Syllabus

Trusts

(Revised for January 2020)

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.

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Trusts

COURSE NOTES

The function of the Trusts examination is to determine whether candidates have acquired a proficiency in the major doctrines of Equity that continue to apply in Canada. Proficiency includes not only knowledge of the legal rules, but their comprehension, demonstrated by an ability to apply the law to resolve practical problems. This requires an ability to spot issues, generalize from the cases and materials read, and an ability to explain why the outcome offered is correct. In other words, candidates are expected to do more than spot issues and regurgitate legal rules. Candidates are expected to solve legal problems. Particular emphasis will be given to the fiduciary concept; to *in rem* remedies available in Canada through the use of the constructive trust and the equitable lien and through the law of tracing, and to the law of trusts. This course intersects the law of contract, restitution, remedies and succession, all of which are featured in the materials.

Simply put, a trust exists in any case where there is a separation between legal ownership and its benefits. The party who has ownership or legal control over property is bound to use the benefits of that ownership or control according to limits imposed by the terms of a trust for the benefit of others. This obligation does not exist in contract, but is recognized through the *in personam* or personal obligations initially recognized by Equity but now enforceable by courts of law. To cope with and understand the trust concept and other equitable concepts, candidates require a firm grasp of equitable theory. This syllabus is designed to give candidates exposure enough to the law to grasp it, and on completion, to apply it competently in the practice of law.

MATERIALS

Required:

Either:

Mark Gillen and Faye Woodman eds., *The Law of Trusts: A Contextual Approach* (3rd ed.)(Toronto: Emond Montgomery, 2015) referred to as G&W. in the Reading List.

Or

A. Oosterhoff, R. Chambers, and M. McInnes, *Oosterhoff on Trusts* (9th ed) (Toronto: Carswell, 2019) - referred to as C.B. in the Reading List.

Recommended:

Eileen E. Gillese, *The Law of Trusts* (3rd ed.)(Toronto: Irwin Law, 2014) - referred to as Text in the Reading List.

READING LIST

Introduction - The Nature of a Trust

The introductory readings are designed to expose students to the origins and theory of Equity. Students should appreciate the historical origin of Equity, including the theoretical foundation that this history gave rise to, for it still influences Canadian law. These readings are intended to give students familiarity with the maxims of Equity and its major tools. Great attention should be paid to the debate in *Canson Enterprises* over the continued role of equity, and the approach Equity takes to remedies, including the personal remedies it employs (which are more advantageous than those developed by the common law) and the availability and nature of proprietary or real remedies.

A. Equity and Overview

1) The trust concept

G&W. 5-15, 37-68
C.B. 3-34
Text 1-18

2) Equity, Equity's primary tools, and the common law

G&W. 369-406
C.B. 671-807, 1047-1151

3) The fiduciary concept introduced

The trustee is the paradigm fiduciary. The fiduciary concept is nonetheless taught before the law of trusts because the fiduciary concept has become one of Equity's signature accomplishments, and goes far beyond the law of trusts. It is a mistake to think of fiduciaries and trustees as the same legal construct. Not all fiduciaries are trustees. Fiduciary relationships have come to permeate Canadian law. By understanding the fiduciary concept, students learn not only about a ubiquitous legal doctrine, but also a great deal about equity. In the following readings, note that the approach to fiduciary law found in the Lac Minerals minority decision found favour in the majority in Simms. Pay close attention to the test for identifying fiduciary obligations and to the factors that will influence the determination, as well as the essential role played by fiduciary obligations. Notice how different fiduciary relationships can produce different obligations. KLB affirms that the fiduciary concept is generally about malfeasance (preventing self-interested decision making) and not misfeasance (poor decision making) but see how Blueberry River Indian Band used the concept to impose standards of care. Also note how the criteria to determine a fiduciary has been considered in *Galambos v. Perez* and *Alberta v. Elder Advocates of Alberta Society*, both stressing the importance played to the presence or evidence of an 'undertaking' by the fiduciary.

