Trusts
Fall Term 2017

Lecture Notes – No. 11

ADMINISTRATION OF TRUSTS

The administration of a trust can be thought of like the operation of a business; the trust settlement is like the articles of the company's incorporation, the trustee is like the CEO, and the beneficiaries are like the shareholders (indeed trusts and equitable devices were used to organize business enterprises before the development of modern corporate law). However, because the beneficiary has little power and the orientation of the trust is often not commercial, the recognition of the trustee as a fiduciary hovers above the whole area.

In the absence of terms provided in the settlement, (and sometimes even where terms are provided) there is a statutory scheme provided that governs the rights, powers, obligations, and liabilities of the trustee. **A settlor may depart from the statutory scheme but should do so carefully.**

Please note that many of the cases arise in a testamentary context. The Estate Trustee is a trustee over the assets of the Estate and the Estate must account to creditors and those interested in the assets of the deceased. The Estate Trustee is a real trustee, but there are many augmentations that arise in respect of the administration of an Estate. We will not deal with those rules very much in this course.

1. Introductory Points

The trustee is the key figure in trusts law once the trust has been established. He or she owes extensive duties to the beneficiary and others, any may suffer personal liability for their breach. These duties arise at in equity and under statute.

At the same time, **the trustee is decidedly not the insurer of the beneficiary's interest.** The trustee will be forgiven technical breaches of his or her duty of care where the trustee acts honestly and reasonably. If the position were otherwise no rational person would ever agree to occupy the office of trustee and the trust device would become an empty doctrine.

As is always the case with legal questions, there is a balancing of interests here – the protection of the vulnerable beneficiary from the incompetence or wrongful conduct of the trustee on the one hand, and, the protection of the trustee from liability for events beyond his or her control or reasonable contemplation on the other. Key to constructing such a balance are precise rules to govern such matters as investment of trust funds and delegation of powers by trustees. Where there remains uncertainty as to a contemplated course of conduct, the trustee may seek directions from the Court.

Please familiarize yourself with the provisions of the **Trustee Act, RSO 1990, c.T-23**; in the absence of provisions in the trust instrument on point, the statute sets out a number of relevant provisions respecting basic administration of the trust.

Basic Duties and Powers of the Trustee

The trustee owes a *general fiduciary duty of loyalty* as well as a *general duty of care*.

A number of non-compellable powers are also at the trustees' disposal – the most important of which is usually the power to sell the trust property**. It is important to note that the Court can rule as to whether a contemplated course of conduct is within the powers of the trustee but that the Court will not go beyond that – the Court will not exercise its own judgment to compel the trustee to exercise a discretionary power.**

For information on the trustee's obligations in respect of reporting to the CRA, see the CRA publications in respect of the T3 Filing available on the Internet at:

http://www.cra-arc.gc.ca/tx/trsts/menu-eng.html

Sources of Regulation

The trustee's conduct is regulated by three main sources:

(i) the trust instrument itself;
(ii) applicable statutes (especially the Trustee Act in Ontario);
(iii) thought the court's equitable jurisdiction.

The over-arching obligation of the trustee is to enforce the trust instrument and safeguard the entitlements of the beneficiaries – statute and equity may change the operation of the trust instrument itself, but it is the trust instrument which is the most important source in most cases.

2. Appointment, Renunciation, Renewal, Retirement & Removal of Trustees

→ See Trustee Act, ss. 2-8.

(a) Appointment

An express trust proceeds from a settlement – written or oral – wherein the settlor conveys to the trustee the subject-matter of the trust in favour of the objects of the trust, the beneficiaries. It is the settlor that chooses the trustee and the trustee must consent to his or her appointment. Once fully constituted, the settlor loses all power to deal with the property. Quite simply, it is now the property of the trustee.

What if the trustee is no longer able or willing to act?

