ should go. Siblings say that S took $ as a trustee we don't know who the beneficiaries are so we can't give effect to the trust. The trust fails so resulting trust to the residue of the estate.
- Arguments also by siblings that even if there is not trust S shouldn't get money and also how can you give her $ for breaching the trust.
- **Court says that trust is created:**
    - Precatory trust is created: ordinarily precatory language (hope, wish, desire) does not create a trust but it can. However although you can find that language is precatory the intention is obligatory
    - Rand says that "dispose of" has a mandatory element to it.
- **Dissent:** Concedes principle that precatory language can make a trust, but not in this case there are no indications that the language intended to create an obligation. On facts, no trust is supported. Testatrix created trusts in other parts of the will.
- **Interesting part of case is statement by dissent at bottom of 154:** Deals with suggestion that even if no trust was intended, the will maker had the intention of trust property going elsewhere. It was intended that S beneficially gets money but has obligation to discharge debts or make gifts. However if she doesn't discharge debts then the money is hers. It would seem that the argument is that how could you allow someone to breach obligations and get money. The response is that the funds go to here because she is beneficiary
    - **This is rule in *Handcock v. Watson:*** Think of it as alternative gifts - $ goes to S, she has obligation and alternatively the rest is hers. You cannot say they are getting property beneficially if they have legal obligations to pay debts or give gifts. That situation is a trust. The only way to make sense of this is that there is a primary obligation to pay $ for these purposes, but if money is left over of for whatever reason the debts are not paid them the $ is hers.
- **Most important point:** Precatory language can create trust but you need strong indication that despite the language a true obligation was intended.

Hayman v. Nicoll (SCC, 1944)

Facts: Same as above

Commentary:

- SCC agrees with the dissent - words in question were not intended to do more than indicate the desire rather than to impose the will of the trust
- Must look at testamentary instrument as a whole
- Words created no obligation but were merely precatory words.
- If the **will expressly created the fiduciary obligation, then the oral communication must be made either before or at the time of the making of the will.** If it is not, then the beneficial interest is deemed not to be distributed and a resulting trust at once arises.
- In Hayman v. Nicholl, the Court of appeal was split on the question of whether precatory language in a will created a trust.
- The Supreme Court of Canada adopted the dissenting view and **held that the precatory language did not create a trust but rather gave rise to an absolute gift.**
- No reference was made by the Supreme Court to the dissenting judge's view that the rule, which I identified **as the rule in *Hancock v. Watson***, might have play.
    - Under that rule, if a person is intended to get a beneficial gift, subject to an obligation to make gifts from the gifted property or to pay debts, even if the intended donee doesn't discharge the obligations in whole or in part, the donee (or the donee's estate) takes the property or the remainder of the property beneficially. This is a strange concept. It turns the obligation of the donee into a precatory obligation.

Notes: Certainty of intention to create a trust usually turns on the words used in the purported trust document. Often however, no document exists at all or documents are incomplete. In these situations, it is the circumstances which surround the transaction that purportedly created the trust, that determines the question of whether there is sufficient intention to create one.

Douet v. Budd

Facts: Testators will was on a **standard form** document. The appellant—executor—was given the estate of trust. **No beneficiary** was named in the will, appellant argues that he was intended to be the beneficiary. A nephew and niece (respondents) as nearest surviving relatives of the testator share equally in the estate is there is intestacy. In space to list beneficiaries the testator listed his personal property.

Commentary:

- If testatory intended his nephews and niece to be beneficiaries he could have easily said so. Testator not likely aware of consequences of intestacy, and it is unreasonable to infer that her would go to the trouble to make a Will merely to ensure that there would be a trustee to pay his just debts, funeral and testamentary expenses.
- When used the word trust he believed that he was giving to D for his own use and benefit, subject to paying his debts etc.

Commentary (Litman)

- What we have is an apparent trust – explicit "trust" language is utilized but no beneficiaries are names
- If no beneficiaries then trust fails (no certainty of objects) if this trust fails then trust passes via intestacy because no residue clause. This is what is argued here by Budd. D argues that no trust was intended at all despite fact that trust language was utilized
- **IF this was CL not statute:** D would not have to argue no trust. He could say as trustee he acquires legal title, there is no countervailing equitable interest (beneficiary) therefore he wins.
- **However in this case we have statute (Wills Act)**
    - When person dies the executor is trustee for any residue unless the person so appointed as executor was intended by will to take the residue beneficially (need intention to get property)
    - This is not same as the common law. Under CL trustee acquires.
- However D succeeds anyway why?
    - Clearly D did not intend to go through a farce of making will and dieing instate.
        - Litman agrees but problem is that we don't know who was intended to get property. Just b/c it wasn't supposed to go to intestacy we don't know that D should get it
    - Testator was unaware of significance of "trust" – it was reasonable to assume that he didn't know technical meaning
        - Litman doesn't agree
    - Judge ultimately concludes that there is intention to dispose of beneficial interest to the executor / trustee (D)
- It is not an express intention – but it doesn't have to be an express intention.
- *Douett v. Budd* affirms the notion **that its intention, not the language utilized by a "settlor" that determines whether a trust is intended**.
- **Litman:** There is no objection in principle to disregarding the word trust in a will or other instrument on the basis that something other than a trust was intended. However, I suggested the Court was engaged in speculation in suggesting that the will maker didn't understand the legal significance of the word "trust" and intended a gift to his nephew Douett. I'm not discounting this possibility, merely suggesting that it is only a possibility. Had the judgment even gone so far as to demonstrate that Douett was the will maker's favorite nephew and that selective beneficence favoring the nephew as plausible, the decision would be more convincing. This kind of extraneous evidence is admissible for the purpose of clarifying an ambiguity in a will. Had it existed, I would have agreed that the will manifested an intent to give the estate beneficially to *Douett*.

From these cases we see that courts are all over the place

Wills Act – Undisposed Residue:

38(1): When person dies on or before July 1, 1960 having by will appointed a person executor, the executor is a trustee of any residue not expressly disposed of, for the person or persons, if any who would be entitled to that residue in the event of intestacy in respect to it, unless the person so appointed executor was intended by the will to take the residue beneficially.

(2): Nothing in this section affects of prejudices a right to which the executor, if this Part had not been passed, would have been entitled, in cases where there is not a person who would be so entitled.

In re Frame

Facts: Will said that money would pass to T (housekeeper) "on adoption condition" and $ conveyance to other children condition. If merely conditions, Ada takes beneficially on payment of awards and adoption (Condition Precedent).

Commentary

- The court holds that in spite of using "condition" instead of trust language **a trust was created**. Even if Ada had died, payments would have to be made.
- Taylor (trustee) was to receive certain monies on the term that she performed certain acts
- Trusts do not fail for want of a trustee. Ada is legal holder of money for which children take their bequeath beneficially (trying to achieve socially just result). Don't know duration of trust (problematic) what if Alma predeceases Ada…

Commentary (Litman):

- Despite the language of a "condition" the clause created an ongoing trust requiring the trustee to adopt and maintain Jessie out of the trust fund
- Note this case tells us that words of condition can be construed as creating a trust and not necessarily conditional interests and in so doing, reaffirms in a fairly stark way, that courts can "massage" language to get what they think is the right result.
- The language really does, on its face, suggest a conditional - contingent - gift to Mrs. Taylor. On its face it appears that before the property is hers, she must adopt Alma. Whether the 5 L gifts to Jessie and May are condition precedents or condition subsequent to the passing of the estate to Mrs. Taylor is debatable.
- Why is this a trust? Is there anything implicit in the analysis that makes it a trust. No doubt if a trust is intended it will not fail for want of a trustee - but how do we know that a trust was intended? The court merely found as a fact that there was an intention to create a trust. My view is that this conclusion was driven by Justice Simonds' view on what the appropriate legal arrangement would be to accomplish the testators' goals with respect to his daughter Alma. Certainly, there is nothing on the face of the will that would reflect an intention to create a trust.
- Since we have a trust favoring the Jessie, May and Edward, it is necessarily implicit in the decision that the two daughters and sons are to be paid there 5L out of the trust fund. It may well be that something else was intended (conditional gift, personal obligation unsecured or secured by the "trust" fund) but there is no practical problem created by this conclusion.
- Justice Simonds provides us with an indication of why he found that a trust was created in his discussion of the testator's sense of Mrs. Taylor's "obligations" pursuant to his testamentary plan. He points out that the will did not simply require Ada to do a single act of formally adopting the child but further required that Ada raise the child "because this is what adoption means." In other words, since we are talking about ongoing obligations, the arrangement can appropriately be conceived of as a trust where typically trustees have ongoing obligations.
- This point, incidentally, doesn't compel the conclusion that the arrangement is a trust. Proprietary conditions can go beyond a single act and require a series of or ongoing acts such as utilizing the premises for a museum.
- Query, what is the duration of the trust? Is it for the infancy of the daughter or minimally this and in the discretion of the trustee longer? What happens if Mrs Taylor dies during the infancy of the child? Actually, the case provides us with an answer to this question. A trust never fails for want of a trustee! Is Mrs. Taylor also a beneficiary of a trust or is she entitled to benefit from the trust monies because she is entitled to remuneration for fiduciary services. How much benefit is she entitled to?
    - T is to adopt Alma and she is to be a trustee – so there is a lot of fuzziness here.
    - On the death of the daughter – the beneficial interest would go to the beneficiaries estate. Then we have to ask who was Alma's beneficiary.
- **Conditions are always questions of construction. Trust device best reflects intention.** It was not totally a discretionary trust in this case.
- **Obligations can be made by conditions:**
    - But the court may just say that there is a trust

Byers v. Foley

Facts: A group of people get together and decide collectively to obtain two season tickets to the Blue Jays. Tickets distributed b/w group using random draw for 1984 – 1988. Defendant wanted to terminate the arrangement after 1989 to obtain greater access to the tickets. Contention arises b/w the group. The **defendant was the rights holder** to the tickets (subscribers of record). They claimed to have full title and to keep all the tickets for themselves.

Commentary:

- For a trust to exist there must have been an **intention to create a trust**. In absence of a formal trust document, the court must look at the surrounding circumstances for evidence as to what the parties intended. Intention can be implied and discovered from indirect and ambiguous language and conduct.
- This case tends to be fact specific and the **onus rests on the party claiming a beneficial interest**.
- Evidence in this case:
    - Parties had discussion prior to obtaining the ticket
    - When parties pulled out, the shares were divided among the group not just given to the defendants
    - Decision to permit new members was made jointly
    - When invoice was issued by TBJ, defendants would contact each member of group who would make cheque for his *pro rata* share payable to the defendants
    - Plaintiffs were shocked, surprised and dismayed when told the arrangement was ending- not compelling.
- Court held that there **was sufficient evidence of intention to create a trust** even though no trust language was used. Note that there is a lot of uncertainty in these types of cases.

Commentary (Litman)

- The case law is mixed. Some of the cases have held that the registered holder holds the tickets on trust and others hold that the registered holder owns the tickets outright. The case observes that the decisions in this area are going to be fact specific, but outline the factors which will influence decisions.
    - 1. Who got the benefit of the reversion when group members drop out? Here it was members of the original group. But, I would point out that this is completely compatible with the Ds version that the group was enjoying the tickets because it let the group do so.
    - 2. Who controls proprietary decisions such as the allocation decision in relation to new applicants to the group? Here it was the group. Again, I would suggest that this is not incompatible with the DS version.
    - 3. Did the appropriation of the tickets pre-date or postdate the discussions pertaining to group rights in the tickets? If discussions pre-dated appropriation of tickets this is fairly determinate (as here). But if the discussions postdated the acquisition of the tickets by a member of the group, surely this is not determinative. After all, the discussion might be the basis for an allocation by the subscriber of the tickets to the group. A declaration of trust is what we would call it.
    - 4. Ease of collection of payment. Respectfully, I have to say this is sheer nonsense. Its often challenging to get people to pay for the burdens associated with their property rights.
    - 5. The negative reaction of the group to proprietary claim of rights holder is described as the "most revealing indicia". Presumably, the intensity of reaction reflects accurately the real expectations that the group holders had. I'm not convinced with this point either. An intense reaction may not reflect as disappointed sense of proprietary entitlement. It may simply reflect deep disappointment. Intensity of emotional reaction is quite a test for who holds rights to property!
    - 6. The rights holder went to extreme lengths to accommodate the groups desire for tickets in 1988-89 by giving them access to the other group. Again, this seems to me to be an equivocal factor. The effort may simply be a product of loyalty and beneficence and not an acknowledgement of any sort of proprietary rights of the group.
- In any event, what is critical is that at some point there was an agreement that the rights holder, the Ds, holds those rights for others - whether that was a the beginning of the arrangement or later is of little moment. These kinds of cases are very fact specific and involve scrutinizing conduct, not simply words, to ascertain intent. So to some extent, the results of this kind of case is a crap shoot. The lesson is be explicit.
- **These cases are very fact specific – Litman is skeptical of the criteria here. The language will rarely determine what is going on – look to the relationships. The important thing is whether there is any indication that the rights holder is obligated to hold those tickets for others. Saying this is easy, applying it is difficult.**

Barry v. Garden River Band of Ojibways

Facts: A Band gets a property settlement ($2,530,000) and decides to pay it out to everyone, but when considering C-31 (removed the discriminatory provisions of *Indian Act* and permitted the re-registration of enfranchised Indian women and their children) members, they wanted to deduct payments the women had received when they originally left the Band (became "enfranchised" by reason of marriage to a man that who was not a status Indian, children of marriage were also deprived of achieving status as Indian). **Other debts and payments were not set off** and therefore those **women and their children were being treated unfairly.**

Commentary:

- The CA held there was a trust and w/ this comes many duties.
- You must treat beneficiaries of a trust w/ an even hand. The **settlor can authorize trustee to treat differentially**, but unless the instrument says otherwise, you must treat equally.
- Band council was a trustee for purpose of distribution of funds
    - One of primary duties of a trustee is to treat all beneficiaries impartially
    - The duty to act impartially would require the trustee to treat equally all members of a class of beneficiaries.
- **Basic to all trust concepts that for a trust to come into existence it must have three characteristics:**
    - **Certainty of intention (words)**
    - **Certainty of Subject-Matter**
    - **Certainty of Objects;**

Commentary (Litman)

- Q. Where did the trust come from and when was it established?
- A. Page 165 (bottom of top paragraph)
    - Accordingly, while the funds were not the subject matter of a trust when they were delivered to the Band Council, when the Band Council resolved to make a per capita distribution, and to se aside $1,000,000 for that purpose, in our view a trust was created. The Band Council was then under a duty to ensure the distribution was carried out.
- Also see bottom of 168, right hand column, bottom paragraph, and top of 169:
    - In order to comply with its own Resolution to make a per capita distribution to band members, the Band Council would have to give an equal share to all band members. In effect, it constituted itself a trustee for this purpose. The Band itself appears to have recognized this, given the language of its questionnaire relating to distribution. The trial judge also appears to have proceeded on the basis that from at least the date of the resolution to make a per capita distribution , the Council was dealing with trust monies.... In our view, the proper construction of the September 28, 1987 Band Council Resolution is that an express trust was created with the Garden River Band as both settlor and trustee of the $1,000,000 being the moneys necessary to make a per capita distribution, and the Garden River Band members as beneficiaries.
- My question for you is: what was there in the conduct of the Band Council or the words used by it that led the Court to conclude that a trust had been created? Is the Court correct?
- In answering this question, consider this hypothetical:
    - In the evening, after the Band Council passed the resolution asking the Crown for $ for making a per capita distribution, the Band celebrates in the band community hall. A fire breaks out and the hall is lost. The next day the Band Council meets and resolves to use the $ies to rebuild the hall rather than making a per capita distribution. Can the Council do that?
- The question for you is at which point in the time line is the judge referring to?
- In any event, the **important point of principle in this case, whether the Court is correct or not about the creation of a trust is, fidelity to the trust instrument and the even hand doctrine both preclude the trustee, the Band, from treating the reinstated members differently from the band pre-existing band members.**
- Court uses trust law to aid conclusion that equitable distribution must be made – trustees must treat beneficiaries with an even hand – **so once you conclude there is a trust there is conceptual baggage (positive obligations) that come along with the trust.**
- **The interesting thing from this case is that explicit trust language is not used anywhere:** So the question is when does the trust come into existence:
    - Court suggests different dates:
        - Date of resolution: implausible because they don't have the money, they have expectation of getting the money
        - December 3rd: They do have the money – getting the money is important it gets us into "complete

constitution of a trust". Just like a gift has to be effected by delivery, the trust has to be completely constituted. You can get CC by handing something over if it is personal property. It is very difficult to create a trust before there is trust property vested by the settlor. **So this date is the earliest the trust could have been created.**

- However L thinks that the court may have been exercising creative license here. When you have conduct or language that is consistent with a declaration of absolute gift as opposed to a declaration of trust, it seems like if you don't know which one it is, you should be treating it as a gift not a trust, b/c a trust creates ongoing relationships. If you treat it as a gift then the band can change its mind b/c the gift isn't perfected.

Certainty of Subject Matter

Any form of property can be the subject matter of a trust, real or personal, tangible or intangible. But if there is no way of ascertaining what that property is, then we have a problem of uncertainty of subject matter which precludes a trust from arising. Obviously trustees need to know what they are responsible for, what it is they have acquired legal title to. And though any property can be the subject matter of a trust, expectancies, such as an expectation that you will inherit the property of favorite aunt cannot be the subject matter of a trust. An expectancy is not property. But be careful because an expectancy can be the subject matter of a binding promise to create a trust of the property that is realized when the expectancy comes to pass. (More on this point, below).

Penner talks about three kinds of uncertainty.

Conceptual uncertainty of subject matter where we have vagueness that is created by the language use by the settlor in creating the trust. For example, a trust "over the bulk" of my estate. One must be careful because sometimes courts are prepared to cure vagueness. In an well known English case, *Re Golay* (1965), a trust of "reasonable income" was upheld based on the following rationale:

> The court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded.

Hence, at the borderline of vagueness, courts appear to be prepared to stipulate what the property is, hence eliminating conceptual uncertainty.

A second type of uncertainty is **evidential uncertainty**. This occurs when the language is precise but its impossible to unearth evidence that permits the trustees to find the trust property. For example, "to T on trust my stamp collection is being cared for by the philatelist I met in Paris and had a lovely dinner with in September 1984." Assume that there is no plausible evidence whatever about who the philatelist might be.

The third type of uncertainty is "**whereabout uncertainty**". At first sight this appears to be an expression or another way of describing evidential uncertainty. A trust of my "one and only baseball glove which is deposited in a secure place in one of my homes." Unlike, the previous example, we know what the subject matter of the trust is. The fact that we can't find it, doesn't invalidate the trust. Trustees need not tear apart the settlors various homes to find the glove but if and when the glove shows up, the trustees have legal title to it which they can administer under the trust. With whereabout uncertainty, we know the whereabouts to a considerable degree but not sufficiently to find the property.