G&W. 769-838
C.B. 73-115

KLB v British Columbia [2003] 2 SCR 403, paras. 38-51.
Galambos v Perez [2009] 3 S.C.R. 247, paras.6-9, 35-39; 48-88

(1) Political Trusts and the Government as a Fiduciary

G&W. 839-904
CB 58-73
Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development) [2018] 1 SCR 83.

4) The constructive trust

The Constructive Trust is a diverse equitable concept that is crucial to the law of remedies and restitution. While it grew by analogy from the express trust it is perfectly understandable without exposure to the express trust, as it differs in operation and application. It is assigned before express trusts in this syllabus to reinforce this and because, again, it is a useful study in appreciating the concepts and contribution of Equity. In the following section you will be expected to read the entire Chapters 10 and 11 in the Case Book (Chapter 9 and 10 in G&W). You are free to read them in the order in which they appear but these Chapters have been assigned piecemeal and out of order in this syllabus because reading the material in this way emphasizes that there are two main, distinct branches to the law of constructive trust (1) the fiduciary breach branch, which is the traditional application of the law, and (2) the remedial branch in which the constructive trust operates as a remedy for "unjust enrichment" and occasionally, other causes of action such as the tort of breach of confidence. Within the fiduciary breach branch, the law of corporate opportunities has taken on a unique analytical structure, so it is hived off.

Bear in mind that these two branches of constructive trust are not necessarily mutually exclusive. Some Constructive Trusts could be imposed under either branch, but many require one or the other line of reasoning. For example, where there is a fiduciary relationship the misuse of confidential information can lead to a fiduciary breach constructive trust, but not all fiduciary breaches involve breach of confidential information, and the tort of breach of confidence can lead to a remedial constructive trust.

Also bear in mind that a "constructive trust" operates only after a cause of action has been established, be it a fiduciary breach or unjust enrichment. Courts prefer to use personal remedies and will turn to a constructive trust remedy only where a proprietary remedy is required.

There are other situations where constructive trusts are used by Equity, including, as you have seen, to give effect to mutual wills. The current readings are dedicated to the two main branches of the constructive trust – the fiduciary breach branch, and the remedial branch. They break out other illustrations, such as the "wrongful death" constructive trust, which operate on different principles.

The final readings, dealing with the "Good Conscience Constructive Trust," have been hived off and left until after these two main branches of the constructive trust have been studied. This is because the "Good Conscience Constructive Trust" spoken of in *Soulos* is no more than the theoretical structure that explains these two main branches of constructive trust. In other words, "good conscience" is the underlying principle that these two distinct legal standards have in common and seek to achieve. Pay attention to the debate in *Soulos* between Justice Sopinka, who would have treated the law of unjust enrichment as overtaking fiduciary constructive trusts, and the prevailing view voiced by McLachlin J. (as she then was) that these are two distinct forms of constructive trust. At first blush, it appears that McLachlin J. may have created a new form of constructive trust – the good conscience constructive trust – that has overtaken the fiduciary breach constructive trust, and works along side the "remedial constructive trust." Close examination shows that this "good conscience constructive trust" in fact operates according to the same standards as the fiduciary constructive trust, with one exception. She suggests that fiduciary-like obligations can be used in the absence of a full-blown fiduciary obligation. This is in keeping with the flexible, contextual approach advocated in many SCC decisions, but the reality is that the "case-by-case" test for fiduciary relationships is so flexible that the "good conscience constructive trust" based on fiduciary-like obligations has not taken root. The decision on whether a constructive trust is appropriate can generally be resolved by applying the fiduciary breach constructive trust or the remedial constructive trust, depending on the case.

On the use of a remedial constructive trust as a remedy in an unjust enrichment claim now see *Moore v. Sweet* 2018 SCC 52.

Your task is to identify and understand the various tests for imposing constructive trusts, and to identify and use these tests that apply in a given case. Bear in mind that not all cases of fiduciary breach or unjust enrichment, or tortious breach of confidence, lead to a constructive trust. It is but one way of achieving restitution and there are standards, exposed in the readings, for deciding whether *in personam* relief may be appropriate and preferable. You will be expected to make and to explain discriminating choices about whether the breach leads to the constructive trust outcome.

