

TRUST ISSUES:  
GAPS, ANOMALIES AND OTHER AREAS OF CONCERN  
WITH MANITOBA TRUST LAW

By

Steven Michael Falkingham

A Thesis submitted to the Faculty of Graduate Studies of The  
University of Manitoba

In partial fulfillment of the requirements of the degree of

MASTER OF LAWS

Robson Hall, Faculty of Law

University of Manitoba

Winnipeg

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## ABSTRACT

Trusts are important tools for estate and tax planning. In Canada, property and trust law are governed at the provincial level—section 92(13) of the *Constitution Act of Canada* provides that “[i]n each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ... Property and Civil Rights in the Province.” The aim of this thesis is to consider areas of trust law that are unique to Manitoba and highlight certain gaps and areas that may be improved through a comparative analysis.

The first issue I explore is the indefeasibility principle enshrined at section 59 of Manitoba’s *Real Property Act* and the co-existence of constructive and resulting trusts as set out in the recent *Hyczkewycz v Hupe* appellate decision. I then consider the applicability in Manitoba of another example of an equitable interest existing “off title” in *Stonehouse v British Columbia (Attorney General)*. I also review remedies available to beneficiaries following remarks in *Hyczkewycz v Hupe* regarding registering caveats to give notice to third parties.

The second issue of this thesis addresses how and why amendments to section 59 of *The Trustee Act* in the 1980s replaced the Rule in *Saunders v Vautier*, and whether, nearly forty years later, there may be a better approach. The third and final issue discussed is the scope of the court’s ability to consent to a proposed variation on behalf of beneficiaries. Manitoba previously expanded the classes of beneficiaries for whom the court could consent from four to eight. I consider whether the change resolved underlying issues and whether some guidance can be taken from other jurisdictions in this regard.

## ACKNOWLEDGMENTS

I wish to express my deepest gratitude to my advisor, Dr. Donn Short, for his encouragement, guidance and friendship.

I have been fortunate to have had many excellent teachers at Robson Hall, both during my Juris Doctor and, more recently, my Masters of Law. In particular, thank you to Professor DeLloyd Guth, Dr. Amar Khoday and Dr. Jennifer Schulz. Thank you as well to Dr. Michelle Gallant and Professor Darcy MacPherson, for their thoughtful review of my thesis, and Marie Jivan and Maria Tepper, for their assistance throughout this process.

To Dr. Mark and Mrs. Sharon Evans, donors of the David T. Sgayais Graduate Fellowship; Justice Martin Freedman, donor of the Samuel Freedman Graduate Fellowship; and the Gerald Schwartz and Heather Reisman Foundation, donor of the Schwartz-Reisman Scholarship, I extend my sincere thanks for their financial support.

I am grateful for the encouragement of my friends and colleagues, especially D. Tomas Masi and Robert Walichnowski. I would also like to acknowledge the partners at D'Arcy & Deacon LLP; without their support, I would not have returned to pursue graduate studies.

I also wish to express my sincere appreciation to my family, with special thanks to my parents and my grandmother, Carrie Falkingham. I would not be where I am without their love and support.

Finally, to my wife, Karen, thank you for everything.

**DEDICATION**

*For Aurora, Henry and Martin.*

## TABLE OF CONTENTS

### Contents

ABSTRACT.....	ii
ACKNOWLEDGMENTS .....	iii
DEDICATION.....	iv
TABLE OF CONTENTS.....	v
INTRODUCTION .....	1
CHAPTER 1: A History of Trusts .....	5
1. Introduction.....	5
2. The Emergence of Trusts .....	5
3. Development of Trusts in Canada.....	9
4. The Inherent Jurisdiction of the Court .....	13
5. <i>Saunders v Vautier</i> .....	16
6. Variation of Trusts Legislation .....	20
7. Conclusion .....	25
CHAPTER 2: Equitable Interests and Indefeasibility of Title.....	26
1. Introduction.....	26
2. Torrens System of Land Registration .....	26
3. Manitoba Jurisprudence on Equitable Interests and Indefeasibility of Title .....	30
4. <i>Hyczkewycz v Hupe</i> .....	33
5. Severance of Joint Tenancy as an Equitable Interest.....	37
6. Caveats and Remedies for Breach of Trust.....	42
i) Remedies against Third Parties .....	45
ii) Knowing Receipt .....	47
iii) Filing of Caveats.....	49
7. Conclusion .....	52

CHAPTER 3: The Elimination of <i>Saunders v Vautier</i> in Manitoba.....	53
1. Introduction.....	53
2. Amendments to the Manitoba Legislation.....	54
3. Criticism of the Rule in <i>Saunders v Vautier</i> .....	55
4. Alberta and Manitoba Law Reform Reports.....	58
5. Early Reception and Other Law Reform Commission Reports.....	63
6. Challenges with Implementation .....	69
i) Justifiable Character .....	69
ii) Managing Postponements.....	75
iii) Other Considerations .....	79
7. Lessons from the Maritime Provinces .....	80
8. Conclusion .....	84
CHAPTER 4: Consenting to Arrangements on Behalf of Beneficiaries .....	86
1. Introduction.....	86
2. What is a “Benefit” .....	86
3. Classes of Beneficiaries .....	90
4. Overriding a Beneficiary’s Objections .....	95
5. Jurisprudence .....	98
6. Guidance from Other Jurisdictions .....	102
7. Recommendations.....	107
8. Conclusion .....	109
CONCLUSION.....	110
WORKS CITED .....	113
Legislation.....	113
Jurisprudence.....	115
Secondary Sources .....	120

## INTRODUCTION

“If uniformity of law is a legitimate goal *per se*, one must question whether Manitoba's uniqueness is appropriate.”<sup>1</sup>

Trusts are important tools for estate and tax planning. In Canada, property and trust law are governed at the provincial level—section 92(13) of the *Constitution Act of Canada* provides that “[i]n each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ... Property and Civil Rights in the Province.”<sup>2</sup> The aim of this thesis is to consider areas of trust law that are unique to Manitoba and highlight certain gaps and areas that may be improved through a comparative analysis.

This thesis is divided into four substantive chapters. The first chapter explains the historical origins of trusts and trust variation, providing important context for the development of trusts in England and Canada and Manitoba.

Chapter 2 considers the intersection between the indefeasibility principle of the Torrens System of land registration in Manitoba and equitable interests as set out in the recent *Hyczkewycz v Hupe* decision.<sup>3</sup> Over the past two decades, Manitoba courts have issued several judgments relating to section 59(1) of *The Real Property Act*.<sup>4</sup> Section 59(1) provides that “[e]very certificate of title or registered instrument, as long as it remains in force and is not

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<sup>1</sup> Jane Matthews Glenn, “Perpetuities to Purefoy: Reform by Abolition in Manitoba” (1984) 62:4 Can Bar Rev 618 at 636.

<sup>2</sup> *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92(13).

<sup>3</sup> *Hyczkewycz v Hupe*, 2019 MBCA 74, leave to appeal to SCC refused, no 38823 [*Hupe CA*].

<sup>4</sup> *The Real Property Act*, CCSM, c R30, s 59(1) [*Real Property Act*].

cancelled or discharged, *is conclusive evidence at law and in equity*, as against the Crown and all persons, that *the owner is indefeasibly entitled to the land or the interest* specified in the title or instrument.”<sup>5</sup> However, if title is truly indefeasible—which a plain language reading of the legislation states—then with the exception of the statutory exception in section 58, courts would be unable to give effect to equitable interests, such as constructive and resulting trusts. In 2016, the Manitoba Law Reform Commission published an issue paper on the “unsettled state of the law in Manitoba regarding section 59(1) of the *Real Property Act*”.<sup>6</sup> The MLRC Report 2016 focused on the current state of the law and included recommendations going forward, but the report was formally withdrawn the following year.<sup>7</sup> The Manitoba Law Reform Commission hoped that an appellate level decision would provide conclusive authority on the matter.<sup>8</sup> This thesis considers the recent *Hupe* CA decision and its conclusions about the co-existence of equitable interests broadly. I then explore another example of an equitable interest existing “off title” in *Stonehouse v British Columbia (Attorney General)*<sup>9</sup> and its applicability in Manitoba. I also review remedies available to beneficiaries following remarks in *Hupe* CA regarding registering caveats to give notice to third parties.

Chapter 3 addresses the law pertaining to early termination and variation of trusts in Manitoba and the elimination of the Rule in *Saunders v Vautier*.<sup>10</sup> Generally, trusts continue until their natural death—typically either an event stipulated by the trust document itself or a trust

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<sup>5</sup> *Ibid* [emphasis added].

<sup>6</sup> Manitoba Law Reform Commission, “Indefeasibility of Title and Resulting and Constructive Trusts”, Issue Paper No 3 (April 2016), online: <[www.manitobalawreform.ca/pubs/pdf/Issue\\_Paper\\_3\\_26\\_April\\_2016.pdf](http://www.manitobalawreform.ca/pubs/pdf/Issue_Paper_3_26_April_2016.pdf)> [MLRC Report 2016].

<sup>7</sup> Manitoba Law Reform Commission, 2016–2017 Annual Report, online: <[www.manitobalawreformca/pubs/pdf/additional/2016-2017annual\\_report.pdf](http://www.manitobalawreformca/pubs/pdf/additional/2016-2017annual_report.pdf)>. The Annual Report advised that “[i]n consultations following the release of the issue paper, the Commission became aware of potentially negative implications of the conclusions reached therein. Therefore, the Commission has decided to formally withdraw the paper” (*ibid* at 24).

<sup>8</sup> MLRC Report 2016, *supra* note 6 at 49, 51.

<sup>9</sup> *Stonehouse v British Columbia (AG)* (1961), [1962] 2 SCR 103, 31 DLR (2d) 118 (BC) [*Stonehouse* cited to SCR].

<sup>10</sup> *Saunders v Vautier*, (1841) 41 ER 482, [1841] CR & PH 240 [*Saunders v Vautier* cited to CR & PH].



exhausting the trust property. For example, the death of a trustee will not end a trust, as equity will not allow a trust to fail for lack of a trustee.<sup>11</sup> Nevertheless, there are situations in which it may be desirable to end a trust prematurely or to vary the terms of the trust. In addition to a court's inherent jurisdiction (which was expanded by legislation<sup>12</sup> in the 1950s), beneficiaries could rely on the application of the Rule in *Saunders v Vautier*, the leading English decision on early termination of trusts. In Manitoba, however, amendments to *The Trustee Act*<sup>13</sup> in 1983 revoked and replaced the Rule in *Saunders v Vautier* following a report by the Manitoba Law Reform Commission.<sup>14</sup> Now, nearly forty years later, it is appropriate to review why the amendments were made, how the amended provisions—specifically section 59 of the *Trustee Act* MB—replaced the Rule in *Saunders v Vautier*, and whether, in the year 2020, there may be a better approach.

The fourth chapter considers the scope of the court's ability to consent to a proposed variation on behalf of beneficiaries. Historically, any application of *Saunders v Vautier* was permissible only with the consent of all beneficiaries to the trust. Naturally, there were situations where not all beneficiaries were capable of consenting, due to some beneficiaries being under age, incapacitated or missing entirely. Legislators drafted variation of trusts legislation to enable the court to consent on behalf of enumerated classes of beneficiaries, thereby “allow[ing] variations that might not have been possible under the case law”.<sup>15</sup>

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<sup>11</sup> Eileen E Gillese, *The Law of Trusts*, 3rd ed (Toronto: Irwin Law, 2014) at 148.

<sup>12</sup> *Trustee Act*, RSM 1954, c 273, s 54(1)–(3) [*Trustee Act* MB 1954].

<sup>13</sup> *Trustee Act*, RSM 1985, c T160 [*Trustee Act* MB].

<sup>14</sup> Manitoba Law Reform Commission, “Report on the Rule in *Saunders v. Vautier*”, Report No 18 (8 January 1975), online: <[www.manitobalawreform.ca/pubs/pdf/archives/18-full\\_report.pdf](http://www.manitobalawreform.ca/pubs/pdf/archives/18-full_report.pdf)> [MLRC Report 1975].

<sup>15</sup> Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2012) at 1246.

In this, Manitoba is again an outlier. Through amendments to section 59 of the *Trustee Act* MB, Manitoba expanded the classes of beneficiaries for whom the court could consent from four to eight. I consider why the new classes were added, whether the amendments resolved underlying issues and whether some guidance can be taken from those other jurisdictions in this regard.

## CHAPTER 1: A History of Trusts

“Trusts have been in existence for thousands of years, yet they continue to transform and adapt to the demands of modern life.”<sup>16</sup>

### 1. Introduction

In order to better situate the reader, the first chapter is largely explanatory in nature. The chapter begins by defining relevant terms, discussing what a trust is and how trusts first arose historically—specifically as a tool used for estate planning and tax avoidance. I explain how trust law (and the law of equity more broadly) was incorporated into Manitoba and Canada, and how trust law continued to develop in Canada as a remedy in family and unjust enrichment decisions. The second portion of this chapter explores the development of trust variation and early termination, including the Rule in *Saunders v Vautier*. Initially the Rule permitted a single beneficiary to prematurely end a trust by calling on the trustee to turn over the trust property. Its applicability was later expanded to include multiple beneficiaries and (arguably) to allow for the varying of the terms of a trust rather than outright termination. Following this discussion of *Saunders v Vautier*, I conclude by reviewing variation of trusts legislation.

### 2. The Emergence of Trusts

For the definition of a trust, the formative text, *Waters’ Law of Trusts in Canada*,<sup>17</sup> relies on the description from G.W. Keeton and L.A. Sheridan:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or

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<sup>16</sup> Gillese, *supra* note 11 at xiv.

<sup>17</sup> *Supra* note 15.

for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.<sup>18</sup>

Comparatively, in *Underhill and Hayton's Law Relating to Trusts and Trustees*, Hayton defines a trust as “an equitable fiduciary obligation, binding a person (called a trustee) to deal with property (called trust property) owned and controlled by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.”<sup>19</sup>

Trusts initially arose as “uses” as early as the twelfth century in the King’s Courts,<sup>20</sup> as a method to control property and avoid feudal dues at a time when all real property was largely owned by the Crown. Pettit noted that there have been cases found that predate the Norman Conquest of England where land was “conveyed to one man to be held by him on behalf of or ‘to the use of’ another”,<sup>21</sup> although such use was only for “a limited time and a limited purpose, such as for the grantor’s family while he went on a crusade.”<sup>22</sup> The settlor (i.e., the originator of the trust) would transfer his land to neighbours, with directions to hold and maintain while the settlor was away. Individuals began taking advantage of uses in other applications, such as the avoidance of feudal dues and increased flexibility for estate planning.<sup>23</sup> The challenge

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<sup>18</sup> *Ibid* at 3, citing GW Keeton & LA Sheridan, *The Law of Trusts*, 12th ed (London, UK: Barry Rose Law Publishers, 1993) at 3.

<sup>19</sup> David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton's Law Relating to Trusts and Trustees*, 19th ed (London, UK: LexisNexis, 2016) at 3 [citations omitted].

<sup>20</sup> Waters, Gillen & Smith, *supra* note 15 at 5. Pettit instead dates uses to the end of the 13<sup>th</sup> century. Philip H Pettit, *Equity and the Law of Trusts*, 12th ed (2012, Oxford: Oxford University Press).

<sup>21</sup> Pettit, *supra* note 20 at 12.

<sup>22</sup> *Ibid*.

<sup>23</sup> On an individual’s death, testaments were probated by the ecclesiastical courts and included only dispositions of personal property and chattels. In 1540, the *Statute of Wills*, 32 Hen VIII, c 1 (1540), first allowed for the disposition of real property by will. The *Statute of Wills* “empowered all persons having lands in fee-simple (except femes covert, infants, idiots, and persons of nonsane memory) to devise by Will in writing the whole of their lands held in socage, and two-thirds of their lands held in knight’s service. *The Statute*, 12 Chas II, c 24, by abolishing all military tenures, and converting them into common socage, extended the testamentary power to all freehold estates in fee-

immediately faced by settlors (then called feoffers) was that common law courts “refused to take any account of the uses—that is, the directions given to the feoffees to uses [the then equivalent to trustee], who although they were bound in honour, could not be sued either by the feoffer or the *cestuis que use*.”<sup>24</sup>

At the time, if the common law courts were ineffective, individuals could appeal to the King or the King’s council. The belief was that “even after the last of the three common law courts to evolve out of the Curia Regis had become separate, ... a residuum of justice was still thought to reside in the King.”<sup>25</sup> Any “petitions seeking the King’s ‘extraordinary justice’ were referred to [the Lord Chancellor].”<sup>26</sup> As the keeper of the King’s conscience, the Lord Chancellor sought to give effect to uses and created a court based on what was fair and equitable—for example, equity “will not allow any man unjustly to appropriate to himself the value earned by the labours of another.”<sup>27</sup> At this time, “hardship increasingly often arose because of defects in the law and petitions began to be brought on this ground. In giving relief in these cases, new law was being created and it was this new law that became known as ‘equity’, in contrast to the ‘common law’ dispensed in the common law courts.”<sup>28</sup>

A critical component to equity is that equity complements rather than interferes with common law decisions. Accordingly, the Court of Chancery drew a distinction between legal and equitable interests. Legal title is in the name of “the person who holds the property for another;

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simple.” UK House of Commons, *The Fourth Report Made to His Majesty by the Commissioners Appointed to Inquire into the Law of England Respecting Real Property* (25 April 1833) at 5.

<sup>24</sup> Pettit, *supra* note 20 at 13.

<sup>25</sup> *Ibid* at 2.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Rathwell v Rathwell*, [1978] 2 SCR 436 at 455, 83 DLR (3d) 289 (Sask) [*Rathwell*].

<sup>28</sup> Pettit, *supra* note 20 at 3.

the equitable estate is in the person beneficially interested.”<sup>29</sup> In giving effect to equity, the Lord Chancellor did not dispute that the feoffees were the legal “owners” of the trust property, instead insisting that the feoffee should deal their legal title “in accordance with the trust for the benefit of the beneficiaries.”<sup>30</sup>

As a result of the Lord Chancellor giving effect to uses, uses became widespread—by the early sixteenth century, it was said that “the greater part of the land in England was held in use”.<sup>31</sup> To rectify the situation, the *Statute of Uses*<sup>32</sup> was introduced in 1535 which, for the most part, eliminated uses.<sup>33</sup> The uses were said to be “executed”<sup>34</sup> with the “effect of transferring legal title to the property to the *cestui qui use*”,<sup>35</sup> despite the clear intention of the settlor that legal title remain with the feoffee to uses.

Occasionally, a settlor would create a use transferring a parcel of land to person A for the use of person B for the use of person C. A principle of property law is that a property owner cannot give away more than the property owner has to give.<sup>36</sup> Because the trust property was already being held for the use of B, the use for C was considered void for repugnancy and would not be effective. In such a case, “A had the legal fee simple, B the equitable fee simple, but the limitation to C was repugnant to B’s interest and accordingly void.”<sup>37</sup> Over time, it was

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<sup>29</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 78.

<sup>30</sup> *Ibid* at 4. The exception was when “even though a judgment was technically good, [the Lord Chancellor felt that he] was entitled to set it aside where it had been obtained by ‘oppression, wrong and a bad conscience’” (*ibid*).

<sup>31</sup> Pettit, *supra* note 20 at 13, citing Y B Mich 15 Hen VII 13 pl 1.

<sup>32</sup> *Statute of Uses*, 27 Hen VIII, c 10 (1535).

<sup>33</sup> Pettit noted that “there were cases to which [the *Statute of Uses*] did not apply—those in which, for instance, the feoffees to uses had active duties to perform—and thus the use never became completely obsolete”. Pettit, *supra* note 20 at 13. Other exceptions included “when the feoffee stood seized not of land but of personalty or chattels real; ... when a corporation was the feoffee; or when a person was seized to his or her own use.” Gillese, *supra* note 11 at 9, n 5.

<sup>34</sup> Pettit, *supra* note 20 at 13.

<sup>35</sup> Gillese, *supra* note 11 at 9.

<sup>36</sup> The maxim *nemo dat quod non habet* stands for the principle that “one cannot give that which one does not have”. Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Thomson Reuters Canada, 2014) at 466.

<sup>37</sup> Pettit, *supra* note 20 at 13.

determined that although the first use was “executed”, the second use (which was no longer repugnant) was not captured or executed under the *Statute of Uses*. The second use became called a trust—as in “unto and to the use of B and his heirs in trust for C and his heirs”.<sup>38</sup>

Pettit noted that “immediately prior to the coming into force of the Supreme Court of Judicature Acts 1873 and 1875 on 1 November 1875, [equity] was enforced exclusively in the Court of Chancery and not at all in the common law—Common Pleas, Exchequer, and King’s Bench.”<sup>39</sup>

### 3. Development of Trusts in Canada

In Manitoba, the Court of Queen’s Bench has jurisdiction over equity. Section 32 of *The Court of Queen’s Bench Act* states:

The court is and continues to be a court of record of original jurisdiction and possesses and may exercise all such powers and authorities as by the laws of England are incident to a superior court of record of civil and criminal jurisdiction in all civil and criminal matters and possesses and may exercise all the rights, incidents and privileges of those courts as fully to all intents and purposes as they were on July 15, 1870 possessed and exercised by any of the superior courts of common law at Westminster, the Court of Chancery at Lincoln’s Inn, the Court of Probate or by any other court in England having cognizance of property and civil rights and of crimes and offences.<sup>40</sup>

In addition to trusts that have been deliberately created by a settlor (called “express trusts”), courts have held that trusts can arise in a number of other situations, often as a remedy in complex family litigation—“[c]ourts are frequently tasked with resolving such disputes as a result of the breakdown of a marriage or common-law relationship, a disagreement over the

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* at 2; *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66; *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77. Note that this does not include the Court of Exchequer prior to 1842, or the Palatine Courts and county courts. Pettit, *supra* note 20 at 2, n 4.

<sup>40</sup> *The Court of Queen’s Bench Act*, SM 1988–89, c 4, s 32.

allocation of proceeds of an estate of a deceased person, or a falling out between parents and offspring or between siblings”.<sup>41</sup>

In some of these difficult situations, courts have held that certain trusts arise naturally by operation of law. One such trust is the resulting trust, which arises where “a transferor gratuitously transfers or causes a transfer of property that he owns or purchases to a transferee ... and ... there is no evidence that the transferor intended to make a gift or loan or to abandon all interest in the property.”<sup>42</sup> Notwithstanding that legal title or equitable title is in the recipient’s name, the recipient “is under an obligation to return it to the original title owner, or to the person who paid the purchase money for it.”<sup>43</sup> Courts have generally limited resulting trusts to three scenarios:

- 1) Where a trustee holds property under the terms of an express trust and the trust fails in whole or in part, the trustee holds the property by way of resulting trust for the settlor.
- 2) Where A purchases property and title is taken in the name of B, or, jointly, in the names of both A and B, the law presumes a resulting trust in favour of A.
- 3) Where A gratuitously transfers property into the name of B, or into the joint names of A and B, so long as B is not A’s child, the law again presumes a resulting trust in favour of A.<sup>44</sup>

Waters noted that the second and third scenarios are occasionally grouped together as “presumed resulting trusts” since “it is presumed that the transferor intended the transferee to hold the property on trust for the transferor or, perhaps more precisely, it is presumed that [the transferor] did *not* intend the transferee to enjoy the benefit of the property.”<sup>45</sup> Comparatively, trusts in the first scenario can be referred to “automatic resulting trusts” because they arise

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<sup>41</sup> MLRC Report 2016, *supra* note 6 at iii.

<sup>42</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 86.

<sup>43</sup> Waters, Gillen & Smith, *supra* note 15 at 394, citing *Pecore v Pecore*, 2007 SCC 17 at para 20 (Ont) [*Pecore*].

<sup>44</sup> Gillese, *supra* note 11 at 107.

<sup>45</sup> Waters, Gillen & Smith, *supra* note 15 at 397–98 [emphasis in original], citing *Re Vandervell’s Trusts*, [1974] 1 All ER 47 (HC), reversed on appeal on other grounds, [1974] 1 Ch 269.



automatically upon the failure of the express trust. Gillese commented that “in [her] view, such terminology is of little utility and may retard the concept from rational development.”<sup>46</sup>

The presumption of resulting trusts may be rebutted with evidence of an intention to gift the property to the transferee.<sup>47</sup> The leading decision, *Pecore v Pecore*, confirmed the presumption of resulting trusts applied to gratuitous transfers from parents to adult children as opposed to gratuitous transfers from parents to minor children where it is presumed that the parents intended to provide for the children.<sup>48</sup>

A second type of trust that arises by operation of law is the constructive trust which “is imposed on proof of recognized categories of special circumstances where a court considers it unconscionable for the owner of the property to hold it for his own benefit to the entire exclusion of the claimant.”<sup>49</sup> In *Rathwell v Rathwell*, Dickson J. (as he then was) held that a constructive trust necessitates “the imposition of trust machinery by the court in order to achieve a result consonant with good conscience.”<sup>50</sup>

The leading decision on the imposition of constructive trusts is *Soulos v Kortontzilas*.<sup>51</sup>

McLachlin J. (as she then was) provided the following criteria:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

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<sup>46</sup> Gillese, *supra* note 11 at 111.

<sup>47</sup> *Pecore*, *supra* note 43 at para 24 *ff.*

<sup>48</sup> Called a “presumption of advancement”, this presumption was historically applicable for transfers from husband to wife as well. Although the presumption of advancement between spouses has been abolished in other jurisdictions (e.g., *Family Law Act*, RSO 1990, c F.3, s 14; *Family Property Act*, SS 1997, c F-6.3, s 50(1)), the presumption of advancement between spouses is still applicable in Manitoba. *Mehta Estate v Mehta Estate* (1993), 88 Man R (2d) 54, 104 DLR (4th) 24 (CA).

<sup>49</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 86.

<sup>50</sup> *Rathwell*, *supra* note 27 at 455.

<sup>51</sup> *Soulos v Kortontzilas*, [1997] 2 SCR 217, 146 DLR (4th) 214 (Ont) [cited to SCR].

- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.<sup>52</sup>

Constructive trusts are used only when damages are not considered an appropriate remedy. In *Lac Minerals Ltd v International Corona Resources Ltd*, La Forest J. held that “a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.”<sup>53</sup> These rights include “the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer”,<sup>54</sup> such as when there is a “contribution [to the property] sufficiently substantial and direct as to entitle [a plaintiff] to a portion of the profits realized upon sale of [the property].”<sup>55</sup> There must also be a sufficient connection “between the contribution that founds the action and the property in which the constructive trust is claimed.”<sup>56</sup>

Unlike resulting trusts, which arise automatically on the purchase or transfer of property or failure of an express trust, constructive trusts arise only by declaration by a court. A constructive trust is “recognized as having come into existence from the time when the unjust enrichment first arose, even though [the constructive trust] is judicially declared at a later date.”<sup>57</sup>

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<sup>52</sup> *Ibid* at 240–41.

<sup>53</sup> *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at 678, 61 DLR (4th) 14 (Ont) [*Lac Minerals*]. This approach has also been endorsed in *Peter v Beblow*, [1993] 1 SCR 980, 101 DLR (4th) 621 (BC) [*Beblow* cited to SCR] and *Kerr v Baranow*, 2011 SCC 10 (BC).

<sup>54</sup> *Lac Minerals*, *supra* note 53 at 678.

<sup>55</sup> *Petkus v Becker*, [1980] 2 SCR 834 at 852, 117 DLR (3d) 257 (Ont).

<sup>56</sup> *Beblow*, *supra* note 53 at para 3.

<sup>57</sup> *Rawluk v Rawluk*, [1990] 1 SCR 70 at 91, 65 DLR (4th) 161 (Ont) [*Rawluk*].

Hayton noted the term “implied trust” is used as a generic term for both resulting and constructive trusts, but cautions that courts “confusingly ... have also used the term in several other ways. To avoid such confusion the term is best avoided altogether.”<sup>58</sup>

#### **4. The Inherent Jurisdiction of the Court**

By their nature, trusts can provide a great deal of flexibility. A settlor can create a trust *inter vivos* (i.e., during the life of the settlor) or a testator can establish a testamentary trust that takes effect on death as part of his or her will. When creating a trust, a settlor provides direction to the trustee(s) as to how to administer the trust for the benefit of the beneficiaries with varying levels of discretion for administering the trust provisions. The trust provisions may be strict with no permitted deviations or discretion on the part of the trustee(s), or, alternatively, a settlor may create a bare trust in which the administration of the trust is at the sole discretion of trustee(s). For example, a Henson trust is a specific type of trust used in situations involving a disabled beneficiary. Because the trust is administered in the sole discretion of the trustee, a Henson trust is used to keep an interest from vesting in the beneficiary and possibly interfering with disability benefits.<sup>59</sup> Another traditional use is a conditional trust in which a trustee holds trust property until certain conditions are met or a specific event occurs, such as a beneficiary marrying or receiving a post-secondary education.

Once a trust is established, however, a trust is only as flexible as drafted. Subject to certain exceptions, trustees must abide by the terms of their trusts, even in situations where

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<sup>58</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 86. For example, the term “implied trust” is also commonly used “where the intention to create a trust is not clearly expressed, but has to be discovered from indirect and ambiguous language.” Waters, Gillen & Smith, *supra* note 15 at 395.

<sup>59</sup> See e.g. *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 (BC): “Because the person with disabilities has no enforceable right to receive any property from the trustee of a Henson trust *unless* and *until* the trustee exercises his or her discretion in that person's favor, the interest he or she has therein is not generally treated as an ‘asset’ for the purposes of means-tested social assistance programs” (*ibid* at para 2, citing Waters, Gillen & Smith, *supra* note 15 at 572–73).

trustees are granted broad discretion. A trust may include a power for the trustee or settlor to revoke the trust, but “[u]nless they have been provided in the trust instrument with the express power, [trustees] do not have the authority to vary any of the terms of the trust or to cause an early termination of the trust.”<sup>60</sup> Reasons for wanting to vary or terminate a trust might include “(a) to avoid obligations to creditors or dependants, (b) to permit property to transferred *in specie* while satisfying obligations to legatees, (c) to frustrate the wishes of a testator by accelerating the vesting of property in trust, or (d) to claim benefits under family law or dependant’s relief legislation greater than those provided by the deceased or on intestacy.”<sup>61</sup>

Prior to specific variation of trusts legislation, courts had limited inherent jurisdiction to vary a trust. A.J. McClean classified the jurisdiction of the court into four unique applications: compromise, conversion, emergency and maintenance.<sup>62</sup> A court’s compromise jurisdiction “permit[ted] the court to sanction on behalf of infant and unborn beneficiaries a compromise settlement of a dispute or doubt with respect to the quantum of beneficial interests.”<sup>63</sup> The conversion jurisdiction allowed a court to direct the sale and conversion “of an infant’s personalty if this be shown to be his benefit, but may only deal with his realty in circumstances of dire necessity.”<sup>64</sup> As the name suggests, the court’s emergency jurisdiction permitted the court to intervene and “authorize a [one-time] deviation from the administrative terms of a trust vary a trust”<sup>65</sup> when something unforeseen by the testator or settlor has occurred or is about to occur

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<sup>60</sup> William S Bernstein, “The Rule in *Saunders v. Vautier* and its Proposed Repeal” (1986) 7:3 E & TQ 251 at 251.

<sup>61</sup> Maria Elena Hoffstein & Julie Y Lee, “Restructuring the Will and Testamentary Trust: Methods, Underlying Legal Principles and Tax Considerations” (1993) 13:1 ETJ 42 at 42 [citations omitted].