Few trusts suffer from subject matter uncertainty. And almost all trusts permit accretions to the subject matter of the trust. That is, they provide that the settlor or others may in the future add property to the trust. The potential for additional trust property, without being able to ascertain precisely what will be added, is not a problem. Certainty of subject matter of a trust is required at the outset, when a trust is created, and at any given point thereafter but it does not require one to be a clairvoyant.
And certainty exists if the subject matter of a trust is ascertainable. That is why trust of the residue of a persons estate meets the requirement of certainty of subject matter. Executors will figure that out in due course (and technically the trust is only a trust of a chose in action in the nature of a right to the residue of the estate until the residue is in fact ascertained.)

As to expectancies, a trust of "1/2 of the estate that which I will inherit from Aunt Wilma" is invalid if Aunt

Wilma is alive. If Wilma is deceased at this point in time, a property right exists in the form of a chose in action and all that needs to be done is for the subject matter of the trust to be ascertained. However, even if Wilma is alive and vigorous, a contract to create a trust of "1/2 of the everything I inherit from Wilma" is binding, so long as the contract is supported by valuable consideration.

Historically, marriage settlements, were common instruments through which contracts to create trusts were executed. In such settlements parents or grandparents made promises to transfer future property to trustees with a view to supporting their child and his or her new spouse. The subject matter of the promise was always an expectancy but beyond that highly variable. It might be 10% of the income derived by the settlors annually beginning two years after the execution of the settlement, it might be 50% of the proceedings of sale of land or valuable paintings or the annual profits of a business. In order to be enforceable contracts to create trusts required valuable consideration. And here is the historically interesting part, at least to me. Equity regarded the valuable consideration as flowing from the prospective marriage partners, even if they were not parties to the settlement (which often took the form as a contract between the settlors and the intended trustee). Even more remarkable, issue of the marriage, living or as yet unborn, were regarded as having provided valuable consideration if they were intended beneficiaries of the settlement. But don't confuse the contract to create a trust with the existence of a trust. Only when the promised property made its way into the trustees hands did the trust arise.

While marriage settlements do occur from time to time in modern life, particularly amongst the elite of England where old patterns die hard, they are not common in Canada. However, contracts to create trusts are not rare, particularly where parties to a marriage split up. And all the old law pertaining to marriage settlements forms the bedrock of the applicable law in such contracts. The contract to create a trust is at the heart of the dispute in Re Beardmore.

Re Beardmore Trusts

Facts: On the separation of Alfred Beardmore, the settlor, from his wife a separation agreement was executed that purported to "hereby" transfer and assign to the "Trustee", the assignment to take effect upon Alfred's death and not before, 3/5ths of the husbands net estate. The beneficiaries of the intended trust were Alfred's wife as a life beneficiary (so long as she doesn't remarry) and thereafter the two children of the marriage as both income and capital beneficiaries. Under the terms of the trust the children would over a considerable period of time get income and shares of capital. However, if they died prior to getting all the income and capital their issue would be entitled to step in their shoes and benefit from the trust. Alfred's wife predeceased Alfred and the children. Shortly after her death the two children joined Alfred in seeking a declaration that the trust was void. One can infer that Alfred and his children have struck an amicable and cooperative arrangement for the division of the assets of the trust. Note, that because the issue of the children had a contingent interest in the trust, Saunders v. Vautier could not be enlisted by the children to terminate the trust.

Issue: Is the subject matter of the trust so vague and unascertainable that the trust fails for uncertainty?

Commentary:

- Certainty requires that when a trust is made that the subject matter be (1) **ascertained** or (2) **ascertainable**.
- Ascertainable is characterized as conceptual certainty: the subject matter can be identified by some formulaic process.
- An example where the subject matter is ascertainable is where in a testamentary document the testator leaves 3/5 of estate on trust. When the trust is created, at death, it is not exactly clear what 3/5th equals, but a court could determine it if required.

Commentary (Litman)

- The trust was declared to be void. This is because the instrument was either testamentary in effect and not in proper testamentary form (without proper formalities, required witnesses) or, if inter vivos, the trust failed because the subject matter was uncertain. If the trust was inter vivos it purported to come into existence at the date the separation agreement was executed, November 17, 1939.
- **Uncertainty of Subject Matter**
    - On November 17, 1939 the subject matter of the trust was neither ascertained, nor ascertainable. All of Alfred's property, while ascertainable, might or might not form part of his estate at his death. Unlike a testamentary trust of "3/5ths of my net estate" the subject matter of the trust at issue was not determinable. Though there is conceptual certainty, evidential certainty can only be had when it is too late, at the testator's

death. If this is an inter vivos trust, the requirement of certainty of subject matter must exist when the trust is created. A creative court might have read in a power on the part of Alfred to receive income and encroach on capital of all of his property at the date of the Agreement (and to add new property to the trust), though this would no doubt do some violence to the wording of the trust. Hence, the main point in the case is that certainty is required at the creation of the trust. One can be critical of this requirement as overly technical. Why not require certainty when the first act of trusteeship must take place? After all, the requirement exists for pragmatic reasons and hence the law's tests of validity should be informed by these pragmatics. Because there is no logical necessity to have certainty of subject matter before Alfred's death, why not wait and see whether certainty exists at this point in time?

- But can't we rescue the intended trust by treating the separation agreement as an enforceable contractual promise to create a trust?
    - If so, the requirement of certainty of subject matter need not be satisfied until the trust contemplated by the contract arises. In this regard, study the second last paragraph of the decision at p. 173 beginning with "Counsel for the Official Guardian....
- **Problem in this case:** Contradictory language as to when the trust is created and also what the trust property is. The court says that if document is a will it is invalid b/c it hasn't been executed with proper formalities you need for will to be valid. Validity of testamentary trust depends on the validity of the will. If it is an intervivos document then trust fails b/c of uncertainty of subject matter- you can't figure out what $3/5^{th}$s of the estate is.
- **However valuation and realization are not the same thing.** You can list inventory of all the assets and ascribe a value to them, which is fairly realistic, even a trust of $3/5^{th}$ doesn't have immediate certainty but you could figure it out.
    - **Another way of approaching is that the trust doesn't come into existence until the death.**
- Litman doesn't disagree w/ case if it is IV trust. What he doesn't like is where it says that intended trust can be rescued by treating it as a K to create a trust, the subject matter of which would be the future trust property. L thinks that this was a valid K to create a future trust – the subject matter of which would be $3/5^{th}$ of the husband's net estate.
- **This case seems to suggest that if K involves the creation of trust the subject matter to which the trust property is determined on the death of the testator then the K in invalid and L disagrees with this.**

Hunter v. Moss

Facts: The defendant purports to make an oral declaration of a trust in favor of the plaintiff of 5% of his stocks in a Company (all shares of the same class).

Commentary Litman:

- Court holds that **there is certainty of subject matter**.
    - In the case where a *chose in action* is a property interest, the subject matter need not be specifically identified, segregated, or appropriated b/c of homogeneous nature.
- Certainty of subject matter must be real and practical and not theoretical and conceptual.
- **Trust by Transfer:** Settlor transfers property to a trustee, who is required to hold on trust for the beneficiary (This is how you effect trust – complete constitution of trust)
- **Trust by Declaration:** This doesn't involve a transfer requirement. All you do is meet the other requirements of trust law for the creation of the trust – certainty of intention, subject matter, objects. This tells us that it is actually quite easy to create a trust by declaration.
- **This case shows the ease by which trusts by declaration are created.** M tries to say that Certainty of SM is not met but he loses.
- **Larger Mass Cases:** There are lots of cases that say no CofSM for cases involving trust assets that are tangibles. For tangibles you need to know exactly which bottles they hold as trustees. However in this case. As long as you are dealing with a chose in action a proportion will be sufficient to create the subject matter.
- **The requirement of certainty of SM is really a pragmatic requirement: However there is a problem in a situation where trustee sells shares realizes gain and then the company goes under.** All we know wrt trust property is that the property is somewhere in there and we don't know if the trustee is dealing with the subject matter or not. In the law of tracing there may be a personal action.
    - This may be a problem and could give rise to liability.
    - **S.41 Trustee Act:** If in any proceedings affecting trustee or trust property, that trustee engaged in transaction proposed to be a breach of trust, but that trustee acted fairly and reasonably then the court may relieve the

trustee either wholly or partly for liability. This may be used in this type of a hypothetical. In other words despite the potential problems there is a statutory principle of trust law that allows for justice to be done.

- **Important for this point:** If it is intangible asset you don't need to worry about an CoSM, but for tangibles you have to worry about it under the theory that there can be physical differences.

British Columbia v. Henfrey Samson Belair Ltd.

Facts: Tops Pontiac collected sales taxes as required by the *Social Service Tax Act*. The tax monies were intermingled with other assets and the company subsequently became insolvent. B.C. contends that s.18 creates a statutory trust and $ should therefore be removed from the bankrupt before secured and ordinary creditors can take.

Issue: Whether statutory trust created by S.18 give priority to the province over creditors?

Commentary:

- S.18 deems tax monies to be held separate whether they are or not. As such the province claims there is certainty of subject matter, and hence the trust exists. Since the *Bankruptcy Act* is a Federal Act, what is meant by a "trust" in s.47(a) can not be altered by provincial legislation, therefore the trust referred to is a common law trust.
- **MacLaghlin**: says that a trust existed when the monies were first collected and will continue to exist if identifiable or traceable. As a result of the extent of intermingling, the tax monies can no longer be traced and therefore the trust was not in existence upon the date of bankruptcy. The Province must take with the creditors.
    - **Implicit in all this is that the existence of a trust requires on going certainty as well as initial certainty. When you lose the ability to find subject matter of a trust, there is no longer a trust**
    - **BC was beneficiary of trust at date of bankruptcy but because there were no trust assets that could be identified, there is not trust asset that can be found.** We are not told why tracing could not occur here.
    - Majority says that if you want to claim as a beneficiary of a trust then you need to identify your property.
    - The province doesn't control what is a trust for the purposes of the bankruptcy act- that is a matter of federal legislation. So the question is what parliament intended. She says that you could lift assets from the trust – as long it is a CL trust.
    - **This case tells you that there is an ongoing requirement**
    - **You can't treat statutory trusts as trusts unless you can find the property:** You don't treat a statutory trust as a trust unless it is a trust under the CL, therefore you have to be able to trace the subject matter. The *Bankruptcy Act* intended the trust definition to be the CL definition.
- **Cory (Dissenting):** By s.18, a trust, as that referred to under s.47(a), was created when the tax monies were collected. Why should it subsequently fail because of intermingling? The lack of identifiable or traceable property does not matter because of the statutory assumption. (Note that this was rebutted by MacLaghlin).
    - **Trust exists irregardless of traceability because act deems the tax collected to be part of the assets of the trustee and to have been segregated.** So province can give itself the advantage of not having to trace trust property. It is a legal fiction created by legislation to create the trust.
    - If we have a CL trust claimant A, competing against the crown B (statutory trust claimant), and they are competing to get assets of a bankrupt then Cory says that "first in time prevails" this is an equitable remedy. This is not a problem. So if we don't know if we are dealing wit trust assets we can always go to court.

Commentary (Litman)

- Statutory trust here. People collecting $ are deemed to be trustees of those $ for whoever they are collecting them for. It is common for statutory trusts to have provision deeming trust assets to be segregated from the collectors other assets (whether or not they are separate or apart makes no difference) – which means you have no problem of CofSM. So government is providing protections that go beyond the ordinary protections of trust law. If the trustee goes personally bankrupt the *Bankruptcy Act* says that the trust assets are not part of the trustees estate.
- Litman thinks that the majority is right here. After this case we do have an amendment to the *Bankruptcy Act* S.67(2) says that subject to (3) nwst any deeming provision (fed or prov) the property of a bankrupt shall not be held in trust unless it would be so regarded in the absence of the statutory provision.
    - **Trust assets don't form part of Bankrupt's estate**
    - **They are not trust assets unless they trust assets under the CL**
    - **Exceptions to rule (67(3) *Bankruptcy Act*:** Feds can fiddle with these rules, and they have given themselves certain priority.
        - ITA
        - Canada Pension Plan Act

- Employment Act

Certainty of Objects

Other Certainties

Trust can take from a business any property that fits the generic description, you can fiddle with the CL requirements of the trust

Trust is subject to distribution on bankruptcy, unless it is a CL trust

Armitage v. Nurse (1994, England and Wales CA)

Facts: In 1984 A who was then 17 became entitled to certain lands. These lands were to be held in trust for her until she reached the age of 40. Clause 15 of the settlement provided that no trustee should be liable for any loss or damage to the plaintiff's fund or the income thereof at any time or form any cause unless it was caused by his own actual fraud. The trustees were not accused of actual fraud but of gross negligence.
Issue: The permitted scope of the trustee exemption clause?
Commentary:

- Exculpatory clause is permitted it is not contrary to public policy to exclude liability for gross negligence by an appropriate clause clearly worded to have that effect.
- The exculpatory clauses can exempt trustees from negligence
- It does not matter how careless or stupid you are, you are exempt, under this case
- What the case says is that you can not use an exculpatory clause to protect someone from dishonesty or a lack of good faith.
- You can not protect them for unconscionable conduct
- Court is asked to declare that the exculpatory clause is repugnant to the trust. Or in the alternative, that the clause is contrary to public policy
- The court refuses to say the clause is repugnant to the trust
- The court recognizes that such clauses are repugnant to the trust to the extent that you can not shield trustees for unconscionable conduct.
- What the court is really saying is that there is a reducible core to the trust, every trust involves honesty and good faith
- It is not a good idea to shield people from extreme negligence, but you can do it
- The note talks about the *Poche* case, you can not exclude someone from gross negligence in Canada
- Littman thinks we have an open question in regards to gross negligence, thinks it is a poorly decided case.

Trusteeship

Trusteeship

- Deals with appointing trustees when there is an operating trust. There must be a trustee
- You should know sections 14-16, but do not have to commit it to memory
- The trust instrument rules when appointing trustees for vacancies, removing, etc.
- If the trust instrument is silent, then the court has the inherent power to appoint a trustee, and the *Trustee Act* section 14-16 set out stat powers for both the courts and trustees to appoint successor trustees, substitute trustees, remove trustees

In re Brockbank (Ward v. Bates)

Facts: A testamentary trust was set up for the testator's widow for life and thereafter for the testator's children. There were two trustees, W and the defendant. W decided to retire and the beneficiaries of the trust wanted to appoint a bank to

replace W. The defendant, trustee, refused to join W in exercising their statutory power to appoint W's successor. The widow and children sought an order to compel the defendant to cooperate with W in appointing the bank.
Issue: Whether if all the beneficiaries concur, they may force a trustee to retire, compel his removal and direct the trustees, having power to nominate their successors to appoint as such successors such persons or person or corporation as may be indicated by the beneficiaries, and it is suggested that the trustees have no option but to comply.
Commentary:

- Court says no. The beneficiaries must choose between two alternatives:
    - Keep the trust of the will on foot, in which case those trusts must continue to be executed by trustees duly appointed either to the original instrument or to the powers of S.36 of the trustee act, and not by trustees arbitrarily selected by themselves, or
    - They must be mutual agreement, extinguish and put and end to the trusts,
- **Court has no jurisdiction to appoint new trustees of a will against the wishes of an existing sole trustee desirous of exercising his statutory power of appointing new trustees**
- As long as the trust subsists, the trust must be executed by persons duly, properly and regularly appointed to the office.
- ***Brockbank:*** Have a trust that gives to the widow and then the children. Trustees are the widow and the defendant. The widow wants to retire, but the family does not trust the defendant. The D and the widow had a statutory power to appoint the widow's successor as trustee. The widow wants to appoint a bank, and the children are in agreement, but the D refuses to consent. Statutory authority requires consent of both
    - This is an action where they are trying to compel the court to go with the bank
    - The court says that the statutory power to appoint a trustee.
    - When you exercise the power, you must to it in the best interests of the beneficiaries.
    - If the beneficiaries are not happy with what is going on with the trustees, they have an alternative (CL termination of the trust)
    - All of the beneficiaries can get together and terminate the trust
    - The court made it clear that they are extremely reluctant to interfere with any powers that trustees have to appoint substitute trustees. They are not going to interfere likely with a power the trustees have in the instrument or in statute to appoint other trustees
    - IF the courts are not going to do that, the beneficiaries can not
    - The bank may involve the couriering of unreasonable expenses.
    - At the end of the day, the court refuses to appoint the bank, saying it is too expensive.
- **What about removing a trustee?**
    - Look at the trust instrument, see if you can remove after certain things are met, or if there can be a vote to remove a trustee
    - Section 14(1) allows existing or surviving trustees to substitute a new trustee for a trustee that is incapable or unable to act.
    - Court can also to the same under 16(2)

Re Moorhouse

Facts: M, an executrix and trustee of certain testamentary trusts, sought to retire and have her lawyer appointed in her stead.
Commentary:

- Where there is a continuing trustee, there is no power in the *Trustee Act* any power permitting one trustee to retire and to dictate that person to be appointed in his or her place or stead.
- If a trustee wishes to retire, he must retire unconditionally, leaving it to the continuing trustee or to the Court to appoint a new trustee.
- ***Moorhouse:*** You generally can not retire prematurely as trustee, unless the instrument says you can, or if the court gives you permission to do that under section 15. You can ask the court for a substitution order by the Court as well
    - The widow is a beneficiary and a trustee. She is 90 and she wants to retire from the trust. But she does not want to retire unconditionally, she wants Eric Moorhouse to be appointed in her stead. The main trustee is resistant.
    - The widow goes to court and tries to get the court to make an appointment, they say they can make an appointment, but not where the discretion is restricted. They have to have discretion.

- Eric is her lawyer, he will have potentially conflicting loyalties because his trustee loyalty will be to all beneficiaries
- You should have the rules in the trust instrument and approved by the settlor
- Trust will not fail for want of a trustee, you can always rely on the court to appoint somebody.

CHAPTER 6: TRUSTS AND OTHER LEGAL RELATIONSHIPS

Trusts and Other Legal Relationships

- Sometimes you have a cross over with trusts and other legal relationships
- One power you may have is power of attorney. If you have general power of attorney, that will give you wide scope
- Power of Appointment

"To A for life, remainder to whosoever she shall appoint by deed or will" This is a broad power of appointment.