G&W. 449-521
C.B. 700-807
Text 123-144

B. The Express Trust – The role of the participants

The express trust is introduced by examining the roles played by, and rights and obligations of, each of the participants. Once candidates understand the implications of a trust, the material relating to how trusts are constructed can be more meaningfully understood. Candidates are expected to understand the rights and obligations of each of the participants in a trust – the settlor who establishes the trust; the beneficiary who enjoys the trust, and the trustee who takes on responsibility for the trust. The relationship between each of these parties and the trust

property, as well as the rights and remedies these participants have to third parties are described in this material. Students are expected to be able to apply the law that follows to resolve legal problems that may arise.

1) The settlor

The settlor, the party who established the trust, will have no role to play once a trust is established, unless the settlor becomes a trustee or beneficiary in which case they change their relationship to the property from that of owner, to that of trustee and/or beneficiary. You will see readings in these materials where trustees have breached their trusts by treating the settlor as if he or she still owns the property. The settlor readings found below concentrate on the ability of settlors to retain powers of revocation in *inter vivos* trusts (trusts they establish to take effect during their lives rather than by testamentary succession.)

G&W. 69-81
C.B. 175-177, 311-316
Text 39-43, 47-53, 81

2) The beneficiary

(a) The nature of the beneficiary's interest

Ownership has two components at law – the right to exercise legal control over the property (sell, assign, give, contract about) and the benefits of ownership (the right to use, abuse and enjoy the fruits of property). A trust operates to separate legal control (which remains in the trustee) and the benefits of ownership (which the beneficiary enjoys) by imposing personal obligations on the owner to use their legal control to benefit the beneficiary. The beneficiary is not, therefore, the “owner” of the trust property. The trustee is. Still, since the ability to enjoy the benefits of property is the reason why we like to own property and in many respects, signals the real owner, there are times when the law will ignore the conceptual divide that the trust creates, and treat the beneficiary as the real owner. This is done in an ad hoc way in most cases, much like lifting the corporate veil. The “nature of the beneficiary’s interest” readings feature cases where the beneficiary is treated as the real owner for tax, estate and other purposes. These cases are difficult. Try to gain an understanding of when this might happen. The readings also demonstrate that not all testamentary estate cases involve trusts, and that beneficiaries of an estate do not achieve a beneficial interest until it is determined after due execution of the estate that there is property left that is obliged to be held for or transferred to that particular beneficiary. Similarly, there is no trust interest in a pension surplus until the beneficial interest of the beneficiaries arises according to the terms of the trust documents.

G&W. 73
C.B. 34-37, 177-178
Burke v Hudson Bay Co. [2010] 2.S.C.R. 273, paras,1-6, 27, 29, 23-37, 41, 48-60, 62, 72, 81-82, 86-88, 90, and 93.

(b) The beneficiary and the trust property

The “beneficiary and the trust property” readings feature the ability of the beneficiary in some Canadian jurisdictions to end the trust and call for the property. Students are expected to be able to apply the law in their jurisdiction, and to devise ways to prevent the beneficiary from exercising this power.

G&W. 150-153
C.B. 316-327
Text 85-89
Buschau v. Rogers Communications Inc. [2006] 1 SCR 973.

(c) Amendment and Variation of Trusts

There are times when the trusts originally established require reform. It is important to understand the power of courts to vary trusts. This material is introduced here as it is closely related to the authority of beneficiaries to terminate trusts.

G&W. 153-165
C.B. 328-360
Text 90-105

(d) The beneficiary's obligations viz the trustee

Although trustees are not ordinarily agents and deal with the trust property as principals fully liable to third parties they contract with or tortiously offend, they are eligible for payment and there are situations when they can look to the beneficiaries to repay them for expenses incurred. Students should understand when this can happen, and know the standards that are to be used.