<sup>62</sup> A.J. McClean, “Variation of Trusts in England and Canada” (1965) 43:2 Can Bar Rev 181 at 185 [McClean, “Variation”].

<sup>63</sup> Bernstein, *supra* note 60 at 258.

<sup>64</sup> McClean, “Variation”, *supra* note 62 at 185, citing *Taylor v Phillips* (1750), 2 Ves Sen 23; *Nunn v Hancock* (1871), LR 6 Ch App Cas 850 at 851.

<sup>65</sup> McClean, “Variation”, *supra* note 62 at 208.

that “threaten[s] the very existence of the trust.”<sup>66</sup> McClean noted the quintessential explanation of the jurisdiction is from *In Re New*, wherein Romer L.J. stated:

But in the management of a trust estate and especially when that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument and which renders it most desirable, and it may be even essential, for the benefit of the trust estate and in the interests of all the cestuis que trust that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained, by reason of some of them not being *sui juris* or in existence then it may be right for the Court, and the Court would in proper cases have jurisdiction, to sanction on behalf of all concerned such acts in behalf of the trustees as we have above referred to.<sup>67</sup>

The final jurisdiction of the court is the maintenance jurisdiction which allowed a court to encroach upon the capital of the trust for the benefit of a life tenant or a vested but defeasible absolute interest.<sup>68</sup> The court could direct capital to be paid out to beneficiaries “if they are in need of money to prevent them from starving or to maintain themselves in a manner appropriate to their expectations under the trust.”<sup>69</sup> In applying this jurisdiction, the court presumes an “intent on the part of the settlor that the beneficiaries should not only not starve, but that they should also be properly maintained while awaiting the bounty he has provided for them.”<sup>70</sup>

McClean also distinguished between the “administrative” and “beneficial” provisions of a trust, with only the administrative provisions being variable under the court’s emergency jurisdiction.<sup>71</sup> An administrative provision “relates to the trustees’ powers of management and

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<sup>66</sup> *Ibid.*

<sup>67</sup> *In Re New*, [1901] 2 Ch 534 at 544–45, [1900-3] All ER Rep 763.

<sup>68</sup> McClean, “Variation”, *supra* note 62 at 201, citing *Revel v Watkinson* (1748), 1 Ves Sen 93; *Greenwell v Greenwell* (1800), 5 Ves 194; *Havelock v Havelock* (1800), 17 Ch D 807; *In Re Collins* (1886), 32 Ch D 229; *In Re Walker*, [1901] 1 Ch 879.

<sup>69</sup> McClean, “Variation”, *supra* note 62 at 208.

<sup>70</sup> *Ibid* at 201.

<sup>71</sup> *Ibid* at 182.

control of the trust property”.<sup>72</sup> A beneficial provision, on the other hand, “governs the nature of the interest or the financial return granted to the beneficiaries.”<sup>73</sup>

### 5. *Saunders v Vautier*

The ability to prematurely terminate trusts was dramatically altered with the well-known decision, *Saunders v Vautier*.<sup>74</sup> *Saunders v Vautier* involved a gentleman named Richard Wright, who

by his will, gave and bequeathed to his executors and trustees thereafter named, all the East India stock which should be standing in [Wright’s] name at the time of [Wright’s] death, upon trust to accumulate the interest and dividends which should accrue thereon until Daniel Wright Vautier, the eldest son of his (the testator’s) nephew, Daniel Vautier, should attain his age of twenty five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns absolutely.<sup>75</sup>

At Wright’s death in 1832, Wright held £2000 of East India stock<sup>76</sup>; at the time, Vautier was still a minor. When Vautier turned twenty-one in 1841, he “presented a petition to the Master of the Rolls, praying that the trustees might be ordered to transfer to him the East India stock, or that it might be referred to the Master to inquire whether it would be fit and proper that any and what part of the stock should be sold, and the produce thereof paid to [Vautier], regard being had to his intended marriage, and for the purpose of establishing him in business.”<sup>77</sup>

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Although the Rule will forever be associated with *Saunders v Vautier*, the original ratio is believed to predate *Saunders v Vautier* by 150 years in *Love v L’Estrange*, (1727) 5 Bro Cas 59, 2 ER 532 (HL). Joel Nitikman, “Variation under the Rule in *Saunders v. Vautier*: Yes or No?” (2015) 35:1 ETPJ 1 at 1.

<sup>75</sup> *Saunders v Vautier*, *supra* note 10 at 240.

<sup>76</sup> *Ibid* at 241.

<sup>77</sup> *Ibid* at 242.

Although the Master initially declined to hear the petition, the matter was appealed to the Lord Chancellor.<sup>78</sup>

The Lord Chancellor considered the condition imposed by the testator that Vautier had to attain the age of twenty-five and determined that the gift was immediate and merely being postponed as to time of payment until the beneficiary was a certain age. The postponement was not a true condition of vesting. In the Lord Chancellor's determination, Vautier was already fully vested in the property—" [t]here is no gift over; and the East India stock either belongs to the great-nephew, or will fall into the residue in the event of his dying under twenty-five."<sup>79</sup> The Rule therefrom, interpreted narrowly, is that "where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has an interest but the legatee."<sup>80</sup> Provided a beneficiary has capacity, is fully vested in the trust property and has attained the age of majority, he or she can call on the trustee to transfer the trust property over to him or her and end the trust. The Rule reinforces the principle "that if a person or persons are solely and absolutely entitled to the property, he or they may enjoy that property in the manner that they choose."<sup>81</sup> Further, "[i]t is not necessary to make an application to the court as with the other methods of varying or terminating a trust such as the inherent jurisdiction and the various statutory provisions."<sup>82</sup>

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<sup>78</sup> The Master declined to hear the petition due to an earlier order related to payment of dividends while Vautier was a minor (*ibid*).

<sup>79</sup> *Ibid* at 248.

<sup>80</sup> Waters, Gillen & Smith, *supra* note 15 at 1235, citing *Wharton v Masterman*, [1895] AC 186 at 198 (UK HL).

<sup>81</sup> Bernstein, *supra* note 60 at 258.

<sup>82</sup> *Ibid* at 259.

Ronald B. Cantlie argued that the justification behind the Rule in *Saunders v Vautier* is that any restrictions or postponements imposed by a settlor are void for repugnancy.<sup>83</sup> If property has been given away by the settlor unconditionally, any further requirements or restrictions on the property are not enforceable. This sentiment is echoed in *Theobald on Wills*; “So too, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of majority are void, unless the property is otherwise disposed of in the meantime.”<sup>84</sup>

Although initially limited to a single beneficiary, subsequent jurisprudence expanded the Rule in *Saunders v Vautier* to apply to multiple beneficiaries. Scholars disagree, however, whether the Rule allows for trust variation in addition to early termination. Waters argued that the inclusion of the right to vary a trust has been incorporated mostly by way of *obiter*, such as the following *obiter* comments in *Finnell v Schumacher Estate*: “‘In light of the rule in *Saunders v. Vautier* ... that a trust can be varied to any extent if all potential beneficiaries are adults and consent’, it is not surprising that respect for the settlor's intent when considering an application under the variation of trusts legislation may not be required, said the court.”<sup>85</sup> Joel Nitikman respectfully took the opposite position that regardless of the origin of variation’s inclusion in the Rule, the overarching 175 years of jurisprudence concludes that variation is now deemed permissible.<sup>86</sup> In a report on the Rule in *Saunders v Vautier* prepared by the Law Reform Commission of Saskatchewan, the authors commented that “some doubt has been expressed that

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<sup>83</sup> Ronald B Cantlie, “A Case of Mistaken Identity: The Rule in *Saunders v Vautier* and Section 61 of The Trustee Act of Manitoba” (1985) 15:2 Man LJ 135 at 136.

<sup>84</sup> HS Theobald, *Theobald on Wills*, 14th ed (London, UK: Stevens, 1982) at 631.

<sup>85</sup> Donovan Waters, “Does the Rule in *Saunders v. Vautier* Include the Power of Beneficiaries to Vary the Terms of the Trust?” (2013) 33:1 ETPJ 78 at 82, citing *Finnell v Schumacher Estate* (1990), 37 ETR 170 (Ont CA) [*Finnell*]. This article is cited with approval in Albert H Oosterhoff, “Trust Law Reform: The Uniform Trustee Act” (2014) 34:3 ETPJ 329 at 342 [Oosterhoff, “Reform”].

<sup>86</sup> Nitikman, *supra* note 74 at 38.



the logic underlying the rule is consistent with modification rather than variation, but since the beneficiaries could, after terminating the trust, resettle the property on themselves on new terms, the distinction is probably without practical importance.”<sup>87</sup> McClean went further in his analysis, arguing that “it would be rather ridiculous to deny to the beneficiaries a direct power of variation. Apart from authority, it could be said that in effect the beneficiaries are ‘owners’ of the property and the law should not deny them the right to deal with it as they wish.”<sup>88</sup>

As a result, the broader version of rule is understood to be that “[i]f there is only one beneficiary or if there are several (whether entitled concurrently or successively) and that they are all of one mind and he or they are not under any disability, the specific performance of the trust may be arrested and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees”.<sup>89</sup>

Variation is still considered distinct from resettlement which involves the trust being terminated and the trust property remade into a new trust. However, the British Columbia Law Institute noted that the “difference between a resettlement and a variation is often less than distinct in light of the fact that any variation can have far reaching consequences.”<sup>90</sup> Additionally, when asked to review a proposed arrangement, “courts often strain to find that a

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<sup>87</sup> Law Reform Commission of Saskatchewan, “Consultation paper on the Law of Trusts #1: The Rule in *Saunders v. Vautier* and the Variation of Trusts” (June 1994) at 7, online: <[https://lawreformcommission.sk.ca/Saunders\\_v\\_Vautier\\_and\\_Variation\\_of\\_Trusts\\_Consultation.pdf](https://lawreformcommission.sk.ca/Saunders_v_Vautier_and_Variation_of_Trusts_Consultation.pdf)>. [Saskatchewan LRC Report].

<sup>88</sup> McClean, “Variation” *supra* note 62 at 235 [citations omitted].

<sup>89</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 443.

<sup>90</sup> British Columbia Law Institute, “Report on the Variation and Termination of Trusts; A Report prepared for the British Columbia Law Institute by its Committee on the Modernization of the Trustee Act”, Report No 25 (October 2003) at 4, online: <[www.bcli.org/sites/default/files/Var+Term.pdf](http://www.bcli.org/sites/default/files/Var+Term.pdf)> [BCLI Report].

revocation and resettlement constitutes a variation so that it falls within the scope of their jurisdiction.”<sup>91</sup>

## 6. Variation of Trusts Legislation

The Rule in *Saunders v Vautier* permitted beneficiaries to end a trust prematurely, but in order for the Rule to be relied on, a beneficiary or beneficiaries needed to meet specific criteria. For example, if a beneficiary was under the age of majority, incapacitated or otherwise unavailable, the Rule in *Saunders v Vautier* was inapplicable. In those situations, beneficiaries had to rely on the inherent jurisdiction of the courts—namely the compromise jurisdiction—to make variations.<sup>92</sup> However, this practice ended with the 1956 decision, *Chapman v Chapman*.<sup>93</sup> *Chapman* held that the compromise jurisdiction “was limited to cases where beneficial interests were in dispute and had not yet been ascertained”<sup>94</sup> and that courts had no inherent power to approve variations, except under the emergency and maintenance jurisdictions. The decision demonstrated that “the court’s inherent jurisdiction to vary a trust had proved not as extensive as had previously been argued.”<sup>95</sup>

Prior to *Chapman*, certain statutes were amended with an aim to resolving “specific problems which the courts, in the exercise of the inherent jurisdiction, had not been able to resolve in a satisfactory fashion.”<sup>96</sup> One such amendment was section 57(1) of the English *Trustee Act, 1925*, which stated:

Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase investment, acquisition, expenditure, or other transaction, *is in the opinion of the court expedient, but the same cannot*

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<sup>91</sup> *Ibid.*

<sup>92</sup> Bernstein, *supra* note 60 at 253, citing *Re Downshire Settled Estates*, [1953] Ch 218, [1953] 1 All ER 103.

<sup>93</sup> *Chapman v Chapman*, [1954] AC 429, [1954] 1 All ER 798 [*Chapman*].

<sup>94</sup> Bernstein, *supra* note 60 at 253.

<sup>95</sup> Glenn, *supra* note 1 at 629, citing Waters, Gillen & Smith, *supra* note 15 at 1061 *et seq.*

<sup>96</sup> McClean, “Variations”, *supra* note 62 at 208–09.

*be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose; on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*<sup>97</sup>

The intent of section 57(1) was to codify in part the emergency jurisdiction, and in so doing, help to reduce and overcome some of the jurisdiction’s shortfalls. Instead of requiring an emergency, courts could make orders under section 57(1) and approve variations where it was deemed “expedient”<sup>98</sup> for the administration of a trust. The revised legislation also eliminated the requirement that the circumstances driving a variation had to be unexpected by the settlor of the trust.

Sections 54(a)–(c) of Manitoba’s *Trustee Act* MB 1954 mirrored the English sections 57(1)–(3), until amended in 1956 by *An Act to Amend the Trustee Act*.<sup>99</sup> The amendment modified the section to read: “Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase investment, acquisition, expenditure, or other transaction, *or any modification or variation of the trusts or investments*, is in the opinion of the court expedient, ...”.<sup>100</sup> McClean argued that the “intent may well have been to allow for variation of the beneficial [interests]”<sup>101</sup> in addition to administrative terms. Regardless of whether the amendment was meant to apply to beneficial

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<sup>97</sup> *Trustee Act, 1925*, 15 & 16 Geo 5, c 19, s 57(1) [*Trustee Act, 1925*]. Other amendments include the *Settled Land Act, 1925*, 15 & 16 Geo 5, c 18, ss 10(3)–(4), 64, 83 & 84, the *Trustee Act, 1925*, *supra* note 97, s 53, and their Canadian equivalents. See McClean, “Variations”, *supra* note 62 at 209.

<sup>98</sup> *Ibid.*

<sup>99</sup> *An Act to Amend the Trustee Act*, SM 1956, c 68, s 1. Section 57(4) of the *Trustee Act, 1925*, contained a restriction for trusts containing real property. Since the Manitoba legislation “applies to all trusts whenever created and to all trustees whenever appointed” (*Trustee Act* MB, *supra* note 13, s 2) when sections 54(1)–(3) were added to the *Trustee Act* MB 1954, there was no need to include section 57(4) of the *Trustee Act, 1925*. McClean, “Variation”, *supra* note 62 at 210.

<sup>100</sup> *Trustee Act* MB 1954, *supra* note 12, s 54(1) [emphasis added].

<sup>101</sup> McClean, “Variation”, *supra* note 62 at 219.

interests, however, “[i]t is difficult ... to escape the impact of the requirement that variation must be needed to facilitate ‘the management or administration of the trust property’.”<sup>102</sup>

However, after *Chapman*, the English Law Reform Committee “was assigned the task of considering the problem of variation of trusts”.<sup>103</sup> Its report, released in November of 1957, determined that “the existing state of the law was unsatisfactory and that the only satisfactory solution was to provide the court with an unlimited jurisdiction to sanction all variations of trusts.”<sup>104</sup> The biggest hurdle in granting unlimited jurisdiction was rectifying the court’s inability to consent on behalf of minor, unborn and unascertained beneficiaries, for “[t]o deny this power to the courts, not only prejudiced these beneficiaries but it also operated to the disadvantage of adult beneficiaries who were interested in the same trust, and who, but for the presence of minors, the unborn and/or unascertained beneficiaries, could have altered the terms of the trust at will.”<sup>105</sup> The addition of the ability for a court to consent on behalf of a beneficiary who otherwise could not was intended to “meet a concern that trusts, once established, were not sufficiently flexible in a rapidly changing society.”<sup>106</sup>

The English Law Reform Committee report did not appear to be overly concerned with the settlor’s or testator’s intentions. The report stated that “when [the settlor] makes the settlement, the settlor parts with his beneficial interest in the property and he ought not to retain any right to veto changes in his dispositions which the court considers to be desirable in the interests of his beneficiaries.”<sup>107</sup> This point was further debated in Parliament when discussing the Variation of Trusts Bill. Both Houses eventually “accepted the proposition that the interests

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<sup>102</sup> *Ibid.*

<sup>103</sup> Bernstein, *supra* note 60 at 264.

<sup>104</sup> *Ibid.*

<sup>105</sup> McClean, “Variation”, *supra* note 62 at 228–29.

<sup>106</sup> Glenn, *supra* note 1 at 628–29, citing Waters, Gillen & Smith, *supra* note 15 at 1056 *et seq.*

<sup>107</sup> Bernstein, *supra* note 60 at 264.

of the beneficiaries must take precedence over the intent of the settlor, though this was made more palatable by the undertaking that arrangements would be made to implement the Committee’s recommendation that the settlor, if living, could be heard on any application under the Bill.”<sup>108</sup>

Subsequently, the United Kingdom enacted the *Variation of Trusts Act 1958*,<sup>109</sup> which permitted courts to consent on behalf of minors, unborn and unascertained beneficiaries, provided that the court is satisfied that there is a benefit to the beneficiary for whom the court is consenting. Ontario, Prince Edward Island and Nova Scotia adopted similar legislation shortly thereafter.<sup>110</sup> Manitoba incorporated similar provisions into its *Trustee Act*,<sup>111</sup> as did Alberta and New Brunswick.<sup>112</sup> In *Goulding v James*, Mummery L.J. stated that variation of trusts legislation “has been viewed by courts as a statutory extension of the consent principle in the rule in *Saunders v Vautier*”.<sup>113</sup> Bernstein similarly described variation of trusts legislation as “a legislative endorsement of the rule in *Saunders v Vautier*.”<sup>114</sup> There are still limits under variation of trusts legislation, however—notably, a court cannot resetttle or otherwise remake a trust. In *Re Irving*, Pennell J. noted “the spirit of the Act ... permits pruning of the trust in order to promote fruitfulness but the root is to be preserved.”<sup>115</sup>

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<sup>108</sup> McClean, “Variation”, *supra* note 62 at 229.

<sup>109</sup> *Variation of Trusts Act 1958* (UK), 6 & 7 Eliz 2, c 53 [*Variation of Trusts Act 1958*].

<sup>110</sup> *Variation of Trusts Act*, SO 1959, c 104; *Variation of Trusts Act*, SNS 1962, c 14; *Variation of Trusts Act*, SPEI 1963, c 34.

<sup>111</sup> *The Trustee Act*, RSM 1970, c T-160 [*Trustee Act MB 1970*].

<sup>112</sup> *Trustee Act*, SA 1964, c 98, s 31(a); *Trustee Act*, SNB 1959, c 76, s 29A.

<sup>113</sup> *Goulding v James*, [1997] 2 All ER 239 at 247 [CA] [*Goulding*].

<sup>114</sup> Bernstein, *supra* note 60 at 281.

<sup>115</sup> *Irving, Re*, 1975 CarswellOnt 581 at para 48, 66 DLR (3d) 387 (Ont SC) [*Re Irving*]. *Re Irving* follows the leading English case of *Re Ball’s Settlement*, [1968] 2 All ER 438, [1968] 1 WLR 899 [cited to WLR], wherein Megarry J. held that “[i]f an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying the trust. But if an arrangement, while leaving the substratum, effectuates the purposes of the original trust by other means, it may still be possible to regard the arrangement as merely varying the original trust, even though the means employed are wholly different and even though the form is completely changed” (*ibid* at 905).

When a court is asked to consent to a proposed variation on behalf of a beneficiary under the English legislation, the court is able to consider whether the appropriateness of the overall change, otherwise described as the “fitness” of the variation. *Re Steed's Will Trusts*<sup>116</sup> was one of the first appellate decisions to consider the *Variation of Trusts Act 1958*; the English Court of Appeal determined that the legislation provided them with a “very wide and, indeed, revolutionary, discretion ... to look at the scheme as a whole, and ... to consider ... what really was the intention of the benefactor.”<sup>117</sup> In his determination, Upjohn L.J. stated that a court is “not confined to the narrow duty of inquiring into the effect of a proposed scheme upon those on whose behalf approval by the court is sought.”<sup>118</sup> Upjohn L.J. held that “the court must, albeit that it is performing its duty on behalf of some person who cannot consent on his or her own part, regard the proposal in the light of the purpose of the trust as shown by the evidence of the will or settlement itself, and of any other relevant evidence available,”<sup>119</sup> and satisfy itself that it is appropriate to approve the arrangement as a whole. The decision “laid down the proposition that, as the jurisdiction to give consent is discretionary, a court can, under the legislation, withhold approval quite independently of the issue of benefit to an infant, contingent or unborn beneficiary.”<sup>120</sup> Subsequently, the “fitness” test has been codified in Canadian variation of trusts legislation.<sup>121</sup>

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<sup>116</sup> *Re Steed's Will Trusts*, [1960] CH 407 (CA) [*Re Steed*].

<sup>117</sup> *Ibid* at 420–21.

<sup>118</sup> *Ibid* at 422.

<sup>119</sup> *Ibid* at 421.

<sup>120</sup> Keith B Farquhar, “Recent Themes in the Variation of Trusts” (2001) 20:1 ETPJ 181 at 200.

<sup>121</sup> See e.g. *Trust and Settlement Variation Act*, RSBC 1979, c 413, s 1 [*Trust Variation Act BC*], which permits the court to approve a proposed arrangement on behalf of incapacitated beneficiaries “if it thinks fit” (*ibid*).

## 7. Conclusion

A trust is an equitable obligation, binding a trustee who holds legal title to property for the benefit of the beneficiaries.<sup>122</sup> Trusts have been in use for nearly 800 years, and continue to evolve. Even though scholars may disagree on the reasons justifying equity's intervention, trusts continue to be used for the same purposes, such as avoiding tax and assisting with estate planning. Their origins—essentially, “what’s in good conscience”—in the Court of Equity continues to shape their use today with the recognition of resulting trusts and imposition of constructive trusts.

As flexible as trusts can be for addressing different situations, trusts are bound by the terms of their trust instruments. The addition of the Rule in *Saunders v Vautier* in 1841 was a boon to beneficiaries who could now call for a trust to be ended and the trust property turned over, provided that the beneficiaries were of age and had capacity. Otherwise, courts had some inherent jurisdiction to vary trusts, until variation of trusts legislation expanded the courts' ability to consent on behalf of beneficiaries who were unable to do so.

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<sup>122</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 2.

## CHAPTER 2: Equitable Interests and Indefeasibility of Title

“Indefeasibility is the heart of a Torrens System. The register is everything; an owner’s title is conclusive and persons dealing with registered owners are not required to go behind the register.”<sup>123</sup>

### 1. Introduction

In this chapter, I consider the collision of equitable interests with the indefeasibility principle enshrined at section 59(1) of the *Real Property Act*. I address three main issues. Firstly, after years of conflicting case law on whether section 59(1) ousts equitable interests, I argue that the recent *Hupe CA* decision conclusively resolves the issue. Secondly, another example of an equitable interest not mentioned in *Hupe CA* but that exists “off title” is from *Stonehouse*. I review *Stonehouse* in the context of Manitoba’s *Real Property Act* and argue that the equitable interest is applicable in Manitoba as well. Finally, I consider the remedies available to a beneficiary for recovery of the property, following the court’s comments on filing caveats for equitable interests.

### 2. Torrens System of Land Registration

Manitoba, like most provinces in Canada,<sup>124</sup> uses the Torrens system created by Robert Torrens. Prior to the creation and adoption of Torrens system, transfers of real property required individuals to produce a series of deeds and prove the chain of ownership each time the property changed hands. The process was a “wearisome and intricate task”<sup>125</sup> that was prone to fraud.<sup>126</sup>

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<sup>123</sup> *Carlidge v Smith*, 44 Man R (2d) 252, 1987 CarswellMan 175 at para 40 (CA).

<sup>124</sup> MLRC Report 2016, *supra* note 6 at 4.

<sup>125</sup> Ziff, *supra* note 36 at 478, citing *Williams & Glyn’s Bank Ltd v Boland*, [1981] AC 487 at 511, [1980] 2 All ER 408 (HL). To replicate delivery of possession, real property was transferred symbolically by handing over a branch or clump of dirt in a ceremony called Livery of Seisin. Ziff, *supra* note 36 at 175.



The Torrens system, in contrast, “is a registry-based system designed to afford those who acquire title to be secure against attack on their title, by reason of some prior defect in the chain of title.”

<sup>127</sup> In the seminal decision from New Zealand, *Fels v Knowles*, the court stated that:

The cardinal principle of the [Torrens System] is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered.<sup>128</sup>

Instead of requiring landowners to prove the chain of ownership, potential purchasers and interested third parties can make inquiries with the register and are “able to rely on the sanctity of the register, including registrations against the title creating interests in land.”<sup>129</sup> The indefeasibility of title in the register is supported by three cornerstone principles—the mirror principle, the curtain principle and the insurance principle:

The first is the ‘mirror principle’ under which the register is a perfect mirror of the state of title. The second is the ‘curtain principle’ under which the purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register. The third is the ‘insurance principle’ under which the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.<sup>130</sup>

The Torrens System and its guarantee of indefeasibility have been codified in Manitoba in the *Real Property Act*. Section 3 of the *Real Property Act* provides that the “[t]he objects of this Act are to simplify the title to land, to give certainty thereto, to facilitate the proof thereof, and to expedite dealings therewith; and the Act shall be construed in a manner to best give effect

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<sup>126</sup> Ziff, *supra* note 36 at 473.

<sup>127</sup> *Langdon v Langdon*, 2015 MBQB 153 at para 193 [*Langdon*].

<sup>128</sup> *Fels v Knowles* (1906), 26 NZLR 604 (New Zealand CA) at 620, cited in *Hupe CA*, *supra* note 3 at para 51.

<sup>129</sup> *Langdon*, *supra* note 127 at para 193.

<sup>130</sup> Marcia Neave, “Indefeasibility of Title in the Canadian Context” (1976) 26:2 UTLJ 173 at 174 [citations omitted].

to those objects.”<sup>131</sup> Section 59(1) states that “[e]very certificate of title or registered instrument, as long as it remains in force and is not cancelled or discharged, *is conclusive evidence at law and in equity*, as against the Crown and all persons, that *the owner is indefeasibly entitled to the land or the interest specified in the title* or instrument.”<sup>132</sup> An “instrument” is broadly defined by the Act as “a certificate of title, title, certificate of search or charge, book, record, plan, or data stored in the electronic information system, relating to a dealing with land, or creating a mortgage, encumbrance, or lien thereon, or evidencing title thereto and includes any duplicate of the instrument”.<sup>133</sup>

In order to ensure the reliability of the register, a critical component of any Torrens System “is that title to land does not pass until registration, but, upon registration, title is conclusive, subject to specific legislated exceptions. Further, ... instruments affecting the property, such as mortgages and long-term leases, will only be effectual upon registration.”<sup>134</sup> Section 66(4) of the *Real Property Act* provides that “[n]o instrument is effectual to pass an interest in land under the new system ... until the instrument is registered in accordance with this Act.”<sup>135</sup>

Notwithstanding section 59(1), a certificate of title to the property alone is not conclusive—“[i]n order to ensure that he is not dealing with a forger or a myth it is still

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<sup>131</sup> *Real Property Act*, *supra* note 4, s 3.

<sup>132</sup> *Ibid*, s 59(1) [emphasis added]. Section 59(1) was originally much longer before it was separated into multiple sections by *The Real Property Amendment Act*, SM 2011, c 33, s 11(1). The section previously stated in its entirety: “Every certificate of title, so long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against Her Majesty and all persons, that the person named in the certificate is entitled to the land described therein for the estate or interest therein specified, subject, however, to the right of any person to show that the land is subject to any of the exceptions or reservations mentioned in section 58, or to show fraud wherein the registered owner, mortgagee, or encumbrancer, has participated or colluded and as against the registered owner, mortgagee, or encumbrancer; but the onus of proving that the certificate is so subject, or of proving the fraud, is upon the person who alleges it”. *The Real Property Act*, RSM 1988, c R30, s 59(1).

<sup>133</sup> *Real Property Act*, *supra* note 4, s 1.

<sup>134</sup> *Hupe CA*, *supra* note 3 at para 49.

<sup>135</sup> *Real Property Act*, *supra* note 4, s 66(4).

incumbent upon a transferee, mortgagee or other person dealing on the faith of the register to satisfy himself as to the identity and capacity of the registered owner and a genuine deed.”<sup>136</sup> DiCatri noted a number of examples that would not be reflected on title, including “the state of accounts between mortgagor and mortgagee, vendor and purchaser; the situation as to the various classes of taxes; what zoning or other bylaws may be in force affecting the user of the land; what portion of the parcel described in the certificate lies within any highway or proposed highway.”<sup>137</sup>

Some of the above limitations have been statutorily enshrined in the *Real Property Act*. Section 59(1.2) states that “[d]espite subsection (1), in a proceeding under this Act, a person may show that the owner is not entitled to the land or the interest specified in the title or the registered instrument when the owner of the land or the owner of the registered instrument has participated or colluded in fraud or a wrongful act.”<sup>138</sup> Section 58 lists a number of restrictions that title is subject to, including reservations in the original grant of land from the Crown, right of ways or other easements, rights of expropriation.<sup>139</sup> Section 58 states these restrictions may be present “by implication and without special mention in the certificate,”<sup>140</sup> indicating that the listed restrictions may be recognized without having to be registered against title.

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<sup>136</sup> Victor DiCatri, *Thom’s Canadian Torrens System*, 2nd ed (Calgary, 1962: Burroughs & Company) at 41.

<sup>137</sup> *Ibid.* Also not adequately reflected in the register are, “unfortunately, all overriding legislation of general application and affecting title” (*ibid.*).

<sup>138</sup> *Real Property Act*, *supra* note 4, s 59(1.2).

<sup>139</sup> *Ibid.*, s 58(1). Section 59(1.1) expressly states that “[d]espite subsection [59(1)], a person may show that a certificate of title is subject to any of the exceptions or reservations mentioned in section 58” (*ibid.*, s 59(1.1)).

<sup>140</sup> *Ibid.*, s 58(1).

### 3. Manitoba Jurisprudence on Equitable Interests and Indefeasibility of Title

The first notable decision on section 59(1) of the *Real Property Act* is *Fort Garry Care Centre Ltd v Hospitality Corporation of Manitoba*,<sup>141</sup> which held that indefeasibility of title was supreme and no other beneficial interests could exist beyond a certificate of title. However, *Fort Garry* dealt with a situation where corporate neighbours shared a right of way over three adjacent properties. The question—and therefore the ruling—did not address indefeasibility of fee simple title, per se. The right of way had been specifically incorporated into the legal description of each of the properties. Issues arose when the registered owner of the middle property wanted to expand the beverage room of the motor inn on the property, thereby encroaching onto the right of way.<sup>142</sup> The then owner of the northernmost property—containing a nursing home—consented to the encroachment provided that “a passage way remain between the motor inn and the nursing home structures sufficiently wide for the passage of emergency vehicles.”<sup>143</sup> However, once constructed, there was not enough room to use the right of way on the motor inn property without trespassing onto the nursing home property. The issue before the court was whether by blocking the right of way to its own property, “the motor inn had effectively blocked its own use of the rights of way eastward from the area of the beverage room extension”.<sup>144</sup>

The trial judge agreed and made an order under the authority of section 176(1) of the *Real Property Act*,<sup>145</sup> that the right of ways be excised from the three certificates of title. On

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<sup>141</sup> *Fort Garry Care Centre Ltd v Hospitality Corporation of Manitoba Inc*, 123 Man R (2d) 241, 1997 CarswellMan 644 (CA) [*Fort Garry* cited to CarswellMan].