- A donee of a power and the appointer are the same person
- The person who benefits from the power are called the appointees or the objects of the power
- Powers are created in a will because they want something distributed over a period of time or if posthumous circumstances come into play
- Powers are also used in intra vivos documents.
- Used in both inter vivos and testamentary situations
- Distinction between trusts and powers

A) To T in Trust for A's children to share and share alike

B) To those of A's children as T may appoint

- Trusts involve obligations, in a pure trust the person has no say on the distributions. The trustee does not have discretion
- In the second example, there is a discretion. What happens if the trustee fails to do their job, the court will do it for them.
- If T dies without disposing of all of the property in his power, the property would go back to the estate
- The other implication relates to the enforcement powers.
- Under the trust, the beneficiaries can enforce the duties of the trustee.
- Example 4 on page 202, creates a power. It is precatory language, and A gets an absolute gift
- Default of appointment clause: The general approach of courts is when the see this clause, they construe the primary clause as construing a power and not a trust. You do not need a default situation for a trust.
- Discretionary Trust or "trust Power": There is a duty, but there is some choice in how you exercise your duty. **This is a hybrid**
- Let us assume you have language favoring trust/power for Edmonton Residents of the Littman family.
- This is a hybrid between a trust and a power

Trusts and Powers and Certainty of Objects

- Certainty of objects: Highest form of certainty is when you can put together a list of beneficiaries.
- Criterion certainty test or requirement: This is satisfied if you can say that for any given person that person qualifies under the instrument. You can say these people either definitively comes within the class or does not come within the class.
- If you satisfy the list certainty test, you will always satisfy the criterion certainty test.
- One person only test. If you can find one person who answers the description for sure, you have certainty of objects.
- You have ambiguous language and linguistic uncertainty. There can be factual uncertainty even when you know for sure who is suppose to benefit

- List certainty test is the greatest threat to invalidity.

Hybrid: This is also called a "power coupled with a trust"

Degree of Difficulty of Certainty Tests:

1) List Certainty Test
2) Criterion Certainty Test
3) 1 Person only test of Lord Denning: There are no subscribers to this test.

None of these tests have a problem with a family trust and a small number of people, but when dealing with institutional trusts, and ee welfare trusts, list certainty can be a big problem: It often comes down to problems on the facts. Often their isn't correct records, or the records could be destroyed. Sometimes the certainty is a problem even if the description of the beneficiaries is complete (linguistic certainty). However when there is a degree of linguistic uncertainty you can run into real problems.

EG: Create a trust for my "moral and distinguished friends" – there is problem wrt this. It is not a crisp concept. Sometimes concepts get a little fuzzy and when that is the case the certainty of objects becomes very difficult to satisfy.

For each type of relationship: Trusts, Powers and Hybrid the certainty is important

Leading into *McPhail* the state of law:

- ***Broadway Cottages:*** With pure trusts the **test is list certainty**. You need to know who each member of the class is, you need to make a list. For trust powers the test is also list certainty
- ***Gulbenkian:*** The test is criterion certainty. Whether that person comes within the class of potential appointees or not

McPhail v. Daulton (1970 HL)

Facts: Deed recited that a settlor would transfer to trustees shares in a company to form the nucleus of a fund for the benefit of the staff of the company, their relatives and dependants.
Issue: certainty of objects
Commentary:

- The HL determines that this is a trust and remits the case to the Chancery Division to deal with the issue of certainty
- **Question:** What is the proper test for determining certainty?
    - **Power for Selection:** the power if valid if it can be said with certainty whether any given individual is or is not a member of the class and does not fail simply
    - **Trust for Selection:** the whole range of objects should be ascertained or capable of ascertainment.
- The court rejects the distinction and says that **the test for the validity of trusts ought to be similar to that for powers, namely that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.**
- **Distinctions in uncertainty:** Distinction is clearly to be made between linguistic or semantic uncertainty, which if unresolved by the court, renders the gift void, and the difficulty of ascertaining the existence or whereabouts of a member of the class, a matter with which the court can appropriately deal on an application for directions. There may be a third case where the meaning of the words used is clear, but the definition of beneficiaries is so hopelessly wide as to not form "anything like a class" so that cannot be executed.

Commentary (Litman)

- This is generally referred to as ***Re Baden:***
- At lower levels the courts treated this language as creating a "mere power" – if it was a trust power then ***Broadway Cottages*** says list certainty and you would have a problem.
- **Why this is a trust power:** "the trustees shall" – if you are given a power and you are told that you must do something with it - it is an obligation – then it is a trust
- **You cannot rescue a failed trust power (hybrid) as treating it as a "mere power".**

- ***Broadway*** says that trust power test is list certainty. So the court has to decide whether it will follow this. With trust power you don't have to make a distribution but you have to select whom you are going to make a distribution to from the class of permissible appointees.
- So in a trust power, assume hypothetically, that there are 10,000 potential appointees, you need to know all of them because you need to make a selection amongst those people. So that is a good reason why we need list certainty.
- Another reason to apply list certainty is the question of what happens if the trustee of the trust power fails to fulfill their duty: The argument is that it falls on the courts.
- **However the court rejects the list certainty test and adopted the "criterion certainty" test for hybrids (trust powers)**
- **Why did the court do this?**
    - There are a lot of beneficiaries, equality for all will be no real benefit for anyone. People will only get a tiny nominal sum. So the court is not moved by that rationale for list certainty.
    - In terms of the notion that the trusts obligation is to exercise discretion for the whole class the court says that would be nice, but as long as the trustee is capable of making an "informed choice" then that should be enough.
- **So you don't need a complete list.**
- **What lies at the heart of the rejection of the list certainty test is to bring to an end the problems associated with ee welfare trusts where there are lots of beneficiaries – this is an incredibly pragmatic decision but an important one.**
- **Question: how can the court be satisfied from the limited people who qualify that the trustee will be making an informed choice?**
    - More to the point, in a case like this where you can't make a list, you know you don't have them all how do you know you are making an informed choice.
    - What are the quantitative requirements of this test?
    - Do we even have a quantitative requirement?
- **So what is the test:** the test for the validity of trusts ought to be similar to that for powers, namely that the **trust is valid if it can be said with certainty that any given individual is or is not a member of the class.**
    - This is criterion certainty. So powers and trusts powers are not the same but the test for certainty of objects of both of these are similar.
    - Similar to ***Gulbenkian***
    - Rejection of ***Broadway***
    - **Similar? Is there any indication of what the difference is?** No there is nothing in the case. So from a black letter point of view the test for certainty of trusts is list certainty, the test for trust powers is similar to the test for certainty for mere powers (criterion certainty) and test for mere powers is (criterion certainty)

Re Baden (#2)

This case goes back to trial and the test to be applied is "criterion certainty": Argument by those attacking trust is that some people are clearly appointees (ee's). However with some people you cannot say that they are relatives of ee's but you cannot also say that they are **<u>not</u>** relatives as well. How far do you go back? Therefore criterion certainty is not satisfied and there is a failure of the trust.

- **Court says that if you can't prove that you are not outside of the potential class then you are presumed to be outside.**
- **You don't have to prove, there is no quantitative aspect**

This matter is appealed: It goes to a 5th level of court

- You don't have to prove that a particular person is in or outside, **but you have to say of a substantial # of persons that they are within the class**
- **There is a quantitative requirement**
- **So before you can say you have a valid trust power, you have to say there are a substantial # of people that are within the class**
    - How do you know what "substantial #" means
    - The court doesn't want very important ee welfare trusts struck down because of uncertainty.
- So when can you make an "informed choice" – when there is a substantial #

- This shows us that one of the reasons that trust powers test for certainty is different than mere powers is that in trust powers you have to come up with a quantitative #.

There are problems in the logic, but this is an area you have to suspend your logic and go with the flow.

It is these kinds of large trusts that are threatened by the test for certainty of objects: Most of these types of trusts are trust powers. The court is really just creating terms for their validity. This body of law is important, and since this case it is still the leading case in the area

Summary – current state of law: Trusts – list certainty, trust powers – criterion with req that need substantial # of identifiable in class. Mere power – criterion certainty

Note for mere powers: Assume that you have a trust where T1 – T3 are trustees for a large # of beneficiaries. In the will later on the will maker provides a power to the trust. This is a separate and distinct power. But he has donated it to a trustee. The courts have said that if you are a trustee, even though we are talking about your function as a donee as a power, you must consider whether or not to exercise your power – you are a fiduciary. A mere donee of a power who is not a trustee does not have to consider whether to exercise their power, they only have obligation not to exercise power in good faith. In that sense perhaps the courts will have to come up with quantitative way to describe who the objects are

Trust: list certainty

Trust powers: criterion with requirement of substantial #s

Mere Powers: Criterion certainty without requirement of substantial #s, but there may be an intermediate area (if a trustee is donated a power, and they are a fiduciary so they must consider whether to use their power).

Certainty of Objects in Purpose Trusts

In a sense we looked at this w/ non-charitable purpose trusts. And the *Woods* case. Non charitable purpose trusts are regulated by S.20 of the *perpetuities act.*

Woods: Purpose trusts must have certainty of objects however

So what is the test?

Jones v. Executive Officers of the T. Eaton Co. Ltd.

Facts: "…to the executive officers of the T. Eaton Co. to be used by them as a trust fund for any needy or deserving Toronto member of the Quarter Century Club as the said..." in their absolute discretion.

Commentary:

- Court held that this was a charitable trust. Charitable trusts are purpose trusts. Charitable trusts are generally well treated by the law
    - **Enforcement:** if you don't have a beneficiary to enforce the trust the trust fails. In the case of charitable trusts the attorney general in default enforces the trust
- **Tax treatment**: incomes generated are shielded
- Text says **a charitable trust can never fail for certainty of object**. If this is the case, why was the court considering certainty?
    - In the case of general charitable trusts (i.e. in trust for charity) courts use scheme making powers to overcome uncertainty (they exercise discretion and pick a charity). But in the case of specific charitable trusts, courts feel they don't have the moral authority to make up a scheme. The court has to ascertain what exactly the purpose is, or the charitable trust will fail for lack of certainty of object (therefore the test as specified in *re Baden No. 2* must be satisfied).

Commentary (Litman)

- **Test cited for certainty of specific charitable purpose trust (*McPhail v. Doulton*):** That trust is valid if it can be said with certainty that any given individual is or is not a member of a class:
    - **There is little difficulty answering this question in the affirmative in this case.**
- The interesting thing about Charitable trusts:
    - Given preferential treatment – AG will enforce the trusts. There is a major public benefit so public official is responsible for enforcing.
    - They have envious tax status. Money generated within trust will not be taxed, people donating to trust will get deduction.
    - **You don't need certainty of objects when dealing with charitable trusts:** If you set up a trust for the relief of poverty, or to promote religion or any other charitable purpose, and that is all you say in the will the court will , pursuant to its *scheme making power*, provide certainty
- **So why is this court looking into certainty of objects in light of fact that this is a charitable trust.**
    - If you have a general statement of intention but it is still charitable that will be ok
    - You could also have a very specific intention but it is only a preference, in that case the court will say they need more specificity so you have to come back with a scheme.
    - There is also a situation where a settlor creates a very specific trust, and yet for some reason you cannot satisfy the requirements for charitable purpose trusts. If there is no underlying charitable intent, if you can't meet the certainty of objects test then the charitable trust will fail
- **So if general intent it will be ok, courts will imply meaning, but if you have a specific intent and no general intent (this charitable trust and nothing else) if you don't satisfy the CoO test you will fail**
- **Can you give effect to its intent in its present form?**
    - Test is CoO for charitable purpose trusts
    - Judge uses term "validity" several times – Litman not certain that it is specific charitable purpose, it just hasn't been sufficiently explicit
- The more specificity in the charitable trust the more you need the CoO to say the charitable trust
- **If there is a general intent then failure to meet CoO will not result in failure of trust, but if there is no underlying general intent and can't meet CoO test then trust will fail**
- Some charitable purpose trusts are clearly intended to benefit individuals. With some Charitable purposes trusts, the purposes are much more abstract. With this trust the test is:
    - **Can it be said with certainty that any individual is or is not a member of a class**
    - So the court is adopting the Criterion Certainty test – without getting into any of the subtleties – it appears that the court is using the same test that it uses for powers.
    - **We don't know if there is a quantum requirement the court is silent wrt this.**
    - **It may well be just a mere power in this case. If they don't have to make a distribution then it is a mere power and it is not surprising that the they apply the basic criterion certainty test not the modified one in *Re Baden #2*.**
- If you go back to ***Woods:*** Court adopts same approach to non-charitable purpose trust- it is the criterion certainty test. It is a test when you are dealing with more abstract benefits. The courts refers to ***Jones v. T. Eaton*** wrt the criterion certainty test.
    - Test is modified for cases with abstraction. The test appears to be, can it be said with certainty **(B of P)** that any given purpose is within the purpose of the trust. It is the criterion certainty
- **Once we are talking about a Charitable purpose trust it may still be valid if there is an underlying charitable intent.**

Trusts and Agency

There are a lot of relationships that could look like trusts on the surface.

For trusts and agency it can be difficult to distinguish b/w the two

Similarities: in both cases you have parties that are working to benefit others. Agents – principals, trustees – beneficiaries. In both cases the workers are fiduciaries. Trustees have possession of property and usually title. Where agency involves property, they have possession (sales) not including title. But an agency can be

equipped with right to title to facilitate a sale. With personal property it is difficult to know if someone who is in possession has title.

Differences:

- **Termination:** basic rule is that subject to K principals determine agency relationship, also death of either agent or principal terminates the agency relationship. Beneficiaries can't terminate trustees, they can go to court and apply, unless they are given power under instrument. Generally speaking they don't have the authority. Death does not terminate the trust. Trust doesn't fail for want of a trustee. Even if beneficiary dies, very often the trust endures.
- **Control:** Beneficiaries don't control their trustees. They can't tell their trustee how to invest trust funds. They can't dictate how their trustees should vote. If the beneficiary is unhappy with the trustee they can terminate the trust, they can seek a replacement trustee, and if they are unhappy with the conduct then they can sue. Principals do control their agents. The presence of control in the agency situation, and the absence of control in the trust context has major ramifications

Control: Agents implicate their principals in tort. Trustees do not implicate their beneficiaries in K or tortuous liability. So when trustee conducts trust it is trustee who is on the line. Trustee is personally liable. Trustee is an entity and is entering into K. It has ownership of trustee assets. So trustees have to be careful about the type of trusts they get involved in. It is true that trustees can dip into the trust fund to pay for a K. If they have used the best of advice and hired to professionals to do transaction they can dip into trust fund to pay off professionals.

- There was point in time in where CL had to assess whether trustees could be reimbursed. The courts said yes as long as reasonable
- **This is not codified under S.25 of the *Trustee Act:*** Most of section deals with liability for trustee. But end says that they can get reimbursed for expenses in administering trust powers. But you can only reimburse yourself for reasonable expenses. This is CL req that is read into section.
    - **Exception:** When beneficiary is involved in any improper expenditure. **S.26** says that the court has discretion to reimburse in these circumstances.

So we have trust – beneficiary and property. Trustee enters into K to buy more. Cost comes out of trust property (if reasonable and authorized). If trustee puts out own money then can get $ from trust funds.

- **What if it is a package of business assets?** Same rules apply, but if business goes under and there are not enough assets in trust fund then the trustee is out of luck. The general rule is that you cannot seek indemnity from the beneficiary. You would have to be mad as a trustee to get involved in running a business. The obligations are personal. You have some coverage, but if that is insufficient and the business goes under you will be liable personally
    - **3 exceptions that you cannot seek indemnification from beneficiary:**
        - ***Hardoon v. Belios:*** If beneficiary is mature, capable (*sui juris* – this represents control and they can terminate the trust*)* and adults then they are reasonable, you can seek indemnity. This is a complicated case. The Cdn courts have not determined whether if you have *sui juris* beneficiary then trustee can be indemnified. This is weak argument in AB given *S.42 of the Trustee Act* – you need courts permission to terminate so not true *sui juris*
        - **Where the settlor is the beneficiary:** This is controversial point. The reason why AB, BC and Ont said that no personal liability for income trusts was the fear of an obligation of indemnification. SH (settlers) are beneficiaries and they were thinking that if Income trust went under then beneficiaries liable
        - **Where the trustee is the agent of the beneficiary:** this is the ***Trident*** case. Trustee can be an agent. It was taking marching orders from beneficiaries

How do you tell if you are dealing w/ a trust or an agency? Agents don't have title (generally) trustees do, but if personal property you don't really know. Trustees have duty to segregate trust assets (unless trust instrument says otherwise). Sometimes agents do segregate (even though no personal req to do so). There isn't a clear characteristic to look at to determine.

Summary:

- **Indemnity by from trust property**
  - **S.25:** If authorized and reasonable
  - **S.26:** If beneficiary involved in breach and court is willing and able to make an order under this section
- **Indemnity by beneficiary**
  - General rule is not duty to indemnity even for reasonable and authorized expenditures
  - Exceptions:
    - If beneficiaries are principals and trustees are agents
    - Arguable:
      - ***Hardoon***
      - Where beneficiaries are also settlor

McIntyre v. Royal Trust Co

Facts: The deceased instructed the trust company to sell certain stocks and place it in an annuity for the plaintiff. The stocks were sold but **before the fund was transferred to the plaintiff the donor died**. The plaintiff argues that the gift was intended to take place by way of a trust. The gift was complete by way of trust.

Commentary:

- The court rejected the trust argument. The trust company was the donor's agent. As the principal died before the gift was perfected, the **agent lost his authority to transfer**—the gift fails. The court does not say why it was an agency and not a trust relationship.
- Implicitly absent any indication that a trust was intended, the court will assume the relationship with the lesser obligation: i.e. an agency relationship.
- The **court will not rescue a failed gift by declaration of a trust**. Equity does not assist a volunteer.
  - Courts are not going to rescue failed gifts by treating them as declarations of trust.

Commentary (Litman):

- The memo which P gave to the trust company to sell the stocks and buy an annuity was, an instruction to his own agent which he might have cancelled or amended at any time before it was carried into effect. Donors to agents are of no assistance to the Plaintiff.
- Instruction to agent could have been cancelled before the time if was effected
- **Trust Co was not acting as a trustee, it was simply an agent for the purposes of carrying out instructions for making gift of annuity. They were halfway into discharging instructions when principal dies, agency relationship is terminated and Trust Co doesn't have authority to complete gift.**
- They now hold assets as personal representative of deceased
- **Why agency and not trust?**
  - Not told – **most likely no indication of an intent to create a trust.**
  - Court will generally presume agency over trust, trusts are onerous and courts will presume agency b/c they are less onerous.
  - The fact that no property of any sort was to pass except in the form of an annuity – this is an important point.
- It would have taken the issuance of a cheque before there is delivery – **it becomes a matter of gift law**
- **Lesson from case:** Given ambiguity the courts will presume agency over trust, also courts will not save an imperfect gift by calling it a trust.

Ex Parte Pye

Facts: Testator died on June 8. His agent was to transfer an annuity to Marie on June 10, this was done even **though the agent** did not have authority because he was unaware of the testator's death. Tries to make gift of annuity. On own, the trustee buys annuity but not in name of Marie but of William. William dies leaves residue of estate to wife. Her committee says that annuity belong to estate not Marie.