G&W. 338-350
C.B. 1052-1059

(e) The beneficiary's rights viz third parties

The beneficiaries have rights to enforce the trust against the trustee, which have translated over time into rights enforceable against third parties who receive trust property. Those rights can be *in personam* (leading to money judgments), or *in rem* (giving rise to property rights). The law is complex. First, there have traditionally been two forms of tracing, legal and equitable tracing. Legal tracing was available to property owners. It has historically been less potent because of reluctance by common law courts to permit owners to trace trust property into bank accounts or mixed funds. Meanwhile trust beneficiaries could not use legal tracing at all because the beneficiary is not an owner. Equity therefore developed equitable tracing but this tool was only available where there were fiduciary breaches involved, since Equity would not otherwise claim jurisdiction. Even though trust beneficiaries are not owners, Equity gave them a superior form of tracing. Recently courts have attempted to merge these two distinct tracing mechanisms. Some courts have played loose with fiduciary obligations in order to open the door to Equity’s more resilient approach. This is undesirable as it confuses doctrine

to achieve results. It would be better to get rid of the fiduciary requirement in equitable tracing as the editors of the Case Book debate. Other courts have tried to liberalize legal tracing. This is what the *BMP* decision does. Pay attention to how it has done so.

The law of tracing is also complex because tracing is a process that can lead to *in personam* (personal) or *in rem* (or proprietary) remedies. At times tracing can lead to a money judgement, and at other times it can lead to specific recovery of the property, or to an equitable lien (a right to hold the property hostage to enforce payment of money owe or sell it if payment is not forthcoming). When specific recovery is granted, it may or may not be by way of constructive trust, depending on whom the defendant is. Pay attention to when particular remedies are available as a result of tracing.

Another reason the law of tracing is complex is that Equity has not integrated well a range of tools available for achieving in rem remedies. Property and personal remedies can be recovered using a cause of action (i.e., fiduciary breach; unjust enrichment) with constructive trust as the remedy, or through tracing, or through the "Strangers to the Trust" rules discussed below. Sometimes these tools overlap and at other times they do not.

Finally, the law of tracing is generally complex because it can be done against trustees and against third parties, using different rules, many of them based on artificial presumptions intended to do justice. These rules even apply differently to third parties depending on how those third parties became involved. Those who are *bona fide* purchasers for value without notice cannot be successfully sued. Those who have innocently received trust property can be sued and the property recovered, but personal remedies cannot be used against these third parties unless they are liable as "strangers to the trust" who have negligently or intentionally received property in breach of trust.

Tracing is particularly complex in bank accounts. Since a bank is a debtor of a depositor, the bills that have been deposited cannot be identified but Equity has developed a number of artificial rules to permit tracing in appropriate cases. There is tremendous controversy over one such rule, the LIBR (Lowest Intermediate Balance Rule). This rule originally applied in all bank account tracing cases. Essentially, if tracing is based on the premise that specific property is identifiable as the trust property, if a trustee wrongfully deposits $25,000 in trust money into an account whose balance later falls to $10,000, the most that can be identified as trust money even if the balance later rises to $50,000, is that LIBR of $10,000. We know factually that at least $15,000 of the trust money was dissipated and that any money subsequently deposited must have come from somewhere else. In the *LSUC v. TD Bank* the Ontario Court of Appeal evaded this rule since its application would have resulted in one innocent trust victim recovering all of its money while other innocent trust victims whose money was paid into the account before the LIBR was achieved would recover only a small percentage of their money. The Court divided the remaining pot pro rata, according to the ratio of contributions. This was an attractive outcome but it created difficulties. *Dhillon v. E. Sands & Assoc. Inc*. applies the LIBR in a contest between the trust claimant and the putative trustee (as an alternative basis for rejecting the cause of action.) In *Re Graphicshoppe* the Ontario Court of

Appeal applied the LIBR to limit an innocent trust beneficiary's claim against a bankrupt trustee, where the real contest was between the innocent beneficiary and general creditors of the bankrupt. There is no way to reconcile the cases coherently. The peculiar result is that an innocent trust beneficiary facing a LIBR problem is better off fighting over a pie with other innocent trust beneficiaries, than when fighting with mere general creditors.

Students are expected to be able to identify and use the relevant tracing mechanisms, and to select appropriate outcomes. Specific answers need to be provided during examinations, identifying the rules being applied and the particular outcomes they produce in the case at hand.