<sup>142</sup> *Ibid* at para 10.

<sup>143</sup> *Ibid* at para 11.

<sup>144</sup> *Ibid* at para 15.

<sup>145</sup> Section 176(1) provides that “[i]n a proceeding respecting land, or in respect of a transaction or contract relating thereto, or in respect of an instrument, caveat, memorial, or other entry affecting land, the court may, by order, direct the district registrar to cancel, correct, substitute, or issue, a certificate of title, or make an endorsement or entry on

appeal, Huband J.A. considered sections 59(1), 76(4) and 62(1) of the *Real Property Act*<sup>146</sup> and held that the “spirit of the legislation in its totality is to discourage a legal attack which would call into question what is shown on the certificate of title, except on the basis of fraud or the rectification of a mistake.”<sup>147</sup> Accordingly, he held that the jurisdiction granted by section 176(1) is limited to those specific instances and “does not authorize the court to conclude that a right of way for all purposes should now have limited purposes or, indeed, should not exist at all.”<sup>148</sup> Regarding indefeasibility of title, Huband J.A. acknowledged that the *Real Property Act* “emphasizes the significance of the certificate of title under the Torrens land registration system. Section 59(1) states that, subject to fraud and specific reservations which have no application in the present case, the certificate of title is conclusive evidence at law and in equity that the registered owner is entitled to the land described therein for the estate or interest therein specified.”<sup>149</sup>

*Fort Garry* was subsequently relied on in *Ehrmantraut v Ehrmantraut (Trustee of)*,<sup>150</sup> which involved a gift from parents to an adult son. At the trial level, McKelvey J. considered the presumptions of resulting trust and the reasoning in *Fort Garry* and others. In her determination, McKelvey J. held that “[t]here are no cases where a Court has expressly held that a resulting trust can be applied to overcome the indefeasibility provision of s. 59 of the Act. Section 59 is clear, and restrictive in its language. ... Accordingly, I find that I am bound by the *Fort Garry* case and

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any instrument, or to do or refrain from doing any act or make or refrain from making any entry necessary to give effect to the judgment, or order of the court.” *Real Property Act*, *supra* note 4, s 176(1).

<sup>146</sup> Section 76(4) of the *Real Property Act* provides that “where land is subject to a right of way agreement, the agreement shall be deemed to run with the land.” *Fort Garry*, *supra* note 141 at para 21. Section 62(1) provides that “no action for ejectment or other action for the recovery of land shall be sustained against the registered owner of the estate or interest in respect of which he is so registered” (*ibid* at para 22).

<sup>147</sup> *Fort Garry*, *supra* note 141 at para 24.

<sup>148</sup> *Ibid* at para 31.

<sup>149</sup> *Ibid* at para 20.

<sup>150</sup> *Ehrmantraut v Ehrmantraut (Trustee of)*, 2008 MBQB 140 [*Ehrmantraut* QB].

conclude that s. 59 has operated as conclusive evidence at law and in equity that [there was no resulting trust in favour of the parents].”<sup>151</sup> Although *Ehrmantraut* QB was upheld at the Court of Appeal, MacInnes J.A. stated that “[a]s we are deciding the appeal on [a separate] issue alone, it is not necessary for us to deal with the issue of indefeasibility of title under s. 59 of *The Real Property Act*, ... a matter best left for another day.”<sup>152</sup>

Comparatively, in *Molinski v Chebib*,<sup>153</sup> Schulman J. gave effect to a constructive trust, notwithstanding the earlier *Fort Garry* and *Ehrmantraut* QB decisions. The plaintiff in *Molinski* had previously obtained an order in a family matter, which, among other relief, included a declaration that she was the beneficiary of a constructive trust for a twenty-five percent interest in a property that had been subsequently transferred.<sup>154</sup> That judgment was registered against title, which was already encumbered by two other judgments and a claim by Legal Aid Manitoba.<sup>155</sup> When the property was sold pursuant to a judgment sale for less than what was owed, Schulman J. had to determine priorities of the various creditors, and particularly the retrospectivity of the constructive trust.<sup>156</sup> After considering relevant jurisprudence in Alberta<sup>157</sup> and *Ehrmantraut* CA, Schulman J. held that “there is no reason to apply s. 59 so as to preclude giving priority to the [plaintiff’s] rights under [the order], which stated that notwithstanding the transfer [the plaintiff] continued to have her equitable rights to the property.”<sup>158</sup>

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<sup>151</sup> *Ibid* at paras 42–43.

<sup>152</sup> *Ehrmantraut v Ehrmantraut (Trustee of)*, 2008 MBCA 127 [*Ehrmantraut* CA].

<sup>153</sup> *Molinski v Chebib*, 2012 MBQB 123 [*Molinski*].

<sup>154</sup> *Ibid* at para 4.

<sup>155</sup> *Ibid* at para 3.

<sup>156</sup> *Ibid* at para 12, citing *Rawluk*, *supra* note 57 at 91.

<sup>157</sup> *Bezuko v Supruniuk*, 2007 ABQB 204; *Kaup v Imperial Oil Ltd*, [1962] SCR 170 at 182–83, 32 DLR (2d) 112 (Alta).

<sup>158</sup> *Molinski*, *supra* note 153 at para 13. The order in the family matter specified that the 25 percent interest in the land was worth \$25,000.00 (*ibid* at para 4). Consequently, Schulman J. held that the order should be construed as creating an equitable mortgage in land since “[c]ourts do not recognize dollar interests in land” (*ibid* at para 13).

#### 4. *Hyczkewycz v Hupe*

The withdrawn 2016 MLRC Report addressed both resulting trusts and constructive trusts and was hopeful that an appellate decision could provide clarity on whether resulting trusts and constructive trusts could co-exist with section 59 of the *Real Property Act*.<sup>159</sup> Notwithstanding the hopefulness of the report, the authors noted that

[e]ven if the *Hupe* case were to come before the Manitoba Court of Appeal, and the Court of Appeal were to conclude that resulting trusts could be recognized in the face of section 59(1) of the *Real Property Act*, or alternatively, that they cannot be recognized, it is unlikely that the matter of whether or not constructive trusts can be recognized notwithstanding section 59(1) of the *Real Property Act* would be addressed by the court in its ruling.<sup>160</sup>

Instead, the decision in *Hupe CA* not only addressed the issue for constructive and resulting trusts, but other types of equitable interests not included in section 58 or 59 of the *Real Property Act*. The decision was extremely thorough and clearly intended to be the definitive answer on whether equitable interests can co-exist with Manitoba's indefeasibility of title. The issues of the case centered on the gratuitous transfer of four residential properties from a mother to her daughter and son-in-law. When the daughter and son-in-law separated, the mother argued that the properties should not be included in the marital property accounting since the mother held beneficial title of the properties on the basis of resulting trusts.<sup>161</sup> At the trial level, Kroft J. determined that “[t]he [*Real Property Act*] provisions protect good faith purchasers for value who relied on the register. A resulting trust does not amend the legislation. It exists between

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<sup>159</sup> MLRC Report 2016, *supra* note 6 at 49, 51. At the time of the report's writing, *Hupe v Hyczkewycz*, 2016 MBCA 23 [*Hupe* 2016], had already been argued at the Court of Appeal. On appeal from the master, the motion judge dismissed a summary judgment application by the defendant, who cited *Fort Garry* and *Ehrmantraut* QB and argued that title was indefeasible. The Court of Appeal also dismissed the appeal, “satisfied that there [were] triable issues as to the proper interpretation of section 59, given the approaches in other provinces and the case law in Manitoba.” *Hupe* 2016, *supra* note 159 at para 3. The Court of Appeal added that “[i]n reaching our decision, we are neither endorsing nor disagreeing with the interpretation of section 59 given by the motion judge. Whether that section is an absolute bar, a rebuttable presumption or something else is a question we think is best left for the trial judge to decide, with the benefit of a full record” (*ibid* at para 4).

<sup>160</sup> MLRC Report 2016, *supra* note 6 at 52.

<sup>161</sup> *Hyczkewycz v Hupe*, 2017 MBQB 209 [*Hupe* QB].

immediate parties or volunteers claiming through them, independent of the land titles register. A resulting trust is but one of a number of circumstances in which an interest in land arises by operation of law.”<sup>162</sup> Accordingly, he held that “resulting trusts and the related presumption [of resulting trusts] can exist in Manitoba despite the certainty of title provisions in the RPA.”<sup>163</sup>

*Hupe* QB was appealed on four grounds,<sup>164</sup> two of which are relevant to our analysis: first, that “the trial judge erred in law in his interpretation of section 59 of the *RPA* in concluding that a resulting trust could be enforced against an owner's registered title to land in Manitoba;”<sup>165</sup> and second, that “the trial judge erred in law in applying the presumption of resulting trust.”<sup>166</sup>

On the first ground of appeal, Beard J.A. compared the origins and goals of western land registry systems, the interplay in those jurisdictions between the indefeasibility principle and trusts generally, and the effect of section 59(1) of the *Real Property Act* on trusts in Manitoba.<sup>167</sup> One argument advanced by the son-in-law was that jurisprudence from other jurisdictions was not persuasive because Manitoba’s legislation was the only legislation with an “Objects” clause (section 3 of the *Real Property Act*<sup>168</sup>). Beard J.A. concluded that notwithstanding their differences, the registry systems of Manitoba, Alberta and Saskatchewan “shared common, close-in-time origins”<sup>169</sup> and were enacted with a similar purpose—“to facilitate the settlement of

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<sup>162</sup> *Ibid* at para 143.

<sup>163</sup> *Ibid* at para 147.

<sup>164</sup> All four grounds of appeal were dismissed. The appellant also argued that the trial judge made errors in factual findings and failed to apply the principles of *Dashevsky v Dashevsky*, 1986 CarswellMan 103, 40 Man R (2d) 58 (QB (Fam Div)) [cited to CarswellMan]—that once a transaction has been characterized in a way to benefit the parties, the parties are bound to those assertions (*ibid* at para 23).

<sup>165</sup> *Hupe* CA, *supra* note 3 at para 2.

<sup>166</sup> *Ibid* at para 2.

<sup>167</sup> *Ibid* at para 33.

<sup>168</sup> *Supra* note 131 and accompanying text.

<sup>169</sup> *Hupe* CA, *supra* note 3 at para 40.



the land by providing a registration system which would allow for cheap, easy and secure sales, purchases and lending.”<sup>170</sup>

Although *Hupe CA* involved only resulting trusts, the decision’s examination of the Torrens System was broad in scope, demonstrating the co-existence in Manitoba of nearly all equitable interests. Beard J.A. frequently referred both to “trusts” and “trusts related to land”.<sup>171</sup> In her review of section 58 and 59 of the *Real Property Act*, Beard J.A. noted that “beyond these statutory exceptions and qualifications, *various in personam equitable interests, including trusts related to land*, can also supersede the principle of indefeasibility.”<sup>172</sup> Following a lengthy analysis of historical records,<sup>173</sup> legal texts and articles,<sup>174</sup> and relevant case law,<sup>175</sup> Beard J.A. concluded that “all Torrens jurisdictions discussed—no matter the manner of expressing their concept of indefeasibility of title or the specific words used—accept and recognise that *equitable interests in land, including trusts*, can exist within the Torrens system. It is universally recognised that the Torrens system did not abolish *trusts or other equitable interests*.”<sup>176</sup> Further, when considering Supreme Court jurisprudence, Beard J.A. noted that “[w]hile there do not appear to be any decisions from the Supreme Court of Canada that deal with the co-existence of trusts and the indefeasibility of title, there are several that deal with other equitable claims to

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<sup>170</sup> *Ibid* at para 48.

<sup>171</sup> See e.g. *Hupe CA*, *supra* note 3 at paras 55–56.

<sup>172</sup> *Ibid* at para 53 [emphasis added].

<sup>173</sup> *Ibid* at paras 56–57, citing, *inter alia*, Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (Adelaide: Register and Observer General Printing Offices, 1859).

<sup>174</sup> *Hupe CA*, *supra* note 3 at paras 58–66, citing, *inter alia*, Louis William Coutlée, *A Manual of the Law of Registration of Titles to Real Estate in Manitoba and the North-West Territories* (Toronto: Carswell, 1890); DiCastrì, *supra* note 136; Lyria Bennett Moses & Brendan Edgeworth, “Taking it Personally: Ebb and Flow in the Torrens System’s In Personam Exception to Indefeasibility” (2013) 35:1 *Sydney L Rev* 107.

<sup>175</sup> *Hupe CA*, *supra* note 3 at paras 67–80, citing, *inter alia*, *Massey v Gibson* (1890), 7 Man R 172 (CA); *Dukart v Surrey (District)*, [1978] 2 SCR 1039, 86 DLR (3d) 609 (BC) [*Dukart* cited to SCR]; *Jellett v Wilkie*, (1896) 2 SCR 282, 16 CLT 260 (NWT) [*Wilkie*]; *In re Church*, [1923] SCR 642, [1923] 3 DLR 1045 (Alta) [*Church*].

<sup>176</sup> *Hupe CA*, *supra* note 3 at para 81 [emphasis added].

land.”<sup>177</sup> Specific examples included “the equitable rights of a purchaser of land as against an execution creditor”<sup>178</sup> and the equitable rights of a devisee of property under a will as against a purchaser of the land.<sup>179</sup>

Notably, in her review of case law, Beard J.A. considered and distinguished *Fort Garry* and *Ehrmantraut* QB, holding that “neither of these cases deals with the main issue in this case.”<sup>180</sup> Beard J.A. wrote that “there was no equitable interest or trust interest being asserted [in *Fort Garry*]; the case merely indicated that an owner could not demand the elimination of a neighbour’s right-of-way from the owner’s property if the right-of-way is included in the description of the land on the owner’s certificate of title—the certificate of title is conclusive in such cases.”<sup>181</sup> Similarly, Beard J.A. found that “in [*Ehrmantraut* CA], this Court determined that a resulting trust did not arise on the facts of the case, and declined to comment on the issue in indefeasibility of title under section 59 of the [*Real Property Act*].”<sup>182</sup>

On the second ground of appeal—whether the *Real Property Act* permits the presumption of resulting trusts as well as resulting trusts, Beard J.A. endorsed the conclusion of Kroft J. in *Hupe* QB:

once it is accepted that resulting trusts can exist despite the [*Real Property Act*’s] certainty of title provisions, the intimately related presumption of resulting trust (which has its own legal history and rationale) cannot simply be hived off absent clear statutory or high court authority. I have seen no such authorities. If resulting trusts or other unregistered interests in land (possibly even express trusts) are posing significant problems for stakeholders in Manitoba, perhaps it is time to reform the legislation.<sup>183</sup>

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<sup>177</sup> *Ibid* at para 72.

<sup>178</sup> *Ibid* at para 73, citing *Wilkie*, *supra* note 175.

<sup>179</sup> *Church*, *supra* note 175.

<sup>180</sup> *Hupe* CA, *supra* note 3 at para 71.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Hupe* QB, *supra* note 161 at para 144.

The conclusiveness of *Hupe CA* is bolstered further by the Supreme Court of Canada's refusal to grant leave to appeal. With a wide discretion to determine which cases it hears, the Supreme Court is "no longer merely concerned with correcting legal errors, but with the broader supervisory function of giving direction to lower courts and Canadians generally on the interpretation and development of the law."<sup>184</sup> The *Supreme Court Act* sets forth the circumstances in which the Supreme Court should grant leave to appeal, namely,

where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.<sup>185</sup>

The Supreme Court Advocacy Institute provides a non-exhaustive list of concerns which are suggestive of a significant public importance, including "interpretation of an important federal statute or provincial statute that exists in several provinces."<sup>186</sup>

## 5. Severance of Joint Tenancy as an Equitable Interest

Although not specifically included by Justice Beard as an equitable interest in *Hupe CA*, another case providing an example of an equitable interest existing "off title" is the Supreme Court of Canada decision, *Stonehouse v British Columbia (Attorney General)*.<sup>187</sup> The Supreme Court held that a joint tenancy could be severed despite the indefeasibility provisions of the *Land Titles Act*,<sup>188</sup> an exception that arguably should be recognized in Manitoba as well.<sup>189</sup> The Supreme Court was asked to consider section 23 of the *Land Titles Act*, previously section 38 of

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<sup>184</sup> Patrick Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80:1-2 Can Bar Rev 374 at 385.

<sup>185</sup> *Supreme Court Act*, RSC, 1985, c S-26, s 40(1).

<sup>186</sup> Supreme Court Advocacy Institute, "Guidelines: Applications for Leave to Appeal", online: <<https://scai-ipc.ca/leave-guidelines.html>>.

<sup>187</sup> *Supra* note 9.

<sup>188</sup> *Land Titles Act*, RSBC 1996, c 250, s 23.

<sup>189</sup> *Stonehouse* was cited in Manitoba's *Davison v Davison Estate*, 2009 MBCA 100, which held that a request for partition and sale in a petition for divorce was not sufficient to sever a joint tenancy where no other negotiations were present. See also *Simcoff v Simcoff*, 2009 MBCA 80.

British Columbia's *Land Registry Act*—a similar provision to section 59(1)—which provided that “such a certificate is ... conclusive evidence ... as against Her Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee-simple in the land therein described...”<sup>190</sup>

*Stonehouse* involved a situation where a husband and wife held the title as joint tenants. Joint tenancy is a form of ownership in which the owners each holds an equal interest in an undivided whole of the property. Joint tenancy is notable for its “right of survivorship, or *jus accrescendi*, by which, if one joint tenant dies without [the joint tenancy being severed] in his lifetime, his interest is extinguished and accrues to the surviving tenants whose interests are correspondingly enlarged.”<sup>191</sup> A joint tenancy can be severed in several ways:

in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund — losing, of course, at the same time, his own right of survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.<sup>192</sup>

In *Stonehouse*, the wife, “without telling her husband what she was doing, conveyed ‘all her interest in and to’ this property to ... her daughter by a former marriage.”<sup>193</sup> The daughter did not register the transfer with the Land Titles office for three years, but on her mother’s death immediately registered the transfer.<sup>194</sup> When the husband tried to register the property in his own name pursuant to his right of survivorship, he was informed that the joint tenancy had been

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<sup>190</sup> *Land Registry Act*, RSBC 1948, c 171, s 38 [*Land Registry Act*].

<sup>191</sup> GC Cheshire & Edward Hector Burn, *Cheshire's Modern Law of Real Property*, 11th ed (London, UK: Butterworth, 1972) at 328–29.

<sup>192</sup> *Williams v Hensman* (1861), 1 John & H 546, 70 ER 862 at 867. See AJ McClean, “Severance of Joint Tenancies” (1979) 57:1 Can Bar Rev 1 [McClean, “Joint Tenancy”].

<sup>193</sup> *Stonehouse*, *supra* note 9 at 104.

<sup>194</sup> *Ibid.* The transfer was registered a day after her mother’s death (*ibid.*).

severed. The dispute in the case was not between the husband and his stepdaughter, but between the husband and the Assurance Fund for monetary damages of the loss of his interest. The husband sued the registrar, arguing that the transfer to the daughter was ineffective as to the deceased wife's joint interest because title had vested in the husband's name immediately upon the wife's death by virtue of the husband's right of survivorship.<sup>195</sup> The husband claimed damages under the remedial provision, section 223(1) of the *Land Registry Act*,<sup>196</sup> on account of the registrar failing to consider the date of the transfer; "the registrar should have been alerted to the possibility of the grantor having died since its execution and the whole title having thus become vested in the appellant as the surviving joint tenant."<sup>197</sup>

Ritchie J. considered section 35 of the *Land Registry Act*,<sup>198</sup> and held that, notwithstanding that the title indicated that the husband and wife held the property as joint tenants, the joint tenancy had been severed at the moment when the mother executed the transfer. Citing the appellate decision, Ritchie J. held that "[i]t is the binding effect upon himself of an owner's dealings with his own property that effects a severance of the joint tenancy."<sup>199</sup> The British Columbia Law Institute Consultation Paper on Joint Tenancy later stated regarding the decision that "[t]he fact that joint tenancies can be severed without registration does not fit well with the land title system. It means that land title office records may not reflect the true state of

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<sup>195</sup> *Ibid.*

<sup>196</sup> Section 223(1) of the *Land Registry Act* provides that "any person sustaining loss or damages caused solely as result of any omission mistake or misfeasance of the Registrar or any of his officers or clerks in the execution of their respective duties under this Act may bring and maintain an action in the Supreme Court against the Attorney-General as nominal defendant for the purpose of recovering the amount of the loss or damages and costs from the Assurance Fund." *Land Registry Act*, *supra* note 190, s 223(1).

<sup>197</sup> *Stonehouse*, *supra* note 9 at 104.

<sup>198</sup> Section 35 states that "[e]xcept as against the person making the same, no instrument ... executed and taking effect after the thirtieth day of June, 1905, purported to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land ... until the instrument is registered in compliance with the provisions of this Act." *Land Registry Act*, *supra* note 190, s 35.

<sup>199</sup> *Stonehouse*, *supra* note 9 at 107, citing *Stonehouse v British Columbia (AG)* (1960), 26 DLR (2d) 391, 33 WWR 625 (BC CA) at 629.

the title to co-owned land at a given point in time. This is inconsistent with the principles of the Land Title Act, under which the register is meant to be a definitive statement of the title to land.”<sup>200</sup>

The omission of *Stonehouse* in *Hupe CA* may have been due to legislative differences. The decision in *Stonehouse* hinged, in part, on the interpretation of section 35 of the *Land Registry Act*, which begins, “[e]xcept as against the person making the same”.<sup>201</sup> Ritchie J. stated that “[t]hese words, ... expressly make operative an unregistered instrument against the party making the same. ...’ It is, therefore, apparent that the deed here in question operated as an alienation of the interest of Mrs. Stonehouse, and the very fact of her interest being transferred to a stranger of itself destroyed the unity of title without which a joint tenancy cannot exist at common law.”<sup>202</sup> Comparatively, section 66(4) of Manitoba’s *Real Property Act* does not contain the exception language and instead states that “[n]o instrument is effectual to pass an interest in land under the new system ... until the instrument is registered in accordance with this Act.”<sup>203</sup>

Section 79(1) adds:

The district registrar must not accept for registration an instrument that has the effect of severing a joint tenancy — other than a transmission by a trustee in bankruptcy or one giving effect to an order of the court — unless

- (a) the instrument is executed by all the joint tenants;
- (b) all the joint tenants, other than those executing the instrument, give their written consent to the instrument; or

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<sup>200</sup> British Columbia Law Institute, “Consultation Paper on Joint Tenancy” (June 2011) at 11, online: <[https://www.bcli.org/sites/default/files/Real\\_Property\\_-\\_Joint\\_Tenancy\\_CP.pdf](https://www.bcli.org/sites/default/files/Real_Property_-_Joint_Tenancy_CP.pdf)> [BCLI Consultation Paper].

<sup>201</sup> *Land Registry Act*, *supra* note 190, s 35.

<sup>202</sup> *Stonehouse*, *supra* note 9 at 107, citing *Davidson v Davidson*, [1946] SCR 115 at 119, [1946] 2 DLR 289 (BC). The BCLI Consultation Paper recommends notice provisions be added as “[t]he ability to sever joint tenancy in secret may overturn long held expectations of future financial and perhaps physical security based on the right of survivorship.” BCLI Consultation Paper, *supra* note 200 at 11. McClean noted that the ability to sever a joint tenancy secretly “is at minimum unfair, and may also lead to a suspicion of fraudulent dealing.” McClean, “Joint Tenancy”, *supra* note 190 at 39.

<sup>203</sup> *Real Property Act*, *supra* note 4, s 66(4).

(c) the district registrar is provided with evidence, satisfactory to the district registrar, that all joint tenants who have not executed the instrument or given their consent to it have been served with a notice of intent to sever, in an approved form, at least 30 days prior to the registration of the instrument.<sup>204</sup>

One interpretation is that sections 66(4) and section 79(1) replace the equitable interest from *Stonehouse* in Manitoba; this type of equitable interest does not arise because delivery of an unregistered transfer is no longer effective to sever a joint tenancy in Manitoba (which position arguably could be supported by *Stonehouse*'s omission in *Hupe CA*).

However, Ritchie J. also noted that the general prohibition contained in section 35 of the *Land Registry Act* (and similarly, section 66(4) of the *Real Property Act*) “is against an unregistered transfer passing any estate or interest. It does not prohibit the transfer from having other effects, and [in *Stonehouse*], the court said, while the husband's joint tenancy was changed from a joint tenancy to a tenancy in common, there was, in respect of his interest, no passing of any estate.”<sup>205</sup> Manitoba’s section 79(5) of the *Real Property Act* also contemplates severance prior to registration, stating that “[n]otwithstanding the date of registration of the instrument severing a joint tenancy, severance may take effect from a date earlier as determined by a judge on an application therefor.”<sup>206</sup>

A somewhat comparable situation arose in the recent Manitoba decision, *Langdon v Langdon*, in which the parties had signed a cohabitation agreement. Notwithstanding the existence of the cohabitation agreement, the husband argued that he continued to hold a half interest in the property as a joint tenant. The court dismissed the husband’s argument, holding that “[s]ection 59(1) is not there to conclusively determine the interests of owners as between

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<sup>204</sup> *Ibid.*, s 79(1).

<sup>205</sup> McClean, “Joint Tenancy”, *supra* note 192 at 41, citing *Stonehouse*, *supra* note 9 at 108.

<sup>206</sup> *Real Property Act*, *supra* note 4, s 79(5).

themselves, or to provide an override for legal consequences they created and which may compromise their beneficial ownership or interest in the land.”<sup>207</sup> The husband and wife held “title to the land, as against the Crown and all other persons, but s. 59(1) is no shield to them when they have in law compromised that ownership between themselves.”<sup>208</sup>

This inconsistency could be clarified by amending the legislation and formally adopting McClean’s recommendation that severance by a unilateral action, such as a conveyance, be effective upon notice to the other joint tenant:

First, until the other joint tenant is notified the joint tenancy would not be affected. Second, when he was notified then severance would take place as between both joint tenants and the person with whom one of them had dealt; so far as the rest of the world is concerned severance would not take place until the registration of the severing transaction. Third, the person who dealt with a joint tenant would not have an application for registration accepted unless he was able to satisfy the registrar that the other joint tenant had been properly notified.<sup>209</sup>

## 6. Caveats and Remedies for Breach of Trust

Beard J.A. held in *Hupe CA* that in addition to having *in personam* rights against a trustee, a beneficiary could also file a caveat against the title of the property to give notice of the equitable interest to third parties.<sup>210</sup> Following her review of the jurisprudence and primary and secondary sources, Beard J.A. noted that the referenced materials “all indicate that trusts related to land can still exist under Torrens systems, that beneficiaries of a trust related to land can take steps under the Torrens system to protect their beneficial interests, and that the beneficiaries of a trust related to land can enforce the trust personally against the trustee for the return of the

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<sup>207</sup> *Langdon*, *supra* note 127 at para 194.

<sup>208</sup> *Ibid* at para 195.

<sup>209</sup> McClean, “Joint Tenancy”, *supra* note 192 at 39, 44. Notice is already required in Manitoba under section 79(2) of the *Real Property Act*: “A notice of intent to sever given under subsection (1) shall be served personally; but in case a person to be served cannot after due diligence be found, the district registrar may direct notice to be served substitutionally in such manner as the district registrar may order.” *Real Property Act*, *supra* note 4, s 79(2).

<sup>210</sup> *Hupe CA*, *supra* note 3 at para 81.



property if it is still in the trustee's hands.<sup>211</sup> This section considers the remedies available to a beneficiary for a breach of trust, and the extent to which a recipient's knowledge of the trust is required for success.

Because equity is a court of conscience, one of the maxims of equity is that equity acts *in personam*, i.e., against the trustee personally.<sup>212</sup> A personal claim is distinguishable from a property claim and “is directed to a particular defendant and requires him to comply with his obligations—if necessary, looking to his own assets.”<sup>213</sup> As it relates to trust property, “[w]here trustees allow trust property to come into the hands of strangers to the trust, the trustees will, of course, be personally liable for breach of trust.”<sup>214</sup> A trustee in breach of trust “must restore or pay to the trust estate either the assets that have been lost to the estate by reason of the breach or compensation for such loss. ... If specific restitution is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed.”<sup>215</sup>

Compensation for the breach of trust, however, “will not be an adequate remedy for the beneficiaries if the trustees do not have the means to repair the breach of trust, and the beneficiaries in that case will want to know whether, and to what extent, a stranger to the trust may be liable.”<sup>216</sup>

In addition to their *in personam* rights against the trustee, beneficiaries also have a property right, i.e., a claim to the specific property. A property right provides certain benefits to

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<sup>211</sup> *Ibid* at para 55.

<sup>212</sup> Gillese, *supra* note 11 at 19.

<sup>213</sup> Waters, Gillen & Smith, *supra* note 15 at 1264.

<sup>214</sup> Pettit, *supra* note 20 at 153.

<sup>215</sup> *Ibid* at 510.

<sup>216</sup> *Ibid* at 153.

its owner. Generally, an individual with a property right may “(i) in case of dispute, recover the property itself as opposed to merely recovering damages payable out of no specific fund; (ii) transfer his right to another; and (iii) enforce his right against at least some third parties.”<sup>217</sup> However, “before an interest can be admitted into the category of property, ‘it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence and stability’.”<sup>218</sup> If trust property is co-mingled with other assets, for example, it may not be identifiable and would not be recoverable.<sup>219</sup> Property rights are “normally binding on third parties—unless a third party can establish that he is a bona fide purchaser for value of a legal estate, without notice, actual or constructive, of the equitable interest.”<sup>220</sup>

An equitable title is not as secure as legal title. An individual with a legal interest “prevails against the whole world unless statute-barred by a Limitation Act whilst an equitable interest prevails against volunteers ... and those having notice of it but does not prevail against a bona fide purchaser for value without notice of the equitable interest affecting it”.<sup>221</sup> The *Real Property Act* also prevents the registered owner as being described as a trust or an individual as trustee. Section 81 provides:

Except in case of land, mortgages, encumbrances, or leases, held by an executor or administrator or a trustee under a will or in trust for, or to be used in connection with, a church or as a cemetery under *The Cemeteries Act*, or by a person as a trustee in bankruptcy, or under an authorized assignment, or in connection with a proposal by a debtor for a composition, extension, or scheme of arrangement, to or with his creditors under

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<sup>217</sup> *Ibid* at 21.

<sup>218</sup> *Ibid*, citing *National Provincial Bank Ltd v Ainsworth*, [1965] AC 1175, [1965] 2 All ER 427 at 494.

<sup>219</sup> Gillese, *supra* note 11 at 184–85.

<sup>220</sup> Pettit, *supra* note 20 at 21.