Issue: Whether this amount is part of the testator's estate?

Commentary:

- The court held that there was an **implied declaration of trust** even though the factual situation was not different than in *McIntyre*. This case shows that there is a fine line in the determination, it could have gone either way.

- Dubost at the start was the agent of the donor. When he is given power of attorney, he is not a trustee, he is the agent of the trustee. When the donor died the agent lost his authority therefore the transfer was a breach of authority but this does not change the fact that Marie had a beneficial interest.
- **If an act is completed, though voluntary, then the court will act on it.**

Commentary (Litman)

- **Argument:** This was never a completed gift. Even though agent transferred annuity to Marie two days after death. If it was agency relationship then agent lost authority to execute instructions on the principals death.
- **Here court says there is a trust favoring Marie:**
- **How is this different from *Macintyre:***
  - Here the annuity was purchased, in ***MacIntyre*** it wasn't
  - If court is saying that trust arose when agent bought annuity then they are saying that he had authority to declare trust. Litman thinks he didn't have authority to do this but he had to just buy the annuity
  - However William later says to "transfer annuity to Marie" when he found out that it wasn't in her name. Court says that he is acknowledging that it is her money. You could argue that that is another instruction to perfect the unperfected gift but the court recognizes the passing of property.
  - **Difference:** Subsequent communication that identifies that the annuity is hers (by William)
- **Important thing:** Once court says that trust was established before the death of the principal the money is hers. Even if it went to estate, and transfer didn't take place then estate would have to give it to here because the trust money is hers.
- **Fact sensitive analysis in this area.**

Trident Holdings Ltd v. Danand Investments Ltd

Facts: The case deals w/ a commercial trust. Danand is the trustee for several companies. Plaintiff (Trident) got judgment against Danand. It clearly is liable on the contract. The issue is <u>whether the beneficiary corporations are liable on the contract</u>. (6 of them).

Commentary:

- Generally a beneficiary is not liable for contracts entered into by a trustee. However, a trust relationship can have an agency relationship super-imposed on it making the beneficiaries liable.
- Investors in trusts are beneficiaries and should therefore suffer its burdens. But, if they don't control acts that give rise to liability they shouldn't suffer.
  - **Therefore, beneficiaries may be liable if a principal/agent relationship can be superimposed on trust. Here this was so and the investors were liable.**
  - **So look for the agency relationship superimposed on the trust**
- In the situation of a bare trust where the trustee has no independent discretion and must do the bidding of the beneficiaries the beneficiaries will be liable on the contract. This point is clear. There is disagreement as to what is the result when there is something short of absolute control. One point of view is that anything less than total control, leaving the trustee some discretion insulates the beneficiaries.
- The other view, which Litman agrees with, it that even if the trustee has discretion, the beneficiaries are liable to the extent of their control.
  - **That is, the beneficiaries will be liable for the contract at issue if it was under their control.**
  - **If trustees are carrying out mandate of the beneficiary then there may be liability.**
  - **This will be the context in a bare trust**
- The court reached the decision that the beneficiaries where liable **by looking at the extent of control.**
  - **Litman think the characterization was wrong,** the trust instrument specifically contemplated beneficiary liability if they were signee to the contract which they were in this case.
  - So regardless as to the extent of control of the trustee they would be liable because of what amounts to a personal guarantee on the contract.

Commentary (Litman):

- A person **may be both agent of and trustee for another.**
  - If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however **it is the agency relationship that predominates, and principles of agency, rather than principles of trust are applicable**.

- Where one is a trustee because they hold legal title to the trust property, but where in addition he has undertaken to act for the beneficiaries and under their control, he is also their agent, and as such can subject them to personal liabilities by acts done by him within the scope of their employment.
- **Court pointed out that this was Bare trust:** Trustees didn't have any duties or powers. The way it was intended to work, was to have trustee controlled by beneficial group – so agency relationship **superimposed** onto a trust relationship.
- **Real issue: WRT the particular K at issue – who controlled entering into that particular K. If controlled by beneficiaries then with that control comes liability.**
- **Important point from case:** Appreciation that mere fact that you are dealing with shell that look like a trust doesn't mean that you aren't dealing with an agency situation that will also have liability implications.

Trusts and Debt

Debt: Money owed by debtor to creditor, when $ comes to debtor it is his $. Debtor can pay back, and doesn't have to be exact same cash. Relationship is about obligation to repay. When debtor goes bankrupt then the creditor says that debtor owes them $ (not particular assets)

Trust: $ in trustees hands belongs to beneficiary. Relationship is property based. When trustee goes bankrupt they can say it is their property and out of reach of creditor.

If trustee is taking trust cash to bank and physically loses it. Can the beneficiary insist on replacement? No if the trustee is not negligent there their won't be liability. However in a debt situation if the debtor loses the money they still have to pay it back.

Sometimes it is better to be in debt relationship sometimes a trust depends on the obligation. Although generally you want to be in a trust relationship

Primary distinction b/w a debt obligation and a trust obligation is that a debt obligation is of a personal nature whereas the trust obligation is of a proprietary nature.

Space Investments Ltd v. CIBC

Facts: The applicant set up a trust account with the Bank. The trust document allowed the bank to take the money out of the account and place it general deposit accounts (Trustee can't act in conflict of interest unless the instrument permits him to do so as in this case). The bank then went bankrupt.

Commentary:

- The ordinary relation between a customer and a bank is that of debtor/creditor. **However in this case it was clear that when the account was set up that the bank was trustee.** If the bank went bankrupt at this point, the applicant **would have been able to take the monies off the top** of the bankrupt.
    - The creditor is the person making the deposit and they acquire a *chose in action* – namely the right on request to payment by the bank of the whole or any part of the aggregate amount of principal and interest which has been credited or ought to be credited to the account.
- However the trust agreement allowed the bank to take the money out of the account and treat it as a deposit account.
    - By doing this the trust property, money, was substituted for a debt obligation and therefore the applicant must take on a pro rata basis.
    - **It is the same as if the trust money was used to purchase art or bonds, the trust res then becomes the art or the bonds.**
- The beneficiary is unsuccessful in lifting money from the bankrupt b/c the trust money has lost its character as trust property.
    - **The chose in action (for return of money) becomes the trust property against the bank (which is worthless when the bank goes bankrupt).**
- Trust property loses character when
    - Authorized disposition
    - Unauthorized disposition that ends up in hands of BFP for value w/out notice.
- These are 2 jurisdic reasons for transferring trust property into a chose in action.

Commentary (Litman)

- Trust account had money in it. Bank has authority to take money out of trust account into other investment account. Bank goes under. Argument is that $ that got moved out of trust account is still trust $, then beneficiary of the trust has priority in insolvency of the bank. This is why you want to argue that it is a trust
- **Court rejects this argument. The $ lost character as trust property:** All that they have is a *chose in action.* In this case trust $ was in trust account. If $ was not moved from that account, there would have been priority. The money is no longer trust money when moved out of the account, the beneficiaries have a chose in action. The property has lost its trust character, and the trust property cannot get priority out of bankruptcy.
- **Transaction or depositing $ could give rise to personal action also against the bank, but it is not worth much (chose in action) because it is a right to bring an action against the bank that is insolvent.**
- **What if terms of the trust precluded bank from taking out $:** Then it is just a matter of tracing, we get an equitable charge and we get priority. That is because the $ doesn't lose its character as trust property as long as you can trace it. In equity you can trace $ including a mixed account. If $ has been used to buy a speculative investment, and the terms of the trust precluded speculative investments, because it is an unauthorized transaction then you follow your trust property into the penny stocks, you can even go beyond that and follow it into the hands of the seller if you can trace it. Can you go after the $. **You cannot go after a BFPV without notice however**
    - **As long as purchaser (BFPV without notice) had no notice then you couldn't trace it.**
- **So sometimes the trust will lose character as trust property under two circumstances see above.**
- If you can't trace then you are stuck with the value
- What the court is saying in this case is that the transaction that bank deposited $ into own account gave rise to debtor creditor relationship with bank being the debtor and had to pay back to the trust.

Barclay's Bank v. Quistclose Investments

Facts: R.R. Ltd. wanted to issue a dividend but has insufficient assets to do so. It was able to arrange financing for the dividend from Quisclose. Quisclose, being aware of the tenuous financial position of R.R. lent the money for a specific purpose—to pay the dividend. The money was deposited in a separate account with the defendant (Barclay's) who used it to cover R.R.'s over drafts. The company became insolvent, the **dividend was not paid and plaintiff seeks the return of the monies form the ban**k. The D argues that the Bank can't take money b/c it doesn't beneficially belong to D.

Commentary:

- Until money is used for the specific purpose, a beneficial interest remains in the money. When that specific purpose is carried out, the creditor/debtor relationship prevails.
- The court determined **that this was an implied trust.** The **trustee was R.R. and the beneficiaries were the shareholders**, if the dividend was not paid the secondary beneficiary was Quisclose. The court could have also held that if the trust in favor of the shareholders failed the trust property would result back to the settlor. It was argued that the plaintiff could no rely concurrently on equitable rights and legal rights. the court rejected this argument.
- The rights in fact are not concurrent, they are successive.
- **There is an equitable right until a dividend is declared, then there is a debt obligation, a legal right.**
    - Finding that there was a trust, there still is the issue that was raised in *McDiarmid*, the bona fide purchaser for value doctrine. However in this case, by the letter sent, the bank was on notice that the monies might be trust monies, and therefore they are bound by the trust.
- You could also argue resulting trust to lender if primary purpose isn't executed.
- When you make loan for a specific purpose, two trusts may be implied (Quistclose Trust
    - Trust in favor of lender until the primary purpose is executed
    - Trust in favor of the beneficiaries of the primary purpose (Litman disagrees w/ this)

Commentary Litman:

- Retain beneficial interest in money if $ is lent for a purpose until it is used for that purpose. Beneficial interest retained until used for purpose. Once used for purpose then there is a debtor creditor relationship but until then although the ultimate goal is debtor creditor relationship you have trusts:
    - Favoring the SH
    - Favoring Q
- In fact the property is never RR's in any beneficial sense. Because of this it cannot be nabbed by the bank to cover off RR's overdraft.
- This is a trust resulting out of intention. However there is no advertence to an explicit trust but it is true that the $ was

clearly intended for the SH, not RR.

Re Kayford

Facts: The company carried on a **mail order business**. The customers either paid in advance or made a deposit. The company foresaw financial difficulties and in an attempt to protect their customers all such monies where paid into a "Trust Deposit Account". The account was not a true trust account but a dormant corporation account. It was thought at the time that it didn't matter what the account was called, as long as a separate account was used. The company became insolvent. Counsel for the liquidatees argues that the trust should fail b/c it is a fraudulent preference: it prefers one creditor to another.

Commentary:

- The **court rejects the fraudulent preference argument** on the basis that for a fraudulent preference to exist the customers must be creditors, but since there is a trust, they are beneficiaries and not creditors so the law of fraudulent preferences does not apply.
- How can one rationalize this conclusion? For it to be successful, at no time prior to the creation of the trust can the customers be creditors. Can this be achieved?
    - If one views the mail order catalog as an invitation to treat, the monies as an offer, this result can be achieved. The company would not accept the offer until the product was ready and therefore they held the money on trust for the customers.
- Where does the company get the authority to create a trust in favor of the customers? There has to be an implied authority for the company to act as an agent for the customers to set up the trust.
- Customers here weren't precluded from tracing their money in the account although there was some company money in the account.
- Kayford could be an expansion of Quistclose trusts: money is being paid for a specific purpose. A declaration of trust is still much safer.
- **Certainty of Words:** Even though words are not there intention to create the trust is present.

Commentary Litman:

- Mail order company is worried about its customers. It receives their orders and puts their $ into what they call a "trust account" and don't take $ out until orders are filled.
- **For fraudulent preferences the must be creditors.** Here the consumers where not creditors. The Company is never really accepting the $ from customers until the goods are actually sent out. They are not declaring trust by using their own assets. They are putting the customers $ into a trust until such time that they can fulfill their orders.
- **Contract analysis in this case:** $ is offer, mail order is ITT, acceptance takes place once the goods are ready and set out. The $ then never actually belonged to the company. The trick here is being able to say that the $ was never actually the co's otherwise you have a creditor situation.
- **Problems in Case:** The account that was used has some $ in it already that was owned by the company:
    - **Litman says this is *de minimus,* also the fact that you mix trust assets with co assets doesn't mean that you aren't dealing with trust assets, it may amount to breach**
- **Another Interesting point about judgment:** Relationship may also arise wrt trade creditors. Implication is that if creditors were advancing $, and Kayford set out an account wrt creditors $ then the result might be different.
    - **Litman:** Here you wouldn't have contractual analysis to be able to prove that $ never became the $ of Kayford. However, Litman says that given the right circumstances the court could get same result w/ trade creditors but you would have to find a way to explain that the assets never actually become the trust property.

Trusts and Bailment

The task of distinguishing trusts from bailment can be difficult. Bailment seems to be made of a kind of a trust.

Cases can be conceived where it would be difficult to say whether there is bailment by deposit or by a trust: If you go abroad in a hurry and do not know when you return and you say to a friend. "take my piano and if I don't return then give it to my daughter" This can be construed in both ways, as a bailment or as a trust.

You usually answer this question by looking at intention of the parties: However this case shows us that it is difficult to ascertain

Elgin Loan and Savings Co. v. National Trust Co.

Facts: Plaintiff E transferred share certificates for shares it held, to the D trust co (National). for safekeeping. Some of the shares had be acquired by the P form another trust co. (A) under an agreement whereby if the shares where sold at a profit, A would share the profits w/ E. National acknowledged receipt for the shares, agreed to hold in their safety deposit box vaults, agreed to remit dividends to E and finally agreed to surrender up the certificates on demand. Under the terms of the arrangement the shares where put in the name of N and it was agreed that N would be remunerated for its services. Both E and A went bankrupt. Western was appointed liquidator for E and National was appointed liquidated for A. Western demanded that the certificates be delivered up to it, National refused. It was argued National that it held the certificates on trust and that if there had been a breach of trust, the breach was technical and could be excused by the Court pursuant to powers found in trust legislation.

Commentary:

- This was a relationship of a trust and not a bailment
- **3 conditions usually to be found in trust transaction:**
  - Creator of trust
  - Trustee of property
  - *Cestui que trust* to be benefited from the creation of the trust property
    - Here there is not *cestui que trust* in the ordinary sense unless that term can be applied to the bailor of the script certificates.
- There were not duties to be performed by the defendants except to collect the dividends and transmit the $ to E, and to hold safely the scrip till its return was demanded. All rested on the terms of the K and not upon equitable obligations of fiduciary import.

Commentary (Litman)

- Court found that they acquired the Share certificates as bailors, and not as trustees. As a bailor they have to comply with the terms of the bailment or they are guilty of detinue.
- **What is peculiar about this case is that title transferred to the bailor:** This doesn't normally happen in a bailment situation. There is more going on in this case then in a traditional bailment, they were also remitting dividends.
- **This is a similar fact situation to *Brockbank:* It is not a bare trust, but if it is a trust at all it is one with minimal duties**
- **What case is really telling us is that courts given the choice of bailment or trust they will presumptively say that it is bailment and not trust**
- **This is true wrt agency situation as well because once you say there is a trust then there is a lot of baggage that goes along with it.**
- Ultimately it is question of intent, but presumptive intent is that it will be a bailment, there is a far less burden on the bailor than on the trustee. Conveyance of title should have been considered, as well as the fact that there were active obligations, is important too.
- One way to see this is as a bailment

Trusts and Contract

Hypothetical: A promises B (an architect) to pay C $3000 if B designs a house.

This is a typical privity problem in K law. There are a series of doctrine to overcome this problem.

It used to be common for 3P (C) to argue trust: The trust property is the promise made to B, this is a *chose in action.* Any time you have a 3P K and you can construct a trust then it is a trust for a *Chose in action.*

If it is merely a 3P K, and A refuses to pay, then as a matter of K law, B can decide to sue or not sue. However if this is a trust of a *chose in action* then B has a duty to sue because B is a trustee.

In K law, if B does sue then contractual compensation will be based on the loss to B. In trust, the loss that counts is the loss to C.

If A refuses to pay B, B would have to sue (if there was a trust) and if B doesn't sue then C can sue B for not doing his or her duty.

All these points really just highlight an obvious point that if you can convert this into a trust then C is much better off. That is why historically they argue that K creates a trust.

Re Scott and Manufacturers Life Insurance Co.

Facts: A mother creates an **annuity for the benefit of her two sons**. One dies and she attempts to make the beneficiary the remaining son. The estate of the dead son argues that the relationship was a trust relationship for the benefit of 3rd parties (#2 above) and as such the settlor can not revoke or amend the trust.

Commentary:

- Generally a settlor can not ex post facto alter a trust. Here the relationship was a contract, not a trust, and the parties can alter/renegotiate their arrangement. It will be presumed that the relationship with the less onerous obligations exists unless it can be established that there was an intention to create a trust (*MacIntyre*).
- The court mentions exception where settlor can alter a trust:
- When settlor retains a general power of appointment. Therefore S has LE, and can appoint the rest to anyone including him/herself, therefore this is not settlor revoking trust, it is beneficiary who terminates trust (b/c he/she owns it all anyway)
- **Viewed as a simple K, Mrs Scott was free to change her designation of the beneficiary as she might from time to time.**

Commentary Litman:

- K for insurance (annuity) if she dies within 10 year period, the K provides for insurance co to pay annuity to people designed by her in K of insurance. She had designated the two sons (so the two sons aren't privy to K).
- One of the sons dies and she changes annuity to name one son as exclusive beneficiary. When she dies here estate and the insurance co, argue that her original designation of the two sons is irrevocable:
- **Argument is that first K created trust:** Settlors then become strangers to the trust. Insurance co clearly doesn't have power to alter the terms of the trust. The argument is that even if the statute or the K make the designation irrevocable, trust law does.
- Ultimately the court says that this is K unless there is a clear intent to create a trust
    - Rationales for this:
        - If you create a trust you limit the power of the parties from revising their relationship.
- **Para at top of 235:** Even where trust has been perfected, the case may be such that court will allow settlor to change his mind and rescind what was earlier proclaimed beyond recall:
    - **This is weird since it says trusts are revocable:** However cases as authority are ones where beneficiaries are given the right to terminate trusts, under the authority of ***Saunders & Vautier***

Summary on this area:

- In certain circumstances trust property will lose its character as trust property. It can turn into a *chose in action* (similar to what creditors have) – ***Space investments.***
- Also in ***Quistclose*** when you lend $ for a specific purpose then loan is secured by trust if $ is not used for that purpose. Lender avoids risk of borrower going under before $ is used for specific purpose.
- ***Kayford*** the court says that you can declare a trust on the eve of bankruptcy to protect your customers. But it has to be the property of the customers you can't use your own $ - that would be a fraudulent preference.
- Wrt **Trust and Bailment** if tangible personal property is involved there isn't a trail of property.
- In ***Elgin*** we were talking about shares. Ultimately if you are not sure if it is trust or something else you assume something else because trusts are a burdensome relationship with obligations and the courts will only impose those obligations if it is clear to the courts that the parties intended it. Finally wrt the interface b/w contracts and trusts – w/ 3P beneficiary contracts is there a trust where A promises B that if they do something then A will pay C. Subject matter is *chose in action* arising from trust to B.