(1) Tracing

G&W. 603-629
C.B. 1155-1210
Boughner v. Greyhawk Equity Partners Ltd. Partnership (Millenium) 2013 ONCA 26
Re Graphicshoppe Ltd. [2005] O.J. No. 5184 (C.A.).
Horizon FX Investments Inc. (Re) 2010 BCCA 594
B.M.P. Global Distributions Inc. v. Bank of Nova Scotia [2009] 1 SCR 504 (read the facts and paras. 75-86.
Easy Loan Corp. v. Wiseman 2017 ABCA 58
Text 184-187

(2) The beneficiary's rights viz third parties - Strangers to the Trust

G&W. 394-402, 551-603,
C.B. 1097-1153
Text 131-142

3) The Trustee

The Trustee is the party that administers the trust during its existence. If there is more than one trustee, they must all remain active. It is a breach of trust for a trustee to let the others handle things. Unless the trust agreement provides otherwise, trustees must also act unanimously. (Remember that an executor of an estate is not a trustee until the estate has been settled and any property earmarked for a trust has been identified. Up until that point executors can act by majority unless the will provides otherwise.)

In order to be able to administer their trusts, trustees are given both duties ("trusts") and powers. Sometimes duties do not involve any choice. For example, the trust may direct the trustee to distribute ¼ of the income to a beneficiary on her 25th birthday. More often duties involve the exercise of discretion. They are therefore coupled with "power" or choice. For example, trustees have a duty to invest, but there is ordinarily discretion in terms of what investments to choose. Trustees are often given simple powers or optional authority they can use to better administer the trust. These mere powers are not coupled with duties and it is therefore up to the trustee to use them or not.

There are three sources that will identify these duties and powers. The primary source, which will govern, is the trust agreement. The trusts and powers of trustees should be crafted in a trust agreement to meet the objectives of a given trust. If there is no trust agreement or it is silent on the matter, the duties and powers provided for in statute and at Equity govern. (The trust statutes tend to create more powers than duties; they were drafted to give trustees powers that settlors may have forgotten to include but that are sensible.)

Being a trustee is a position that carries tremendous potential liability. As a result, no-one need accept an appointment, but once an appointment is accepted, liability is extensive. The theory is that the trustee has accepted a position of power and must, as a matter of conscience, carry it out.

As has been seen, trustees can be sued personally by third parties for their trust dealings but they can reimburse themselves from trust funds (if available) for expenses properly incurred, and can, in some cases, look to beneficiaries to indemnity them. Most litigation involving trustees arises because of breaches of trust by them.

We have explored the fiduciary duty, which is breached where the trustee fails to act in the best interests of the trust beneficiaries in the sense that the trustee profits from the position or acts in conflict of interest. When a trustee has a duty to perform, they will be strictly liable for failing to complete it. For example, if the trustee fails to distribute ¼ of the income to a beneficiary on her 25th birthday contrary to the terms of the trust, the trustee will be strictly liable. There is no need to consider standards of care. Where a trustee has discretion whether to do a job or how a job is to be done, the trustee can be liable for failing to achieve an acceptable standard of care when performance is undertaken. So, if a trustee is empowered to sell trust property, a careless decision to do so is actionable but a decision not to sell the property is not actionable unless the trustee has breached some other obligation when choosing not to do so (such as refraining from selling as the result of a conflict of interest). Where duties carry powers with them, such as an investment obligation, the trustee will be strictly liable for failing to invest in accordance with the terms of the trust, and can be held liable for exercising that power more carelessly than the standard of care requires. All of these rules can be modified in the trust agreement, which, subject to limits, can change the level of liability. The readings cover this.

Given the importance of the personal obligations undertaken by trustees, Equity discouraged delegation, although practical realities of commerce have loosened the duty not to delegate. The key in delegation cases, however, is that if a delegate messes up, the trustee will be personally liable if the delegation was wrongful, but not if it was lawful. Be careful. In all cases a trustee has a duty to protect the trust property and therefore has to use causes of action available against any delegate, whether the delegation was wrongful or not, and it is a breach of trust not to sue where a suit is appropriate. The point is that in wrongful delegation cases the trustee is on the hook personally even if it is not possible to sue the delegate, or if the delegate is insolvent.