<sup>221</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 79 [citations omitted].

the *Bankruptcy and Insolvency Act* (Canada), the district registrar shall not make any entry in the register containing notice of trusts, expressed, implied, or constructive.<sup>222</sup>

However, Beard J.A. noted that “Torrens systems allow beneficiaries of a trust relating to land to take steps to protect their beneficial interests by filing caveats.”<sup>223</sup> In support, Beard J.A. cited Robert Torrens’ own writings, wherein Torrens suggested that “‘beneficiaries under the trust may, at a trifling cost, lodge caveats forbidding dealing with the property without their concurrence’, which would provide security to the beneficiaries where a trustee’s ability to deal with the land was circumscribed in some manner under the trust.”<sup>224</sup> Also cited was Louis William Coutlée, *A Manual of the Law of Registration of Titles to Real Estate in Manitoba and the North-West Territories*,<sup>225</sup> in which Coutlée stated that “[t]rusts, however, are not abolished under the new system, they may exist as between the parties ... but the responsibility of enquiring as to trusts is shifted from the purchaser, and it now rests upon the beneficiary to take means to protect his interests against improper dealings by lodging a caveat.”<sup>226</sup>

### **i) Remedies against Third Parties**

If a third party receives the property for no value and knows or later becomes aware of the trust, the third party is obligated to maintain and continue the trust for the beneficiary as a new trustee; “if [the third party] still holds the property, then unless he is a bona fide purchaser for value of a legal interest, who lacked notice of the trust, he is bound by the trust.”<sup>227</sup> However, if a third party pays good and valuable consideration for trust property in breach of trust, “the

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<sup>222</sup> *Real Property Act*, *supra* note 4, s 81 [emphasis added]. The reference in section 81 to “entry in the register” refers to the registered owner of the property. For example, in *Ehrmantraut* QB, McKelvey J. stated that “any trust agreement between the applicant and the bankrupt could not have been entered on the title by virtue of the operation of these sections. It is important to note, however, that a trust agreement can still be registered by way of a caveat on the title. This mechanism serves to provide notice as to the existence of a trust to those who view the title.”

*Ehrmantraut* QB, *supra* note 150 at para 18.

<sup>223</sup> *Hupe* CA, *supra* note 3 at para 81.

<sup>224</sup> *Ibid* at para 56, citing Torrens, *supra* note 173 at 39.

<sup>225</sup> *Supra* note 174.

<sup>226</sup> *Hupe* CA, *supra* note 3 at para 59, citing Coutlée, *supra* note 174 at 4. See also *Dukart*, *supra* note 175 at 1060.

<sup>227</sup> *Waters, Gillens & Smith*, *supra* note 15 at 519, n 208.

stranger may be under no liability at all ... if he can establish that he is a bona fide purchaser for value without notice.”<sup>228</sup>

There are limited circumstances under the *Real Property Act* where a registered owner can be removed from title. Section 62(1) provides that “[n]o action of ejectment or other action for the recovery of land under the new system lies or shall be sustained against the registered owner for the estate or interest in respect of which he is so registered, except in the [enumerated] cases”.<sup>229</sup> Section 62(1)(c) includes “[t]he case of a person deprived of land by fraud or error as against the person registered as owner through fraud or error, or as against a person deriving his right or title, otherwise than bona fide for value, from or through a person so registered through fraud or error.”<sup>230</sup> If a third party obtained trust property fraudulently, the beneficiary would also be able to recover the property under sections 59(1.2) and 59(1.3). Section 59(1.2) states that “[d]espite subsection (1), in a proceeding under this Act, a person may show that the owner is not entitled to the land or the interest specified in the title or the registered instrument when the owner of the land or the owner of the registered instrument has participated or colluded in fraud or a wrongful act.”<sup>231</sup> Section 59(1.3) similarly provides that “in a proceeding under this Act, an owner who is deprived of an estate or interest in land as a result of fraud or a wrongful act, is entitled to have the estate or interest restored, unless a court determines that it is just in the circumstances to order otherwise.”<sup>232</sup>

Complicating this exercise is that under the *Real Property Act*, having knowledge of the trust is not fraud. Section 80(3) states that “[a] person's knowledge that a trust or interest is in

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<sup>228</sup> Pettit, *supra* note 20 at 153, citing *Pilcher v Rawlins* (1872) 7 Ch App 259.

<sup>229</sup> *Real Property Act*, *supra* note 4, s 62(1). An individual deprived of an interest in land or registered instrument due to a fraud or wrongful act may also apply to Registrar-General for compensation (*ibid*, s 169.4(1)).

<sup>230</sup> *Ibid*, s 62(1)(c).

<sup>231</sup> *Ibid*, s 59(1.2).

<sup>232</sup> *Ibid*, s 59(1.3).

existence—although *it is not registered by an instrument or a caveat*—shall not of itself be imputed as fraud or a wrongful act.”<sup>233</sup> Likewise a bona fide purchaser for value without notice may be aware that they are dealing with trust property, but have no notice that the transfer is in breach of trust. In the English case of *Foskett v McKeown*, Lord Millett stated in a concurring opinion that “[t]he proprietary claims to the trust property or its traceable proceeds can be maintained against the wrongdoer and anyone who derives title from him except a bona fide purchaser for value *without notice of the breach of trust*.”<sup>234</sup>

## ii) **Knowing Receipt**

“Knowing receipt” is a personal claim that arises when a third party receives trust property in breach of trust.<sup>235</sup> Remedies for knowing receipt can include an imposition of a constructive trust, return of the trust property or damages personally against the third party if the third party no longer has the trust property. Relief “flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property.”<sup>236</sup>

Unlike the related claim of “knowing assistance”, which requires a higher level of knowledge and complicity,<sup>237</sup> “the standard for knowing receipt is one of “objective carelessness”<sup>238</sup> and simply requires that the “recipient’s conscience is sufficiently affected for it

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<sup>233</sup> *Real Property Act*, *supra* note 4, s 80(3) [emphasis added].

<sup>234</sup> *Foskett v McKeown*, [2001] 1 AC 102 at 131 [emphasis added].

<sup>235</sup> Waters, Gillen & Smith, *supra* note 15 at 518.

<sup>236</sup> *Citadel General Assurance Co v Lloyd’s Bank Canada*, [1997] 3 SCR 805 at para 49, 152 DLR (4th) 411 (Alta).

<sup>237</sup> Waters, Gillen & Smith, *supra* note 15 at 521.

<sup>238</sup> *Ibid.*

to be right to bind him by the obligations of a constructive trustee”.<sup>239</sup> If a third party “learns of, or suspects a breach of trust, he is under no obligation to act as a sort of policeman; all he needs to do is to have nothing to do with the actual or intended or suspected breach of trust.”<sup>240</sup> However, if the third party suspects a breach of trust, and proceeds with the transaction, the third party “is a party to the breach of trust, even though (in the case of knowing receipt) he may only have been careless.”<sup>241</sup>

Knowing receipt is more difficult to demonstrate for transactions involving real property in Manitoba as the *Real Property Act* eliminates constructive knowledge. As noted, section 80(3) states that knowledge of a trust does not by itself mean that that was a fraud or wrongful act.<sup>242</sup> Additionally, if a trust is not registered against title, a third party is not under a duty to make inquiries. Section 80(2) of the *Real Property Act* provides:

A person who contracts for, deals with, takes or proposes to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not — except in the case of fraud or a wrongful act in which that person has participated or colluded —

(a) required for the purpose of obtaining priority over a trust or other interest *that is not registered by an instrument or caveat*,

(i) to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest, or

(ii) to see to the application of the purchase money or any part of the money; and

(b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land *that is not registered by an instrument or caveat*, despite any rule of law or equity to the contrary.<sup>243</sup>

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<sup>239</sup> *Re Montagu's Settlement Trusts* (1985), [1987] Ch 264 at 273, [1992] 4 All ER 308.

<sup>240</sup> *Groves-Raffin Construction Co v Canadian Imperial Bank of Commerce* (1975), [1976] 2 WWR 673, 64 DLR (3d) 78 at 139 (BC CA).

<sup>241</sup> Waters, Gillen & Smith, *supra* note 15 at 524–25.

<sup>242</sup> *Real Property Act*, *supra* note 4, s 80(3).

<sup>243</sup> *Ibid*, s 80(2)(b) [emphasis added].

### iii) Filing of Caveats

In addition to section 62(1)(c), section 62(1)(g) allows for recovery “[f]or rights arising under any of the matters as to which the certificate of title is subject by implication.”<sup>244</sup> In *Hupe CA*, Beard J.A. noted that one matter permitting an action for ejectment “is a caveat filed under section 58(1)(j). Thus, if [a beneficiary has] a right to file a caveat, [the beneficiary has] the right to enforce that caveat by an action for ejectment or for the recovery of the land.”<sup>245</sup> Subsection 58(1)(j) provides that “the land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to ... (j) caveats affecting the land *filed since the date of the certificate*”.<sup>246</sup> As a contrary intention appears in subsection 58(1)(j), the beneficiary must have taken the step of registering a caveat in order to rely on this provision.<sup>247</sup>

Under section 62(1)(g), if a beneficiary registers a caveat, the beneficiary can enforce their trust against a third party without regard to knowledge or notice to the third party. In fact, the third party transferee is unable to receive the property without acknowledging the caveat; section 148(1) provides that “[a] person claiming an estate or interest in land ... under the new system, may file a caveat in an approved form, forbidding the registration of any person as

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<sup>244</sup> *Ibid*, s 62(1)(g).

<sup>245</sup> *Hupe CA*, *supra* note 3 at para 97.

<sup>246</sup> *Real Property Act*, *supra* note 4, s 58(1)(j) [emphasis added].

<sup>247</sup> Additionally, the MLRC Report 2016 suggested that “where an alleged beneficiary of a resulting or constructive trust has commenced an action in a Manitoba court, seeking to obtain recognition, at law, that a resulting or constructive trust relationship exists, the alleged beneficiary may register a pending litigation order against the title.” MLRC Report 2016, *supra* note 6 at 25. Pending litigation orders are one of the enumerated exception to title under subsection 58(1), although as with caveats (subsection 58(1)(j)), pending litigation orders must be registered against title to be effective. Subsection 58(1)(g) describes the exception as “any pending litigation order issued out of a court in the province and registered since the date of the certificate of title”. *Real Property Act*, *supra* note 4, s 58(1)(g).

transferee or owner of, or of any instrument affecting the estate or interest, unless the instrument is expressed to be subject to the claim of the caveator.”<sup>248</sup>

Additionally, section 152 of the *Real Property Act* states that “[s]o long as a caveat remains in force, the district registrar shall not register an instrument purporting to transfer, mortgage, or encumber, the land, mortgage, encumbrance, or lease, unless the instrument is expressed to be subject to the claim of the caveator.”<sup>249</sup>

In *Hupe CA*, Beard J.A. cited as support the initial debates for the introduction of the Torrens System in the Senate and House of Commons:

The principle of the Act in this respect appears to be to shift the onus of the action and responsibility from the purchaser, who is not interested under the trust, to the beneficiary, who is, and to enable the beneficiary to protect himself by proceeding against the trustee, when an improper dealing is contemplated, *rather than by remaining inactive to rely upon the purchaser’s knowledge of his rights as a safeguard against their violation*. It will be remembered that a cestui que trust may enter a caveat *under which we will receive notice of any dealing with the trust property in time to stop it*.<sup>250</sup>

Also, it should also be stated that a caveat is intended only to provide notice of an underlying claim to the land: “the acceptance of a caveat by the district registrar is not an indication by the registrar that the caveator is legally entitled to the interest in the land claimed therein.”<sup>251</sup>

Caveats may not be available for all types of equitable interests, however. In *Kadyshuk v Sawchuk*, Freedman J.A. held that “[a] caveat cannot be properly filed unless the caveator has an estate or interest in land.”<sup>252</sup> Because a constructive trust arises by imposition by the court, it is

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<sup>248</sup> *Real Property Act*, *supra* note 4, s 148(1).

<sup>249</sup> *Ibid*, s 152.

<sup>250</sup> *Hupe CA*, *supra* note 3 at para 81, citing *Debates of the Senate*, 5th Parl, 3rd Sess (11 March 1885) at 265 (Alex Campbell), online: <[https://www.canadiana.ca/view/oocihm.9\\_08065\\_15\\_1/256?r=0&s=1](https://www.canadiana.ca/view/oocihm.9_08065_15_1/256?r=0&s=1)> [emphasis added].

<sup>251</sup> Teranet Manitoba, “Manitoba Land Titles Guide”, Revision 65 (May 2020) at 11, online: <<https://teranetmanitoba.ca/wp-content/uploads/2019/11/landtitlesguide-en-3.pdf>>, citing *Jacques v Alexander (District)*, 109 Man R (2d) 223, [1996] 7 WWR 677 (QB).

<sup>252</sup> *Kadyshuk v Sawchuk*, 2006 MBCA 18 at para 11, citing *Real Property Act*, *supra* note 4, s 148(1).



more appropriate to register the judgment itself, as in *Molinski*, or alternatively, a pending litigation order if litigation is ongoing.<sup>253</sup>

Section 62(1) was considered in *Forgan v Lovatt*<sup>254</sup> with regards to a pending litigation order registered in connection with a residential transaction. When the defendants tried to rely on indefeasibility of title, De Graves J. held that “[t]his is not a case involving indefeasibility of title: it is a case involving title equities disclosed to the district registrar and the district registrar issued title to [the defendants] subject to these equities.”<sup>255</sup>

Although registering a caveat eliminates the requirement for proving knowledge of breach of trust, case law suggests that if a caveat lapses or is discharged, a beneficiary would no longer be able to rely on knowing receipt for the return of property. In *Fort Garry*, Huband J.A. considered the Supreme Court of Canada decision, *Boulter-Waugh & Co. v Phillips*, which involved a mortgage and a pre-existing equitable interest. When the mortgage was registered, “[t]he bank had prior knowledge of the equitable interest, but the equitable interest was not protected by the registration of a caveat, the caveat having lapsed. ... [U]nder the land registration system in Saskatchewan, the content of the register was the sole consideration.”<sup>256</sup> Davies C.J. held “that the plaintiff, whether by mistake or negligence, having allowed its caveat to be vacated, cannot invoke the old rule of notice and knowledge to maintain its priority of claim over that of the bank.”<sup>257</sup> The decision also aligns with the equitable maxim that a

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<sup>253</sup> *Supra* note 247. Judgments are registrable against title pursuant to *The Judgments Act*, RSM 1987, c J10, s 2, and are an exception to indefeasibility under section 58(1)(f) of the *Real Property Act*, *supra* note 4: “any instrument registered and maintained in force in the general register pursuant to section 69, which describes the debtor in a name identical to that of the owner as set out in the certificate of title”.

<sup>254</sup> *Forgan v Lovatt*, 2000 MBQB 123, rev’d on other grounds 2001 MBCA 181.

<sup>255</sup> *Ibid* at para 67.

<sup>256</sup> *Fort Garry*, *supra* note 141 at para 24, citing *Boulter-Waugh & Co v Phillips* (1919), 58 SCR 385, 46 DLR 41 (Sask) [*Boulter-Waugh* cited to SCR].

<sup>257</sup> *Boulter-Waugh*, *supra* note 256 at 388–89.

beneficiary cannot be careless with enforcing his or her rights; “[e]quity will aid the vigilant, not the indolent. ... A party who has slept on his rights cannot obtain equitable relief.”<sup>258</sup>

## 7. Conclusion

After decades of uncertainty and unsettled law,<sup>259</sup> the appellate decision, *Hupe CA*, appears to be conclusive on the issue that equitable interests, such as resulting trusts and constructive trusts, can exist “off title” notwithstanding the indefeasibility provision set out at section 59 of the *Real Property Act*. Although equitable interests are not specifically enumerated as an exception in section 58 of the *Real Property Act*, jurisprudence, secondary sources and historical records all support the co-existence of equitable interests. Although *Stonehouse* was not cited as an example, severance of a joint tenancy by an unregistered instrument was previously recognized by the Supreme Court as an equitable interest that exists off title in British Columbia. The same should be applicable in Manitoba as well.

Lastly, the remarks in *Hupe CA* regarding the registration of caveats to protect a beneficiary’s interests stand out as an effective replacement to the traditional method of enforcing *in personam* rights against a trustee, or proving notice of breach of trust under the personal claim of knowing receipt. However, beneficiaries must be wary not to allow their caveats to lapse lest they be left without any recourse. Land registration places more onus on beneficiaries to protect their legal interest, but registration does not eliminate them.

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<sup>258</sup> Gillese, *supra* note 11 at 19.

<sup>259</sup> MLRC Report 2016, *supra* note 6 at 3.

## CHAPTER 3: The Elimination of *Saunders v Vautier* in Manitoba

“It is difficult for any ordinary mind to conceive that [the Rule in *Saunders v Vautier*] is anything else but a deliberate interference by the Courts with the declared and lawful will of the testator. The reasons assigned for such interference are by no means convincing.”<sup>260</sup>

### 1. Introduction

In this third chapter, I discuss the elimination and replacement of the Rule in *Saunders v Vautier* in Manitoba. First I review the 1983 amendments to the *Trustee Act* MB as they exist today. After reviewing existing commentary on the Rule, I consider the MLRC Report 1975 and its concerns that the Rule was being applied inconsistently. In short, the report’s proposals sought to replace the uncertainty that the Rule in *Saunders v Vautier* presented, by expanding the judicial discretion already existing in variation of trusts legislation to encompass all variations and terminations—including those to which the Rule in *Saunders v Vautier* applied. Following a review of Manitoba case law, I argue that the requirement for judicial review has added additional hurdles for beneficiaries. Additionally, the novel test of “justifiable character”,<sup>261</sup> purposely left undefined so as to be flexible, has simply increased uncertainty. After comparing recent amendments to Nova Scotia’s and New Brunswick’s variation of trusts legislation, I advocate for similar changes to Manitoba’s legislation.

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<sup>260</sup> *Livingston Estate (No 2), Re*, 32 Man R 465, 1923 CarswellMan 12 at para 2 (CA) [*Livingston*].

<sup>261</sup> *Trustee Act* MB, *supra* note 13, s 59(7)(b).

## 2. Amendments to the Manitoba Legislation

In 1983, Manitoba passed *An Act to Amend the Trustee Act*,<sup>262</sup> eliminating the Rule in *Saunders v Vautier*; now trusts may only be terminated pursuant to the terms of the trust instrument or with judicial approval. Section 59(2) of *The Trustee Act* (Manitoba) provides:

Subject to any trust terms reserving a power to any person to revoke, or in any way vary the trust, a trust arising before, on or after October 1, 1983, whatever the nature of the property involved and whether arising by will, deed or other disposition, *shall not be varied or terminated before the expiry of the period of its natural duration as determined by the terms of the trust except with the approval of the court.*<sup>263</sup>

Additionally, the legislation specifically contemplates those situations to which *Saunders v Vautier* has been held to apply. Section 59(3) states that

[w]ithout limiting the generality of subsection (2), the prohibition contained in subsection (2) and the requirement for the approval of the court for the purposes of subsection (2), apply to

(a) any provision of a trust under which the transfer or payment of the capital or of the income, including rents and profits,

(i) is required to be postponed *until the attainment by a person of a stated age, or*

(ii) is required to be postponed *until a stated date or time or the passage of a stated period of time, or*

(iii) is required to be *made by instalments, or*

(iv) is subject to a discretion to be exercised during any period by the trustee, as to the person to whom the capital or income, including rents and profits, may or shall be transferred or paid, or as to the time at which or the manner in which the payment or transfer of capital or income, including rents and profits, may or shall be made; and

(b) any variation or termination of the trust

(i) by merger, however occurring, with another trust, or

(ii) *by consent of all persons who are beneficially interested, or*

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<sup>262</sup> *An Act to Amend the Trustee Act*, SM 1982-83, c 38 [*Act to Amend the Trustee Act* 1983].

<sup>263</sup> *Trustee Act MB*, *supra* note 13, s 59(2). Section 59(1) states that “[i]n this section, “person” includes charitable and non-charitable purposes.”

(iii) by renunciation of any person's beneficial interest by that person so as to cause an acceleration of remainder or reversionary interests.<sup>264</sup>

Somewhat ahead of its time, the *Trustee Act* MB expressly grants the court jurisdiction for approving the resettlement of a trust. Section 59(4) states that:

The approval of the court required under subsection (2) shall be given by means of an order approving a proposed arrangement for

- (a) the variation or termination of the whole or any part of the trust; or
- (b) the resettling of any interest under the trust; or
- (c) the merger of the trust with another trust; or
- (d) the enlargement of the powers of the trustee to manage or administer any of the property subject to the trust.<sup>265</sup>

In determining whether to approve a proposed arrangement, a court must be satisfied “(a) that the carrying out of the arrangement appears to be for the benefit of each person on whose behalf the court may consent under subsection (5); and (b) that in all the circumstances at the time of the application to the court, the arrangement appears otherwise to be of a justifiable character.”<sup>266</sup>

### 3. Criticism of the Rule in *Saunders v Vautier*

Historically, the debate over the Rule in *Saunders v Vautier* centres on the appropriate weighing of rights. Critics of the Rule often focus on the argument that the Rule in *Saunders v Vautier* “permits results that are contrary to the expressed intention of the settlor”.<sup>267</sup> In most situations, the intentions of a testator are given effect wherever feasible. In *Re Eames Estate*,

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<sup>264</sup> *Ibid.*, s 59(3) [emphasis added].

<sup>265</sup> *Ibid.*, s 59(4).

<sup>266</sup> *Ibid.*, s 59(7).

<sup>267</sup> Glenn, *supra* note 1 at 627.

Montague J. stated that “[t]he Court owes a sacred duty to protect a man's last will. The guiding principle is to give effect, if possible, to his intentions.”<sup>268</sup>

The Saskatchewan Law Report agreed that “[t]he whole purpose of a trust is to carry into effect the settlor's intentions in regard to the property. When a dispute arises over the meaning of the terms of a trust, the basic rule of construction adopted by the courts is to give effect to the intention of the settlor if it is possible to discern it from the language of the trust document.”<sup>269</sup> McClean also noted that “[t]he general principle of freedom of alienation suggests that a donor should be free to confer benefits on his donees subject to such conditions as he sees fit.”<sup>270</sup> Bernstein commented that “[i]t is apparent that the application of the rule to allow for the early termination of the trust will generally frustrate the stated intentions of the settlor or testator.”<sup>271</sup>

On the other hand, there are also the rights of a beneficiary to be considered. It is “well-established that if a donor has conferred an absolute interest on a donee, the donee is entitled to enjoy that interest as he sees fit.”<sup>272</sup> Further, a principle of property law is “the way in which property is enjoyed should be determined by the living rather than the dead.”<sup>273</sup> Bernstein noted that “[t]he rule represents a clear policy choice in favour of viewing the beneficiaries as the owners of the property with the settlor being unable to impose terms on the manner in which the beneficiaries may enjoy the trust property.”<sup>274</sup> As well, “[s]ince equity regards the beneficiaries as the real owners and the trustees as merely acting to balance the rights between the various

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<sup>268</sup> *Re Eames Estate*, [1934] 3 WWR 364, 1934 CarswellMan 77 at para 6 (KB).

<sup>269</sup> Saskatchewan LRC Report, *supra* note 87 at 1, citing Donovan WM Waters, *Waters' Law of Trusts in Canada*, 2nd ed (Toronto: Thomson Reuters Canada, 1984) at 85 ff [Waters, *Law of Trusts*, 2nd ed].

<sup>270</sup> AJ McClean, “The Rule against Perpetuities, *Saunders v. Vautier*, and Legal Future Interests Abolished” (1983) 13:3 Man LJ 245 at 260 [McClean, “Perpetuities”].

<sup>271</sup> Bernstein, *supra* note 60 at 257.

<sup>272</sup> McClean, “Perpetuities”, *supra* note 270 at 260.

<sup>273</sup> *Ibid* at 246.

<sup>274</sup> Bernstein, *supra* note 60 at 259.

beneficiaries with conflicting interest, once the beneficiaries are all legally capacitated and in agreement, the basic reason for the trustees' existence no longer exists.”<sup>275</sup>

Comparatively, a number of Canadian decisions appear to favour the testator’s intentions over the rights of beneficiaries.<sup>276</sup> In Manitoba, as early as 1923, Cameron J. lamented that “[i]t is difficult for any ordinary mind to conceive that [the rule in *Saunders v Vautier*] is anything else but a deliberate interference by the Courts with the declared and lawful will of the testator. The reasons assigned for such interference are by no means convincing.”<sup>277</sup> Keith Farquhar noted that “[i]n *Irving (Re)*, one of the variation of trust cases most often cited in Canada, Pennell J. stated that [intention of the testators] was the first consideration in the approval process, and this appears to have had a great impact on the jurisprudence in this country.”<sup>278</sup> *Re Irving* involved the variation of two trusts pursuant to the *Variation of Trusts Act* (Ontario).<sup>279</sup> Pennell J. noted in his review of case law that

[t]he search in all these cases was to find the intention of the founder of the trust and then to decide whether the proposed arrangement remains within the ambit of the intention. The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flouted arbitrarily.<sup>280</sup>

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<sup>275</sup> *Ibid* at 258.

<sup>276</sup> Farquhar, *supra* note 120 at 187.

<sup>277</sup> *Livingston*, *supra* note 260 at para 2. See also *Re Townshend Estate*, [1941] 3 DLR 609, 16 MPR 69 (NB SC) [*Townshend*]. *Townshend* involved a similar set of facts to *Saunders v Vautier*. Baxter C.J. stated that “[w]hile a Court is supposed to exert its abilities in discovering and enforcing the will of a testator yet it is sometimes confronted by authorities which compel it to depart from common sense. This is such a case. I am not left in the least doubt as to what the testator intended” (*ibid* at para 3). After reviewing the Rule in *Saunders v Vautier*, Baxter C.J. held that “I am therefore compelled to disregard the wishes of the testator and declare that the applicant is entitled to immediate possession of the fund” (*ibid* at para 4).

<sup>278</sup> Farquhar, *supra* note 120, citing *Re Irving*, *supra* note 115 at para 14. Notably, *Re Irving* was not followed in *Russ v British Columbia (Public Trustee)* (1994), 89 BCLR (2d) 35, 69 WAC 209 (CA) [*Russ*], leave to appeal to SCC refused, 5 ETR (2d) 147. Finch JA held that “[t]he language of s. 1 ... is inconsistent with the suggestion that the settlor’s intention is a consideration at all, much less a consideration of first importance ... In my respectful view, the Court need not consider whether the basic intention of the settlor is preserved. The Court is not charged under the *Trust and Settlement Variation Act* with protecting the interests of the settlor.” *Russ*, *supra* note 278 at para 58, citing *Trust Variation Act BC*, *supra* note 121, s 1.

<sup>279</sup> *Variation of Trusts Act*, RSO 1970, c 477 [*Variation of Trusts Act ON*].

<sup>280</sup> *Re Irving*, *supra* note 115 at para 14.

The opposite is true for English variation of trusts decisions. In *Goulding v James*,<sup>281</sup> Mummery L.J. “rejected the submission that ... *Re Steed* had laid down any rule, principle or guideline of general application on the importance of the intentions and wishes of a settlor or testator to applications to approve arrangements under the 1958 Act.”<sup>282</sup> *Goulding* involved an application for variance for the benefit of the testator’s grandchildren, but “[t]here was evidence to indicate that the testator distrusted the daughter’s husband and wished to deny him even indirect access to the capital of the trust.”<sup>283</sup> Sir Ralph Gibson held that “[t]he fact that a testator would not have approved or would have disapproved very strongly does not alter the fact that the beneficiaries are entitled in law to do it ... if it be proved that the arrangement is for the benefit of the unborn.”<sup>284</sup>

#### 4. Alberta and Manitoba Law Reform Reports

Prior to Manitoba’s amendments, Alberta implemented changes following the release of Alberta’s Institute of Law Research and Reform report on the Rule in *Saunders v Vautier* in 1972.<sup>285</sup> The Alberta ILRR Report heavily favoured a testator’s intentions over the rights of beneficiaries, arguing that “the theoretical consequence of absolute ownership should not operate automatically to defeat the testator’s intention. The law allows [the testator] to make the gift, and there should be no rule of ‘legal theology’ to prevent him from imposing restrictions upon enjoyment even when the ownership is vested and indefeasible.”<sup>286</sup>

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<sup>281</sup> *Supra* note 113.

<sup>282</sup> Peter Luxton, “Variation of Trusts: Settlor’s Intentions and the Consent Principle in *Saunders v Vautier*” (1997) 60:5 Mod L Rev 719 at 723.

<sup>283</sup> Farquhar, *supra* note 120 at 187.

<sup>284</sup> *Goulding*, *supra* note 113 at 252.

<sup>285</sup> Alberta Institute of Law Research and Reform, Report No 9, *The Rule in Saunders v Vautier* (Edmonton: University of Alberta, 1972) at 5, online: <<https://www.alri.ualberta.ca/1972/02/rule-in-saunders-v-vautier/>> [Alberta ILRR Report].

<sup>286</sup> *Ibid* at 5.



The Alberta ILRR Report also considered that the rule in *Saunders v Vautier* could easily be circumvented by a settlor or testator (or a drafter on his or her behalf) being mindful of the rule and drafting the provisions of a trust accordingly. For example, the Saskatchewan LRC Report stated that “[t]he most common device for avoiding application of the rule is postponement of vesting by providing for a gift over in the event of the beneficiary’s death.”<sup>287</sup> Alberta’s ILRR Report felt this was more reason to repeal the rule, as “[t]he law should not lay traps which require sophistication to avoid. Further, the fact that the rule can be got around by careful drafting actually invalidates any rationale for it.”<sup>288</sup> The Alberta ILRR Report concluded that “[t]here is no point to a rule which merely penalizes poor drafting and there is nothing to be said for a policy which can be got around by a different form of words.”<sup>289</sup>

Concurrently with the release of the Alberta ILRR Report, Manitoba’s Attorney General requested the Manitoba Law Reform Commission review the rule in *Saunders v Vautier* as it applied to Manitoba.<sup>290</sup> When the Manitoba Law Reform Commission released their report in 1975, it benefitted from a review of both the Alberta ILRR Report and Alberta’s subsequent legislation, which was enacted in 1973.<sup>291</sup>

The MLRC Report 1975 took a different approach than the Alberta ILRR Report, instead focusing on a distinction between “simple” trusts and “special” trusts. A “simple” trust, it stated, is one in which the trustee is to hold the trust property, but without any further direction or guidance from the settlor as to how the trust property is to be administered; “the nature of the trust,

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<sup>287</sup> Saskatchewan LRC Report, *supra* note 87 at 7. The authors of the Saskatchewan LRC Report argue that “[t]his, of course, makes it clear that the beneficiary does not have an absolute interest in the trust property” (*ibid*).

<sup>288</sup> Alberta ILRR Report, *supra* note 285 at 5.

<sup>289</sup> *Ibid*.

<sup>290</sup> MLRC Report 1975, *supra* note 14 at 4. The reference was received by the Commission on March 1<sup>st</sup>, 1972 and stated, “While there may be no urgency, could I have your comments in due course ...” (*ibid*).

<sup>291</sup> *Trustee Act*, RSA 1980, c T-10, s 42 [*Trustee Act AB*].

not being prescribed by the settlor, is left to the construction of the law”.<sup>292</sup> A beneficiary under a simple trust has the right to direct the trustee to make a conveyance of the trust property or call on the trust property to be handed over to the beneficiary.