- ***Scott Manufacturing*** says no they will not interpret 3P Ks as trusts, unless there is intention, because if you do the freedom to K is restricted.

CHAPTER 7: THE NATURE OF BENEFICIARIES' INTERESTS

The primary question is whether the beneficiary has a right *in personam (*Personal) or a right *in rem (*Proprietary)

It is clear as a matter of simple trust law, that the beneficiaries interest is both a **personal interest** (they can sue the trustee for breach) and a **proprietary interest** (The beneficiary can trace property, they can also terminate the trust)

So nature of interest is hybrid: Personal & Proprietary – this is pure trust law

Issue of what they have however arises in the context of a fact situation that is set in some other body of law. It is a trust but there is a tax issue, or there is a Q of landlord / tenant. Can the landlord seize the goods. You are getting into complications that involve other bodies of law

Most of the cases are tax cases that complicate the issue.

Commissioner of Stamp Duties v. Livingston

Facts: The widow of the testator was a residual legatee under the will. A succession duty was owed but the widow dies before the will was administered. The CSD claims that the Livingston estate owes the duties as she had a "beneficial interest" in the property.

Commentary:

- The court holds that a **residual legatee does not have an interest in the estate property until the will is administered**.
- A will is completely administered when the only thing left to do is to distribute the property. The court bases this finding on the fact that a finding to the contrary would put certainty of subject matter into question as debts and what not have to be paid, so it is never certain what a beneficiary will get: "there is a difference between valuation and realization".
- Mrs. Coulson **only has chose in action**—to compel executors to properly administer estate—she doesn't have to pay tax b/c the state is trying to double tax on single use and enjoyment (tax policy driven decision—it would be draconian to have her pay taxes on property she never got to use and enjoy).
- **Once administration is complete the executors become trustees for the beneficiary of the will**

Commentary (Litman)

- Widow dies before RE is actually transferred to her. Issue turns on whether Widow had beneficial interest in the estate. She didn't have title (legal), she didn't get to use the property as an owner, husbands estate is being administered and she died and question is whether b/w her death and his was she beneficial owner
- **Court says no:** So question then is where is the beneficial interest?
    - There isn't always a situation where you can point to who has legal title and who has beneficial title.
- **It is fair to say that the executor does not have beneficial title – this is not a case where equity must find someone has beneficial interest**
- When person dies Capital assets are deemed taxation so there is always a difference b/w valuation and realization and that doesn't mean there is no beneficial interest
- **Principle point: She would get a beneficial interest once the will is completely administered – debts are paid etc. So as soon as we know when the reality is going to her and there are no more debts to be paid and all that remains is conveyance then that is when she gets the beneficial interest.**

- **What did she have b/w date of husbands death and hers:** She has a *Chose in action* to ensure that the estate is administered. This is a transferable interest, she can sell this right. A *Chose in action* will eventually lead to a right to property. Many CIA operate like a right to bring an action, but you can assign it to 3rd party.
- **What do we learn from case:** Tax policy that informs this decision. What drove decision was desire to avoid double taxation. Question of whether for tax law purposes the point to acquire the interest depends on the type of tax and policy behind the tax.

Hillis v. The Queen

Facts: Under tax law, at the death of a property owner, there is a **deemed sale of the property** and as such there is capital gains taxes owed. There are "role-over" provisions which are intended to protect the surviving spouse by deferring tax payment until the spouses death. In order to defer the taxes

1) Had to prove she was **indefeasibly vested of the property giving rise to capital gains w/in 15 months**, and
2) **Proof Requirements:** Had to establish w/in that period or a reasonable period thereafter that vesting has occurred (prove of 1).

The estate was not administered w/in that period, and still not at trial. *Prima facie*, she is not indefeasibly vested w/in 15mo's. Notionally, under the *Family Relief Act* and CL principles, she was entitled to the property.

Issue: Whether property of the deceased TP became indefeasibly vested in the surviving spouse within the meaning and the time prescribed in the section

Commentary:

- Three potential views on case:
  - Like *Livingston*, looking for right answer given policy considerations. She doesn't satisfy the two requirements, capital gains apply. She wasn't indefeasibly vested b/c non-administered estate and time period. If this occurs, every time estate administration takes longer than 15mo's, roll over provisions will not apply. This is not intended by legislation. *Livingston* exception makes sense.
  - Property interest vested in Mrs. Hillas upon his death b/c of *Family Relief Act* order, therefore timely vesting is satisfied and **roll-over provisions apply**. Litman agrees w/ Heald, J. here.
  - Prevailing Judgment by Clemens. Doesn't accept retrospective effect of relief order for the *Tax Act* provisions. We know at the end of the 15mo's Mrs. Hillas is entitled to 1/3 of the property and therefore 1/3 of the estate is exempt from capital gains provisions and taxes must be paid on 2/3.
- If Heald and Litman are correct (#2), **what we have are different rules that should apply when dealing with beneficial interests under a trust**, w/ a result oriented approach to develop appropriate tax policy. Appropriate tax policy applies to both *Livingston* and *Hillis*, to explain result oriented judgment.
- Note: you must figure out what the statute is trying to do before trying to answer if requirements have been satisfied.

Commentary (Litman)

- Here roll over applies if spouse becomes beneficially entitled to what is otherwise taxable capital property within 15 months of death, and if you can prove within 15 months or reasonable time thereafter that wife or husband has acquired an indefeasibly vested within 15 months.
- Here Mr. H's estate was still being administered after 15 months.
- **Why do we have rollover provision:** Without it the burden of having to pay CG would mean that capital property would have to be sold, sometimes that would seriously interfere with surviving spouses lifestyle.
- **Pratte:** Takes *Livingston* view that she merely have *chose in action* – She has nothing
- **Heald:** Disclaimers and orders under act are retrospective, therefore she gets a full rollover and no CG tax should be paid at all.
- **Clement:** Looks at *Intestate succession act* and says that it gives her 1/3 and says that she is entitled to ½ roll over. He is obviously rejecting the notion that you only require a beneficial interest once the estate is fully administered. He is looking at a very specific tax provison. Looks at only actual events and she gets 1/3 interest so that goes to 1/3 rollover
- **End result is that she gets a 1/3 rollover –** Clement and Heald take view that you acquire interest before the estate is fully administered. This puts us into a discussion of tax policy:
  - **Policy of rollover provisions:** Doesn't make sense, given that goal, to say state vests only once estate is fully administered. This is because complicated estates would then not have advantage of 15 month roll over provision. Roll over provisions should apply to both simple and complicated estates.
  - What about the issue of finality? It is the case that the notion that the estate vests on death thwart finality. This part of test requires that you prove w.i. 15 months or reasonable time thereafter that estate is vested. 2 of

three judges say that she was able to prove within reasonable period of time that she had become reasonably vested.

- **What decision is informed by:** Tax policy that gives rise to rollover.
- **So different taxing provision, different policy and so different test as to when beneficial interest arises: For the purpose of trust law the beneficial interest arises when the trust is made, but for tax law the answer is highly variable it will depend on the policy at play.**

Attenborough v. Solomon

Facts: The two sons of the deceased were the **executors** of the estate. It was completely administered s/in a year but the residue had not yet been distributed. After completion of the administration, one of the sons pawned the chattel in question (certain articles of silver plate) and then died. The estate claims that the chattel should be returned by the pawnbroker. Was the executor acting as trustee? This is important b/c the executor can do most acts of administration severally whereas most significant acts of trusteeship must be done by consensus.

Commentary:

- As per *Livingston*, once the administration is complete the executors become trustees for the beneficiaries under the will (all that was left was transferring to residual beneficiaries). When the chattel was pawned the son was a trustee, the disposition was unauthorized and therefore legal title was not transferred to the pawnbroker.
- Therefore the bona fide purchaser for value doctrine does not apply and the estate in entitled to recover.
- To be BFP for value you need to establish that you purchased legal title. All the pawnbroker could establish is a security interest **b/c the trustee didn't have legal title to give by himself**).
- Litman agrees b/c the rule that delays transformation from executor to trusteeship facilitates the administration of the estate (b/c they can act severally) and when administration is done, you are concerned w/ beneficial interests, and hence trusteeship.
- **So at the time of the transfer to the pawn broker he didn't have sole legal title.**

Commentary (Litman)

- Executors pay off estate within a year. Every estate that involves executors involve a trust. However in this case the court distinguishes b/w when they were executor trustees and non-executor trustees – this is b/c rules of game are different:
    - When you are dealing with an ordinary trust the trustees must act unanimously, unless the trust instrument provides for another rule (**This is for decision making, investments, etc)**
    - For the purposes of conveying or buying property you also need to be unanimous as well unless trust instrument says otherwise
    - You can delegate responsibility to someone else to do things.
- Executors wrt personal property can make administrative decisions on their own, argument made is that executor did not have authority to pledge silver on his own b/c at the time that he did it he was a true trustee and that required unanimous action. **Court accepts this – relationship converted into true trust when administration of estate was complete. At that point the executors became true trustees and then they had to act together. That meant that the pledge wasn't lawful**
- **What about BFPV w.o. notice:** No that doctrine only applies when there is a transfer of legal title, here there was no transfer b/c S on his own needed the co-action of his brother to convey legal title, all he conveyed as a possessory interest.

Notion of delegation

Normally you can't delegate your fiduciary obligations (including to other trustees)

However there are a series of exceptions:

- Mundane tasks: personal actions not required or contemplated
- You can delegate where it is necessary to do so: lawyer, actuary, notary public, accountant

- Common business practice: eg. Valuations
- Where trust instrument permits delegation
- When statute permits delegation:
    - S.5 *Trustee Act:* Agent includes stockbroker, investment dealer, investment counsel, so you can hire agents and delegate degree of authority that prudent investor would delegate in common business practice.

Other than these exceptions you need unanimous conduct and no delegation.

Standard of Care for Trustees

If you hire an agent you still have to be selective in hiring the agent, selecting the terms of the responsibility, even monitoring the agent.

CHAPTERS 8 - 10 : THE FORMAL REQUIREMENTS OF A TRUST

Completely and Incompletely Constituted Trusts: "Equity will not Assist a Volunteer"

Refers to a trust that is fully recognized in law as an operating trust – usually refers to formality required to have trust.

Need three certainties, need trustee (but trust will not fail for want of trustee), however something else is required: It is a lot like a gift (delivery)

With a trust the 3 certainties are insufficient, the property has to actually be transferred to the trustee

Trust by transfer: Settlor is not the same person as trustee, constitution once property is transferred to trustee. If you don't then the trust has not arisen, nor is there anything that the trustee can do to compel the creation of the trust, unless, there is an enforceable K.

Where settlor is same as trustee you don't have to transfer property to yourself: So in this case this is a trust by declaration.

So if you aren't given consideration you can't compel someone to completely constitute a trust. You need either complete constitution or an enforceable K. You may require more – for some types of property writing is also required.

Why do we require these formalities: Formalities have **evidentiary function**. It corroborates the existence of a trust, and it also performs a **cautionary function**.

So these cases are all about where something short of the normal set of formalities have occurred and the

Summary from last time: Time of when beneficial interest arises is dictated by the policy and the type of law.

When do executors become true trustees: When the administration is complete. That allows maximum flexibility for the execution of the estate.

Complete Constitution: Classically when the trustee gets legal title. Property has to be conveyed to the trustee.

Trust by transferor requires transfer of property

- What if transfer doesn't take place
- Look if there is enforceable K to create a trust – this will turn on whether the settlor has received valuable consideration for the promise to create a trust.
- ***Milroy*** was volunteer - there was no consideration
- The party that provides that consideration is the party that can enforce the promise to create a trust
- **If you don't have complete constitution, you can still compel the property to be transferred if you have provided valuable consideration.**
- **However in some cases a K for the benefit for a third party does give rise to an immediate trust on promise (*Scott Manufacturing)***

Trust by declaration, where settlor is trustee, you don't need transfer of property so complete constitution is not a problem

Milroy v. Lord

Facts: Medley gave Lord the certificates to 50 shares to be held on trust for Milroy. Lord had the power of attorney to trade the stocks and to receive the dividends. Title was never transferred into Lord's name.

Commentary:

- In order to render a voluntary settlement valid, the settlor must have done everything, which according to the nature of the property, was necessary in order to transfer the property. **Since the title was never transferred to Lord, the trust was incompletely constituted; the trusts fails**. The settlor did not render the settlement binding on himself. Equity will not assist a volunteer.
- Milroy argued that there was an interim declaratory trust in her favor until transfer to Lord took place (*Ex Parte Pye*).
    - **Argument:** Settlor himself became a trustee by virtue of the Power of Attorney that he had given to Lord. However in *Pye* the PoA was given by the settlor for the express purpose of enabling the annuity to be transferred to the object of the settlor's bounty.
- Here a trust by transfer was intended w/ Lord being trustee. **The court will not give effect to one intended mode of trust using another mode (**saving trust by transfer using trust by declaration). If they did this, trust would never fail for lack of constitution.
- The only ground on which he can be held to have become a trustee of them is that he held a PoA under which he might have transferred them into his own name.
- **Milroy should have made a transfer of shares so as to confer the legal proprietorship on another person or persons. Shares should have been vested in lord.:**
    - The only ground on which he can be held to have come a trustee of the shares, is that he held a PoA under which he might have transferred them into his own name; but he held that PoA as the agent of the settlor. **So when the settlor died, the power ceased with him.**

Commentary (Litman)

- Here no steps are actually taken to transfer the shares into Lords name. Lord gets dividends on bank shares and passes some (but not all) to Medley. He uses some of those dividends to buy insurance shares. That is state of affairs when Medley (settlor) dies. Lord has share certificate but he has never really affected trust by transferring title to himself.
- Lord hands over shares certificate to Medley's executors and Milroy says that they are his.
- **Intent of Medley was to transfer shares on trust. His mistake**
    - Wrong document used
    - Not submitting document for registration
    - If he would have done this Lord would have been registered owner as trustee
- **Court says voluntary settlement, no consideration. In order to render a voluntary settlement valid the settlor needs to do everything in his power to do what was necessary to be done:** In normal course this would be to fill out the right document
- **No valuable consideration was provided so Milroy can't enforce the intended trust by way of K.**
- **Is there another way of rescuing the trust:** There was intention to create a trust, so argument that we could treat it as a declaration of trust. Medley holds shares on trust for Milroy. And so shares don't belong to the estate of Medley. Court makes it clear that this won't work b/c you can't perfect it by saying that declaration of trust saves the trust.
    - **Litman thinks this is wrong:** The facts of this case are different, the cautionary and evidentiary function of formalities are satisfied.

- **Another argument is that trust by declaration makes Medley a trustee and then he would be burdened by trusteeship. As a result you could have someone who is a trustee and they don't even know that they are a trustee. They could have a breach of trust and not even know they are trustee in the first place.**

- **Principle of case:** Represents the current law. If you try to convey property using one mode and it doesn't work you can perfect it via another mode (you can't use trust to perfect a gift) this is set out in ***Carson***
- Milroy is ultimately recognized as beneficiary of insurance shares. These shares where purchased by dividends from Bank of Louisiana shares (which court found were not hers because no trust was created)
  - Bank shares produce dividends – some remitted to Milroy some buy insurance shares
  - Court says that Milroy never lost the bank shares
  - Court says that Lord treated dividends as belonging to Milroy. So it is as if Milroy supplied the $ to buy shares so we have a resulting trust. Shares bought in Medley's name
  - This is really just a way of providing sympathetic relief to Milroy – unless you take the view that the PoA authorized Lord to do this.
  - Litman thinks this is practical justice. It is not enough to treat $ as belonging to someone else the person in authority must declare trustee or treat party receiving property as trustee

Do you actually have to convey title to completely constitute at trust? This is what *Re Rose* addresses

Re Rose

Facts: The deceased transferred stocks on trust for his wife in March 43. The shares pursuant to the articles of association where transferred by June 1943. The Crown claims estate duties on the shares as they claim the transfer was not effectuated by April 1943 (w/in 5 years).

Commentary:

- The court held that the trust was completely constituted as of March 43 and therefore the taxes were not owed. It reached this conclusion as the settlor did everything to render the settlement binding on himself. The matter was out of his hands when he instructed the corporation to transfer title. This is factually different from *Milroy v. Lord*. **b/c there, the settlor did not tell the bank to effectuate the transfer.**
- **Did he really do everything in his power?**
  - He could transfer the shares himself therefore don't apply the power test too rigorously. Mr. Rose did everything that was necessary to be done by him (endorsing certificates and handing them over = complete constitution in equity). Complete constitution in law is getting title into trustee' name. Mr. Rose is the trustee until the transfer occurs.
- You can argue here that an interim trust by declaration arises until the transfer is executed.
- Depending on the subject matter of the trust, what is necessary to be done to constitute in equity is set out in legislation relating to that subject matter.

Commentary (Litman)

- Complete constitution without an actual conveyance of property.
- In this case statute deemed every statute given within 5 years of death is part of estate. So dates are important. Critical point in time is April 10th 1943 – who owned shares beneficially. If it was Mr. Rose then shares would be included in estate and subject to calculation of estate tax.
- **Test from *Milroy:*** In order to render a voluntary settlement valid the settlor must have done everything necessary to be done to transfer the property.
  - **Necessary to be done?** Is this all in his power to do? What is the difference?
    - Can he do more – yes Rose could deliver shares to company.
- **Case says that requirement is that settlor do all that is "necessary" for them to do:** In this case he had to fill out form, sign it and deliver it. Here he did all this. He had done what was necessary to be done by him. So at that point we have complete constitution in equity not in law. In law you only have CC when trustee gets title.
- **So effect of what he did was a trust by declaration. This brings us back to *Milroy* you can't transfer property intended by one mode to be saved via another mode. If intend trust by transfer it can't take effect by declaration. Also if you intend gift it can't take effect as trust by declaration.**
  - So a trust by transfer can take effect as a trust by declaration is you fill out the correct documents. For some limited period of time or otherwise, as long as you execute the correct documents and meet the requirements of doing everything that is necessary to be done by you.

- Important thing is that complete constitution in equity can override ***Milroy*** principle

Carson et al. v. Wilson et al.

Facts: W owned lands and mortgages and executed valid deeds and assignments for these assets in favor of named donees. W advised by solicitor that without delivery the gifts would fail. W said he would deliver the documents but he instructed his solicitor to do so. Documents were not delivered by time of W's death.