The trustee owes duties equally to all beneficiaries, unless the trust agreement provides otherwise. This creates challenges where there are capital beneficiaries and income beneficiaries, as those entitled to capital will have interests that conflict with those entitled to income. The trustee is to balance those competing interests in investment and payment decisions and can be liable to disadvantaged beneficiaries if this is not done correctly.

The trustee is also obliged to account for the trust property and to keep records and make them available to beneficiaries subject to reasonable conditions.

Recently the Supreme Court has indicated that in certain circumstances a trustee is required to inform beneficiaries of the fact of the trust's existence in a duty to disclose. See *Valard Construction Ltd. v. Bird Construction Co.* [2018] 1 SCR 224.

Trustees can seek the advice of the Court in some cases – such as where trustees, who must act unanimously, are deadlocked through an inability to agree – but courts do not want trustees passing the buck and failing to make decisions they should be able to make with reasonable legal advice.

There are potential defences, and exculpatory clauses are possible. These are discussed below.

Students are expected to know the range of trustee duties and powers that apply in a given case, and to recognize breaches of trust, applying the appropriate standards. Students should also be able to call on earlier material dealing with remedies to identify how the breaches will be remedied, and to recognize the impact of exculpatory clauses, defences, and rights of indemnification against co-trustees and beneficiaries.

(a) Appointment and removal

Text 147-152
G&W. 251-272
CB. 873-900

(b) General Overview

Text 154-168
G&W. 273-279
CB. 115-142

(c) The basic duty of loyalty and good faith

- material already covered above in fiduciary duty context.

(d) The duty to carry out trusts and the use of powers

G&W. 273-279
CB. 901-908

(e) The duty of care and its standard

G&W. 273-284, 347-369
C.B. 135-142

(f) The duty not to delegate

G&W. 279-284
C.B. 910-915

(g) The duty to be impartial

G&W. 298-309
C.B. 951-973

(h) The duty to account

G&W. 313-316
C.B. 115-128

(i) The duty to invest and investment powers

G&W.284-298
C.B. 945-973

(j) Trustee's powers

G&W. 316-325
CB. 143-169
Review the Trustee Act in the jurisdiction where you will be taking the examination

(k) Advice of the court

G&W. 325-338
C.B. 903-908

(l) Trustee's defences

Text 1187-193
CB 1049-1076
G&W. 350-363

C. The Express Trust – Establishing the Express Trust

Now that the trust mechanism in operation is understood, it makes sense to learn how to build a trust. The following readings identify the elements that must be present for a valid enforceable trust to be created.

In the ordinary case, the law relating to certainty of intention is simple. What is required is a finding that the settlor intended to impose mandatory, enforceable obligations on himself of

herself in declaration of trust cases, or on the transferee of the property in trust transfer cases. This is a question of fact to be determined based on the objective indicators of what the settlor must have had in mind. As *Antle v Canada* shows, this is determined both by the alleged trust instrument, and the way the parties in fact behave, particularly where it is alleged that the trust is a sham transaction. The cases selected give an indication of some of the factors that will influence a court's finding on this. Where a trust is said to arise out of a business arrangement, the apparent intention of both parties will influence the determination of whether there is a trust. See *Dhillon v E. Sands & Assoc.Inc.* [2010] B.C.J. No. 2599 (B.C.C.A.).

The cases also introduce the *Quistclose* trust, which arises whenever property is transferred subject to mandatory limits on the use to which it can be put. The *Quistclose* trust has created conceptual challenges since it arose in cases involving unsecured loans where it was agreed that the money was to be used only for specific purposes. If the money is used for the specific purpose, it is obvious that the relationship between the transferor and transferee is a mere debtor-creditor relationship. Problems occur if the money is used for improper purposes. Courts used the *Quistclose* trust to engraft trust obligations to give the transferor proprietary remedies in such cases. Some decisions base this mechanism on the theory that the transferor intended the money to be transferred in trust on terms that if the specific purpose is not carried out the money is to be returned to the settlor, who retained the beneficiary's interest in the property pending its proper application. In *Twinsectra,* Lord Millet, no doubt bothered by the artificial search for intention, preferred to consider the *Quistclose* trust to be a "resulting trust." As will be seen, resulting trusts arise when an express trust fails after the property has been transferred; since the trust cannot be perfected and the "trustee" was never meant to keep the property beneficially, the beneficial interest in the property "results back" to the settlor. Since "resulting trusts" are closely tied to "intention," intention issues arise again in that context. The editors of the Case Book have included the *Quistclose* trust in the discussion of purpose trusts because the mechanism can be used as an alternative way to get around the limitation on non-charitable purposes trusts, which will be explored below.