A “special” trust, on the other hand, imposes active duties on the trustees and will direct the trustees to turn the property over at a certain time or certain event taking place. For example, the trust in *Saunders v Vautier* would have been considered a special trust because the trustees “had to accumulate income from the corpus, and were directed to pay over the entire gift at a particular time.”<sup>293</sup>

The Rule in *Saunders v Vautier* is triggered when trust property vests in a beneficiary earlier than intended by the testator. At that time, a trustee’s obligations and duties in what would be considered a special trust are “rendered superfluous ... thus converting the special trust into a simple trust”<sup>294</sup> and giving the beneficiary the right to call on the trust property. Historically, courts considered the intentions of the testator as they appeared in the will or trust document:

if it is apparent from the true construction of a gift provision that the testator intended the beneficiary to have an absolute interest in the property gifted, and has in effect, given such an interest, this will be deemed by the court to be the testator’s primary intention, and other directions which detract in any way from the beneficiary’s absolute interest will be disregarded as being logically and politically indefensible. After all, how can an “absolute” interest be absolute, if there be conditions attached to it?<sup>295</sup>

This analysis leads to the issue highlighted in the Alberta ILRR Report—because courts look at the language and construction of the trust to determine whether a gift has vested in the beneficiary, a careful drafter “can easily ensure that the rule will not be applicable and that the settlor's intentions will not be frustrated. In the case of a single beneficiary, the trust instrument

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<sup>292</sup> WJ Mowbray, *Lewin on Trusts*, 16th ed (London, UK: Sweet & Maxwell, 1964) at 6.

<sup>293</sup> MLRC Report 1975, *supra* note 14 at 7.

<sup>294</sup> *Ibid* at 8.

<sup>295</sup> *Ibid*.

should ensure that the beneficial interest is contingent.”<sup>296</sup> If there are multiple beneficiaries who are all above the age of majority and have capacity, premature vesting is not a concern because all beneficiaries entitled to the property can consent to a proposed termination or variation. In those situations, drafters can instead add unascertained or minor beneficiaries to trigger variation of trusts legislation and force judicial review.<sup>297</sup> In *Drafting Wills in Canada: A Lawyer’s Practical Guide*, the authors advise that “[i]t is not sufficient to make a gift over to another known individual, because even if the trust is vested in several individuals, if they are all of age and agree, they can ‘bust the trust.’”<sup>298</sup>

If a beneficiary wished to rely on the Rule in *Saunders v Vautier*, he or she might petition the court and argue that a trust provision is a postponement. Alternatively, a beneficiary or trustee desiring to avoid the application of the Rule could argue that a trust provision is conditional in order to force judicial discretion. A concern raised in the MLRC Report 1975 was the interpretation of those provisions may be applied inconsistently from case to case, as judges apply weight to different policy considerations. The authors of the report considered the various competing interests and noted that “a sensitive balance must be drawn between the Scylla and Charybdis of certain law and uncertain equity; the sanctity of a testator’s intentions; the repugnance of controlling property from the grave; the need to protect a spendthrift from himself; the economics of making assets productive; [and] the conserving of those assets that are subject to waste”.<sup>299</sup>

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<sup>296</sup> Bernstein, *supra* note 60 at 260.

<sup>297</sup> *Ibid.*

<sup>298</sup> Robyn Solnik, Mary-Alice Thompson & Brian Gillingham, *Drafting Wills in Canada: A Lawyer’s Practical Guide*, 2nd ed (Toronto: LexisNexis Canada, 2016) at 247.

<sup>299</sup> MLRC Report 1975, *supra* note 14 at 21.

After reviewing decisions in which the Rule in *Saunders v Vautier* had been applied, the MLRC Report 1975 concluded that “from one situation to the next the only constant factor to emerge is the judges’ fine instinct for what is fair and equitable in the circumstances.”<sup>300</sup> Additionally, in applications under Manitoba’s variation of trusts legislation, “the equities of the particular case are far more likely to determine whether the so called ‘Rule’ is applied than any rigid following of inexorable legal logic”.<sup>301</sup>

Following its consideration of Manitoba jurisprudence, the MLRC Report 1975 recommended that “[i]f the Rule in *Saunders v. Vautier* is to be replaced, it will have to be by some form of judicial discretion.”<sup>302</sup> Substituting the Rule with a different rule of law was believed to be vulnerable to the same frustrations as before, particularly with creative drafters attempting to circumvent the new rule. The authors acknowledged that requiring judicial discretion may itself lead to uncertainty and “the possibility of needless litigation, although this is a fear that has been expressed before in other situations involving the proposed use of judicial discretion, with later events showing it to be largely a chimera.”<sup>303</sup>

The MLRC Report 1975 also recommended that “to avoid possible problems with the enforcement of the order, the court be given the direct power of variation.”<sup>304</sup> In other variation of trusts legislation, including Alberta’s revised legislation, the court merely approves the scheme and “[t]here is no power in the court actually to make or direct any variation.”<sup>305</sup> The *Variation of Trusts Act 1958*, for example, “does not expressly confer any power on the court to

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<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid* at 15.

<sup>302</sup> *Ibid* at 24.

<sup>303</sup> *Ibid.*

<sup>304</sup> Bernstein, *supra* note 60 at 278.

<sup>305</sup> Hoffstein & Yee, *supra* note 61 at 71.

direct the trustees to carry the arrangement into effect”.<sup>306</sup> Effectively, “the court gave its consent on behalf of the incapacitated beneficiaries, and thus paved the way for a normal application of the Rule in *Saunders v. Vautier*, it being the Rule which forced the trustees to comply and not the court order.”<sup>307</sup> In *Re Holmden’s Settlement Trusts*, the court noted that “the arrangement must be regarded as an arrangement made by the beneficiaries themselves. The court merely acted on behalf of or as representing those beneficiaries who were not in a position to give their consent and approval.”<sup>308</sup>

## 5. Early Reception and Other Law Reform Commission Reports

On the second reading of Bill 35—what would later become the *Act to Amend the Trustee Act* 1983—the Honourable Roland Penner, QC, introduced the bill by stating that the proposed amendment “flows substantially from [the] recommendations made by the Law Reform Commission; it is not the same as those recommendations but it flows from them.”<sup>309</sup> Even so, contemporary scholarship was not receptive to the amendments. Glenn, writing in 1983, noted that “it seems regrettable that the rule in *Saunders v. Vautier* is no longer available at all, that in all cases, even the most simple, termination as of right has been replaced by judicial discretion.”<sup>310</sup> McClean wrote that the requirement for court approval “carries with it more disadvantage than the Report acknowledges ... and on balance it is not clear that the present law ought to be changed.”<sup>311</sup> One of the concerns was that increased discretion is unlikely to reduce

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<sup>306</sup> McClean, “Variation”, *supra* note 62 at 233.

<sup>307</sup> MLRC Report 1975, *supra* note 14 at 25.

<sup>308</sup> *Re Holmden’s Settlement Trusts*, [1968] AC 685, [1968] 1 All ER 148 (HL).

<sup>309</sup> Manitoba, Legislative Assembly, “Bill 35 – The Trustee Act”, 2nd reading, *Hansard*, 32nd Leg, 2nd Sess, No 53A (25 April 1983) at 2032 (Hon Roland Penner), online: <[https://www.gov.mb.ca/legislature/hansard/32nd\\_2nd/hansardpdf/53a.pdf](https://www.gov.mb.ca/legislature/hansard/32nd_2nd/hansardpdf/53a.pdf)>.

<sup>310</sup> Glenn, *supra* note 1 at 636.

<sup>311</sup> McClean, “Perpetuities”, *supra* note 270 at 263.

uncertainty—“[d]iscretion is in itself productive of uncertainty, it compels litigation and, with all respect to the court, there is no guarantee of the wisdom of the exercise of the discretion”.<sup>312</sup>

The Ontario Law Reform Commission and the Law Reform Commission of Saskatchewan both recommended a similar change to the Rule—Ontario in 1986 and Saskatchewan in 1994.<sup>313</sup> Bernstein specifically advocated against the change in Ontario in his review of the OLRC Report, arguing that the purpose of trusts is to add flexibility and the change in legislation adds obstacles and removes flexibility.<sup>314</sup> McClean had previously written that

[i]f a trust is to be a useful method of disposing of property it must in some way or other be enabled to keep pace with economic and social change. An inflexible trust caught flat-footed in a period of inflation or depression, confronted with a variable stock market or changing government taxation policies, or even merely faced with the necessity of making some more or less minor family re-arrangement may cause the name beneficiary to appear something of a misnomer.<sup>315</sup>

In the BCLI Report, published in 2003, the “principal recommendation” was that the law regarding the Rule in *Saunders v Vautier* “needs to be revised to allow trust instruments to be amended more effectively and efficiently than is possible under the present law.”<sup>316</sup> Notwithstanding this mandate, the BCLI Report recommends not repealing, citing concern about paternalism and an increase in applications and expenses—“by abrogating the rule in *Saunders v. Vautier*, a rule which itself violates settlor intent, and requiring in effect that all proposals go through the courts, this approach would likely give rise to an increase in applications to the court,

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<sup>312</sup> *Ibid.*

<sup>313</sup> Ontario Law Reform Commission, “Report on the Law of Trusts”, Volume II (1984), online: <<https://collections.ola.org/mon/27010/25452-2.pdf>> [OLRC Report]; Saskatchewan LRC Report, *supra* note 87 at 20.

<sup>314</sup> Bernstein, *supra* note 60 at 288.

<sup>315</sup> McClean, “Variation”, *supra* note 62 at 181.

<sup>316</sup> BCLI Report, *supra* note 90, Introductory Note.

and consequent expense.”<sup>317</sup> McClean also commented that the MLRC Report 1975 “is rather sanguine about the prospect of needless litigation arising out of the conferring of a further discretion on the courts.”<sup>318</sup>

In its proposed Uniform Trustee Act, the Uniform Law Conference of Canada (“ULCC”) specifically codifies the Rule in *Saunders v Vautier*:

An arrangement takes effect without court approval if

- (a) all of the objects of a trust are beneficiaries that are of full capacity, and
- (b) all of the beneficiaries of the trust consent to the arrangement.<sup>319</sup>

The notable departure from the Rule is that the ULCC draft legislation defines “arrangement” as either “(a) a variation, resettlement or termination of a trust, or (b) a variation or deletion of, or an addition to, the powers of a trustee in relation to the management or administration of a trust”.<sup>320</sup>

As previously noted, there has been debate among scholars as to whether *Saunders v Vautier* allows for variation of a trust. The accompanying commentary to the Uniform Trustee Act states that its inclusion of the ability to vary the terms of a trust (as well as the ability to vary

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<sup>317</sup> *Ibid* at 3. The BCLI Report recommended that “[a] revised *Trust and Settlement Variation Act* should confer upon the beneficiaries the [express] power to vary, resettle or revoke a trust without judicial consent where all the beneficiaries are of full capacity and unanimously approve of the proposed variation” (*ibid*). Such an approach “would allow adult beneficiaries to deal with their property as they see fit, without having to get court approval to do so” (*ibid*) and would be more efficient and cost effective than requiring judicial approval in each instance. The report noted that “the rule in *Saunders v. Vautier* has worked well for the termination of trusts for over a century and there is no reason to think that the rule would not work equally well if it is extended to allow for the variation of trusts” (*ibid* at 3–4).

<sup>318</sup> McClean, “Perpetuities”, *supra* note 270 at 263.

<sup>319</sup> Uniform Law Conference of Canada, “Uniform Trustee Act” (2012), s 59, online: <[www.ulcc.ca/images/stories/2012\\_pdfs\\_eng/2012ulcc0029.pdf](http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf)> [Uniform Trustee Act]. Oosterhoff noted that the Uniform Trustee Act “is based on the 2004 Report of the British Columbia Law Institute: *A Modern Trustee Act for British Columbia*. That Report in turn used the Ontario Law Reform Commission’s 1984 *Report on the Law of Trusts* as its template.” Oosterhoff, “Reform”, *supra* note 85 at 330.

<sup>320</sup> Uniform Trustee Act, *supra* note 319, s 57.

the powers of a trustee) is “a significant reform of the law.”<sup>321</sup> The drafters felt the change was justified because providing beneficiaries the ability to vary a trust “is consistent in principle with their existing ability to terminate a trust: to allow this is to enable capable adult beneficiaries to deal, as they determine, with that which is their property.”<sup>322</sup>

The concern about paternalism is a valid criticism. The requirement for a decision to be of justifiable character “was inserted so as to allow the court to reject an arrangement that it regarded as being patently unwise or unjust or improvident or unreasonable from the standpoint of the adult beneficiary. ... It is questionable whether the court should put itself in a position of second guessing what an adult beneficiary regards as being for his benefit.”<sup>323</sup> Further, “[i]t should be presumed that a capacitated adult beneficiary is in the best position to decide what is in his interests.”<sup>324</sup>

To overcome concerns about loss of flexibility and paternalism, the legislative changes in Manitoba may be defensible “if one accepts as the starting premise that the intentions of the settlor should prevail over the wishes of the beneficiaries, unless the beneficiaries can convince the court otherwise.”<sup>325</sup> For example, the OLRC Report specifically considered the concerns about paternalism, stating that their proposed legislation “would make it clear that, insofar as such beneficiaries are concerned, the court would be expected to examine the evidence of the

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<sup>321</sup> *Ibid*, s 59, Comment. That the ULCC took this position is not terribly surprising as Waters was both the Chair for the BCLI Report and a member of the ULCC working group for the Uniform Trustee Act.

<sup>322</sup> Uniform Law Conference of Canada, Civil Section, Uniform Trustee Act, “Final Report of the Working Group” (2012) at para 27, online: <<https://www.ulcc.ca/en/uniform-acts-en-gb-1/619-uniform-trustee-act-2012/1254-uniform-trustee-act-final-report-of-the-working-group>> [ULCC Final Report].

<sup>323</sup> Bernstein, *supra* note 60 at 277.

<sup>324</sup> *Ibid* at 286.

<sup>325</sup> *Ibid*.



trust creator's intentions and the current circumstances of all the adult beneficiaries.”<sup>326</sup> Under this model, beneficiaries would have to demonstrate

why their circumstances justify a rearrangement which, in whole or in part, ignores that intention. The trust creator may not have known of those circumstances or foreseen future events; he may indeed have known or foreseen, as the case may be, but failed to appreciate the disadvantages created by the terms he has chosen. On the other hand, the beneficiaries may only be able to show, for instance, that they would sooner have capital now rather than later.<sup>327</sup>

However, Bernstein was pessimistic that the changes would necessarily lead to a testator’s intentions “prevailing over the wishes of the beneficiaries, as it would simply be one of the considerations to be taken into account by the court.”<sup>328</sup> Like Alberta, the MLRC Report 1975 was reluctant to leave the law in a state where the testator’s intentions were regularly and cavalierly dismissed and “recommended that the legislation expressly contain a direction that the court take into consideration the intentions of the settlor or testator.”<sup>329</sup> The legislative changes as drafted do not “adopt this suggestion of expressly referring to the intentions of the settlor or testator”<sup>330</sup> with the result that “the intention of the testator is to be considered, if at all, under the general requirement that ... [a proposed arrangement] appears ‘otherwise to be of a justifiable character’.”<sup>331</sup> Bernstein was even more skeptical, stating that “[i]n the event that court approval is required in all circumstances, it is likely that the court would favour the interests of the

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<sup>326</sup> OLCRC Report, *supra* note 313 at 420.

<sup>327</sup> *Ibid.*

<sup>328</sup> Bernstein, *supra* note 60 at 281.

<sup>329</sup> *Ibid* at 279. The Manitoba Law Reform Commission also recommended in its 1982 report that “the intentions of the settlor or testator in creating the trust [should be] something which [section 59] should expressly require the courts to consider in deciding each case whether overall the proposed arrangement should receive the court’s sanction.” Manitoba Law Reform Commission, “Report on the Rules Against Accumulations and Perpetuities”, Report No 49 (1982) at 56, online: <[www.manitobalawreform.ca/pubs/pdf/archives/49-full\\_report.pdf](http://www.manitobalawreform.ca/pubs/pdf/archives/49-full_report.pdf)> [MLRC Report 1982].

<sup>330</sup> Bernstein, *supra* note 60 at 279.

<sup>331</sup> Glenn, *supra* note 1 at 631–32, citing the *Trustee Act MB*, *supra* note 13, s 59(7)(b). McClean oppositely argued that “[o]n a narrow construction [the section] might be read as excluding any consideration of the intent of the settlor at the time of the creation of the trust, for it might be argued that is not a circumstance existing at the date of the application.” McClean, “Perpetuities”, *supra* note 270 at 259.

beneficiaries over the intentions of the settlor in any event, so that the requirement of court approval would serve no purpose.”<sup>332</sup> This skepticism was also shared by the Saskatchewan LRC Report, which stated that “[i]f all trust terminations are brought within *The Variation of Trusts Act*, the court might find it difficult to refuse to terminate the trust. In the result, the rule in *Saunders v. Vautier* would continue to be in effect, but only on a *pro forma* application to the court.”<sup>333</sup>

Comparatively, courts in the United States have refused to adopt the Rule in *Saunders v Vautier*, emphasizing instead the “material purpose” of a trust when considering a proposed variation. The leading American decision is *Clafin v Clafin*,<sup>334</sup> in which the Supreme Judicial Court of Massachusetts held “that the intent of the settlor or testator could only be frustrated when the terms of the trust were contrary to the law or public policy.”<sup>335</sup>

Waters noted that

[t]here were three positions which [Manitoba and Alberta] could have taken if greater significance was to be given to the settlor’s intent: the first was to adopt the American material purpose doctrine, the second was to prohibit the termination of trusts in those factual circumstances which have excited judicial criticism of *Saunders v. Vautier*, and the third was to make all trust termination subject to judicial consent under the terms of the variation of trusts legislation.<sup>336</sup>

The third option represented “a compromise between the prohibition of the American position which heavily favours the settlor’s intent, and the *Saunders v. Vautier* rule which as heavily favours the beneficiaries’ contrary wishes.”<sup>337</sup> Bernstein likewise acknowledged “the legislation

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<sup>332</sup> Bernstein, *supra* note 60 at 280.

<sup>333</sup> Saskatchewan LRC Report, *supra* note 87 at 18. *The Variation of Trusts Act*, RSS 1978, c V-1.

<sup>334</sup> *Clafin v Clafin*, 149 Mass 19 (1889) [*Clafin*].

<sup>335</sup> Bernstein, *supra* note 60 at 271, citing *Clafin*.

<sup>336</sup> Waters, Gillen & Smith, *supra* note 15 at 1259.

<sup>337</sup> *Ibid.*

adopted in Manitoba and Alberta offers more flexibility than the material purpose doctrine of the United States”.<sup>338</sup>

## 6. Challenges with Implementation

In *Goulding*, Mummery L.J. stated that “[f]or a jurisdiction invoked thousands of times over almost forty years, there are remarkably few reported cases on its construction.”<sup>339</sup> Mummery L.J. was referring to the *Variation of Trusts Act 1958*, although a similar argument could be made for *The Trustee Act* of Manitoba.<sup>340</sup> Applications in Manitoba are unreported except for a small sample of decisions.

### i) Justifiable Character

An important departure from earlier variation of trusts legislation is the new consideration of “justifiable character”. Similar to the test of “fitness” exemplified in *Re Steed*, in order to approve a proposed arrangement, the court must satisfy itself that “in all the circumstances at the time of the application to the court, the arrangement appears otherwise to be of a justifiable character.”<sup>341</sup> The inherent challenge before the court is that the legislation fails to provide any formal definition for what constitutes justifiable character. McClean predicted that “it may be that the use of the word will give rise to more issues than it solves.”<sup>342</sup> Since the amendments, courts have been inconsistent with how the term has been applied, with no clear consensus for future applications.

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<sup>338</sup> Bernstein, *supra* note 60 at 286.

<sup>339</sup> *Goulding*, *supra* note 113 at 246.

<sup>340</sup> Peter Luxton noted that with the exception of a handful of judgments that were given in open court, “the vast majority of applications [were] both heard and judged in chamber.” Luxton, *supra* note 282 at 719.

<sup>341</sup> *Trustee Act MB*, *supra* note 13, s 59(7)(b).

<sup>342</sup> McClean, “Perpetuities” *supra* note 270 at 259.

Early decisions involving section 59(7) relied on jurisprudence on variation of trusts legislation from other jurisdictions and adopted the test of “fitness” used in those other provinces. In *May v May*, Beard J. (as she then was) noted:

At my request, counsel has provided me with several cases dealing with the exercise of the statutory power to vary a trust.

In *Re Irving* (1975), 66 D.L.R. (3d) 387 (Ont. H.C.), the court reviewed many English and Canadian cases on the statutory variation of trusts and then summarized the issues for consideration as follows (at p. 394):

First, does it keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?<sup>343</sup>

*May* formed an initial basis for the test, relying on *Re Irving*. *Charlesworth Estate (Re)*<sup>344</sup> (also decided by Beard J. (as she then was)) relied on the same test and considered the testator’s intentions as the first step to approve a variation on the basis of justifiable character. In *Re Charlesworth*, a testamentary trust was established for the children of the testatrix’s niece and nephew. The niece filed an application to vary the trust by adding her second child—born sixteen months after the death of the testatrix—as a beneficiary.<sup>345</sup> Beard J. commented that the niece’s second child was “excluded as a beneficiary as a result of the application of the rules of construction of testamentary instruments rather than by the specific wording of the will or direct

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<sup>343</sup> *May v May*, 1994 CarswellMan 168 at paras 24–25, 96 Man R (2d) 268 (QB) [*May*], citing *Re Irving*, *supra* note 115 at 394. Despite referring to several cases, *Re Irving* is the only case cited for considerations on whether to approve a proposed variation.

<sup>344</sup> *Charlesworth Estate (Re)*, [1996] 5 WWR 578, 108 Man R (2d) 228 (QB) [*Re Charlesworth* cited to WWR].

<sup>345</sup> *Ibid* at para 5.

extrinsic evidence as to the testatrix's intention."<sup>346</sup> As a result, Beard J. determined that the variation was not contrary to the testatrix's intentions.<sup>347</sup>

Comparatively, Huband J.A. considered justifiable character in *Teichman v Teichman Estate* and held that "[a]s long as the affected parties know what they are doing, and the proposed arrangement does not appear to give any beneficiary an advantage over any other beneficiary, the approbation of the court should not be withheld."<sup>348</sup> Contrasted with Bernstein's comments that "the legislation is only justifiable if one accepts as the starting premise that the intentions of the settlor should prevail over the wishes of the beneficiaries,"<sup>349</sup> *Teichman* appears to indicate the opposite approach.

Intention was a consideration in the more recent decision, *Shinewald v Putter*, which involved a family trust set up for tax purposes. Dewar J. stated:

It is argued on the part of the applicant that since the initial intention of the settlor was to benefit Edward Shinewald *and* his family, the proposed variation is consistent with that intention, given that Sharon Shinewald has passed on. Since there is no objection to the proposed variation by any of the parties who have a beneficial interest in the Trust, I am prepared to conclude that the proposed arrangement is of a justifiable character at least on a prospective basis.<sup>350</sup>

Notably, in *Knox United Church v Royal Trust Corp of Canada*,<sup>351</sup> Huband J.A. overturned the trial decision and allowed the proposed trust variation. The motion judge initially "refused approval on the single ground that the arrangement, although undoubtedly beneficial,

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<sup>346</sup> *Ibid* at para 17.

<sup>347</sup> *Ibid*.

<sup>348</sup> *Teichman v Teichman Estate*, 1996 CarswellMan 158 at para 11, 110 Man R (2d) 114 (CA) [*Teichman*].

<sup>349</sup> Bernstein, *supra* note 60 at 286.

<sup>350</sup> *Shinewald v Putter*, 2014 MBQB 254 at para 14 [emphasis in original].

<sup>351</sup> *Knox United Church v Royal Trust Corp. of Canada*, 1996 CarswellMan 96, 110 Man R (2d) 81 (CA) [*Knox* cited to CarswellMan].

was contrary to the intention of the testator.”<sup>352</sup> In the appellate decision, Huband J.A. noted that “[i]n [the Court’s] view, the learned motions judge placed undue emphasis on the intentions of the testatrix which will inevitably be overcome in every successful application to vary, and by so doing he did not exercise his discretion on a sound basis in determining what constitutes a justifiable character.”<sup>353</sup> Huband J.A. relied on the unreported Court of Appeal decision, *Brown v National Victoria & Grey Trust Co.*,<sup>354</sup> which predated *May*. Huband J.A. noted that “[w]ithout defining what was meant by the words ‘justifiable character,’ the Court [in *Brown CA*] observed that all of the affected beneficiaries were financially responsible, that no party was gaining any apparent advantage over another, and that the equities as between the parties were reasonable.”<sup>355</sup> The proposed variation was contrary to the testator’s intention, but “that did not inhibit the Court [in *Brown CA*] from reaching the conclusion that the variation was of a justifiable character.”<sup>356</sup>

Justifiable character was considered but not defined in *Shoal Lake Indian Band No 40 v Royal Trust Corp of Canada*,<sup>357</sup> in which an application to vary a trust was made by Shoal Lake Indian Band No. 40 as the sole beneficiary. The trust had been created by the City of Winnipeg and the Province of Manitoba as part of an agreement with the City, the Province, Shoal Lake Indian Band No. 40 and Royal Trust Corp. of Canada, for land previously surrendered by the Band.<sup>358</sup> The agreement provided that management of the trust, including disbursement of

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<sup>352</sup> Farquhar, *supra* note 120 at 189.

<sup>353</sup> *Knox*, *supra* note 351 at para 7.

<sup>354</sup> *Brown v National Victoria & Grey Trust Co.*, (12 November 1985), suit no 341/85 [*Brown CA*].

<sup>355</sup> *Knox*, *supra* note 351 at para 8, citing *Brown CA*, *supra* note 354.

<sup>356</sup> *Knox*, *supra* note 351 at para 8.

<sup>357</sup> *Shoal Lake Indian Band No 40 v Royal Trust Corp of Canada*, 91 Man R (2d) 287, 1994 CarswellMan 104 (QB) [*Shoal Lake* cited to CarswellMan].

<sup>358</sup> *Ibid* at para 5.

income, was to be directed by unanimous vote of the Shoal Lake Agreement Committee.<sup>359</sup> The Committee was to consult with a second committee known as the Working Group prior to making any determinations.<sup>360</sup> The Working Group prepared a report in March 1992, for the period from April 1991 to March 1992, and included a recommendation that income for the following year, 1992–93, not be disbursed until a condition precedent was completed.<sup>361</sup> After some delay, it became clear that the condition precedent would not be completed before the end of the period, which would cause the income to be taxed in the hands of the trust and create a \$300,000 tax liability.<sup>362</sup> Without defining justifiable character, Schulman J. held that the variation was of a justifiable character within section 59(7) of the *Trustee Act* MB. Regarding the settlors' intentions, Schulman J. commented that “[t]he order will carry out effectively the basic intention of the tripartite agreement on which the trust was created. It will not, however, accomplish the basic intention through the process provided for in the agreement, but in my view that one factor should not prevent this court from making the order in question.”<sup>363</sup>

Other decisions, such as *Re Goldstein Insurance Trust*,<sup>364</sup> were even less descriptive. In approving the variation in *Goldstein*, Monnin J. (as he then was) stated, “I have little difficulty in understanding the reasons which prompted this application. On the whole, the benefits which will accrue to the present beneficiaries of the trust are more than sufficient to satisfy the requirements of s. 59(7)(a) of the Act and the arrangement is of a justifiable character.”<sup>365</sup> In *Re*

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<sup>359</sup> The Committee included the Mayor of Winnipeg, the Chief of the Band and the designated Minister of the Province of Manitoba (*ibid*).

<sup>360</sup> The Working Group was similarly comprised of two members of each of the Band, the City of Winnipeg and Province of Manitoba (*ibid*).

<sup>361</sup> *Ibid* at para 7.

<sup>362</sup> *Ibid* at paras 13, 17.

<sup>363</sup> *Ibid* at para 17.

<sup>364</sup> *Goldstein Insurance Trust, Re*, 56 Man R (2d) 73, 1988 CarswellMan 372 (QB) [*Goldstein* cited to CarswellMan].

<sup>365</sup> *Ibid* at para 8.

*Henderson Estate*, Schwartz J. noted that section 59(7) requires that “the court must be satisfied in all the circumstances, at the time of the application, the arrangement appears otherwise to be of justifiable character”<sup>366</sup> without further discussion or explanation.

Because most of the reported decisions were decided between 1990–96, it is difficult to discern any trends or patterns over time. From those cases, however, there does not appear to be any consensus between the judiciary on how to approach justifiable character. Huband J.A. appeared to favour the property rights of beneficiaries over the intentions of the testator, as evidenced by *Teichman* (1996) and *Knox* (1996). Conversely, Beard J.A. began her assessment of a proposed arrangement’s justifiable character with the testator’s intentions in *May* (1994) and *Re Charlesworth* (1996). Dewar J. held in *Shinewald* (2014) that because the proposed variation was consistent with the intentions of the testator, the variation was of justifiable character. Other justices, such as Schulman J. in *Shoal Lake* (1994) or Monnin J. in *Goldstein* (1988) declined to define justifiable character, but still approved the proposed variations.<sup>367</sup> That both Huband and Beard J.A. were consistent in their (opposite) approaches to justifiable character suggests that the approach may be judge-dependent to a certain degree, validating McClean’s concerns that the test would result in an increase in uncertainty.<sup>368</sup> An opposite interpretation is that the authors of the MLRC Report 1975 were justified in its finding that “from one situation to the next the only

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<sup>366</sup> *Henderson Estate, Re*, 77 Man R (2d) 91, 1991 CarswellMan 269 at para 6 (QB) [*Re Henderson*].

<sup>367</sup> Monnin J. also heard *Brown CA* at the trial level. Monnin J. cited *Black’s Law Dictionary* for the definition of “justifiable”: “Rightful; defensible; warranted or sanctioned by law; that which can be shown to be sustained by law”. *Brown v National Victoria & Grey Trust Co*, 35 Man R (2d) 300, 1985 CarswellMan 79 at para 20 (QB), citing Henry Campbell Black, Joseph R Nolan & Michael J Connolly, *Black’s Law Dictionary*, 5th ed (St Paul: West Pub, 1979) at 778.

<sup>368</sup> McClean “Perpetuities”, *supra* note 270 at 263.



constant factor to emerge is the judges' fine instinct for what is fair and equitable in the circumstances."<sup>369</sup>

Alberta's *Trustee Act*<sup>370</sup> also uses the framework of justifiable character, as best exemplified by *Salt v Alberta (Public Trustee)*.<sup>371</sup> Like *May* and *Re Charlesworth*, Hutchinson J. reviewed *Re Irving* and considered as well Bernstein's assessment of Alberta's revised legislation: "the policy debate would seem to be as to whether or not it is appropriate to provide a compromise whereby the court can balance the intentions of the settlor with the wishes of the beneficiaries."<sup>372</sup> Bearing this assessment in mind, Hutchinson J. determined that "the test was whether the court should override the wishes of adult, capacitated beneficiaries when they are inconsistent with the intention of the testator"<sup>373</sup> and held that "[u]nless there has been a demonstrable change in the circumstances of the beneficiaries, it would appear that, at least in the present instance, the testator's attempt to balance the interests of those persons whom he wished to benefit should be followed."<sup>374</sup> An arrangement is not justifiable (and consequently, a trust should not be varied) "[j]ust because the adult beneficiaries may want to receive the immediate enjoyment of the capital of the estate."<sup>375</sup>

## ii) Managing Postponements

Like Huband J.A. in *Teichman* and *Knox*, Waters suggests that intentions are only one factor to consider:

[T]he courts in ... Manitoba are invited by the provincial legislation, it would seem, to consider each of set of acts from the standpoint, not only of the beneficiaries, and anything

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<sup>369</sup> MLRC Report 1975, *supra* note 14 at 21.

<sup>370</sup> *Trustee Act* AB, *supra* note 291, s 42(7).