Commentary:

- **Issue:** Gift v/ trust
- To establish a that a trust has been created, it is essential to prove an intention to create the trust. Here the donor purported to make a gift by deed of transfer or assignment to the supposed *cestuis que trustent.*
- This is wholly incompatible with the view that he intended to declare himself a trustee, for that is a character which assumed that he was able to retain the property to himself and not to part with it.
- **The court will not perfect an imperfect gift by declaring a trust.**

Commentary (Litman)

- Court applies the ***Milroy v. Lord*** principle that this was an intended gift by transfer you can't rescue it as a trust by declaration. If you intend to do it one way you have to do it that way.

So any time you have a trust with a type of property – was is necessary to be done is different depending on the type of property. This is wrt transferring or conveyancing forms. But the basic rules are the same – the forms have to be filled out and they have to be handed over to company effecting the transfer of the intended beneficiary.

Enforceable promise to create trust: There is a body of law that in the absence of valuable consideration the courts can create a promise to create a trust by treating the promise as a promise to create a *chose in action* that takes place immediately.

- Promise to create a trust is a chose in action, it is a binding promise in law, there is a sealed document or nominal consideration. Trustee holds that chose in action on trust for intended beneficiary. It is enforceable b/c it is binding in law
- This is just a fictional way of circumventing around the requirement of valuable consideration.
- If there is a trust of a chose of action then the beneficiary can sue the trustee.
- **No immediate trust but a collateral trust of a chose in action**

<u>Exceptions to the Maxim that "Equity will not assist a volunteer"</u>

The Failure to complete the necessary formalities to create a trust is not as fatal to the creation of the trust as one might believe.

- In some cases equity regards a gratuitous promise contained in a deed to create a trust some time in the future as creating an immediate trust of a chose in action. The chose in action is created by the binding promise to create a trust made under seal
- **Rule in *Bird v. Strong:*** regards intended gifts as being completely constituted if a donee of the gift is named executor of the donor's estate and thereby acquires legal title to the intended subject matter of the gift.
  - **Precondition that donor die with the intention of making the gift.**
  - This is another peculiar way of perfecting gift
  - Donee is named the executor – as such they get legal title to estate and so the court says that the gift is perfected.
  - This is completed artificial. The donee acquired legal title in capacity as executor, but the courts say it doesn't matter.

Sometimes Equity will disregard its own requirement of complete constitution in the interest of giving effect to an unequivocal intention to create a trust. However the mechanisms for doing so are creative, complex and highly artificial

Re Halley Estate

Facts: The deceased intended to create a trust in favor of his granddaughter, with his daughter as trustee, the trust property being shares. The shares were never transferred to his daughter, but she acquired legal title upon his death as she was name executrix.

Commentary:

- The court refused to extend the *Bird v. Strong* doctrine to a trust settling. They distinguished the factual situation: the executor was not to get the beneficial interest as in *Bird v. Strong*. This is really a technical reason and does not explain why the doctrine should not be imported.
- Litman thinks there was no reason not to import it into a trust context.
    - One could possibly argue that the doctrine is not reasonable in either setting. It has become entrenched in an inter vivos gift setting but the court does not want to extend a bad doctrine to the trust settling.
    - The rule in *Bird v. Strong* surpasses the cautionary function of making settlor divest himself of property.
- H**ow come at the end of the day there was a trust?**
    - The court implied a declaration of trust

Commentary (Litman)

- Tries to extend ***Bird v. Strong*** to trust situation. But this only applies when executor gets property beneficially. It should not be extended to the trust situation.
    - Litman view on this:
        - B&S is artificial rule – we should extend to trust relationship.
        - This is leading authority in Canada and they say you cannot extend B&S into a trust situation

Revocability

Inter Vivos Trusts and the Statute of Frauds

Until the SoF it was easy to allege a trust without any evidence. SoF introduced writing requirement – if trust of land then it must be evidenced in writing. Problem that occurs thereafter is that mischief just changes form. People would use the SoF to perpetuate a fraud

S.7 of SoF: Trust of land, arising out of intention must be evidenced in writing – what if it is not – it is unenforceable.

- **The document must be signed**
- ***Rochefoucauld v. Boustead:*** Document must prove what the trust is with sufficient fullness and precision
- ***Langille v. Nass:*** You have to set out what the trust pertains to. You need a certain minimum amount of information in the writing before you are brought into this section. In this case it was clear what the terms of the trust were from the document.
- **Litman: thinks that the documents must prove more than the 3 certainties.** It may not tell you the nature of the estate – that is a material term, it may not tell you about a power of appointment that the trustee may have that may have the effect of depriving the beneficiary of the property. So you could say that the writing must make reference to all the material terms. We are really not sure how much information will be sufficient to satisfy the writing requirement in S.7
- **If you know that three certainties are met through document then you can use parole evidence to ascertain material terms –** however S.7 says that the evidence must ascertain the trust
- **If there is insufficient writing then we have to look at whether the S of F is being used as an instrument of fraud.**

S.8: Some trusts arise by operation of law. They need not be in writing (exemption here)

S.9: If you are dealing with a **grant or assignment of an equitable interest**, it **must be in writing**. That is different than S.7 that says "evidenced in writing".

The document has to be signed.

S of F says that the trust in unenforceable however a trust may still exist

Summary from last time: B&S is inapplicable to the trust.

Rochefoucauld v. Boustead

Facts: The Defendant, B, purchased certain lands, which he later mortgaged. Upon finding himself bankrupt he allowed his mortgagees to sell the lands. The plaintiff, R claimed that the D had purchased the lands as trustee for herself. The D had purchased the lands formerly owned by B and agreed that he would hold the lands for her during financial difficulties.

Commentary:

- So the defendant is saying that because of the statute of frauds the trust must be in writing, since there was nothing in writing then no trust and hence fraud is complete.
- One **can not use the *Statute of Frauds* to perpetrate a fraud**.
    - In this case, the trustee is refusing to transfer the land to the beneficiary b/c he knows the trust is not enforceable (it doesn't comply with the statute of frauds). He can not do this. But what is his fraud?
    - The rational is that he is unjustly enriched.
- **Statute of Frauds:** Prove by some writings signed by the defendant, that the conveyance was subject to some trust, but also what the trust was.
    - **So in this case there will be a trust found, but the trust will be a CT – based on UE.**
- **You can't have trustee use the S of F as an instrument of fraud, in the sense that the trustee was not intended to get beneficial title.**

If you apply this principle to a trust by declaration: then there is no formalities to a trust by declaration – there is nothing performing an evidentiary or a cautionary function. Complete constitution involves formal extent that involve cautionary and evidentiary functions. There is an argument that from a function point of view it is mistake to apply this principle to trust by declaration – **there is no authority on this point one way of the other**

Counter points: Valid trust but the trust in unenforceable. There is a valid beneficial interest and there is a fraud in that the beneficiary does not have access to the beneficial interest.

So when you apply R&B what type of trust are you enforcing: ***Bannister*** does not uphold an express trust but a constructive trust. Court goes on to enforce the constructive trust. This also happens in ***Langille*** where a CT is upheld. ***Scheurman*** also says that whether the property was held for the husband or a third party then the trust would be held for him.

- **The criticism of R&B is that what is the remedy:** B cannot retain the lands, he was not intended to be anything but a trustee (that is UE). So do we enforce the express trust? If you do then you are ignoring S.7 and there is no writing. As a result, a lot of commentators are correct when you say you shouldn't enforce the express trust. So that means that B cannot retain property but that the trust is not upheld
- **So what is the solution:** B holds on trust for someone other than the intended beneficiary of the express trust. In R&B even if the court had done a CT analysis the result would have been the same. It makes sense to call it a resulting trust or CT because it causes S.7 to be upheld and as per S.8 you don't need

So the case law is mixed we don't know if you have CT forward or backward. CT backward is like an express trust.

Argument that CT forward is just an artifice to enforce the express trust.

Summary: It is not completely clear if you enforce express trust or CT, and better view is that it favors the CT back rather than CT forward. That is most respectful of the statute.

Case law is divided on whether solution to R&B is CT forward or back:

- **Issue:** What trust do we enforce
  - **Express trust:** No this ignores S.7 – there is no writing that makes express trust enforceable (but they did this in R&B)
  - **CT:** make one up to respect the provisions of the S of F and make sure that trustee doesn't use S of F as an instrument of Fraud
    - **CT Forward:** To intended beneficiary of the express trust – ***Bannister, Langville & Nass:*** This seems a lot like you are enforcing the express trust and calling at a CT
    - **CT Backward:** To the settlor, this in Litman's idea is the best idea.

R&B enforces express trust

Bannister give CT Forward

Bannister v. Bannister

Facts: P made oral undertaking that the D would be allowed to live in a cottage rent free for as long as she desired, to which the D agreed to sell to him the cottage as well as an adjacent cottage. **The P's oral undertaking was not included in the formal conveyance**. Subsequently with the D's consent, the P occupied the whole of the first named cottage with the exception of one room, which the defendant continued to occupy. In an action for the recovery of possession of that room, the P claimed that the D had been occupying it as a tenant at will and that her tenancy at will had been duly determined by notice to quit. The D counterclaimed for a declaration that the **P held the cottage in trust for her for her life**.

Commentary:

- A constructive trust raised here favoring the D and the P holds trust for D during lifetime. Court applies trust forward.
- **Cannot use SoF to perpetuate a fraud.**
- The statute of frauds cannot be used to say no trust if to do so would be to commit a fraud
- **Could argue however that the person changed their mind:** So question is whether the rule in ***Rochefaulcault*** has application in this context.
- **Here defendant was settlor and conveyed it to P.** She is both settlor and beneficiary. So what is the remedy here?
  - **D entitled to declaration that that P held on trust during lifetime**

Scheuerman v. Scheuerman

Facts: Husband purchased land in Edmonton, and transferred property to wife. While he was in US, the wife sold the property for profit, and husband brought action claiming resulting trust and that the property was his and the residue of the purchase price that the wife held was beneficially held for him.

Commentary

- He was trying to get $, she can't use it herself b/c she would have to convey $ back to him. He was relying on his own illegal conduct and you can't do this (UE principle).
- **Intention of transfer:** Was to conceal the property from creditors
- **Allegation of express trust**: Allegation of an express trust arising out of the oral agreement that the property was to be held for him with the object stated. The wife cannot use the S of F to say that there was no trust, when to do so would be to commit a fraud. However in this case the entire arrangement was based on his own illegal conduct, and he was trying to rely on his own illegal conduct to have the $ revert back to him.
  - **In order to prove resulting trust he would have to show that his purposes were fraudulent**
- **In this case S argues that the court should enforce a CT backwards not forwards. He is arguing that it is a CT back to the settlor. CT forward means CT forward to the intended beneficiary of the express trust**

Langille v. Nass

Facts: Action for damages for acts of trespass alleged to have been committed by the defendants by B&E into a building known as "Farmington Hall" and unlawfully trespassing upon lands and premises conveyed to the plaintiffs in trust. P seek to recover damages for trespass to FH.

Commentary:

- Court says if *Stature of Frauds* not satisfied, there's a constructive trust in favor of beneficiaries under express trust. This court avoids the statute by applying constructive trust forwards.
- Constructive trust then becomes another way of characterizing express trust.
- In this case it was not a private trust but rather a charitable trust, for the benefit of the residents of Farmington, an uncertain or fluctuating body
- **It looks like they are upholding the express trust but calling it a CT**
- **CT forward:** CT is not in favor of the settlor but it is moving forward in time.

Hypothetical 2 (pg 275): Ivan is trustee by operation of law, denying it unless he can rebut the presumption of resulting trust amounts to fraud. R&B principle has application here. Settlor in effect would be Sidney.

Hypothetical 3 (275): Acknowledgement is not enough for S.9 if S.9 has application. It if is a grant or assignment it has to be in writing not just acknowledged in writing. If transaction is grant or assignment then S.9 has not been satisfied. If S.9 is not satisfied then there is no trust. Question is whether this even involves S.9

- **Grant or Assignment of Equitable interest:** This doesn't appear to be happening here, it is the creation of a subtrust, not a trust grant or assignment of an equitable interest.
- **S.9 does not cover subtrusts. There is a debate as to whether cover areas to the creation of a subtrust.** In a subtrust, if the trustee of the subtrust the primary trust operates and you get a subtrust. This section applies when you are granting away your equitable interest – debate if you hold you equitable interest for someone else.
    - **Debate favors position that it doesn't apply to a subtrust situation**
    - **What is S.9 trying to achieve:** Litman thinks that they are trying to create an evidentiary trail for something that is difficult to document – the transmission of an equitable interest. They want documentary evidence b/c you have a trustee that needs evidence before it starts remitting $ to a third party. To have documentary evidenced for a subtrust structure is of no interest to the original trustee – the original beneficiary is still in place and that is all that matters for the purpose of the original trustee.

Judicature Act s.21(1): Assignment of chose in action

When debt or other legal chose in action is assigned by absolute assignment in writing. There is argument that section is codification of the notion that writing is required (S.9) and also that notice is required (equitable principle). However the reference to the legal chose in action. However **Snell** says that equitable CIA come within section. Legal should be read as merely enforceable by the courts. Litman agrees with this. So upshot of analysis is that unless you have the intended beneficiary stepping out of relationship it is completely of no interest to the trustee. The trustees duties will be unaffected by creation of subtrust. So for subtrust you don't need writing or notice.

So if S of F says you can create trust of PP without writing. Then it doesn't matter if you are dealing with a CIA rather than PP.

S.9 only applies then to transactions that involved the beneficiary of a trust doing a transaction that introduces a new beneficiary to primary trust (not a subtrust)

No writing req for creation of subtrust – that is true for both land or personalty.

It is not easy for beneficiary to assign their interest – you are varying trust (you need judicial permission *s.42 Trustee Act*). But if Trust instrument says that you can assign you interest under the trust then it can be done. If the beneficiary does this (after trust instrument said it could) then S.9 applies.

Secret Trusts

Important for a couple of reasons: Sensitive relationship issues you don't want to make public, also you may not want to make public certain information even if it not about sensitive issue.

Content of ST is not public. Contents of a will is public. Content of will may make reference to trustee of ST but there is a privacy advantage to the secret trust

ST in the context of wills law: Formal wills require witnesses, signature at bottom of document, and document must be in writing (or if formal will then typed). Holograph will have their own formalities, all in writing, signed at the bottom. Signed at bottom, has to be in the handwriting of willmaker

How do you modify document (Will): By codicil that meets the requirement of formal or holograph.

So if you have a formal or holograph will that says all my estate to T: if you later execute a document (codicil) that doesn't meet requirements of wills act then it won't take place. Change has to meet requirements of the wills act. Courts say that you are trying to skirt around the wills act.

Half Secret Trust: Arise in will, refers to named beneficiary as a trustee and doesn't provide the terms of the trust

Fully Secret Trust: Don't know that someone is taking as a trustee. You think beneficiary is taking as an ordinary beneficiary but there is secret arrangement

Rationale for enforcing secret trusts:

a) For fully secret trusts you have to enforce or else the secret trustee would use the *Statute of Wills* as an instrument of fraud.
   i) You are binding the conscience of the secret trustee and using SoW to utilize fraud and preventing UE at the end of the day
   ii) What about where the secret trustee doesn't prevent to keep the property for himself?
b) For **half secret trusts**:
   i) No possibility for unjust enrichment – you know that trustee will not get property beneficially.
   ii) One argument is to protect beneficiary (litman doesn't like)
   iii) Protect reliance of settlor:
c) There is a problem with the rationale – every time a willmaker executes a defective will someone is UE
d) **Answer:** Litman is not sure – this is one of the problems. It may be that judges think these are socially usefully interests designed to protect privacy – no real mischief and as a result they are understandable.

Two interrelated questions wrt the cases:

- <u>What are the communication rules that apply to fully and half secret trusts</u>?
  - **Fully Secret:**
    - **Rule:** If secret trustee doesn't know they are appointed as a secret trustee, or finds out about intended beneficiaries after death of testator, then the courts have found these secret trusts to be invalid. The trustee would take the interest free and clear. If communication within the life of the willmaker then the secret trustee is bound
    - Constructive delivery: sealed orders are just fine. Naming people in a document and licking it closed and saying not to be opened until death and if given to agent or trustee then that is ok.
    - Incorporation by reference: document must be existence at time the will is made. But if a secret trust, the document can come into existence later – also you can have oral discretion that gives rise to trustees duties
  - **Half Secret:**
    - The communication rules that seem to be accepted in Canada are in accordance with the traditional UK rules

- **Rule:** Terms of the half secret trust must be communicated before the will is signed. Any communication after the will is signed, isn't valid.
    - **Rationale:** If the rule would be otherwise then we would be permitting willmakers to bypass the requirements of the *Wills Act*.
- No fraud in half secret b/c we know that person is trustee.
- Rule is historic one in UK and Canada (***Jankowsky)***
- **Ireland and Aussie:** Rules that govern half and fully secret trusts should be the same (communication up until death of settlor)

- Are these secret trust really testamentary or are they inter vivos?
    - We have to figure out what a secret trust is – is it testamentary or IV
    - ***Gardner:*** Says that it is not testamentary but doesn't say what a secret trust is. Question is at what point in time interest is obtained. If not a testamentary gift then all rationales wrt communication that implicate *Wills Act* don't apply.
    - **Problem with *Gardner:*** Fine to say Doctrine of lapse doesn't apply but question is when did the beneficiary acquire their interest. Was it simply when the communication was made to the secret trustee. If the answer is yes then that is extraordinary because normally we require more than a communication of an intention to create a trust. Especially when document for creating the trust is a will that can be revoked by the will maker. Also what about complete constitution. Where is the complete constitution of the trust. We don't get any explanation of this.
        - The reason is that these are arrangements that courts want to give effect to and they are scrambling and making up doctrines that are less than coherent.
        - No matter what theory you come up with to explain enforcement of secret trust there is no complete constitution. It is the operation of will that conveys title and that is what completely constitutes the trust. What about the rule in **Milroy v. Lord?**
    - ***Re Young:*** Secret trusts operate outside of wills, and in the case of ***Gardner*** the interest vests prior to the death of the will maker.
    - **What happens if the estate is insolvent**
        - Can secret trustee say that $ is not available for distribution to the creditors (it is trust asset) or can the trust assets be used to pay off creditors.

At the end of the day the conclusion may be that the courts are being very results oriented.