Certainty of subject has two components – what the subject matter of the trust is and what the share of each beneficiary is. The subject matter rules are obvious; it is not sensible to speak about property being held in trust if it is not clear what that property is. There are rules for identifying share, disclosed below.

Certainty of object is more complex because there are different kinds of trusts which carry different certainty of object rules.

Students are expected to be able to provide reasoned conclusions in applying the correct certainty standards to a given set of facts.

A. Establishing the Trust

1) Capacity

G&W. 70-73
C.B. 175-177
Text 51-53

2) The Certainties

Text 41-47

(a) Intention

G&W. 74-81, 376-393
C.B. 178-185
Antle v Canada [2010] F.C.J. No. 1317 (Fed.C.A.), leave to appeal refused [2010] SCCA No. 462
C.B. 671-697, G&W. 495-504 unjust enrichment

(b) Subject matter

G&W. 81-87
C.B. 185-202

(c) Objects

(i) fixed trusts
G&W. 87-88
C.B. 202-205

(ii) discretionary trusts and powers
G&W. 88-104
C.B. 205-229
Text 21-37

3) The Beneficiary Principle

The "beneficiary principle" arises from the fact that trusts are mandatory equitable obligations. Unless there is someone with standing to enforce the obligations, there cannot be a trust. Since it is the beneficiaries who have standing, there must be a human beneficiary capable of enforcing the trust or it is invalid. The trust must therefore be for persons, not purposes. A trust is not a person trust simply because it benefits humans. A trust to promote peace benefits humans but it is a purpose trust. The question is whether the predominant intention of the settlor is to bestow a benefit on particular individuals, or to accomplish a purpose. Be clear. A person trust can be set up to accomplish a specific objective without it becoming a purpose trust; a trust to educate my children accomplishes a purpose but my primary motivation is to benefit my particular children. This trust would not offend the beneficiary principle. Historically, Equity took a narrow view of when trusts were for persons.

Some purpose trusts benefit society. The Attorney General has sufficient interest in these trusts to be able to enforce them. Courts therefore began to enforce trusts that had sufficient public benefit to be "charitable." The law continues to do so and there are strict standards, described below, for charitable trusts. Develop an analytical framework for each kind of charitable trust so that you can apply them when the facts call for it.

Be aware that some charitable trusts benefit from preferred tax treatment, as a matter of public policy. Whether a charitable trust qualifies for tax preferred treatment is a different question than whether it is valid, although there is tremendous overlap as CRA, Canada's tax agency, tends to use the equitable tests of validity in determining whether tax preferred status is conferred. The tax cases are therefore helpful in setting out standards for valid charitable trusts. Students are expected to apply Canadian standards in setting out and applying the relevant standards to see if trusts achieve charitable status validity and charitable status tax preferred treatment. They must also be adept at the political purpose doctrine and potential ways of saving charitable trusts that appear to run afoul of it. Students are also expected to be capable of applying cy pres doctrine where charitable trusts become impossible or impracticable to perform.

Ironically, since mere powers are not mandatory, the beneficiary principle is not offended where money is set aside or transferred with the recipient being given the "authority" rather than the duty to use it for a "purpose." Subject to public policy, and "perpetuity considerations" (having to do with rules setting out how long a settlor can impose ongoing limits on the use that transferred property is to be put to – the period for purposes is 21 years), a purpose power can be upheld. Since it is a power, the recipient cannot be forced to use it for the purpose identified, but can be stopped from using it for an improper purpose. This limitation would be enforced by the party who is to receive the property if the power is not used or if used does not exhaust the funds set aside. This will be the donee of the gift over, if any (i.e., the party described in the disposition as the one to receive if the power is not exercised) or the settlor, if there is no gift over.