<sup>371</sup> *Salt v Alberta (Public Trustee)* (1986), 71 AR 161, 1986 CarswellAlta 127 (QB) [*Salt* cited to CarswellAlta].

<sup>372</sup> Bernstein, *supra* note 60 at 277.

<sup>373</sup> Farquhar, *supra* note 120 at 201.

<sup>374</sup> *Salt*, *supra* note 371 at para 15.

<sup>375</sup> *Ibid.*

the trustees may have to say, but from the standpoint also of the settlor's purpose as it appears in the trust terms, and to assess the continued relevance or significance of that purpose. If no purpose is apparent from the instrument or other admissible evidence, or it has ceased to have relevance, then the court can disregard that consideration.<sup>376</sup>

If a trust was created for a specific beneficiary, courts have the benefit of the “implied intention of the settlor; if [the settlor] had wanted the beneficiary to have legal title and possession of the property he could have made a direct transfer to him.”<sup>377</sup> There may not be any evidence of a testator's intentions, however, when a trust arises due to a standard provision in the testator's will. Because minors are not permitted to take title to property themselves, drafters often include standard provisions to hold any gifts to minors in trust until the minor becomes of age.<sup>378</sup>

Often testators wish to postpone the age that a minor becomes entitled to avoid a windfall upon the minor attaining the age of majority. The Saskatchewan LRC Report states that “[i]n practice, the rule [in *Saunders v Vautier*] is most often applied when there is a single beneficiary, and termination of the trust is postponed under the terms of the trust past the age of majority”<sup>379</sup>—including the original *Saunders v Vautier* decision itself. Bernstein echoes that “[o]ne of the most common situations [for the application of variation of trusts legislation] is where the settlor or testator has delayed payment of the capital to a beneficiary until he has reached a specified age.”<sup>380</sup> The most frequent reason for postponement “is usually a reservation about the maturity and responsibility of the beneficiary.”<sup>381</sup>

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<sup>376</sup> Waters, Gillen & Smith, *supra* note 15 at 1262.

<sup>377</sup> McClean, “Perpetuities”, *supra* note 270 at 260.

<sup>378</sup> Solnik, Thompson & Gillingham, *supra* note 298 at 242. For example, “[i]f a grandchild or other issue of mine (a ‘Beneficiary’) becomes entitled to receive any portion of my estate before attaining the age of 25 years, that portion (the ‘Portion’) shall be held and invested by my Trustees on the following terms . . .” (*ibid* at 269–70).

<sup>379</sup> Saskatchewan LRC Report, *supra* note 87 at 2. See Solnik, Thompson & Gillingham, *supra* note 298; the authors note that “[w]hile the principle [of *Saunders v Vautier*] is not hard to grasp, it has a nasty way of cropping up in trusts anywhere property is to be held for someone past the age of majority” (*ibid* at 245).

<sup>380</sup> Bernstein, *supra* note 60 at 260.

<sup>381</sup> Saskatchewan LRC Report, *supra* note 87 at 2.

A postponement provision may be modified so that payments are made at instalments,<sup>382</sup> although courts have considered that instalments are also subject to *Saunders v Vautier*:

In *Re Dawson*, the rule was found to apply to the following provision:

One quarter of residue to trustees on trust to pay A \$60 per month. Should A predecease the testator or die before all of the capital is paid to him, the property to pass to A's estate.

In *Montreal Trust Co. v. Krisman*, the following provision was subject to early termination under the rule:

Proceeds of insurance policies on testator's life on trust to hold the proceeds as a separate trust fund, and to pay \$15,000 per annum to A out of the capital or accumulated revenue of the fund until the entire capital and income are used up.<sup>383</sup>

Arrangements varying trusts with instalment payments are also captured by section 59(3)(iii) of the *Trustee Act MB*.

Section 59(7) of the *Trustee Act MB* applies to those trusts with a single capacitated beneficiary who would otherwise be entitled to rely on the Rule in *Saunders v Vautier*. In *Shoal Lake*, Schulman J. determined that section 59(7) of *The Trustee Act* “empowers a court to vary a trust where all parties who are beneficially interested in the trust, and are capable of consenting, do consent in writing”<sup>384</sup>; as the sole beneficiary, the Band “consented in writing to the making of the order sought by virtue of the notice of application filed.”<sup>385</sup>

*Shoal Lake* was unique because the beneficiary was a Band (rather than an individual) and therefore cannot die—the trust was to “be maintained for a period of 60 years and ... during

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<sup>382</sup> See e.g. *Re Townshend*, *supra* note 277.

<sup>383</sup> Bernstein, *supra* note 60 at 261–62, citing *Re Dawson*, [1941] 1 DLR 790, [1941 1 WWR 177 (Alta SC); *Montreal Trust Co v Krisman*, [1960] SCR 659 (BC). See also *Re Townshend*, *supra* note 277.

<sup>384</sup> *Shoal Lake*, *supra* note 357 at para 15.

<sup>385</sup> *Ibid* at para 17.

that period interest on the fund would be paid to the Band. On expiry of the agreement, the principal would be paid to the Band.”<sup>386</sup>

Otherwise, many trusts include a “gift over” to divert the trust property to another beneficiary in the event that a named beneficiary dies or is unable to take, thereby avoiding a situation (and unwanted tax liabilities) where trust property reverts back to a testator’s estate.<sup>387</sup> However, if a trust arises as the result of a boilerplate postponement clause, there is unlikely to be a gift over.<sup>388</sup> Such a trust would typically involve a single beneficiary, who, upon attaining the age of majority, having capacity and being fully vested in the trust property, would be required to apply to the court in order to have the trust property turned over to him or her, when he or she would have otherwise been entitled under the Rule in *Saunders v Vautier*. The Saskatchewan Law Report noted that “[i]f the rule in *Saunders v. Vautier* has any contemporary justification, it likely lies in the fact that some trusts postponing termination [to the time] when only adult beneficiaries remain no longer serve their original purpose, and can create inconvenience, or even hardship, if continued to their natural end.”<sup>389</sup> Glenn added that “it seems regrettable that the rule in *Saunders v. Vautier* is no longer available at all, that in all cases, even the most simple, termination as of right has been replaced by judicial discretion.”<sup>390</sup>

Further, creating additional litigation is at odds with Manitoba’s current emphasis on access to justice and efforts to reduce the excessive cost and length of time involved with

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<sup>386</sup> *Ibid* at para 5.

<sup>387</sup> *Inter vivos* trusts may be subject to attribution rules for reversionary trusts under section 75(2) of the *Income Tax Act*, SC 1970, c 63, if there is a possibility for the trust property to revert back to settlor.

<sup>388</sup> For an analysis of what would happen in the event of a minor beneficiary dying before reaching the age of postponement, see Albert Oosterhoff, “The Rule in *Saunders v. Vautier*: Use It Or Lose It?” (23 July 2018), *WELBlog* (blog), online: <<http://welpartners.com/blog/2018/07/the-rule-in-saunders-v-vautier-use-it-or-lose-it/>>.

<sup>389</sup> Saskatchewan LRC Report, *supra* note 87 at 4.

<sup>390</sup> Glenn, *supra* note 1 at 636.

navigating the court system.<sup>391</sup> Manitoba’s Court of Queen’s Bench Rules were recently revised with weight given to proportionality:

In applying [the Queen’s Bench Rules] in a proceeding, the court is to make orders and give directions that are proportionate to the following:

- (a) the nature of the proceeding;
- (b) the amount that is probably at issue in the proceeding;
- (c) the complexity of the issues involved in the proceeding;
- (d) the likely expense of the proceeding to the parties.<sup>392</sup>

Additionally, the Queen’s Bench Rules “shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”<sup>393</sup>

### iii) Other Considerations

Further to the issue of access to justice, the skepticism by Bernstein and the Saskatchewan LRC may have been warranted when they expressed concern that courts would likely favour the interests of the beneficiaries to the point where trust variations and terminations were nearly automatic.<sup>394</sup> Of the reported cases in Manitoba, only the proposed variation in *Knox* was rejected, albeit temporarily before the decision was overturned and the variation approved at the Court of Appeal.<sup>395</sup> This led Farquhar to comment that “in Manitoba there appears to be a presumption in favour of variation by an emphasis on the principle that adult, capacitated consenting beneficiaries should, by and large, be able to decide matters for themselves.”<sup>396</sup>

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<sup>391</sup> Government of Manitoba, News Release, “Manitoba Introduces Legislation That Would Improve Access to Legal Services” (9 March 2020), online: <<https://news.gov.mb.ca/news/index.html?item=46922>>; Manitoba Courts, Media Release, “Access to Justice Initiatives” (27 June 2014), online: <[www.manitobacourts.mb.ca/news/access-to-justice-initiatives-media-release/](http://www.manitobacourts.mb.ca/news/access-to-justice-initiatives-media-release/)>.

<sup>392</sup> Manitoba, *Court of Queen’s Bench Rules*, r 1.04(1.1).

<sup>393</sup> *Ibid.*, r 1.04(1).

<sup>394</sup> Bernstein, *supra* note 60 at 280.

<sup>395</sup> There may, however, be unreported applications that were dismissed without being reported.

<sup>396</sup> Farquhar, *supra* note 120 at 203–04.

Alberta, in contrast, has refused applications for variation where it has been deemed appropriate to do so—in *Kinnee v Alberta (Public Trustee)*, for instance, Hope J. dismissed an application where the applicant intended to “transfer the dwelling house to his father on payment of one-half of the value thereof.”<sup>397</sup> The arrangement was not considered justifiable as the testator had “made it abundantly clear that she did not want her husband (the father) to have any part of her estate.”<sup>398</sup> In that respect, Manitoba might benefit from a demarcated test comparable to Alberta’s test from *Salt*—namely that “the court should override the wishes of adult, capacitated beneficiaries when they are inconsistent with the intention of the testator.”<sup>399</sup> In *Brown CA*, however, the court specifically rejected the proposition of an established test.<sup>400</sup>

Further research should be undertaken to determine whether replacement of the Rule in *Saunders v Vautier* with section 59(7) alters the rights of trustees—Pettit noted that the “rights of beneficiaries under the *Saunders v Vautier* principle are subject to the right of trustees to be sufficiently protected against all possible claims against them as trustees.”<sup>401</sup> Practically, does variation or early termination ordered by court circumvent the ability of the trustees to obtain releases?

## 7. Lessons from the Maritime Provinces

In light of the aforementioned criticisms and issues, particularly as it relates to those trusts that arise from postponing gifts to minors, section 59(7) should be amended. A more balanced approach may be to eliminate additional hurdles by allowing automatic variation or early termination by the beneficiaries in non-contentious situations, comparable to Nova Scotia’s

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<sup>397</sup> *Kinnee v Alberta (Public Trustee)*, 3 Alta LR (2d) 59, 1977 CarswellAlta 54 at para 4 (SC) [*Kinnee*].

<sup>398</sup> *Ibid* at para 5. The testator “also expressed an apprehension of influence of her husband over the applicant” (*ibid*).

<sup>399</sup> Farquhar, *supra* note 120 at 201.

<sup>400</sup> *Brown CA*, *supra* note 354.

<sup>401</sup> Pettit, *supra* note 20 at 411, citing *Re Brochbank*, [1948] Ch 206 at 211, [1948] 1 All ER 287; *X v A*, [2000] 1 All ER 490.

*Variation of Trusts Act*.<sup>402</sup> With its recent amendments,<sup>403</sup> the Nova Scotia legislation has managed to strike a balance between the flexibility and accessibility of the Rule in *Saunders v Vautier* and the requirement for judicial consent. Section 3(1) of the *Variation of Trusts Act* NS provides that “[w]here property is held on a trust arising before or after the coming into force of this Section under any will, settlement or other disposition, a person may apply to the court for an order *confirming an arrangement* with respect to the property.”<sup>404</sup> Arrangement is given the same definition as under the Uniform Trustee Act—“a variation, resettlement or revocation of a trust in relation to property or a variation, deletion or termination of, or an addition to, the powers of a trustee in relation to the management or administration of the property subject to the trust”.<sup>405</sup> Judicial review of a proposed arrangement of a trust is not mandatory. The Rule in *Saunders v Vautier* is still applicable and available if all beneficiaries of a trust have capacity and have attained the age of majority. However, if a trustee or other interested party has concerns about the appropriateness of a proposed variation, such as in *Kinnee*, the trustee has the ability to apply to the court—section 3(1) does not limit who may apply to the court for review.

Notably, the *Variation of Trusts Act* NS avoids the ambiguity of demonstrating an arrangement is of “justifiable character”; instead, section 3(2)(b) provides that “the court may issue an order confirming the arrangement if ... the court determines it is appropriate to do so.”<sup>406</sup> This change not only removes a potential interpretation issue, but the legislation includes factors for the court to take into account. When considering an arrangement, the court must consider the following criteria:

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<sup>402</sup> *Variation of Trusts Act*, RSNS 1989, c 486 [*Variation of Trusts Act* NS].

<sup>403</sup> *Perpetuities Act*, SNS 2011, c 42, s 6. The *Perpetuities Act* also contained amendments for the *Real Property Act*, RSNS 1989, c 385.

<sup>404</sup> *Variation of Trusts Act* NS, *supra* note 402, s 3(1) [emphasis added].

<sup>405</sup> *Ibid*, s 2(a).

<sup>406</sup> *Ibid*, s 3(2)(b).

- (a) the intention of the settlor of the trust, if the settlor's intention is objectively discernible;
- (b) the positions of the trustees;
- (c) the positions of the beneficiaries; and
- (d) the position of any person appearing before the court on the application.<sup>407</sup>

The language in section 3(2)(b) of the *Variation of Trusts Act* NS is comparable to the discretion provided to courts under section 1 of the *Trust Variation Act* BC,<sup>408</sup> namely that a court may approve a proposed arrangement on behalf of incapacitated beneficiaries “if it thinks fit”.<sup>409</sup> By using “appropriate” instead, Nova Scotia’s solicitors are able to distinguish applications under the *Variation of Trusts Act* NS from the body of jurisprudence surrounding *Re Steed* and *Re Irving*.

For an example of how the *Variation of Trusts Act* NS is applied in practice, *The John Risley Family Trust 2009 (Re)*, involved a proposed arrangement to the terms of a trust indenture.<sup>410</sup> Affidavits in support had been filed by the settlor of the trust, the trustees and a beneficiary. Rosinski J. first considered whether the arrangement being proposed was a true variation as opposed to a revocation or resettlement of the trust property, since the variation of a trust “may be preferable, for tax reasons, to the termination and creation of a new trust.”<sup>411</sup> In his determination whether the approving the proposed arrangement was appropriate, Rosinski J. “accept[ed] the evidence of the Settlor, the Trustees, and Judith Risley, that they support the application for variation of the trust, and that their motivations are consistent with the original

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<sup>407</sup> *Ibid*, s 3(5).

<sup>408</sup> *Supra* note 121.

<sup>409</sup> *Ibid*, s 1.

<sup>410</sup> *The John Risley Family Trust 2009 (Re)*, 2017 NSSC 318 [*Risley*].

<sup>411</sup> BCLI Report, *supra* note 90 at 3. See e.g. William Innes & Joel T Cuperfain, “Variation of Trusts: An Analysis of the Effects of Variations of Trusts under the Provisions of the Income Tax Act” (1995) 43:1 CTJ 16.



and continuing intention that the trust is to ‘make some provision for the welfare and benefit of certain persons as hereinafter set out’.”<sup>412</sup>

Comparatively, in *Rotary Club of Truro Charitable Trust v Bethel Estate*, Pickup J. noted that he was “not satisfied that to allow [the] application [would be] a significant departure from [the testator’s] intentions, but that it is a factor to consider but not a strong argument against the proposed variation.”<sup>413</sup>

Removing the requirement for judicial review might revitalize the concern in the MLRC Report 1975 that a new rule of law would result in a “constructional chess game”<sup>414</sup> in which courts are forced to determine whether a trust is conditional or merely a postponement. However, under this new scheme, I suggest that a more appropriate dividing line would be whether a proposed variation is contentious or non-contentious. If all beneficiaries are capacitated and the trustees take no issue, then by relying on the Rule in *Saunders v Vautier*, the parties involved would be able to vary or prematurely terminate the trust without having to proceed to court.

New Brunswick also revised their *Trustee Act* in 2015,<sup>415</sup> modelling it after the Uniform Trustee Act. The *Trustee Act* NB codifies *Saunders v Vautier* so that “beneficiaries of the trust may make an arrangement if (a) they are all of full capacity, and (b) they all agree to the arrangement.”<sup>416</sup> Any concerns about a constructional chess game are addressed by section 58, which states that “[t]his Part applies whether the interest of a beneficiary in the trust property is vested or contingent or arises by operation of law.”<sup>417</sup>

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<sup>412</sup> *Risley*, *supra* note 410 at para 20.

<sup>413</sup> *Rotary Club of Truro Charitable Trust v Bethel Estate*, 2015 NSSC 216 at para 55.

<sup>414</sup> MLRC Report 1975, *supra* note 14 at 24.

<sup>415</sup> *Trustee Act*, SNB 2015, c 21 [*Trustee Act* NB].

<sup>416</sup> *Ibid*, s 59.

<sup>417</sup> *Ibid*, s 58.

I note that neither the *Trustee Act* NB or the *Variation of Trusts Act* NS alter the process for varying or terminating trusts with incapacitated beneficiaries—similar to traditional variation of trusts legislation, those arrangements would remain subject to court approval. Bernstein had argued that “[t]he consideration of the settlor's intentions with respect to capacitated adult beneficiaries cannot be justified in the same way [as with beneficiaries lacking capacity], since the court should not be involved in questioning whether a capacitated adult beneficiary knows what is in his best interests.”<sup>418</sup>

Amending the *Trustee Act* MB to conform with the provisions in the *Trustee Act* NB or the *Variation of Trusts Act* NS would likely be met positively by critics of Manitoba’s repeal of the Rule in *Saunders v Vautier*. Waters had previously recommended that the Rule should be retained in trusts with multiple beneficiaries—“[a] trust set up to ensure that a beneficiary with only a life interest does not dissipate the assets of the trust to the detriment of the residual beneficiaries has served its real purpose if all the beneficiaries are competent and can agree on a mutually satisfactory disposition of the property”.<sup>419</sup> Such a change would still favour the rights of beneficiaries and allow beneficiaries to circumvent a testator’s intentions, although no more than the present legislation where arrangements are given effect under section 59 of the *Trustee Act* MB.

## 8. Conclusion

After the release of the Manitoba Law Reform Commission’s report on *Saunders v Vautier*, the Manitoba legislature amended the *Trustee Act* MB to address some of the report’s concerns. Although its intentions were admirable, the new requirement for an arrangement to be

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<sup>418</sup> Bernstein, *supra* note 60 at 282.

<sup>419</sup> Saskatchewan LRC Report, *supra* note 87 at 4–5.

of “justifiable character” was poorly defined. Judges approached the assessment in different ways, creating more uncertainty, and now, largely gloss over it.

Further, the amended legislation necessarily increases court applications and expense to beneficiaries, which runs contrary to Manitoba’s current focus on proportionality and access to justice, particularly for those trusts that arose as the result of a standard clause. Revising Manitoba’s legislation to conform with the provisions of the *Variation of Trusts Act* NS or the *Trustee Act* NB would make the Rule in *Saunders v Vautier* accessible for non-contentious trust variations without exposing the courts to the “constructional chess game”<sup>420</sup> that the MLRC Report 1975 expressed concerns about. Additionally, replacing “justifiable character” with a clearer assessment of whether a proposed arrangement is appropriate would simplify the court’s analysis and increase consistency between decisions.

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<sup>420</sup> MLRC Report 1975, *supra* note 14 at 24.

## CHAPTER 4: Consenting to Arrangements on Behalf of Beneficiaries

“[W]hat is contemplated is not dependents’ relief legislation but the determination of already established rights to property, rights based on actual or potential ownership. Each and every beneficiary of a particular trust fund has an interest in any contemplated change of his particular benefit. To deprive him of his right of veto would be an unwarranted and dangerous interference with his civil rights and a radical alteration of the law.”<sup>421</sup>

### 1. Introduction

Chapter 4 concerns a second but related issue relating to the variation of trusts—specifically, on whose behalf the Manitoba Court of Queen’s Bench can consent under section 59(5) of the *Trustee Act* MB. Prior to the amendments, the initial list of classes for whom the Manitoba Court of Queen’s Bench could consent included the four classes that existed in the majority of variation of trusts legislation. When the *Trustee Act* MB was amended in 1983, the amendments introduced four additional classes at the recommendation of the Manitoba Law Reform Commission. This chapter considers the requirement that a proposed arrangement must provide a benefit and the extent that the amendments addressed and resolved underlying issues with the existing classes of beneficiaries. I also consider the MLRC’s recommendation about consenting on behalf of beneficiaries who object to a proposed arrangement and compare Manitoba’s approach to the approaches in other provinces.

### 2. What is a “Benefit”

A second element required for approving a proposed arrangement under section 59 is that “the carrying out of the arrangement appears to be for the benefit of each person on whose behalf

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<sup>421</sup> MLRC Report 1975, *supra* note 14 at 25.

the court may consent under subsection (5)".<sup>422</sup> What is considered a benefit in Manitoba is now informed by section 59(8), which states:

For the purposes of clause (7)(a), without limiting the generality of the word "benefit", an arrangement in respect of a trust is for the benefit of a person

(a) if it would enhance the financial, social, moral or family wellbeing of that person; or

(b) where the person on whose behalf the court is being asked to consent to the arrangement, is a corporation or association, if it would advance or further the purposes of the corporation or association; or

(c) where the persons on whose behalf the court is being asked to consent to the arrangement are persons who might derive some benefit from benefits used for a specified purpose, if it would advance or further that purpose.<sup>423</sup>

Section 59(8) was added to the legislation in 1983, following the recommendations in the MLRC Report 1982 that the legislation "contain a description of the 'benefit' which the courts must find in a proposed arrangement".<sup>424</sup> McClean noted that "little has been gained by this. The definition does not provide any greater guidance than does the existing law, and the [MLRC Report 1982] accepted that the courts might still wish to look at the earlier case law."<sup>425</sup>

In *May*, the court considered the new section 59(8) and commented that the section "reflects the interpretation of the word 'benefit' in the case law [in other jurisdictions] which has recognized that the word 'benefit' is to be liberally interpreted and is not confined to financial benefit".<sup>426</sup> However, "the mere fact that a beneficiary derives financial benefit from a proposed

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<sup>422</sup> *Trustee Act MB*, *supra* note 13, s 59(7)(a).

<sup>423</sup> *Ibid*, s 59(8).

<sup>424</sup> MLRC Report 1982, *supra* note 329 at 56. The report stated that "[r]etentionists of the rule have argued, and we should meet this criticism, that section [59] offers no guidance to the courts in the exercise of their discretion, either as to what constitutes 'benefit' or as to when the court should 'think fit' to approve a proposed arrangement. It is on this basis that it is said section [59] replaces the certainties of an objectively determinable perpetuity period with the vagaries and unpredictability of the exercise of judicial discretion" (*ibid* at 54).

<sup>425</sup> McClean, "Perpetuities", *supra* note 270 at 258.

<sup>426</sup> *May*, *supra* note 343 at para 29, citing *Re Zekelman*, (1971), 19 DLR (3d) 652 at 654 (Ont HC). Other examples are set out in *Farquhar*, *supra* note 120 at 198–99.

arrangement does not necessarily mean that the court will approve it on his behalf.”<sup>427</sup> Under the amended legislation in Manitoba, a proposed variation or scheme “must provide a sufficient and individualized benefit to induce a prudent advisor to support the application on behalf of minor and unborn beneficiaries.”<sup>428</sup>

Per the Saskatchewan decision, *Ridalls v Ridalls Estate*,<sup>429</sup> a benefit does not need to be a direct benefit. In *Ridalls*, Maher J. considered a proposal to wind up a trust of farmland in order to meet an estate’s tax obligations under the *Income Tax Act*,<sup>430</sup> with the alternative being the trustee being forced to sell the family’s farmland. Maher J. held that “[t]he retention of the land and its operation as a unit is a distinct benefit to the present beneficiaries of the trust and the grandchildren are bound to profit, or at least be better off as a result of the benefit to their parents.”<sup>431</sup>

In *Re Henderson*, Schwartz J. relied on *Ridalls* and *Finnell* in approving the proposed variation, holding that “if this estate is diminished by one-half, the interest of the unborn contingent beneficiaries would be significantly adversely affected. They would be disbenefited.”<sup>432</sup> Generally, a benefit “must always be of a kind that a prudent adult, motivated by intelligent self-interest, would accept as a good bargain.”<sup>433</sup>

Oosterhoff noted that “while family harmony and similar considerations are important aspects of ‘benefit’ [under variation of trusts legislation], the court may not approve a variation

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<sup>427</sup> Bernstein, *supra* note 60 at 268, citing *Re Weston’s Settlements*, [1969] 1 Ch 233, [1968] 3 All ER 338.

<sup>428</sup> *Re Henderson*, *supra* note 366 at para 14, citing *Finnell*, *supra* note 85 at para 31.

<sup>429</sup> *Ridalls v Ridalls Estate*, 24 Sask R 16, 1983 CarswellSask 113 (QB) [*Ridalls* cited to CarswellSask].

<sup>430</sup> *Supra* note 387.

<sup>431</sup> *Ridalls*, *supra* note 429 at para 20.

<sup>432</sup> *Re Henderson*, *supra* note 366 at para 22.

<sup>433</sup> Farquhar, *supra* note 120 at 203. Farquhar also noted that “in British Columbia at least, the courts have hinted that where an interest is so remote that it is highly unlikely ever to be realized, lack of benefit to the holder of that interest may be discounted” (*ibid*).

unless there is also a financial benefit for the persons on whose behalf it approves the variation.”<sup>434</sup> Comparatively, in Manitoba, section 59(8)(a) provides that a benefit may “enhance the financial, social, moral *or* family wellbeing of that person”.<sup>435</sup> In *Re Charlesworth*, the variation was approved despite there being “no offsetting financial benefit to the three beneficiaries who are within the class.”<sup>436</sup> Beard J. (as she then was) stated that there would, “however, be an enhancement of family well-being if the proposal [was] granted, that enhancement being as follows:

- (i) each child will be treated equally and receive an equal share of the bequest, rather than one child being singled out to receive nothing; and
- (ii) the two families will be treated equally, as each will receive one-half of the residue, rather than the [nephew’s] family receiving two-thirds and the [niece’s] family receiving only one-third.<sup>437</sup>

Despite tax planning as being a main reason for using trusts, there is some disagreement between jurisdictions about whether avoiding undesirable tax consequences should be considered a “benefit”. The Official Guardian of Ontario stated its position in 1988 that “tax relief by itself is not a sufficient ‘benefit’ at law [to permit a variation] though very compelling. There must be some further ‘benefit’ at law for the wonderful interests we represent”.<sup>438</sup> In Manitoba, the Court of Queen’s Bench approved variations in *Shoal Lake* and *Re Henderson*, which both involved limiting or avoiding tax. The variation in *Shoal Lake* was to avoid a potential \$300,000 tax

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<sup>434</sup> Albert H Oosterhoff, C David Freedman, Mitchell McInnes & Adam Parachin, *Oosterhoff on Wills*, 8th ed (Toronto: Thomson Reuters Canada, 2016) at 653, citing Albert H Oosterhoff, C David Freedman & Mitchell McInnes, *Oosterhoff on Trusts*, 8th ed (Toronto: Thomson Reuters Canada, 2014), §6.5.4(c).

<sup>435</sup> *Trustee Act MB*, *supra* note 13, s 59(8)(a).

<sup>436</sup> *Re Charlesworth*, *supra* note 344 at para 21.

<sup>437</sup> *Ibid* at para 19.

<sup>438</sup> Willson A McTavish & Ronald R Anger, “Variation of Trusts: The Official Guardian’s View” (1988–89) 9:2 ETJ 132 at 133. The article was written in response “to many requests from the Bar of Ontario to shed some light on the Official Guardian’s view of the law [on variation of trusts] and his role within it” (*ibid*).

liability.<sup>439</sup> Likewise, in *Re Henderson*, the trust was terminated prior to incurring a \$103,000 tax obligation resulting from the twenty-one year deemed disposition rule.<sup>440</sup> Manitoba’s approach follows the model from the United Kingdom, where the “general attitude of the courts has been that tax avoidance is a legitimate purpose for a proposed arrangement and, so long as there is a benefit to the beneficiaries, the tax avoidance motivation will not prevent the court from approving the arrangement.”<sup>441</sup>

### 3. Classes of Beneficiaries

When variation of trust provisions were first added to Manitoba’s *Trustee Act* MB 1970, the sections mirrored the English *Variation of Trusts Act 1958*. The legislation initially allowed the court to consent on behalf of four classes of beneficiaries:

- (a) on behalf of any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who, by reason of minority or other incapacity, is incapable of consenting; or
- (b) on behalf of any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust, as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons; or
- (c) on behalf of any person who is unborn; or
- ...

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<sup>439</sup> *Shoal Lake*, *supra* note 357 at para 17.

<sup>440</sup> *Re Henderson*, *supra* note 366 at para 3. The decision made reference to the existence of other reasons without specifying what they were. The \$103,000 tax obligation would have been “approximately one half of the value of the estate” (*ibid*).

<sup>441</sup> Bernstein, *supra* note 60 at 269, citing *Re Sainsbury’s Settlement*, [1967] 1 All ER 878, [1967] 1 WLR 476; Hoffstein & Yee, *supra* note 61 at 74. McClean noted that in his review of trust variation, the “majority of the English cases have been concerned with the extension of investment clauses or the avoidance of taxation.” McClean, “Variation”, *supra* note 62 at 252.



(e) on behalf of any person in respect of an interest of that person which may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined; ...<sup>442</sup>

The first class under the Manitoba legislation includes both vested and contingent interests held by minors and others who are unable to consent due to any “other incapacity”, such as a mental disorder or infirmity. The second class includes contingent beneficiaries who are subject to a contingency and may not be known at the time the proposal is made. The third class allows the court to consent on behalf of those individuals who have not yet been born. The final class of beneficiaries are those who arise out of discretionary powers, such as the power of appointment. Some confusion may arise with the fact that the four classes are not necessarily mutually exclusive.<sup>443</sup>

There are some differences between the *Trustee Act* MB and its English predecessor. The clause pertaining to beneficiaries who may become entitled to a future interest, enumerated at 1(1)(b) of the *Variation of Trusts Act 1958*, continues with the addendum, “so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, *if the said date had fallen or the said event had happened at the date of the application to the court*”.<sup>444</sup> This exception

limits the jurisdiction of the courts to the extent that it requires that all fully capacitated beneficiaries consent to an arrangement for the court to give its approval. For example, under the English legislation if a trust provided “to A for life, remainder to her children,” and at the date of the application to vary the trust A was still the life tenant and one of A’s children was an adult and opposed the arrangement, the court could not consent on that person’s behalf and the application would fail. The policy underlying this is that if a beneficiary would be in a

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<sup>442</sup> *Trustee Act* MB, *supra* note 13, s 59(5). The trust variation provisions were originally listed at section 61, and were later moved in an amendment to their current placement at section 59. For sake of clarity, I will refer to the current section 59 consistently throughout.

<sup>443</sup> The possibility of overlap is more problematic in England, as the legislation does not require there to be a benefit for beneficiaries that fall within section 1(1)(d) of the *Variation of Trusts Act 1958*. McClean, “Variation”, *supra* note 62 at 251.