If the trust documents provides a procedure for retirement and a new appointment, then its provisions will be followed. For example, the settlor may reserve a power of further

appointments to herself or set out a list of substitutes – this is really just a matter of construing the trust instrument and following the procedures set out therein.
In the absence of such provisions, or where such provisions are defective, the statute's provisions provide the framework for appointment, renewal, retirement, and removal. It is important for a person drafting a settlement to be aware of these provisions. **In most cases, it is most convenient to follow the statutory scheme.**

Re Brockbank
[1948] Ch 206

This was a typical sort of dispute. There was a testamentary trust established in favour of the widow for life with a gift-over to the children. There were two trustees and one wished to retire; the beneficiaries had a preferred replacement trustee but the retiring trustee disagreed and would not join the other trustee in exercising their joint power to appoint a replacement. The beneficiaries sought to force his hand; the judge declined to make the requested Order, holding that **the beneficiaries cannot compel a trustee not to exercise or not exercise a statutory or trust-created power of appointment of new trustees; the beneficiaries may either wind up the trust if all are sui juris or allow the trustee to act as he or she is entitled to act**.

Per Vaisey J:

> It seems to me that the beneficiaries must choose between two alternatives: Either they must keep the trusts of the will on foot, in which case those trusts must continue to be executed by trustees duly appointed pursuant either to the original instrument or to the powers of s. 36 of the Trustee Act, 1925, and not by trustees arbitrarily selected by themselves; or they must, by mutual agreement, extinguish and put an end to the trusts, with the consequences which I have just indicated.
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> The claim of the beneficiaries to control the exercise of the defendant's fiduciary power of making or compelling an appointment of the trustees is, in my judgment, untenable. The court itself regards such a power as deserving of the greatest respect and as one with which it will not interfere… [i]f the court, as a matter of practice and principle, refuses to interfere with the legal power of appointment of new trustees, it is, in my judgment, a fortiori not open to the beneficiaries to do so. As I have said, they can put an end to the trust if they like; nobody doubts that; but they are not entitled, in my judgment, to arrogate to themselves a power which the court itself disclaims possessing, and to change trustees whenever they think fit at their whim or fancy - for it follows from Mr. Cross' argument for the present plaintiffs (as appeared from his reply to a question I put to him during the course of the hearing) that whenever the beneficiaries choose to say that they do not like their trustee, they can order him to retire and order him to appoint anyone they like to succeed him. That seems to me to show a complete disregard of the true position.

Indeed, this same policy governs where the trustee wishes to exercise a statutory power and wishes to force the hand of the other trustees to agree. Again, the trustee can exercise the power or remain in office or not, but it's not for the court to involve itself:

Re Moorhouse
[1946] OWN 789 (HCJ)

Here one of the trustees wished to retire but only on the condition that a person whom she nominated – her own lawyer - would be appointed by the Court. The judge refused holding that she was in essence trying to remain in place (through her lawyer) while retiring and calling upon the Court to exercise a power which it did not have.

Per Barlow J:

> 6 Mary Elizabeth Butler Moorhouse does not ask to retire unconditionally as trustees She only asks to be discharged if Eric G. Moorhouse is appointed in her place and stead. If he is not to be appointed by the Court she wishes to continue…
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> 7 This places in the Court not only the power to appoint but also there goes with it a discretion as to the person to be appointed.
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> …
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> 10 Where there is a continuing trustee, I do not find in The Trustee Act any power permitting one trustee to retire and to dictate the person to be appointed in his or her place or stead. If a trustee wishes to retire, he must retire unconditionally, leaving it to the continuing trustee or to the Court to appoint a new trustee, if it appears advisable. It therefore follows that Mary Elizabeth Butler Moorhouse has no power to appoint Eric G. Moorhouse a trustee in her place and stead, and furthermore she ought not to be permitted to hamper the Court in its discretion by attempting to dictate whom the Court should appoint.
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> 11 Furthermore, Eric G. Moorhouse is the personal solicitor of Mary Elizabeth Butler Moorhouse, who is now a trustee and the life tenant. If he were to be appointed trustee it may very well be that his interest as trustee and his interest as solicitor for the life tenant would come in conflict. For this reason alone he ought not to be appointed: In Re Kemp's Settled Estates, (1883) 24 Ch. D. 485; Lewin on Trusts, 14th Edn. p. 445 and In Re Norris, Allen v. Norris, (1884) 27 Ch. D. 333.
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> 12 For the above reasons it would be improper to grant the application. The application will be refused. The costs of the Premier Trust Company will be paid by the applicant.