Questions we are left with: It appears they are not testamentary but if not then it is hard to determine how they would be constituted. Also real question that if they are not testamentary then why are we referring to *Wills Act* justification for the communication rules (an also why we have different rules for fully secret and half secret trusts)

In Re Boyes

Facts: Testator dies leaving personal property. He communicated intentions at the time he made his will that the D should take the property as trustee upon trust to deal with it according to further directions, which the testator was to give by letter after his arrival on the continent. He said that he wanted to make certain provisions for a lady and child, but that he didn't want their names to appear in the will. As such he wanted to give the entire property to the defendant as trustee to act thereto with respect to any further directions that he would give. The word "trustee" however was never used. He went to the continent but never gave any further directions in his lifetime. There were however two letters directed to the defendant stating intentions to devise property that were found after his death

Commentary:

- For the secret trust to be effectuated, the **communication to the devisee must be made in the testator's lifetime naming the beneficiary** and covering the terms of the trust.
    - The devisee or legatee cannot, by accepting an indefinite trust enable the testator to make an unattested codicil
- The trust need not be mentioned in the testamentary devise.
- In this case, while the devisee was aware that he was to be trustee, he did not become aware of the terms of the trust specified in the letters, till after the death, **as such the trust must fail**.

- Had the letters been executed as a **holographic will**, the trust would have been upheld. The letters would have to been in the handwriting of the testator and it would have to been signed at the foot.

In Re Blackwell

Facts: Testator has 16 year old son, the women of a child who was not his wife. He wanted to provide from them without disclosing all the circumstances about their existence in the will. He told B and W who were his friends and they agreed to be his trustee for this purpose. Instructions were incorporated by reference in 4th codicil to the will for 12000 pounds to use pursuant to this desire. Allegation by widow that fourth codicil fails and $ goes into residue.

Issue: What extent it is possible to give effect to testamentary intentions that are not contained in a written document duly executed as a will

Commentary:

- The court describes the reasons for upholding such trusts.
- It is to uphold the **reliance interests of the testator**.
- To do otherwise in the case of a fully secret trust **could lead to fraud**, the trustee keeping the property for himself.
- The court then addressed when the communication to the trustee had to be made.
    - In the case of a **fully secret trust**, there must be communication prior to death.
    - In the case of a half-secret trust, the communication must have taken place prior to the execution of the will or codicil; if not the property results back to the estate.
- To allow otherwise would be to invest in the testator the power to make **unwitnessed dispositions**. Litman thinks the courts are being influenced by the doctrine of incorporation by reference. The court suggests that these trusts are not testamentary trusts at all.

Ledgerwood shows the Irish and Aussie position wrt half secret trusts:

Ledgerwood v. Perpetual Trustee Co. Ltd

Facts: Communication wrt secret trust was made after the time of the will.

Issue: In the course of discussing the timing rules for communicating who the beneficiaries of a half-secret trust are.

Commentary

- **Rule:** ***Blackwell:***
    - In the case of a **fully secret trust**, there must be communication prior to death.
    - In the case of a half-secret trust, the communication must have taken place prior to the execution of the will or codicil; if not the property results back to the estate
- **Irish Position:** ***Re King's Estate:*** There can be a valid half secret trust even if the communication is made subsequent to the execution of the will.
- **Court follows method in** ***Re Browne:*** It is also immaterial that the trusts were communicated after the execution of the will, so long as they were communicated to the legatee, and accepted by him in the life time of the testator.
    - ***Re Prendville:*** There was no difference in the rules applicable to fully secret and half-secret trusts on the subject of communication
- A secret trust is not constituted simply by notification **but rather by notification coupled with the giving of an undertaking,** and it is this factor which distinguishes an effective secret trust from an abortive attempt at incorporation by reference

Jankowski v. Pelek Estate

Facts: Testatrix was twice married.. She accumulated some property through the first marriage. The 2nd marriage was an unhappy one. She made a number of wills in which she left her second husband a small amount of $ and the rest of the property to various members of her family. Mr H, a solicitor, whom she knew well, drew up all of the wills. She gave instructions to him at his house. He was named as executor. Mr H typed out the will and it was property executed. At issue was the last clause of the will that directed the residue to be paid "to my said executor to deal with as he may in his discretion decide upon". Immediately after the will was signed, the testatrix told Mr. H the names of the persons who should receive the residue. Mr H wrote the names on a

separate sheet of paper and had the testatrix sign it, but the signature was not witnessed. Her husband made an application for an order declaring that the clause containing the residue was invalid and that the testatrix died intestate with respect to it. The residue would then pass to him as her sole intestate heir. The judge at first instance dismissed the application, the husband appealed and the appeal was denied. The majority and dissent differed on the issue of secret trusts

Commentary:

- **Huband (Dissent):**
  - A fully secret trust arises where the legatee ostensibly is entitled to the beneficial interest in a legacy. Any trust obligation which the legatee has undertaken is hidden from view, revealed only by extrinsic evidence. In such circumstances, where the testator has communicated the intention that the legacy should be held in trust for others, where the objects of the trust are known to the legatee, and where the legatee agrees to act as trustee or acquiesces in that arrangement, the trust will be enforced, and extrinsic evidence is admissible to prove the essential facts
  - **It matters not whether the arrangement predated or postdated the making of the will**. The court will enforce the trust in order to avoid the fraud on the part of the legatee were he to keep the legacy as his own in defiance of his undertaking.
  - **This is intended trust and rules pertaining to secret trust have no application**
  - **Half secret trusts:** legatee is identified in will as trustee but terms of trust are missing
- **Helper (Majority):**

Issue of IV v. testamentary is set out in Gardner

In Re Gardner

Facts: Will with secret trustee who holds on trust for A. At death of willmaker A has already died. So intended beneficiary predeceases testator. Wills doctrine says that if you name them as beneficiary then doctrine of lapse applies (gift fails)

Commentary:

- Does testamentary doctrine of lapse apply to secret trusts?
- No. **They are then not testamentary**.
  - A's heirs step into A's shoes wrt trust
  - You can't make testamentary or inter vivos gift to a dead person, therefore secret trust must arise before the death of the beneficiary

Commentary Litman:

Revocability (pg 265) – in section with Complete Constitution

Issue: Can you as a settlor can you revoke it. If you have then you haven't rendered the settlement binding on themselves (***Milroy v. Lord)***

Cannot argue power to revoke unless you have expressly reserved it to yourself

Issue 2: If you have reserved it is it effective in law? (you haven't rendered settlement binding on yourself)

S creates trust as T as trustee B is beneficiary – monthly income and upon B being 25 gets ½ capital and 30 gets other ½ capital

- Trust includes an explicit power to revoke
- Argument: until you exercise your power to revoke it is binding. Even if you do get a later revocation that revocation cannot undo the remittances. Beneficiary keeps $ distributed so in that sense the trust is binding until the settlor revokes. It is B that enjoys fruits of
- There are tax consequences for an express power of revocation: settlor pays tax b/c they retain control of property

Resolution of Issue: ***Schmidt v. Air Products of Canada Ltd:*** Case deal with whether you can have explicit power of revocation and the courts say that you can. Court says that this power is valid (no worry about ***Milroy).*** Also if you have power to revoke then you also have power to amend the trust. What the case doesn't say however is that if you use this power of amendment whether any amendment is considered to be the creation of a new trust (resettlement) or whether you can amend within the framework of the non-existent trust. Courts have been slow to recognize that if there are major changes to terms of trust then that if new trust (since that has tax consequences).

Settlors of trusts that are intended to benefit creditors: Settlor sets up trust to secure the interest of the creditor. Questions have arisen about the revocability of such trusts, and the case law have said they are not revocable. **Gillese:** They are not really trusts, they are arrangements for paying creditors (one argument). The other argument is that if they are a trust then the real beneficiaries are the debtors not the creditors. So even though it looks like revocation of a trust it is termination. It is the debtor that it terminating in capacity as beneficiary. **Litman:** Thinks that they are real trusts. Debtor is not a beneficiary.

There is a splinter bit of case law, and if you want a power of revocation that says you have to explicitly set it out but ***Schmidt*** overrides

CHAPTER 11: LIMITATIONS ON THE SETTLOR'S POWER OF DISPOSITION

Trusts against PP

Examples: Trust that promote celibacy, promote an encouragement of the weakening of the sanctity of the marriage bond, defeat creditors

Perpetuities

It is in the context of trusts more than anything that you see perpetuities arise. You have class gifts for individuals that must satisfy a contingency, etc. It is in the context of trusts more than anything that the rule is vital.

Purpose of rule: Prevent settlers and testators from projecting their control over property for too long a time after they have ceased to be owners. Rule is all about controlling contingent interests that have effect of tying up property. If talking about interests in particular land then contingencies stall the deals wrt land.

- Rule is all about controlling the period in time that the interest may be contingent
- While the interest is contingent it undermines the ability of property to rise to best and highest use. Rule had to strike balance b/w allowing contingencies and making sure it isn't contingent for too long. So court said if it had potential to be contingent longer then that period of time – if it vests outside of the perpetuity period then it is void at the outset
- Rule concerned with possibilities not probabilities – where it is possible that a contingent interest will vest outside of the perpetuity period it will be void under the rule

Rule: Timely vesting – an interest must vest, in interest, if at all, within 21 years after the death of some life in being at the creation of the interest – plus a gestational period in applicable cases.

- **So Life in Being + 21 Years + Gestation Period (if applicable)**
- Rule applies to equitable contingent interests (beneficiaries interest under trust)
- Must satisfy the rule at the instant of creation

Example: Trust in favor of A's children who attain 21

- Is there any possibility for remote vesting? A is alive and has two children who are 10.
- This is valid

- **We know that one of A's children will attain 21 years within 21 years of A's death**
- Because you can point to a person and say that for sure the person is alive and say that within 21 years of that persons death plus a gestation period vesting will occur
- A is helpful live in being
- Key is to find a relevant or helpful life in being: This is someone who is alive and ascertainable of whom you can say that within 21 years of their death plus a gestation period vesting will occur if it ever occurs.

- So question of whether interest violates the RAP is whether there is relevant life in being. LIB is someone if ascertainable you know that vesting will occur within 21 years. And so the rule will tolerate contingent interests within 21 years.

Example: Trust to A's grandchildren who marry.

- A is alive, no children no grandchildren. Can we say that within 21 years that we know that his grandchildren will marry. The answer is obviously no
- What if A is alive: C1 & C2 – Can we say of parents that within 21 years of death kids will marry if at all. No
- What if we add grandchildren to mix: GC1, GC2, GC3, GC4 – A is not relevant helpful life in being neither are kids. We know that if GC1 marries and also GC2-4 that if they marry then they will marry within their own lifetimes. So our relevant and helpful life in being is future survivor of life in being. However there may be additional grandkids – this precludes us from finding a relevant LIB at the CL.
- So if we have trust established and A is deceased an all of A's kids deceased then no more grandkids so relevant LIB if survivor of grandkids

Class Closing Rules: What if one of the kids is already married (above example) at the creation of the interest. So the fact that **<u>one of the members has satisfied contingency the class becomes closed</u>**. As a result – notionally only those grandchildren who are alive when the class closes may benefit from this gift. This being the case the possibility of after born grandkids becomes irrelevant. The class closing rules are independent from the RAP, and they can have the effect of overcoming the CL perpetuities problem.

- Only these members share in the gift and the class closes to any other potential future members. However, if at the earliest potential moment for distribution, no members are in existence, or have been in existence since the creation of the gift, the class stays open and does not close artificially at all.
- **If the interests vest upon some contingency:** Eg "to the children of A who marry" or "to the children of A who become medical doctors"

The all or nothing perpetuities rule: Works to invalidate a gift to a class unless the interest of every possible member of the class must vest, if at all, within the perpetuity period. If the interest of even one potential member might vest outside the period, the entire gift fails even in respect of those whose interests have already vested.

Lives in Being: Traditional approach is to categorize into express lives and implied lives

- **Express:** Those lives that the limitation expressly indicates are used to be a measuring stick in determining the date by which vesting must occur.
- **# of potential lives in Being:** ***Re Villar:*** vesting postponed until the expiration of 20 years from the death of the survivor of all lineal descendants of Queen Victoria living at the testators death (120 in 10 different countries)
- **How to determine:** Look to people named in trust

***Perpetuities Act* –** Came into force July 1st, 1973. The act is not retroactive and so it is still possible that the CL will invalidate perpetuities devised pre 1973. So s.25 says that anything earlier than July 2nd 1973 you use the CL, but anything July 2nd or later is to apply the statute.

- **S.9: Rebuttable Presumptions: Fertility**
  - **S.9(1)(a)(i):** Rebuttable presumption that a male under 14 years of age is incapable of having children
  - **S.**9(1)(a)(ii0: Rebuttable presumption that female under 12 and over 55 is incapable of having children.
- **S.4 Wait and See Provision:** Suspends the operation of the rule of perpetuities which normally applies at the creation of an interest. If vesting occurs within perpetuity period then gift is valid (so it suspends declaring the gift to be void for 21 years)
- **Lives in Being:**

- **S.5(1)(a)** in order to be a life in being, the person must come within a class of persons designed by section 5(2)
    - Person must be alive an ascertainable at the creation of the interest
    - Person who makes disposition is live in being (settlor but not testator)

- **Age Qualification:** S.6 – age is reduced as much as is necessary to save the gift. Rather than automatically reducing the age to 21 years, (as in the UK legislation) the age is reduced to the extent that most closely gives effect to the testator's or settlor's intention.
- **S.7: Age Reduction and Exclusion**

Litman (*Perpetuities Act):*

- RAP applies to every contingent interest whether it is in a trust or not. In the statute if you look at S.22 however it says that the RAP does not apply, and has never applied to pension trusts, annuities, institutional trusts.
- First thing you do is to apply the CL law, if it is satisfied as per the CL then you don't need to apply the statute
- **Examples:**
    - **To A's Grandchildren who attain 21:** A is alive, two Children C1 &C2 and Grandkids GC1 – GC4. All grandkids are less than 10
        - GC will obtain 21 within lifetime but they are not only possible live in being.
        - A could have new kids not just C1 & C2.
        - So based upon set of facts there is no life in being. Even if A was 90 (women) you can't say that she couldn't produce another.
        - So under the CL you have invalidity
        - But if you changed facts you might have validity
        - The class would close at the time that one of the beneficiaries have satisfied the contingency at the creation of the interest. So if you change facts that one of the GCs are already 21 when gift comes into existence then the class would close – it would allow for immediate distribution of share that GC would get. B/c we have closed the class and no possibility under law of additional GCs then CC rules have had indirect effect of providing a remedy to the Perp problem.
        - Assume again that everyone is less than 21 years of age, CL not satisfied so you apply the statute:
            - S.11: This is the instruction manual. It says that the *Perpetuities Act* should be applied in this order:
                - S.9: Presumption of Fertility (rebuttable presumption)
                    - If A is alive and is 90 then she is not fertile, so we don't have to worry about. So the CL problem has been cured in that we know that every CG will attain 21 years of age within 21 years of the death of C1 or C2.
                - S.4: Wait and See
                - S.7: Age Qualification
                - S.8: General Cy-pres Provision
    - **To A's GC who marry:** A is alive, C1 & C2, GC1 – 4, not married at the time of the interest.
        - CL there is no life in being
        - S.9 doesn't help
        - S.4 is the "wait and see" provision – at CL RAP had no patience. There was no waiting and seeing. This section says wait and see. But to do so you need a different conception of what a LIB is.
            - If we are going to create a wait and see regime we have to know how long to wait and see
            - What this statute does it that it continues to use the CL formula
            - You can wait and see for a LIB + 21 years + gestation period.
            - **What the act does is it changes the concept of LIB for the purposes of Waiting and Seeing:** LIB is set out in S.5. 5(a) says in order to be LIB, a person has to be alive and ascertainable, and they have to be found in the list set out in 5(2)
            - **So you make a LIB list:** Wait to see whether contingency is satisfied up until 21 years after death of LIB. The people on list are those alive and ascertainable and in 5(2)
                - Person by whom disposition is made
                - The person to whom of in whose favor the disposition is made
                - Class: any potential member of class
                - Person who has child who may benefit

        - Person who takes any prior interest in the property
        - (e) exception to rule about alive and ascertainable: This is the "unborn widow problem" in one situation a person who is not alive and ascertainable may be LIB – To A for life remainder to A's widow remainder to A's eldest child then living. At CL A's eldest child had contingent interest. **This section says you can use an unborn widow as LIB**
    - **So in our case who is LIB for purposes of wait and see:** C1&2 are on list, GC1-4 are on list.
    - So you keep track of these people, and also the potential beneficiaries. Once the last of the people who are LIB then you know that you have another 21 years (+ gestation where relevant) to vest. So you could add to beneficiaries. If you had an unborn GC as long as they marry within 21 years of death of last LIB then that is ok
    - CL class closing rules still apply, therefore once you begin waiting and seeing it is possible that one of the GCs marry. Say GC1 married 10 years into the wait and see period, the class then closes and GC6, who was born later, and any future born GC are excluded.
    - So we wait until last person is alive and then after that person dies there is only 21 years left. Assume that at the end of the wait and see period then 3 have married and 1 have not, so it is possible to have remote vesting. This is where S.7(2) comes in.
    - **S.7(2) you can kick certain members of the class out:** Authorizes this because otherwise the gift will be violated. This is **exclusion of class members to avoid remoteness**
- **To A's GC who attain 30 (Trust):** A, C1&2, GC1-4.
    - At end of W&S GC1 the oldest are 24, GC2-3 are both 22, and GC4 is 21.
    - We have waited to the end of the perpetuity period, if we punt them all then the gift will fail
    - **S.6 is age reduction, it authorizes them to reduce the age such that it will safe the kids as long at the age is 21 or greater.** So in this case, S.6 says that if you want reduce age to safe gift then that is ok. You reduce age to 21. If age of youngest was 18 at the end of the W&S then you could not use this section. Maximum reduction is 21. You only use age reduction or class exclusion when it becomes necessary and that is usually at the end of the W&S period, but you may need to use this section earlier.
    - If 18 year old at end of W&S then you can't safe the gift by reduction. **This is where S.7(1) comes in – you will have to kick someone out of the class even though age reduction hasn't helped, so you would use this section to kick out the youngest GC.** At the end of the perpetuity period you may have to kick out potential beneficiaries, s.7(1)

So when you get problem you apply CL, see if class closing rules are satisfied to overcome RAP, then go to statute, see if presumptions of fertility help, then go to W&S, make your list and wait until 21 years of LIB, and also make list of beneficiaries, you can add to list unless class is closed, then remedial provisions help out as well

S.8: General *Cy-Pres:* This is last section to apply to remediate a CL problem. When it becomes apparent that disposition would void RAP (you W&S) and general intention of rule can be ascertained then the disposition **shall** if possible and so far as possible be reformed to give effect to rule. **Judge is given authority to rewrite the actual trust so as to give effect to the general intention of settlor but only within the limits of the rule against perpetuities.**

What this is saying that if you can follow the general underlying intention of the settlor but in a way that satisfies the rule against perpetuities:

There have been no cases on this. When you rewrite it you still have to do it within the limits of the RAP.

It remains to be seen what will happen with this.

S.20: Employee benefit trusts (Non charitable purpose trusts) are changed to a power valid for 21 years.