<sup>444</sup> *Variation of Trusts Act 1958*, *supra* note 109, s 1(1)(b) [emphasis added].

position to approve a proposal if the future event bringing the beneficiary's interest into possession had occurred at the time of the application, then that person should be able to consent or withhold consent to the arrangement on his or her own behalf without interference from the court.<sup>445</sup>

By removing this exception language, there is a possible gap in the Manitoba legislation where a beneficiary who has capacity nevertheless might fall into subsection 59(5)(b).

As well, the fourth class of beneficiaries for whom the English court can consent differs considerably from the *Trustee Act MB*. Section 1(1)(d) of the *Variation of Trusts Act 1958* includes: "any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined."<sup>446</sup> The language in the *Variation of Trusts Act 1958* relates to "section 33 of the Trustee Act, 1925, of which there is no Canadian equivalent."<sup>447</sup> As with subsection 59(5)(b), Waters argued that the new language in section 59(5)(e) "allows the court to give consent on that fully capacitated person's behalf."<sup>448</sup>

McClellan similarly noted that the Manitoba provision

covers a much wider range of beneficiaries than does the corresponding English provision and is drafted more widely than is necessary to meet the recommendation of the Law Reform Committee. Thus where property is held on trust for A for life, remainder to his children at the discretion of the trustees, it can be said that the interest of the children arises from a discretionary power exercisable on the determination of a prior interest. ... Consideration should perhaps be given to re-drafting the Canadian paragraph (d) in narrower terms than it presently stands.<sup>449</sup>

The OLRC noted that the *Variation of Trusts Act 1958* "no doubt contains this exception because the statutory protective trust in England installs the next-of-kin of the protected life tenant as the discretionary trust beneficiaries, if he is without children and unmarried. The next-

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<sup>445</sup> BCLI Report, *supra* note 90 at 7.

<sup>446</sup> *Variation of Trusts Act 1958*, *supra* note 109, s 1(1)(d).

<sup>447</sup> McClellan, "Variation", *supra* note 62 at 231 [citation omitted].

<sup>448</sup> Waters, Gillen & Smith, *supra* note 15 at 1376.

<sup>449</sup> McClellan, "Variation", *supra* note 62 at 251.

of-kin are there merely to enable the statutory trust to provide protection for the life tenant.”<sup>450</sup> McClean added that “[t]he opportunity has ... been missed to deal with two substantive defects [being subsections 59(5)(b) and 59(5)(e)] ... That means it is still possible on occasions for a court to consent on behalf of competent adults.”<sup>451</sup>

Another minor difference between the English and Manitoban legislation is that England’s *Variation of Trusts Act 1958* does not expressly apply to charities. In *In Re Robert’s Settlement Trusts*,<sup>452</sup> the court was asked to approve a charitable trust on behalf of a future spouse. The Attorney General argued that charities did not fall within any of the enumerated classes of beneficiaries, but nevertheless supported the arrangement.<sup>453</sup> Courts in England are, however, able to vary terms of charitable trusts under Section 57 of the *Trustee Act, 1925* and the *Charitable Trusts Act 1853*,<sup>454</sup> which “in practice ... have proved to be more useful and are availed more frequently than the 1958 Act.”<sup>455</sup> Following the recommendation of the MLRC Report 1975,<sup>456</sup> section 59(1) of the *Trustee Act MB* clarifies that “[i]n this section, ‘person’ includes charitable and non-charitable purposes.”<sup>457</sup> The amendment was intended to clear up uncertainty since “the Rule in *Saunders v. Vautier* applies to charities, but it is not certain whether [s. 59] of ‘The Trustee Act’ so applies.”<sup>458</sup>

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<sup>450</sup> OLCRC Report, *supra* note 313 at 421.

<sup>451</sup> McClean, “Perpetuities”, *supra* note 270 at 257.

<sup>452</sup> *In Re Robert’s Settlement Trusts*, [1961] TR 401.

<sup>453</sup> McClean, “Variation”, *supra* note 62 at 246.

<sup>454</sup> *Charitable Trusts Act, 1853*, 16 & 17 Vict, c 137.

<sup>455</sup> The Law Reform Commission (Ireland), “Report on the Variation of Trusts” (December 2000) at 45, online: <[https://www.lawreform.ie/\\_fileupload/Reports/rVTs.pdf](https://www.lawreform.ie/_fileupload/Reports/rVTs.pdf)>, citing *Halsbury’s Laws of England*, vol 5(2), 4th ed (London, UK: Butterworths, 1985) at para 137, n 6.

<sup>456</sup> MLRC Report 1975, *supra* note 14 at 26.

<sup>457</sup> *Trustee Act MB*, *supra* note 13, s 59(1). The *Trustee Act AB* also includes a provision that “‘beneficiary’, ‘beneficiaries’, ‘person’ or ‘persons’ includes charitable purposes and charitable institutions”. *Trustee Act AB*, *supra* note 291, s 42(1).

<sup>458</sup> MLRC Report 1975, *supra* note 14 at 26.

The MLRC Report 1982 additionally recommended that “it be made clear that the court is empowered under [section 59] both to act on behalf of any person, natural or corporate, who is in any way unable to consent on his, her or its own behalf, and also to bind with its consent any trust interest which is dedicated to a charitable or non-charitable purpose, and where there is no person qualified to bind that purpose.”<sup>459</sup> Subsequently, the *Act to Amend the Trustee Act 1983* added four additional classes of beneficiaries for whom the court can consent on behalf of:

(d) on behalf of any person who is missing and whose whereabouts are unknown to the trustee, to the other persons beneficially interested and to the settlor, if the settlor is alive and available; or

...

(f) on behalf of a corporation or association where there is no person able or empowered to consent on behalf of the corporation or association; or

(g) where the benefits under the trust are to be used, directly or indirectly, for a specified purpose, and there is no person who is able or empowered to consent on behalf of all those persons, whether born or unborn and whether ascertained or not, who might derive some benefit from benefits used for that purpose, on behalf of all those persons; or

(h) where the benefits under the trust are directed to be administered under another specified trust, and there is no person who is able or empowered to consent on behalf of all those persons whether born or unborn and whether ascertained or not who have or might have a beneficial interest under that other trust, on behalf of all those persons.<sup>460</sup>

McClellan lamented that “[s]ection [59(5)] originally listed four groups of beneficiaries on whose behalf the court may consent to an arrangement varying a trust. The list was defective in both form and substance. The Report recommended that the convoluted description of those beneficiaries be replaced by simpler language. That has not been done.”<sup>461</sup>

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<sup>459</sup> MLRC Report 1982, *supra* note 329 at 57.

<sup>460</sup> *Trustee Act MB*, *supra* note 13, s 59(5).

<sup>461</sup> McClellan, “Perpetuities”, *supra* note 270 at 257.

The Alberta ILRR Report had also recommended including missing individuals to the list for whom the court could consent.<sup>462</sup> Accordingly, the Alberta legislation added missing individuals to subsection 42(5)(c): “any person who is a missing person (as defined in the *Public Trustee Act*) or who is unborn...”.<sup>463</sup> Manitoba’s provision instead included both as separate classes, adding missing individuals to subsection 59(5)(d) and moving those beneficiaries with a discretionary interest to subsection 59(5)(e). Subsections 59(5)(f)–(h) were added to accommodate the remaining recommended classes in the MLRC Report 1982.

The OLRC Report and BCLI Report both followed Manitoba’s example and recommended adding charitable purpose trusts; “[t]he Ontario Law Reform Commission observed that while the courts have acted as if they had the jurisdiction to approve a variation to the terms of a charitable trust it was ... ‘highly questionable’ whether the wording of the Act actually conferred this jurisdiction on the courts.”<sup>464</sup>

#### **4. Overriding a Beneficiary’s Objections**

Although the amended legislation provides the court jurisdiction to consent for additional classes of beneficiaries, an issue raised in the MLRC Report 1975 is whether the court should be able to consent on behalf of beneficiaries who are capable of consenting but who oppose the variation:

The jurisdiction of the court under the Act is, it is thought, limited to authorizing an arrangement which the beneficiaries themselves could have authorized if they had all been ascertained and sui juris. Certainly, the court has no power to override the objections (however unreasonable), or to dispense with the consent, of persons on whose behalf the Act

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<sup>462</sup> Alberta ILRR Report, *supra* note 285 at 19.

<sup>463</sup> *Trustee Act* AB, *supra* note 291, s 42(5)(c). The *Public Trustee Act* defines “missing person” as “a person who cannot be found and whose present place of abode is unascertainable”. *Public Trustee Act*, RSA 1980, c P-36, s 1.

<sup>464</sup> BCLI Report, *supra* note 90 at 13, citing OLRC Report, *supra* note 313 at 423, n 146.

does not expressly authorize it to give approval, even when such persons are very numerous and difficult to ascertain.<sup>465</sup>

The MLRC Report 1975 considered the issue and “whether it should be a prerequisite that all capacitated adults provide their written consent to the arrangement.”<sup>466</sup> The authors were averse to interfere with a beneficiary’s rights, stating that

what is contemplated is not dependents’ relief legislation but the determination of already established rights to property, rights based on actual or potential ownership. Each and every beneficiary of a particular trust fund has an interest in any contemplated change of his particular benefit. To deprive him of his right of veto would be an unwarranted and dangerous interference with his civil rights and a radical alteration of the law.<sup>467</sup>

Notwithstanding, the MLRC Report recognized that “[i]f a proposed variation is clearly to the material benefit of all concerned, including the recalcitrant beneficiary, then there seems little justification for losses to be incurred at the whim of that one individual.”<sup>468</sup> (Farquhar noted that “[c]ertainly the existence of such a beneficiary would frustrate any invocation of the rule in *Saunders v. Vautier*.”<sup>469</sup>) The authors weighed the extent to which the courts should be able to override a beneficiary’s refusal—particularly in situations where multiple beneficiaries objected to an arrangement—and acknowledged that the issue could quickly become a slippery slope.<sup>470</sup>

Ultimately, the authors of the MLRC Report 1975 were reluctant to endorse overruling a beneficiary’s objections: “[T]here is no easy answer, and perhaps on balance, and considering the low degree of social impact involved, the Alberta Institute’s proposal to retain unanimous consent is the best solution.”<sup>471</sup> Consequently, section 59(6) of the amended *Trustee Act* MB

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<sup>465</sup> Hayton, Matthews & Mitchell, *supra* note 19 at 391.

<sup>466</sup> Bernstein, *supra* note 60 at 279.

<sup>467</sup> MLRC Report 1975, *supra* note 14 at 25.

<sup>468</sup> *Ibid* at 26.

<sup>469</sup> Farquhar, *supra* note 120 at 184.

<sup>470</sup> MLRC Report 1975, *supra* note 14 at 26. For example, the authors suggest that “[p]erhaps such an authority should be [granted to] the Court, to be used only in cases in of clear obstructionism” (*ibid*).

<sup>471</sup> *Ibid*.

requires that “[b]efore a proposed arrangement is approved by the court, [the court] must have the consent in writing of *all* persons who are beneficially interested under the trust and *who are capable of consenting thereto*.”<sup>472</sup> For example, the court can consent under subsection 59(5)(d) on behalf of a beneficiary who has a vested interest and (presumably) has capacity but cannot be located. The legislation is otherwise silent as to whether the court can overrule a beneficiary’s objections when approving a proposed arrangement.<sup>473</sup>

The requirement that all persons capable of consenting provide their consent appears to close the gap left when the exception language in subsection 1(1)(b) of the *Variation of Trusts Act 1958* was not adopted in subsection 59(5)(b). As noted above, the language English court could not consent on behalf of “any [capacitated] person who would [fall under s (1)(1)(b)], if the said date had fallen or the said event had happened at the date of the application to the court”.<sup>474</sup> In the event that a person who falls under 59(5)(b) has capacity and is capable of consenting, the court would require his or her written consent prior to approving an arrangement.

Comparatively, section 42(6) of the *Trustee Act AB* states that the Court “must have the consent in writing of *all other* persons who are beneficially interested and who are capable of consenting thereto”,<sup>475</sup> referring to all persons other than those for whom the court can consent. Glenn takes the opposite stance, however, arguing that the phrase “beneficially interested under the trust” in section 59(6) “suggests that their interests must be vested.”<sup>476</sup> Because subsection 59(5)(b) allows the court to consent on behalf of “*any person*, whether ascertained or not, who

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<sup>472</sup> *Trustee Act MB*, *supra* note 13, s 59(6) [emphasis added].

<sup>473</sup> Glenn remarked that the court can “always override a competent adult’s *consent* to variation” because of the requirement that an arrangement be of justifiable character. Glenn, *supra* note 1 at 631 [emphasis in original].

<sup>474</sup> *Variation of Trusts Act 1958*, *supra* note 109, s 1(1)(b).

<sup>475</sup> *Trustee Act AB*, *supra* note 291, s 42(6) [emphasis added].

<sup>476</sup> Glenn, *supra* note 1 at 631.

may become entitled, directly or indirectly, to an interest under the trust...”,<sup>477</sup> it follows that the court is able to “consent on behalf of those persons, including competent adults, whose interests are contingent at the time of application.”<sup>478</sup>

## 5. Jurisprudence

There have been several noteworthy decisions where courts have held that variation of trusts legislation allows overruling a beneficiary’s objections. The first, an English decision, *Knocker v Youle*,<sup>479</sup> held that it was possible to vary a contingent interest held by a capacitated beneficiary provided that the interest was very remote. The phrase “may become entitled” in section 1(1)(b) of the *Variation of Trusts Act 1958*—the equivalent of Manitoba’s 59(5)(b)—was very narrowly interpreted “so that the only persons within paragraph (b) are those who have a mere hope of having an interest, for instance, the objects of a mere power of appointment. The holder of a contingent interest *is* presently entitled, albeit contingently.”<sup>480</sup> The decision has been criticized by Farquhar: “At a theoretical level, it is said that the decision creates a difficult and unnecessary distinction between types of contingent interest. At a practical level, it makes it impossible to vary a trust where there are adult beneficiaries who are untraceable.”<sup>481</sup>

The ratio in *Youle* was adopted in the Canadian decision, *Bentall Corporation v Canada Trust Co.*<sup>482</sup> *Bentall* involved an employer, Bentall Corporation, trying to vary its pension plan under section 1(b) of the *Trust Variation Act BC*<sup>483</sup> after it was determined that the pension fund

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<sup>477</sup> *Trustee Act MB*, *supra* note 13, s 59(5)(b) [emphasis added].

<sup>478</sup> Glenn, *supra* note 1 at 630, citing Waters, *Law of Trusts*, 2nd ed, *supra* note 269.

<sup>479</sup> *Knocker v Youle* (1985), [1986] 1 WLR 934, [1986] 2 All ER 914 (Eng Ch Div) [*Youle*].

<sup>480</sup> Waters, Gillen & Smith, *supra* note 15 at 1381 [emphasis in original] [citations omitted].

<sup>481</sup> Farquhar, *supra* note 120 at 183.

<sup>482</sup> *Bentall Corp. v Canada Trust Co*, 26 BCLR (3d) 181, 1996 CarswellBC 1797 (SC) [*Bentall* cited to CarswellBC].

<sup>483</sup> Section 1(b) mirrors subsection 59(5)(b) of the *Trustee Act MB*, and allows the court to consent on behalf of “any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons”. *Trust Variation Act BC*, *supra* note 121, s 1(b)).



had a surplus of \$6.7 million.<sup>484</sup> Bentall had made all contributions to the pension plan for the previous eight years. Prior to that, the employer had only been required to make up the shortfall between members' contributions and what was needed to fund the plan.<sup>485</sup> The surplus was the result of several factors—"investment returns exceeded expectations, there was an unexpected decrease in the number of members and actuarial methods proved to be too conservative."<sup>486</sup> The arrangement proposed by Bentall used \$2 million to increase the pension benefits of the members by twenty percent with another \$3 million to be paid out to Bentall as a lump sum.<sup>487</sup> The remaining \$1.7 million was intended to "fund a four to five year contribution holiday",<sup>488</sup> during such time the employer would not need to contribute any additional funds to the plan. Sigurdson J. noted that the holiday was available to the employer without needing an amendment or variation.<sup>489</sup>

The employer initially proposed the variation directly to its members. Seven of the 279 members opposed the variation,<sup>490</sup> so the employer brought the application under the *Trust Variation Act* BC arguing "that since the opponents of the scheme were contingent beneficiaries of the plan ... they fell under clause (b)."<sup>491</sup> The issue before the court was whether the court had jurisdiction to approve the variation despite the objections of some of the beneficiaries, and if it did, whether the court should approve said variation.<sup>492</sup>

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<sup>484</sup> *Bentall*, *supra* note 482 at para 1.

<sup>485</sup> *Ibid* at para 8.

<sup>486</sup> *Ibid* at para 9.

<sup>487</sup> *Ibid* at para 1.

<sup>488</sup> *Ibid*.

<sup>489</sup> *Ibid* at para 12.

<sup>490</sup> *Ibid* at para 1.

<sup>491</sup> Farquhar, *supra* note 120 at 184.

<sup>492</sup> *Bentall*, *supra* note 482 at para 4.

Though the corporation had no present intention of ending the plan, it was contemplated that “the members may well be entitled to the surplus”<sup>493</sup> on the plan’s termination in the future. Sigurdson J. noted that “while the Plan continues, the surplus will be held in the Plan and the members will derive no direct benefit from it.”<sup>494</sup> The member’s interests were therefore contingent upon “the Plan being terminated by the employer, a surplus existing and the employee still being a member of the Plan at the time of termination.”<sup>495</sup>

Relying on *Waters’ Law of Trusts in Canada*,<sup>496</sup> Sigurdson J. held that “Canadian courts have jurisdiction under the legislation to vary that future interest, even if all beneficiaries are adult, provided the future interest is contingent [and] ... even where there is opposition from some of those beneficiaries.”<sup>497</sup>

*Buschau v Rogers Communications Inc.*<sup>498</sup> distinguished *Bentall* at the British Columbia Court of Appeal, noting that *Bentall* considered whether the members or the corporation were entitled to the plan’s “surplus”.<sup>499</sup> Newbury J.A. held that section 1(b) of *Trust Variation Act BC* allows “the court to consent only on behalf of fully capacitated adults who ‘may become entitled’ to an interest at a future time. Where the person already has an interest, whether vested or contingent, the court may consent on his or her behalf only if he or she is incapable of assenting by reason of infancy or other incapacity, as described in s. 1(a).”<sup>500</sup> Additionally, Newbury J.A. added that “in [her] opinion *Bentall* was ... wrongly decided. If the members in that case had a ‘present’ or ‘contingent’ interest in the trust, the existence of an actuarial surplus

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<sup>493</sup> *Ibid* at para 10.

<sup>494</sup> *Ibid*.

<sup>495</sup> *Ibid* at para 37.

<sup>496</sup> *Ibid* at para 18, citing *Waters, Law of Trusts*, 2nd ed, *supra* note 269 at 1070–71.

<sup>497</sup> Farquhar, *supra* note 120 at 184.

<sup>498</sup> *Buschau v Rogers Communications Inc*, 2004 BCCA 80 [*Buschau CA*], rev’d on other grounds 2006 SCC 28 [*Buschau SCC*].

<sup>499</sup> *Buschau CA*, *supra* note 498 at para 94.

<sup>500</sup> *Ibid* at para 96.

did not give them a distinct entitlement which had the effect of bringing them within the wording of s. 1(b).”<sup>501</sup>

Some of the confusion surrounding *Bentall* and *Buschau* has been blamed on the differences between Canadian variation of trusts legislation and the additional language of section 1(1)(b) of the *Variation of Trusts Act 1958*. For instance, the BCLI Report noted that the differences have “created some uncertainty in British Columbia about whether a court may disregard the refusal of a capacitated beneficiary to consent to a proposal under the [*Trust Variation Act BC*].”<sup>502</sup>

Because *Bentall* and *Buschau* CA both involve specific pension trusts, it is questionable whether they have much (if any) precedential value.<sup>503</sup> In *Buschau* SCC, the Supreme Court considered the Supreme Court of Canada decision, *Schmidt v Air Products of Canada Ltd*,<sup>504</sup> wherein Cory J, speaking for the majority held that “[w]hen a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles”.<sup>505</sup> However, the Supreme Court in *Buschau* SCC held that neither the Rule in *Saunders v Vautier* nor the *Trust Variation Act BC* were among the trust principles “applicable” to pension trusts, having been replaced with the *Pension Benefits Standards Act*<sup>506</sup>—“any application regarding the termination of the Plan and

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<sup>501</sup> *Ibid* at para 98.

<sup>502</sup> BCLI Report, *supra* note 90 at 7.

<sup>503</sup> Prior to *Buschau* CA, *Bentall* was followed in *Continental Lime Ltd v Canada Trust Co*, 84 ACWS (3d) 576, 1998 CarswellBC 2757 (SC) [cited to CarswellBC], which had a similar pension issue involving a surplus of funds. Only one of the 90 plan members objected to the proposed variation, as well as the Public Guardian and Trustee who was served on behalf of potentially unborn members. Notably, Shaw J. approved the variation despite acknowledging that there was “a remote possibility that an individual contingent beneficiary may not get an increased benefit, either directly or indirectly” (*ibid* at para 45). Shaw J. felt such a risk was “too remote ... to be allowed to stand in the way of the prospective benefits to be gained by the members and all who stand to gain through them” (*ibid*). It was also significant that 89 of the 90 members had approved the variation (*ibid* at para 49).

<sup>504</sup> *Schmidt v Air Products of Canada Ltd*, [1994] 2 SCR 611, [1994] 8 WWR 305 [cited to SCR].

<sup>505</sup> *Ibid* at 643.

<sup>506</sup> *Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (2nd Supp) [*PBSA*].

Trust must be dealt with in accordance with the terms of the Plan and the provisions of the [PBSA].”<sup>507</sup>

## 6. Guidance from Other Jurisdictions

McClellan noted that under the pre-1958 legislation, the court seemingly had the power to authorize a variation despite the objections of an adult beneficiary, although “[n]o doubt great weight would be attached to any such objection and it would only be in the clearest case that a court would override it.”<sup>508</sup>

Like the MLRC and Alberta ILRR reports, the OLRC Report weighed permitting overriding a beneficiary’s concerns and determined that courts should not be permitted to consent for a dissenting beneficiary. The OLRC Report recommended that, as with the original Rule in *Saunders v Vautier*, all adult and capable beneficiaries should be required to provide their consent, since “each such person has a property interest and should not have it changed or lessened without his consent.”<sup>509</sup>

The BCLI Report similarly acknowledged that “each beneficiary has an interest in the trust and arguably should have the right to protect that interest as he or she sees fit, which may extend to vetoing proposed changes to the trust.”<sup>510</sup> However, the BCLI Report also appreciated that the power to overrule a beneficiary would give “the courts the ability to dismiss unreasonable objections.”<sup>511</sup> On balance, the authors recommended that the court be provided the jurisdiction to override a beneficiary’s objections, but cautioned that the use of such power “should be restricted to cases where, based on an objective test, it is clear that the beneficiary is

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<sup>507</sup> *Buschau SCC*, *supra* note 498 at para 100.

<sup>508</sup> McClellan, “Variation”, *supra* note 62 at 236.

<sup>509</sup> OLRC Report, *supra* note 313 at 419.

<sup>510</sup> BCLI Report, *supra* note 90 at 7 [citations omitted].

<sup>511</sup> *Ibid.*

blocking an arrangement that is of benefit to the trust as a whole and the vast majority of beneficiaries support the proposal.”<sup>512</sup> Additionally, any jurisdiction provided to the court for the purpose of overriding concerns “should be exercised only where a substantial majority of beneficiaries in number and interest agree, there would be no detriment to the person who withheld consent, and a failure to approve the arrangement would be detrimental to the administration of the trust and the interests of other beneficiaries.”<sup>513</sup>

Another recommendation in the BCLI Report was to clarify the discretionary trust provision in their equivalent to Manitoba’s subsection 59(5)(e), something McClean describes as “an attempt to mold to Canadian circumstances the comparable English provision on protective trusts, ... but with all of its attendant uncertainties and imperfections.”<sup>514</sup> The BCLI Report considered removal of the section entirely, but recommended instead that it be “tailored in scope to provide that the court is expressly empowered to consent on behalf of beneficiaries of an immediate discretionary trust and appointees of a mere power of appointment.”<sup>515</sup>

In the Uniform Trustee Act prepared by the ULCC, the variation of trusts provisions at section 60 would allow a court to consent in the event that “a beneficiary of the trust is not of full capacity or does not consent to an arrangement”.<sup>516</sup> The proposed legislation includes the four enumerated classes that are typical in most jurisdictions—minors or other incapacitated individuals, the unborn, those who have an interest that may arise by power of appointment, or an individual, “whether ascertained or not, who has a vested or contingent interest and whose

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<sup>512</sup> *Ibid* at 8.

<sup>513</sup> *Ibid*.

<sup>514</sup> McClean, “Perpetuities”, *supra* note 270 at 257–58, citing Waters, Gillen & Smith, *supra* note 15 at 916 *et seq*; McClean, “Variation”, *supra* note 62 at 249 *et seq*.

<sup>515</sup> BCLI Report, *supra* note 90 at 10.

<sup>516</sup> Uniform Trustee Act, *supra* note 319, s 60(1)(a). Section 60 also applies if a beneficiary of the trust is “a charitable organization that is legally incapable in its own right of consenting to an arrangement; or an object of the trust is a charitable purpose or a non-charitable purpose” (*ibid*, s 60(1)(b)–(c)).

existence or whereabouts cannot be established despite reasonable measures having been taken to discover that information”.<sup>517</sup> Like the English *Variation of Trusts Act 1958*, beneficiaries do not need to demonstrate a benefit for the court to approve a proposed arrangement on behalf of someone whose interest may arise by power of appointment; there is a requirement only that the arrangement not be detrimental to the person’s interests.<sup>518</sup> Although this is already the case for Ontario<sup>519</sup> and British Columbia,<sup>520</sup> this is a lower threshold than what Manitoba currently requires.

On the issue of whether a court could consent on behalf of beneficiary who withholds his or her consent, sections 60(5) of the Uniform Trustee Act recommends that “the court may approve an arrangement for the purposes of subsection (2) (a) (ii) on behalf of a person who has the capacity to consent to the arrangement but refuses to consent to the arrangement.”<sup>521</sup> However, “[t]he court may not approve an arrangement on behalf of a person under subsection (5) unless the court is satisfied that

- (a) the arrangement will not be detrimental to the pecuniary interest of the person,
- (b) a substantial majority of the beneficiaries, representing a substantial majority of the beneficial interests in the trust property as determined by the monetary value of those interests, have
  - (i) consented to the arrangement, or
  - (ii) had the court approve the arrangement on their behalf under subsection (3), and
- (c) not approving the arrangement will be detrimental to the administration of the trust and the interests of other beneficiaries.<sup>522</sup>

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<sup>517</sup> *Ibid*, s 60(3).

<sup>518</sup> *Ibid*, s 60(4).

<sup>519</sup> *Variation of Trusts Act ON*, supra note 279, s 1(2).

<sup>520</sup> *Trust Variation Act BC*, supra note 121, s 2.

<sup>521</sup> Uniform Trustee Act, supra note 319, s 60(5).

<sup>522</sup> *Ibid*, s 60(6).

The ULCC Final Report noted that the drafters expect that the requirements at paragraphs 60(6)(a)–(c) “will not be easily met and this power is likely to be used only when the beneficial interests are widely distributed and a small number of beneficiaries are holding out against a generally desired change.”<sup>523</sup>

New Brunswick adopted the majority of recommendations of the Uniform Trustee Act in its amendments to the *Trustee Act* NB, which grants its courts the power to consent on behalf of:

- (i) a minor or otherwise not of full capacity,
- (ii) an unborn person,
- (iii) a person, whether ascertained or not, who has a vested or contingent interest and whose existence or whereabouts cannot be established despite reasonable measures having been taken, or
- (iv) a person who has an interest that may arise by reason of the person being in a class of persons that may benefit from a power of appointment that may or must be exercised by the trustees or any other donee of the power[.]<sup>524</sup>

Notably, the *Trustee Act* NB has a lower threshold for approving an arrangement—the court may provide its consent on behalf of the above-noted beneficiaries so long as “the court is satisfied that the arrangement is for the benefit of, *or not unfair to*, the person referred to in paragraph (1)(a).”<sup>525</sup> New Brunswick also adopted the Uniform Trustee Act recommendations for overruling a beneficiary’s objections in their entirety.

Nova Scotia’s *Variation of Trusts Act* NS is even simpler, removing the various classes of beneficiaries completely:

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<sup>523</sup> ULCC Final Report, *supra* note 322 at para 28.

<sup>524</sup> *Trustee Act* NB, *supra* note 415, s 60(1)(a). The court can also consent in applications where “a beneficiary is a charitable organization that is legally incapable in its own right of consenting to an arrangement, [or] ... the terms of the trust include a charitable purpose” (*ibid*, s 60(1)(c)–(d)).

<sup>525</sup> *Ibid*, s 60(2)(b)(i) [emphasis added].

Where one or more beneficiaries *are incapable of consenting* to the arrangement, the court may

- (a) approve the arrangement on behalf of those beneficiaries on any terms that the court considers appropriate, unless the arrangement is detrimental to the interests of any of the beneficiaries incapable of giving consent; and
- (b) issue an order confirming the arrangement if the court determines it is appropriate to do so.<sup>526</sup>

The *Variation of Trusts Act* NS also grants the court to override any beneficiaries who object to a proposed variation. Section 3(4) of the *Variation of Trusts Act* NS provides that “where one or more beneficiaries who are of full age and capacity refuse their consent to the arrangement, the court may

- (a) approve the arrangement on behalf of those beneficiaries on any terms that the court considers appropriate if
  - (i) the arrangement is not detrimental to the pecuniary interest of any person who has withheld consent, and
  - (ii) it would be detrimental to the administration of the trust or to the interests of the other beneficiaries to not approve the arrangement; and
- (b) issue an order confirming the arrangement if the court determines it is appropriate to do so.<sup>527</sup>

The test for overruling an objecting beneficiary in *Variation of Trusts Act* NS is the same as the Uniform Trustee Act and the *Trustee Act* NB, except the Uniform Trustee Act and *Trustee Act* NB include the additional requirement that “a substantial majority of the beneficiaries, representing a substantial majority of the beneficial interests in the trust property as determined by the monetary value of those interests, have consented to the arrangement or have had the court approve the arrangement on their behalf”.<sup>528</sup> Interestingly, in his review of the Uniform Trustee Act, Oosterhoff noted that the ability to overrule an objecting beneficiary “is a very

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<sup>526</sup> *Variation of Trusts Act* NS, *supra* note 402, s 3(3) [emphasis added].

<sup>527</sup> *Ibid*, s 3(4).

<sup>528</sup> *Trustee Act* NB, *supra* note 415, s 60(3)(ii).



helpful provision”, although in his opinion the requirements are too strict.<sup>529</sup> Due to concerns about the interpretation of “substantial”, he proposed replacing “substantial majority” with “50 percent or more”, or, “[a]lternatively and preferably, the [Uniform Trustee Act] could adopt the similar provision in the revised [Variation of Trusts Act NS]”<sup>530</sup> where the requirement is eliminated completely.