Equity's courts refused to treat non-charitable purpose trusts as if they were purpose powers, and thereby save them. They would be struck down, although a handful of esoteric exceptions arose; purpose trusts for saying masses, building monuments, maintaining graves and caring for pets will be treated as purpose powers and saved for the perpetuity period. Courts and legislation have found ways around this limit. Students are expected to be able to identify mechanisms available in their jurisdiction for saving failed purpose trusts.

The readings also explore the theory that permits unincorporated associations to hold property. These associations are not separate legal entities, and therefore do not have legal capacity to own assets. Functional utility has required courts to find ways to permit unincorporated associations to administer assets. Students should be capable of applying those techniques.

(a) General

Text – 44-47

(b) Charitable Trusts

(i) determining charitable status and its benefits
G&W. 183-239
C.B. 365-440

Vancouver Society of Immigrant v Visible Minority Women [1999] 1 SCR 10
Text 61-69

(c) Other Transfers for Purposes

(i) Non-charitable purpose trusts
G&W. 165-183
C.B. 503-548
Text 69-80

4) Constitution of Trusts

In the trust context, the law of constitution simply describes the process of getting the property into the hands of the trustee. In declaration of trust cases (cases where the settlor announces they will henceforth hold property they already own in trust) issues of construction are indistinguishable from certainty of intention issues. In trust transfer cases (case where a settlor transfers property to a trustee) the successful transmission of legal title is needed. The cases below describe a number of propositions identifying how Equity responds when trust transfers fail to occur. They deal with cases where property ends up in the ownership of the designated trustee by coincidence, and whether and when this will perfect a trust. Students are expected to be able to cope with these rules. [Cases dealing with promises to create a trust are quite esoteric, and are therefore omitted from the syllabus.]

(i) General
Text 47-57
CB 229-238
G&W 104-112

(ii) by declaration
G&W. 112-125
C.B. 238-244

(iii) by transfer
G&W. 106-112
C.B. 244-262

5) Formalities

Some trusts must be created in writing. Equity hates to see *inter vivos* trusts fail for want of formalities and so tends to find a way around the formality requirements. This is not so with testamentary formalities. Students should know when formality requirements apply and be able to identify techniques that limit their effectiveness.

G&W. 126-146
C.B. 277-286

6) Public Policy

Students are expected to be able to recognize trusts that are contrary to public policy.

G&W. 134-141
C.B. 289-309

D. The Resulting Trust

Equity developed the "resulting trust" tool to deal with cases where legal title has been transferred but where the beneficial interest has not been properly assigned. The trustee was never intended to have it so Equity felt obliged to find a way to keep that from happening. The theory is that the beneficial interest "results back" to the settlor. There are essentially two classes of case where this happens. In the first, the settlor has not succeeded because of inadvertence or rules of conveyancing or public policy from successfully disposing of the beneficial interest. These cases are sometimes called "automatic resulting trust" cases since the result is pre-ordained by rules of law. Other cases are based on a search for intention. Courts are not quick to presume that an owner intended to give the benefit of ownership away; the law of Equity requires "certainty of intent" for this to occur. Equity therefore developed rules or presumptions to deal with recurring situations, in determining whether a gift was apt to have been intended. Students are expected to know how the presumptions of advancement and resulting trust operate in their jurisdiction and to be able to apply those and other resulting trust rules.

The Supreme Court of Canada has explored the interplay of the presumption of advancement and the resulting trust in *Pecore v. Pecore* [2007] 1 SCR 795. The case dealt with an elderly testator who had placed his funds while alive into a joint account shared with his daughter. The decision is quite prescriptive as to what happens in this circumstance.

1) General

Text 107-123
G&W. 411-413
C.B. 553-561
See *Kerr v Baranow* [2011] 1 SCR 269, paras1-3, 12-29
Rascal Trucking Ltd. v. Nishi [2013] 2 SCR 439 – rebutting presumption of a 'commercial purchase money' resulting trust.

2) Failure of Express Trust Where Property Passes

G&W. 439-446
C.B. 562-588

3) Apparent Gifts, Purchase Money and Voluntary Transfers

G&W. 413-439
C.B. 588-670

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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (**www.canlii.org**). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

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