CHAPTER 12: PURPOSE TRUSTS

Charitable Trusts

Notion of what is a charity is the same: However there are different vehicles (Trusts, corps, etc)

Financial Advantages enjoyed by Charities: tax receipt from donation, tax receipt for shares get receipt and no CGs tax, charities don't get taxed wrt income generated by trust funds. Charities need tax # in order to get charitable status, CRA has to be satisfied that CL test of what is charity is satisfied.

It is the purpose of the trust that are critical – are the purposes charitable:

Legal Advantages: When you have a gift to charity, certainty of objects law is not applicable. It is also easily enforceable.

- **Rule against indestructibility:** Capital of trust cannot be tied up for longer than perpetuity period, this doesn't apply to charitable trusts.

Perpetuities Act:

- S.19: Specific wait and see period for certain kinds of interests – This section says that for reversionary interests there is a wait and see period of 40 years
- S.19(3): 40 year period does not apply when event that determines prior interest is the cessation of a charitable purpose. In other words, this section is saying that once $ is dedicated to a charity even if there is a contingency that will terminate the charitable trust then the 40 years period doesn't occur. If event occurs then you have to go to the court for a new scheme.
- 19(4) if you have property vested in Charity A but on contingency it is to go to Charity B even though the contingency may not apply forever the 40 year period will not apply, B cannot argue that A's interest is subject to the RAP

Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.

Facts: The appellant Society applied to the Minister of National Revenue for registration as a charitable organization under ss. 149.1(1) and 248(1) of the *Income Tax Act*. The Society's purposes, as stated in its amended constitution, were "

> (a) to provide educational forums, classes, workshops and seminars to **immigrant women** in order that they may be able to find or obtain employment or self employment;
> (b) to carry on **political activities** provided such activities are **incidental and ancillary** to the above purposes and provided such activities do not include direct or indirect support of, or opposition to, any political party or candidate for public office;
> (c) to raise funds in order to carry out the above purposes by means of solicitations of funds from governments, corporations and individuals; and
> (e) to provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives."

The Society described its activities as providing a "public benefit" through services and workshops designed to "advance education". The Society's activities included a "career and vocational counseling service" to assist women in obtaining employment, and assistance in such practical skills as résumé writing and interview skills as well as activities such as networking, soliciting job opportunities, maintaining a job skills directory, liaising for accreditation of foreign credentials and offering referral services. Revenue Canada rejected the Society's application mainly because it was not convinced that the organization was constituted exclusively for charitable purposes, as required for registration under the Act. The Federal Court of Appeal dismissed the Society's appeal

Commentary:

- Per Cory, Iacobucci, Major and Bastarache JJ.:
  - For an organization to qualify for registration under s. 248(1) of the Income Tax Act:

- (1) the **purposes of the organization must be charitable**, and must define the scope of the activities engaged in by the organization; and
- (2) **all of the organization's resources must be devoted to these activities** unless the organization falls within the specific exemptions of s. 149.1(6.1) or (6.2).

- Since the Act does not define "charitable", Canadian courts have consistently applied the Pemsel test to determine that question.
  - The Pemsel classification is generally understood to refer to the preamble of the *Statute of Elizabeth*, **which gave examples of charitable purposes**.
  - While the courts have always had the jurisdiction to decide what is charitable and were **never bound by the preamble**, the law of charities has proceeded by way of analogy to the purposes enumerated in the preamble.
  - The Pemsel classification is subject to the consideration that the purpose must also be "**for the benefit of the community or of an appreciably important class of the community**" rather than for private advantage.
- While the definition of "charitable organization" in s. 149.1(1) focuses on "charitable activities" rather than purposes, it is really the **purpose** in furtherance of which an activity is carried out, not the character of the activity itself, that determines whether or not the activity is of a charitable nature.
  - Accordingly, in making that determination, **the inquiry must focus not only on the activities of an organization but also on its purposes**. Subject to the exemptions provided by s. 149.1(6.1) and (6.2), s. 149.1(1) requires that all of the purposes and activities of the organization be charitable.
  - However, even the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfillment of another, charitable purpose and not as an end in itself.
- Under the traditional approach, the "advancement of education" head of the Pemsel classification is generally limited in Canada to the "formal training of the mind" or the "improvement of a useful branch of human knowledge".
  - While purpose (a) -- the primary purpose of the Society -- would not qualify as charitable under the traditional approach as it seems to lack the element of systematic instruction, there is no logical or principled reason why a more expansive definition of education for the purposes of the law of charity should not be adopted.
  - **SCC Majority expands the educative branch of *Pemsel***
- To limit the notion of "training of the mind" to structured, systematic instruction or traditional academic subjects r**eflects an outmoded and under inclusive understanding of education** which is of little use in modern Canadian society.
  - So long as information or training is provided in a **structured manner and for a genuinely educational purpose** -- that is, to advance the knowledge or abilities of the recipients -- and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education. Education should not be broadened beyond recognition but the law ought to accommodate any legitimate form of education.
- **Here, purpose (a) is charitable under the proposed more expansive definition of education**.
  - The purpose is to train the minds of immigrant women in certain important life skills, with a specific end in mind: equipping them to find and secure employment in Canada.
  - Moreover, certain activities carried out in furtherance of this purpose, such as the provision of the educational programs contemplated by the purposes clause, are undoubtedly charitable within this expanded definition, whether or not they have the quality of systematic instruction traditionally associated with education in the charitable sense. The purpose also satisfies the requirement that it benefit "the community or . . . an appreciably important class of the community".
- To bring a purpose within the fourth head of Pemsel, more is required than simple "public benefit", in the ordinary sense of the term. It is incumbent upon the Society to explain just how its purposes are beneficial in a way the law regards as charitable. To assess whether an organization's purposes are charitable under that head, a court should:
  - (1) consider the trend of those decisions which have established certain objects as charitable under this heading, and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these;

- (2) examine certain accepted anomalies to see whether they fairly cover the objects under consideration; and
- (3) ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity; if so, the argument for charity must fail.
    - To this approach must be added the general requirement that the purpose also be "**for the benefit of the community or of an appreciably important class of the community".**
    - This approach indicates that the Society's purpose (a) is not charitable under the fourth head. No "trend" can be discerned from previous decisions recognizing that assisting immigrant women to integrate into society through helping them to obtain employment is a charitable purpose under the fourth head of charity. Purpose (a) should therefore be characterized solely in terms of education.

o A valid charitable organization must be **constituted exclusively for charitable purposes**. While political purposes are not generally considered charitable, the Society's purposes clause makes clear that the **sole purpose of carrying out political activities and raising funds under clause 2(b) and (c) is to facilitate a valid educational purpose**.

- Accordingly, purposes (b) and (c) can be taken as means to the fulfillment of purpose (a), not ends in themselves, and thus do not disqualify the Society from obtaining registration as a charity under the Act.
- It is difficult, however, to discern whether purpose (e) is a means of fulfillment or an end in itself because of its extremely broad wording, which mandates the Society to do "all such things that are incidental or conducive to the attainment of" its other purposes. One purpose may be conducive to another while still remaining an end in itself, not merely a means to the fulfillment of the second purpose.
- This, combined with the exceedingly vague content of purpose (e), leads to the conclusion that **it cannot be classified as charitable simply on the basis of its relationship to the educational purpose disclosed in purpose (a).**
- Furthermore, the question of whether an organization was constituted exclusively for charitable purposes cannot be determined solely by reference to the objects and purposes for which it was originally established. **It is also necessary to consider the nature of the activities presently carried on by the organization as a potential indicator of whether it has since adopted other purposes.**
    - Here, the nature of the activities carried out by the Society further supports the conclusion as to the **non-charitable character of purpose** (e).
        - The provision of a job skills directory and the establishment of support groups for professionals do not constitute educational activities, nor do they appear to be "incidental" to the attainment of purpose (a) of the Society. They must fall under purpose (e) as activities "conducive" to the other purposes. However, while these may well be useful services, they are directly in furtherance of helping immigrant women to find employment, which in itself is not a charitable purpose.

o **The purposes of the Society therefore can and do accommodate non-charitable activities.**

- They are simply too vague and indeterminate to permit the Society to qualify for charitable status under the fourth head of Pemsel. In the result, the Society has not satisfied either of the two criteria for registration as a charity under s. 248(1) of the Act. While some of the Society's purposes contemplate charitable activities, they do not restrict the Society to charitable activities alone.

o Even though some substantial change in the law of charity would be desirable and welcome at this time, it **would not be appropriate for the Court, in the context of this case, to adopt an entirely new definition of charity.**

- If this is to be done, especially for the purposes of the Income Tax Act, the specifics of the desired approach will be for Parliament to decide since a new and more expansive definition of charity, without warning, could have a substantial and serious effect on the taxation system.

o The operation of the charitable registration scheme in the Income Tax Act does not violate the equality rights of the Society's intended beneficiaries under s. 15 of the Canadian Charter of Rights and Freedoms. The interplay of Pemsel and the Income Tax Act results in a scheme whereby any organization, by restricting

itself to charitable purposes and activities, can qualify for registration as a charitable organization. This requirement applies uniformly to every organization that seeks to be registered as charitable.

- **SCC MAJORITY CONCLUSION**
  - **Meets educational standard, doesn't meet general standard, however all resources are not used for charitable purpose (clause e too vague)**
  - **Says focus on purposes but then uses nature of activities to preclude charitable status**

- Per L'Heureux-Dubé, Gonthier and McLachlin JJ. (dissenting):
  - The starting point for the courts in determining whether a particular purpose is charitable is the Pemsel case, which provides a classification of charitable purposes.
  - The Pemsel classification carves out three presumptively charitable categories:
    - **relief of poverty,**
    - **advancement of education,**
    - **and advancement of religion**)
    - and creates a residual fourth category of charitable purposes ("**other purposes beneficial to the community"**), which itself comprises a number of recognized subcategories.
  - Any purpose which is charitable must fit into one or more of the four Pemsel categories.
  - Further, a valid charitable organization **must be constituted exclusively for charitable purposes**.
    - This requirement is reflected in the definition of "charitable organization" in s. 149.1(1) of the Act, which also requires that a charitable organization must devote all of its resources to charitable activities.
    - The pursuit of purposes which, though not charitable in themselves, are merely ancillary or incidental to the fulfillment of the primary, charitable, purposes of an organization will not cause the organization to run afoul of the exclusivity requirement.
    - Furthermore, for the organization to qualify as charitable, its purposes must be "**for the benefit of the community or of an appreciably important class of the community**". The public benefit requirement has two distinct components:
      - there must be an **objectively measurable and socially useful benefit** conferred;
      - and it must be a **benefit available to a sufficiently large section of the population** to be considered a public benefit.
    - Although the public benefit requirement applies to all charitable purposes, it is of particular concern under the fourth head of the Pemsel classification. This is so because under the first three heads, public benefit is essentially a rebuttable presumption, whereas under the fourth head it must be demonstrated.
  - In determining whether a particular purpose may be placed within one or more of the Pemsel categories, the courts adhere to the analogical approach to legal reasoning familiar to the common law.
    - Since the Pemsel classification does not itself provide any enumeration of purposes from which to analogize to putatively charitable purposes under consideration, the courts should consider whether the purpose is analogous to one of the purposes enumerated in the preamble of the Statute of Elizabeth or build analogy upon analogy.
  - While the courts should not shy away from the recognition of new purposes which respond to pressing social needs, the pursuit of analogy should not lead the courts astray. To modernize the existing categories of charitable purposes, a court should adhere to the principles of altruism and public benefit in order to identify new charitable purposes and to ensure that existing ones continue to serve the public good. When considering a purpose under the fourth head of the Pemsel classification, the mere fact that a purpose is of public benefit does not, without more, render that purpose charitable. To qualify as charitable, a purpose must be beneficial to the public "in a way which the law regards as charitable". The best approach for making such a determination is one which marries adherence to principle with respect for the existing categories as established by the Pemsel scheme.
  - In the law of charity, the courts' primary concern is to determine whether the purposes being pursued are charitable. It is these purposes which are essential, not the activities engaged in, although the activities must bear a coherent relationship to the purposes sought to be achieved. Accordingly, in determining whether an organization should be registered as a charitable organization, the proper approach is to begin by:
    - (a) identifying the primary purposes of the organization;
    - (b) determining whether those purposes are charitable. If one concludes that the purposes are not charitable, then the organization is not charitable, and the inquiry ends there. However, if the

organization's primary purposes are charitable, then it must be considered (c) whether the other purposes pursued by the organization are ancillary or incidental to its primary purposes; and (d) whether the activities engaged in by the organization are sufficiently related to its purposes to be considered to be furthering them. If positive responses are made to these two latter inquiries, then the organization should be registered as a charitable organization. The Society's purpose is set out in clause 2(a) of its constitution and the other purposes are merely subsidiary to, and in direct furtherance of, this purpose.

- **The "advancement of education" head of the Pemsel classification has traditionally been given a relatively restrictive interpretation in Canada and this traditional definition should be abandoned in favor of a more modern conception (Concur with majority).**
  - So long as information or training is provided in a structured manner and for a genuinely educational purpose -- that is, to advance the knowledge or abilities of the recipients -- and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education. In order to be educational under this head, an organization must pursue "actual teaching" or a "learning component". The concept of education, however, is not amenable to indefinite expansion. The more that purposes stray from traditional conceptions of education, the more difficult it will be to engage in the task of distinguishing charitable from non-charitable purposes. Here, the "advancement of education" head encompasses the Society's purpose set out in clause 2(a) of its constitution. Accordingly, the Society is prima facie charitable because its purpose is charitable under a head of the Pemsel classification.
- The Society's purpose can also be placed within the fourth head of the Pemsel classification. Assisting the settlement of immigrants and refugees, and their integration into national life, is a charitable purpose already recognized under the fourth head and the Society's purpose is subsumed within this subcategory. Immigrants are often in special need of assistance in their efforts to integrate into their new home. The Society provides assistance, guidance, and learning opportunities. It helps immigrants in developing and acquiring vocational skills, so that they may obtain employment. An organization, such as the Society, which assists immigrants through this difficult transition is directed towards a charitable purpose. Clearly, a direct benefit redounds to the individuals receiving assistance from the Society, and the nation as a whole gains from the integration of those individuals into its fabric. That is the public benefit at issue here.
- A proper determination of whether the Society's activities are sufficiently connected to its purpose must take into account the unique needs and problems faced by immigrant and visible minority women in obtaining employment. Activities must be evaluated in the light of the purposes they are supposed to further. When this is done on the facts of this appeal, there is no doubt that the Society's activities are charitable. While some of the activities may not be sufficiently connected to the "advancement of education", no position is taken on that question in light of the finding that assisting immigrants so that they may obtain employment or self-employment, and thus become fully integrated into national life, is a valid charitable purpose under the fourth head of the Pemsel classification. These activities, which include maintaining a job skills directory, networking, liaising for accreditation of foreign credentials, soliciting job opportunities, and offering referral services, cannot be viewed as other than directly connected to achieving that purpose. Since each of these activities is directly related to the Society's charitable purpose, each of them constitutes a "charitable activity" under the Income Tax Act
- Under the fourth head of the Pemsel classification, to qualify as charitable the class of persons eligible to benefit must be the community as a whole, or an appreciably important class of the community. The Society has not impermissibly limited the scope of its class of beneficiaries. Despite its primary focus on immigrant women, there is no indication that in practice the Society's beneficiaries are exclusively women or members of minority groups. On the contrary, the evidence suggests that the Society's services are open to all in need of them.
- The political purposes doctrine has no application on the facts of this appeal. It is obvious from a plain reading of clause 2(b) that the Society's purpose is not political. Clause 2(b) does not authorize the Society to pursue political purposes, but merely enables it to engage in political activities in furtherance of its charitable purpose, provided that such political activities are incidental and ancillary to that charitable purpose.
- The Society's purpose is not too vague or uncertain to be charitable. The purposes of an organization will almost invariably be phrased in broad, general terms and that cannot, of itself, render those words ambiguous. One should not aspire to an unrealistic degree of precision in such matters. By inserting the words "or conducive" into clause 2(e), the Society did not place itself outside the scope of legal charity. Though

notionally a purpose clause, what is contemplated by clause 2(e) is the ability to conduct activities, not purposes. The key observation is that an organization whose purpose is charitable does not surrender that status merely because it engages in some activities which are not in themselves charitable, **so long as those activities are subordinate to, and in furtherance of, the exclusively charitable purpose of the organization**. That is the case here. The plain language of clause 2(e) indicates the obvious intent of the drafter to enable the Society to carry out certain activities in furtherance of its purpose.

- It is unnecessary in this case to engage in a wholesale revision of the common law definition of charity because the Society's purpose can be placed within the existing Pemsel categories. Before asking this Court to modify the common law, litigants should demonstrate that they have exhausted the possibilities of the existing law. In the law of charity, those possibilities are considerable.

Commentary Litman:

- It is purposes that make a trust charitable, the activities can tell you whether activities are charitable purposes.

CHAPTER 13: DUTIES UNDERLYING THE OFFICE OF TRUSTEE

Duty of Affirmative Action and Standard of Care

Fales v. Canada Permanent Trust Co

Trustees have affirmative duties. A duty to familiarize yourself with the terms of the trust and the state of the trust, and a duty to convert.

- Duty to consider Investment Options
- Duty to consider the exercise of other powers
- Duty to seek out relevant information
- Contingent Duties: Applying to court to break a deadlock
    - Being passive is a breach in itself.

Investment of Trust Funds

Set out in TI or statute: Until recently the majority approach was "legal list approach" – this was literally list of safe investments. Trustees told what they may invest in. If not in list then impermissible. Legal list approach was considered by professional trustees as being too restrictive. It is no longer in use.

Now all provinces have – "prudent investor" approach: Duties of trustee in S.2-4 of *Trustee Act* – Trustees should shy away from high risk investments but modern theory is portfolio theory – you look at the overall portfolio and look at both sides of the risk horizon. Court would say that is a balanced approach in diversifying risk.

Impartiality: The trustees must keep an even hand – so when thinking of successive interests – you create income beneficiaries and capital beneficiaries and they have very different interests. Capital want conservative investments (slowly add to capital value of assets), Income beneficiaries don't like that, if there is very little capital risk then little income. Income beneficiaries would want milk cows because they are only good for income production – this is a wasting asset – produces a lot of $ over lifetime but once that if over then worthless.

- Legal list approach was automatically impartial
- Now, trustees have must greater discretion. In pension trust there is dilemma in that you increase payouts to cover inflation or keep the $ to ensure / enhance the future viability of the fund for future retirees.
- Also issue of whether you can use pension funds to induce early retirement. ***Anova v. Manufacturers Life:*** This was allowed in this case.
- **However this duty creates a very technical body of law:**
- **Power to postpone conversion:** If illiquid market, or market downturn then trustees don't have to dump at a discount.
- **When there is a duty to convert an asset:** There is a requirement in law that you go through an accounting exercise to create a proper balance.