In *Re Bettens*, the Nova Scotia Supreme Court considered a proposed arrangement where an applicant requested an advance of funds for the payment of tuition prior to his attaining 23 years of age—the age at which the applicant became entitled to his share of the residue of an estate.<sup>531</sup> Until such time as the applicant turned 23, his share was to be held in trust. In the event that the applicant died prior to attaining 23 years of age, his share included a gift over to another beneficiary. The contingent beneficiary did not expressly object to the arrangement, nor did she provide her consent.<sup>532</sup> LeBlanc J. considered section 3(4) of the *Variation of Trusts Act NS* and held that, due to a life insurance policy put in place by the applicant, the contingent beneficiary “would not be prejudiced by the granting of this application.”<sup>533</sup> LeBlanc J. observed that, on the other hand, “it would be detrimental to the Applicant's academic or financial interests if [he] were to refuse the proposed variation.”<sup>534</sup>

## 7. Recommendations

When compared with the *Variation of Trusts Act 1958*, the wording in Manitoba’s legislation suggests that the Manitoba Court of Queen’s Bench has the ability to consent on behalf of beneficiaries. Unlike Alberta, Manitoba’s requirement for *all* capable beneficiaries to

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<sup>529</sup> Oosterhoff, “Reform”, *supra* note 85 at 343.

<sup>530</sup> *Ibid.*

<sup>531</sup> *Re Bettens*, 2015 NSSC 326 at para 4.

<sup>532</sup> *Ibid* at para 16.

<sup>533</sup> *Ibid* at para 17.

<sup>534</sup> *Ibid* at para 19.

provide written consent addresses some concerns that Manitoba can consent on behalf of capacitated adults, particularly as the concerns relate to subsection 59(5)(b). However, the language continues to be complex. The MLRC Report 1982, and McLean in 1983, both advocated for “the convoluted description of those beneficiaries [to] be replaced by simpler language.”<sup>535</sup> The descriptions of the classes of beneficiaries remain unchanged since then.

It is also unclear how effective the additional classes of beneficiaries are without any reported decisions. Moving to a “catch all” model similar to the *Variation of Trusts Act NS* would effectively simplify the language and resolve issues related to subsection 59(5)(e). To the extent that there remain concerns that a particular subsection of beneficiaries is not included—the MLRC Report 1982 had recommended that “it be made clear”<sup>536</sup> that section 59 applies to corporations and charitable trusts—an express provision could be added to the legislation to that effect.

It would also be advantageous to lower the threshold to the standard required by the *Trustee Act NB*—that an “arrangement is for the benefit of, *or not unfair to*,”<sup>537</sup> a beneficiary for whom they are consenting.<sup>538</sup> Doing so would permit more arrangements like those in *Re Henderson*, where the court had to justify an indirect benefit to contingent unborn children.

The addition of an overruling provision would likewise prevent dissident beneficiaries from holding the remaining beneficiaries hostage. It would be beneficial to adopt provisions similar to those in the *Variation of Trusts Act NS* or the *Trustee Act NB*. As the ULCC stated in

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<sup>535</sup> McClean, “Perpetuities”, *supra* note 270 at 257.

<sup>536</sup> MLRC Report 1982, *supra* note 329 at 57.

<sup>537</sup> *Trustee Act NB*, *supra* note 415, s 60(2)(b)(i) [emphasis added].

<sup>538</sup> Similarly, the threshold for approval in the *Variation of Trusts Act NS* was that an arrangement not be “detrimental to the interests of any of the beneficiaries incapable of giving consent”. *Variation of Trusts Act NS*, *supra* note 402, s 3(3)(a).

their Final Report, the requirements for overriding a beneficiary's objections under the *Trustee Act* NB "will not be easily met and this power is likely to be used only when the beneficial interests are widely distributed and a small number of beneficiaries are holding out against a generally desired change."<sup>539</sup> Oosterhoff's recommendation to define what constitutes a substantial amount of the beneficiaries is well made. Otherwise, it may be preferable to follow the *Variation of Trusts Act* NS and omit the requirement that a majority of beneficiaries consent entirely.

## 8. Conclusion

As with most other jurisdictions, the *Trustee Act* MB allows the court to consent to a proposed arrangement on behalf of beneficiaries who are otherwise unable. When the Manitoba legislation was amended, a definition for "benefit" was added—including four new unique classes of beneficiaries. The definition of "benefit" did not add anything new, nor prevent the court from relying on case law from other provinces, and it remains unclear if the additional classes have been effective as there are no reported decisions.

One class of beneficiary that would be worth adding to the list for whom the Manitoba court can consent is a beneficiary who is holding out against a majority of beneficiaries, albeit with some restrictions. Nova Scotia and New Brunswick have both added this type of provision, following the recommendations of the ULCC. By adopting similar legislation, Manitoba could also reduce the existing classes of beneficiaries to a streamlined model akin to the *Variation of Trusts Act* NS and lower the threshold required for consenting.

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<sup>539</sup> ULCC Final Report, *supra* note 322 at para 28.

## CONCLUSION

“The general aim of the [*Variation of Trusts Act 1958*] was to enable beneficiaries to vary their trust when this would be to their benefit ... The cases have revealed some, though perhaps no serious defect in the drafting of the legislation, but there is room for improvement and in some cases where the Act is not applicable the earlier law may still be needed to fill in some of the gaps.”<sup>540</sup>

Manitoba is an interesting and exciting jurisdiction for trust law, and is frequently an outlier among other provinces.<sup>541</sup> For example, when Manitoba abolished the Rule against Perpetuities, McClean commented that “abolition is a great step into the unknown, and that is no doubt what has inhibited others from taking it. The Manitoba Law Reform Commission and the Manitoba legislature are not to be numbered amongst the law’s timorous souls.”<sup>542</sup> From time to time, it is helpful to compare legislation from other jurisdictions and consider what is working well and what could be improved.

Relying on historical records, secondary sources and extra-provincial jurisdiction, the recent *Hupe CA* decision appears to have settled a decades-long debate about the co-existence of equitable interests and the indefeasibility of title in Manitoba’s Torrens system. The decision was thorough in its analysis and should be the final word on resulting trusts and constructive trusts. Another equitable interest existing off title that should be recognized in Manitoba is the severance of joint title by an unregistered instrument comparable to *Stonehouse*, notwithstanding section 66(4) of the *Real Property Act*. Additionally, by registering a caveat for an equitable

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<sup>540</sup> McClean, “Variation”, *supra* note 62 at 260.

<sup>541</sup> See e.g. *ibid* at 219, citing *Trustee Act MB 1954*, *supra* note 12, s 54; *The Perpetuities and Accumulations Act*, RSM 1987, c P33, s 4.

<sup>542</sup> McClean, “Perpetuities”, *supra* note 270 at 275.

interest, a beneficiary can put third parties on notice of that interest and obtain a remedy for recovery of property without needing to prove knowledge on the part of a third party.

Secondly, the amendments following the Manitoba Law Reform Commission's report on *Saunders v Vautier* eliminated the Rule and replaced the "fitness" test from *Re Steed* with the new requirement that an arrangement be of "justifiable character". Justifiable character was left undefined, however, and judges approached its assessment in different ways, creating more uncertainty. As well, the need for judicial review in every case creates obstacles and increases cost for beneficiaries at a time when the courts are emphasizing proportionality and access to justice.

Lastly, the *Trustee Act* MB allows the court to consent to a proposed arrangement on behalf of those beneficiaries who are minors or otherwise lack capacity. Manitoba amended its legislation in 1983, adding new unique classes of beneficiaries without addressing underlying issues. Differences between legislation suggest that Manitoba courts have the ability to consent on behalf of capacitated beneficiaries, although further clarification is needed. Section 59 of the *Trustee Act* MB would also benefit from provisions allowing the court to override a beneficiary's objections in certain situations.

In this thesis, I offered the following recommendations:

- 1) Regarding equitable interests:
  - a) The joint tenancy severance provisions at section 79 of the *Real Property Act* should be amended to expressly permit joint tenancy severance prior to registration.
- 2) Regarding the application of the Rule in *Saunders v Vautier*:

- a) The *Trustee Act* MB should be revised to allow for the application of the Rule in *Saunders v Vautier* for non-contentious arrangements, similar to the *Variation of Trusts Act* NS or the *Trustee Act* NB.
  - b) Any amendments to the *Trustee Act* MB should likewise provide clarity on “justifiable character” by replacing the test with a determination of whether a proposed arrangement is appropriate.
- 3) Regarding consenting on behalf of beneficiaries:
- a) The classes of incapacitated beneficiaries for whom the court can consent should be simplified.
  - b) The threshold for approval of a benefit should be lowered so that the court can consent so long as a proposed arrangement is “for the benefit of, *or not unfair to*”<sup>543</sup> a beneficiary for whom the court has been asked to consent.
  - c) It should be clarified that section 59(6) is intended to occupy the field so that the court cannot consent on behalf of capacitated beneficiaries, or in the alternative, stated expressly whether, and in what situations, the court can consent on behalf of capacitated beneficiaries.
  - d) The *Trustee Act* MB should have an express provision that allows the court to consent on behalf of beneficiaries who refuse to consent, similar to the *Variation of Trusts Act* NS or *Trustee Act* NB, subject to Oosterhoff’s comments.

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<sup>543</sup> *Trustee Act* NB, *supra* note 415, s 60(2)(b)(i) [emphasis added].

**WORKS CITED****Legislation**

*An Act to Amend the Trustee Act*, SM 1982-83, c 38.

*An Act to Amend the Trustee Act*, SM 1956, c 68.

*Charitable Trusts Act, 1853*, 16 & 17 Vict, c 137.

*Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

*The Court of Queen's Bench Act*, SM 1988-89, c 4.

*Family Law Act*, RSO 1990, c F.3.

*Family Property Act*, SS 1997, c F-6.3.

*Income Tax Act*, SC 1970, c 63.

*The Judgments Act*, RSM 1987, c J10.

*Land Registry Act*, RSBC 1948, c 171.

*Land Titles Act*, RSBC 1996, c 250.

Manitoba, *Court of Queen's Bench Rules*.

*Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (2nd Supp).

*Perpetuities Act*, SNS 2011, c 42.

*The Perpetuities and Accumulations Act*, RSM 1987, c P33.

*Public Trustee Act*, RSA 1980, c P-36.

*The Real Property Act*, CCSM, c R30.

*The Real Property Act*, RSM 1988, c R30.

*Real Property Act*, RSNS 1989, c 385.

*The Real Property Amendment Act*, SM 2011, c 33.

*Settled Land Act, 1925*, 15 & 16 Geo 5, c 18.

*Statute*, 12 Chas II, c 24.

*Statute of Uses*, 27 Hen VIII, c 10 (1535).

*Statute of Wills*, 32 Hen VIII, c 1 (1540).

*Supreme Court Act*, RSC, 1985, c S-26.

*Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66.

*Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77.

*Trust and Settlement Variation Act*, RSBC 1979, c 413.

*Trustee Act, 1925*, 15 & 16 Geo 5, c 19.

*Trustee Act*, RSA 1980, c T-10.

*Trustee Act*, SA 1964, c 98.

*Trustee Act*, SNB 2015, c 21.

*Trustee Act*, SNB 1959, c 76.

*The Trustee Act*, RSM 1987, c T160.

*The Trustee Act*, RSM 1970, c T160.

*The Trustee Act*, RSM 1954, c 273.

*Variation of Trusts Act*, RSO 1970, c 477.

*Variation of Trusts Act*, SO 1959, c 104.



*Variation of Trusts Act*, RSNS 1989, c 486.

*Variation of Trusts Act*, SNS 1962, c 14.

*Variation of Trusts Act*, SPEI 1963, c 34.

*The Variation of Trusts Act*, RSS 1978, c V-1.

*Variation of Trusts Act 1958* (UK), 6 & 7 Eliz 2, c 53.

Y B Mich 15 Hen VII 13 pl 1.

## **Jurisprudence**

*Ball's Settlement, Re*, [1968] 2 All ER 438, [1968] 1 WLR 899.

*Bentall Corp. v Canada Trust Co*, 26 BCLR (3d) 181, 1996 CarswellBC 1797 (SC).

*Bettens, Re*, 2015 NSSC 326.

*Bezuko v Supruniuk*, 2007 ABQB 204.

*Boulter-Waugh & Co. v Phillips* (1919), 58 SCR 385, 46 DLR 41 (Sask).

*Brochbank, Re*, [1948] Ch 206, [1948] 1 All ER 287.

*Brown v National Victoria & Grey Trust Co*, 35 Man R (2d) 300, 1985 CarswellMan 79 (QB).

*Brown v National Victoria & Grey Trust Co.*, November 12, 1985, suit no 341/85 (CA).

*Buschau v Rogers Communications Inc*, 2006 SCC 28.

*Buschau v Rogers Communications Inc*, 2004 BCCA 80.

*Cartlidge v Smith*, 44 Man R (2d) 252, 1987 CarswellMan 175 (CA).

*Chapman v Chapman*, [1954] AC 429, [1954] 1 All ER 798.

*Charlesworth Estate (Re)*, [1996] 5 WWR 578, 108 Man R (2d) 228 (QB).

*Church, Re*, [1923] SCR 642, [1923] 3 DLR 1045 (Alta).

*Citadel General Assurance Co v Lloyd's Bank Canada*, [1997] 3 SCR 805, 152 DLR (4th) 411 (Alta).

*Clafin v Clafin*, 149 Mass 19 (1889).

*Collins, Re*, (1886), 32 Ch D 229.

*Continental Lime Ltd v Canada Trust Co*, 84 ACWS (3d) 576, 1998 CarswellBC 2757 (SC).

*Dashevsky v Dashevsky*, 1986 CarswellMan 103, 40 Man R (2d) 58 (QB (Fam Div)).

*Davidson v Davidson*, [1946] SCR 115, [1946] 2 DLR 289 (BC).

*Davison v Davison Estate*, 2009 MBCA 100.

*Dawson, Re*, [1941] 1 DLR 790, [1941] 1 WWR 177 (Alta SC).

*Downshire Settled Estates, Re*, [1953] Ch 218, [1953] 1 All ER 103.

*Dukart v Surrey (District)*, [1978] 2 SCR 1039, 86 DLR (3d) 609 (BC).

*Eames Estate, Re*, [1934] 3 WWR 364, 1934 CarswellMan 77 (KB).

*Ehrmantraut v Ehrmantraut (Trustee of)*, 2008 MBCA 127.

*Ehrmantraut v Ehrmantraut (Trustee of)*, 2008 MBQB 140.

*Fels v Knowles* (1906), 26 NZLR 604 (New Zealand CA).

*Finnell v Schumacher Estate* (1990), 37 ETR 170 (Ont CA).

*Forgan v Lovatt*, 2000 MBQB 123.

*Fort Garry Care Centre Ltd v Hospitality Corporation of Manitoba Inc*, 123 Man R (2d) 241, 1997 CarswellMan 644 (CA).

*Foskett v McKeown*, [2001] 1 AC 102.

*Goldstein Insurance Trust, Re*, 56 Man R (2d) 73, 1988 CarswellMan 372 (QB).

*Goulding v James*, [1997] 2 All ER 239 (CA).

*Greenwell v Greenwell* (1800), 5 Ves 194.

*Groves-Raffin Construction Co v Canadian Imperial Bank of Commerce* (1975), [1976] 2 WWR 673, 64 DLR (3d) 78 (BC CA).

*Havelock v Havelock* (1800), 17 Ch D 807.

*Henderson Estate, Re*, 77 Man R (2d) 91, 1991 CarswellMan 269 (QB).

*Holmden's Settlement Trusts, Re*, [1968] AC 685, [1968] 1 All ER 148 (HL).

*Hupe v Hyczkewycz*, 2016 MBCA 23.

*Hyczkewycz v Hupe*, 2019 MBCA 74, leave to appeal to SCC refused, no 38823.

*Hyczkewycz v Hupe*, 2017 MBQB 209.

*Irving, Re*, 1975 CarswellOnt 581, 66 DLR (3d) 387, 11 OR (2d) 443 (Ont SC).

*Jacques v Alexander (District)*, 109 Man R (2d) 223, [1996] 7 WWR 677 (QB).

*Jellett v Wilkie*, (1896) 2 SCR 282, 16 CLT 260 (NWT).

*The John Risley Family Trust 2009 (Re)*, 2017 NSSC 318.

*Kadyshuk v Sawchuk*, 2006 MBCA 18.

*Kaup v Imperial Oil Ltd*, [1962] SCR 170, 32 DLR (2d) 112 (Alta).

*Kerr v Baranow*, 2011 SCC 10 (BC).

*Kinnee v Alberta (Public Trustee)*, 3 Alta LR (2d) 59, 1977 CarswellAlta 54 (SC).

*Knocker v Youle* (1985), [1986] 1 WLR 934, [1986] 2 All ER 914 (Eng Ch Div).

*Knox United Church v Royal Trust Corp. of Canada*, 1996 CarswellMan 96, 110 Man R (2d) 81 (CA).

*Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14 (Ont).

*Langdon v Langdon*, 2015 MBQB 153.

*Livingston Estate (No 2), Re*, 32 Man R 465, 1923 CarswellMan 12 (CA).

*Love v L'Estrange*, (1727) 5 Bro Cas 59, 2 ER 532 (HL).

*Massey v Gibson* (1890), 7 Man R 172 (CA).

*May v May*, 1994 CarswellMan 168, 96 Man R (2d) 268 (QB).

*Mehta Estate v Mehta Estate* (1993), 88 Man R (2d) 54, 104 DLR (4th) 24 (CA).

*Molinski v Chebib*, 2012 MBQB 123.

*Montagu's Settlement Trusts, Re*, (1985), [1987] Ch 264 at 273, [1992] 4 All ER 308.

*Montreal Trust Co v Krisman*, [1960] SCR 659 (BC).

*National Provincial Bank Ltd v Ainsworth*, [1965] AC 1175, [1965] 2 All ER 427.

*New, Re*, [1901] 2 Ch 534, [1900-3] All ER Rep 763.

*Nunn v Hancock* (1871), LR 6 Ch App Cas 850.

*Pecore v Pecore*, 2007 SCC 17 (Ont).

*Peter v Beblow*, [1993] 1 SCR 980, 101 DLR (4th) 621 (BC).

*Pettkus v Becker*, [1980] 2 SCR 834, 117 DLR (3d) 257 (Ont).

*Pilcher v Rawlins* (1872) 7 Ch App 259.

- Rathwell v Rathwell*, [1978] 2 SCR 436, 83 DLR (3d) 289 (Sask).
- Rawluk v Rawluk*, [1990] 1 SCR 70, 65 DLR (4th) 161 (Ont).
- Revel v Watkinson* (1748), 1 Ves Sen 93.
- Ridalls v Ridalls Estate*, 24 Sask R 16, 1983 CarswellSask 113 (QB).
- Robert's Settlement Trusts, Re*, [1961] TR 401.
- Rotary Club of Truro Charitable Trust v Bethel Estate*, 2015 NSSC 216.
- Russ v British Columbia (Public Trustee)* (1994), 89 BCLR (2d) 35, 69 WAC 209 (CA),  
leave to appeal to SCC refused, 5 ETR (2d) 147.
- Sainsbury's Settlement, Re*, [1967] 1 All ER 878, [1967] 1 WLR 476.
- SA v Metro Vancouver Housing Corp*, 2019 SCC 4 (BC).
- Salt v Alberta (Public Trustee)* (1986), 71 AR 161, 1986 CarswellAlta 127 (QB).
- Saunders v Vautier*, (1841) 41 ER 482, [1841] CR & PH 240.
- Schmidt v Air Products of Canada Ltd*, [1994] 2 SCR 611, [1994] 8 WWR 305.
- Shinewald v Putter*, 2014 MBQB 254.
- Shoal Lake Indian Band No 40 v Royal Trust Corp of Canada*, 91 Man R (2d) 287, 1994  
CarswellMan 104 (QB).
- Simcoff v Simcoff*, 2009 MBCA 80.
- Soulos v Kortontzilas*, [1997] 2 SCR 217, 146 DLR (4th) 214 (Ont).
- Steed's Will Trusts, Re*, [1960] CH 407 (CA).
- Stonehouse v British Columbia (AG)* (1961), [1962] 2 SCR 103, 31 DLR (2d) 118 (BC).
- Taylor v Phillips* (1750), 2 Ves Sen 23.

*Teichman v Teichman Estate*, 1996 CarswellMan 158, 110 Man R (2d) 114 (CA).

*Townshend Estate, Re*, [1941] 3 DLR 609, 16 MPR 69 (NB SC).

*Vandervell's Trusts, Re*, [1974] 1 All ER 47 (HC), reversed on appeal on other grounds, [1974] 1 Ch 269.

*Walker, Re*, [1901] 1 Ch 879.

*Weston's Settlements, Re*, [1969] 1 Ch 233, [1968] 3 All ER 338.

*Williams & Glyn's Bank Ltd v Boland*, [1981] AC 487, [1980] 2 All ER 408 (HL).

*Williams v Hensman* (1861), 1 John & H 546, 70 ER 862.

*Wharton v Masterman*, [1895] AC 186 (UK HL).

*X v A*, [2000] 1 All ER 490.

*Zekelman, Re*, (1971), 19 DLR (3d) 652 (Ont HC).

## Secondary Sources

Alberta Institute of Law Research and Reform, Report No. 9, *The Rule in Saunders v Vautier* (Edmonton: University of Alberta, 1972), online: <<https://www.alri.ualberta.ca/1972/02/rule-in-saunders-v-vautier/>>.

Bernstein, William S. "The Rule in Saunders v. Vautier and its Proposed Repeal" (1986) 7:3 E & TQ 251.

Black, Henry Campbell, Joseph R Nolan & Michael J Connolly. *Black's Law Dictionary*, 5th ed (St Paul: West Pub, 1979).

British Columbia Law Institute, "Consultation Paper on Joint Tenancy" (June 2011), online: <[https://www.bcli.org/sites/default/files/Real\\_Property\\_-\\_Joint\\_Tenancy\\_CP.pdf](https://www.bcli.org/sites/default/files/Real_Property_-_Joint_Tenancy_CP.pdf)>.

British Columbia Law Institute, “Report on the Variation and Termination of Trusts; A Report prepared for the British Columbia Law Institute by its Committee on the Modernization of the Trustee Act”, Report No 25 (October 2003), online: <[www.bcli.org/sites/default/files/Var+Term.pdf](http://www.bcli.org/sites/default/files/Var+Term.pdf)>.

Cantlie, Ronald B. “A Case of Mistaken Identity: The Rule in *Saunders v Vautier* and Section 61 of The Trustee Act of Manitoba” (1985) 15:2 Man LJ 135.

Cheshire, GC & Edward Hector Burn. *Cheshire's Modern Law of Real Property*, 11th ed (London, UK: Butterworths, 1972).

Coutlée, Louis William. *A Manual of the Law of Registration of Titles to Real Estate in Manitoba and the North-West Territories* (Toronto: Carswell, 1890).

*Debates of the Senate*, 5th Parl, 3rd Sess (11 March 1885) (Alex Campbell), online: <[https://www.canadiana.ca/view/oocihm.9\\_08065\\_15\\_1/256?r=0&s=1](https://www.canadiana.ca/view/oocihm.9_08065_15_1/256?r=0&s=1)>.

DiCatri, Victor. *Thom's Canadian Torrens System*, 2nd ed (Calgary, 1962: Burroughs & Company).

Farquhar, Keith B. “Recent Themes in the Variation of Trusts” (2001) 20:1 ETPJ 181.

Gillese, Eileen E. *The Law of Trusts*, 3rd ed (Toronto: Irwin Law, 2014).

Glenn, Jane Matthews. “Perpetuities to Purefoy: Reform by Abolition in Manitoba” (1984) 62:4 Can Bar Rev 618.

Government of Manitoba, News Release, “Manitoba Introduces Legislation That Would Improve Access to Legal Services” (9 March 2020), online: <<https://news.gov.mb.ca/news/index.html?item=46922>>.

*Halsbury's Laws of England*, vol 5(2), 4th ed (London, UK: Butterworths, 1985).

Hayton, David, Paul Matthews & Charles Mitchell. *Underhill and Hayton's Law Relating to Trusts and Trustees*, 19th ed (London, UK: LexisNexis, 2016).

- Hoffstein, Maria Elena & Julie Y Lee. “Restructuring the Will and Testamentary Trust: Methods, Underlying Legal Principles and Tax Considerations” (1993) 13: ETJ 42.
- William Innes & Joel T Cuperfain, “Variation of Trusts: An Analysis of the Effects of Variations of Trusts under the Provisions of the Income Tax Act” (1995) 43:1 CTJ 16.
- Keeton, GW & LA Sheridan. *The Law of Trusts*, 12th ed (London, UK: Barry Rose Law Publishers, 1993).
- Law Reform Commission (Ireland), “Report on the Variation of Trusts” (December 2000), online: <[https://www.lawreform.ie/\\_fileupload/Reports/rVTs.pdf](https://www.lawreform.ie/_fileupload/Reports/rVTs.pdf)>.
- Law Reform Commission of Saskatchewan, “Consultation Paper on the Law of Trusts #1: The Rule in *Saunders v. Vautier* and the Variation of Trusts” (June 1994), online: <[https://lawreformcommission.sk.ca/Saunders\\_v\\_Vautier\\_and\\_Variation\\_of\\_Trusts\\_Consultation.pdf](https://lawreformcommission.sk.ca/Saunders_v_Vautier_and_Variation_of_Trusts_Consultation.pdf)>.
- Luxton, Peter. “Variation of Trusts: Settlor’s Intentions and the Consent Principle in *Saunders v Vautier*” (1997) 60:5 Mod L Rev 719.
- Manitoba, Legislative Assembly, “Bill 35 – The Trustee Act”, 2nd reading, *Hansard*, 32nd Leg, 2nd Sess, No 53A (25 April 1983), online: <[https://www.gov.mb.ca/legislature/hansard/32nd\\_2nd/hansardpdf/53a.pdf](https://www.gov.mb.ca/legislature/hansard/32nd_2nd/hansardpdf/53a.pdf)>.
- Manitoba Courts, Media Release, “Access to Justice Initiatives” (27 June 2014), online: <[www.manitobacourts.mb.ca/news/access-to-justice-initiatives-media-release/](http://www.manitobacourts.mb.ca/news/access-to-justice-initiatives-media-release/)>.
- Manitoba Law Reform Commission, 2016–2017 Annual Report, online: <[www.manitobalawreform.ca/pubs/pdf/additional/2016-2017annual\\_report.pdf](http://www.manitobalawreform.ca/pubs/pdf/additional/2016-2017annual_report.pdf)>.
- Manitoba Law Reform Commission, “Indefeasibility of Title and Resulting and Constructive Trusts”, Issue Paper No 3 (April 2016), online: <[www.manitobalawreform.ca/pubs/pdf/Issue\\_Paper\\_3\\_26\\_April\\_2016.pdf](http://www.manitobalawreform.ca/pubs/pdf/Issue_Paper_3_26_April_2016.pdf)>.



Manitoba Law Reform Commission, "Report on the Rule in *Saunders v. Vautier*", Report No 18 (8 January, 1975), online: <[www.manitobalawreform.ca/pubs/pdf/archives/18-full\\_report.pdf](http://www.manitobalawreform.ca/pubs/pdf/archives/18-full_report.pdf)>.

Manitoba Law Reform Commission, "Report on the Rules Against Accumulations and Perpetuities", Report No 49 (1982), online: <[www.manitobalawreform.ca/pubs/pdf/archives/49-full\\_report.pdf](http://www.manitobalawreform.ca/pubs/pdf/archives/49-full_report.pdf)>.

McClellan, AJ. "The Rule against Perpetuities, *Saunders v. Vautier*, and Legal Future Interests Abolished" (1983) 13:3 Man LJ 245.

McClellan, AJ. "Severance of Joint Tenancies" (1979) 57:1 Can Bar Rev 1.

McClellan, AJ. "Variation of Trusts in England and Canada" (1965) 43:2 Can Bar Rev 181.

McTavish, Willson A & Ronald R Anger. "Variation of Trusts: The Official Guardian's View" (1988-89) 9:2 ETJ 132.

Monahan, Patrick. "The Supreme Court of Canada in the 21st Century" (2001) 80:1-2 Can Bar Rev 374.

Moses, Lyria Bennett & Brendan Edgeworth. "Taking it Personally: Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility" (2013) 35:1 Sydney L Rev 107.

Mowbray, WJ. *Lewin on Trusts*, 16th ed (London, UK: Sweet & Maxwell, 1964).

Neave, Marcia. "Indefeasibility of Title in the Canadian Context" (1976) 26:2 UTLJ 173.

Nitikman, Joel. "Variation under the Rule in *Saunders v. Vautier*: Yes or No?" (2015) 35:1 ETPJ 1.

Ontario Law Reform Commission. "Report on the Law of Trusts", Volume II (1984), online: <<https://collections.ola.org/mon/27010/25452-2.pdf>>.

- Oosterhoff, Albert H, C David Freedman, Mitchell McInnes & Adam Parachin. *Oosterhoff on Wills*, 8th ed (Toronto: Thomson Reuters Canada, 2016).
- Oosterhoff, Albert H, C David Freedman & Mitchell McInnes, *Oosterhoff on Trusts*, 8th ed (Toronto: Thomson Reuters Canada, 2014).
- Oosterhoff, Albert. “The Rule in *Saunders v. Vautier*: Use It Or Lose It?” (23 July 2018), *WELBlog* (blog), online: <<http://welpartners.com/blog/2018/07/the-rule-in-saunders-v-vautier-use-it-or-lose-it/>>.
- Oosterhoff, Albert H. “Trust Law Reform: The Uniform Trustee Act” (2014) 34:3 ETPJ 329.
- Pettit, Philip H. *Equity and the Law of Trusts*, 12th ed (2012, Oxford: Oxford University Press).
- Solnik, Robyn, Mary-Alice Thompson & Brian Gillingham. *Drafting Wills in Canada: A Lawyer’s Practical Guide*, 2nd ed (Toronto: LexisNexis Canada, 2016).
- Supreme Court Advocacy Institute. “Guidelines: Applications for Leave to Appeal”, online: <<https://scai-ipc.ca/leave-guidelines.html>>.
- Teranet Manitoba, “Manitoba Land Titles Guide”, Revision 65 (May 2020), online: <<https://teranetmanitoba.ca/wp-content/uploads/2019/11/landtitlesguide-en-3.pdf>>.
- Theobald, HS. *Theobald on Wills*, 14th ed (London, UK: Stevens, 1982).
- Torrens, Robert R. *The South Australian System of Conveyancing by Registration of Title* (Adelaide: Register and Observer General Printing Offices, 1859).
- UK House of Commons, *The Fourth Report Made to His Majesty by the Commissioners Appointed to Inquire into the Law of England Respecting Real Property* (25 April 1833).
- Uniform Law Conference of Canada, “Uniform Trustee Act” (2012), online: <[www.ulcc.ca/images/stories/2012\\_pdfs\\_eng/2012ulcc0029.pdf](http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf)>.

Uniform Law Conference of Canada, Civil Section, Uniform Trustee Act, “Final Report of the Working Group” (2012), online: <<https://www.ulcc.ca/en/uniform-acts-en-gb-1/619-uniform-trustee-act-2012/1254-uniform-trustee-act-final-report-of-the-working-group>>.

Waters, Donovan. “Does the Rule in *Saunders v. Vautier* Include the Power of Beneficiaries to Vary the Terms of the Trust?” (2013) 33:1 ETPJ 78.

Waters, Donovan WM, Mark R Gillen & Lionel D Smith. *Waters’ Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2012).

Waters, Donovan WM. *Waters’ Law of Trusts in Canada*, 2nd ed (Toronto: Thomson Reuters Canada, 1984).

Ziff, Bruce. *Principles of Property Law*, 6th ed (Toronto: Thomson Reuters Canada, 2014).