(b) Retirement:

Re McLean
(1982), 135 DLR (3d) 667 (Ont HCJ)

Whilst a trustee may resign, an executor (now 'estate trustee') may not (although the court may allow substitution) and thus a person who holds both offices must seek release from both under separate processes. Why? Although the two offices share many features, the Estate Trustee owes more extensive duties to those interested in the assets of the estate (creditors) and has made an undertaking to the efficient administration of the estate (upon appointment).

Gonder v Gonder Estate
2010 ONCA 172 (Ont. C.A.)

Here a brother and sister fought over the sole asset of their late sister's estate. The sister and her husband were the estate trustees. The house was left to the testarix's mother for life, gift over in differential shares to others including both the brother and the sister. Taxes were owed and their was a lien on the house in favour of the CRA. The brother said he was the true owner of the house, sued the Estate, and obtained a Certificate of Pending Litigation (which prevented it from being sold). The upshot was that the estate trustees had to manage an asset, but could not sell it to settle the action or satisfy the lien. The sister brought an application to be allowed to retire.

At trial, **(2009), 49 E.T.R. (3d) 152 (Ont Sup Ct)**: the court allowed the trustee to retire even without a replacement as the brother could apply himself to be appointed. In essence, the Court told the brother that he was holding up the administration of the Estate and was in a position to himself take it on.

On appeal, Rouleau and and Epstein JJ.A. held:

> **22** The role of trustee is a difficult one. **A trustee must act in the best interests of the beneficiary, even at personal hardship. However, if such obligations were unlimited, and if no relief were available, "no one would undertake the task of trusteeship":** see Donovan W.M. Waters, *Waters Law of Trusts in Canada* 3d ed. (Toronto: Carswell, 2005), at p. 841.
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> **23** In the specific circumstances of this case there were three objectives that ought to have been considered and addressed by the motion judge: (1) ensuring the orderly administration of the estate in the interests of the beneficiaries; (2) recognizing the plight of the respondents; and (3) providing for the timely resolution of the disputes concerning the estate.
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> **24 Although the interests of the beneficiaries must be the primary concern of both trustees and the courts, as we see it, the courts can meet each of these concerns, and do justice to all of the parties without requiring that a replacement trustee be immediately appointed, so long as there are steps taken to ensure the proper administration of the estate.** We reach this conclusion based on the following: First, the courts have historically exercised an inherent equitable jurisdiction to remove trustees, even

if it would, for a period, leave no trustee to administer the estate, so long as provision was made for the estate's orderly administration. Second, no statute has removed this power. Finally, there may be reasonable alternatives to the immediate appointment of a new trustee that can ensure the proper administration of the estate.

25 The motion judge erred not because he removed the respondents as trustees without appointing a replacement. Rather, the error was to remove them without making alternate provisions for the proper administration of the estate. It is for this reason alone that the matter must return to the Superior Court to be reconsidered.

…

33 We recognize that there is good reason to ordinarily require a replacement trustee to be located. The fiduciary nature of the trustee role ensures that they "put the beneficiary's interests first in the performance of any act and the exercise of any powers or duties": see Gillese, at p. 130. History has proven that trustees are effective actors in ensuring that the estates of deceased persons are administered properly. When a trustee wishes to resign, it will ordinarily fall to that person to locate a replacement trustee. The modern reality is that the court is ill suited to locate replacements.

34 However, as we will discuss below, a trustee is not the only entity that can ensure the proper administration of an estate. **In the very rare cases where equity demands that a sole trustee be removed, but no replacement is forthcoming, courts possess an inherent jurisdiction to order the trustee's removal and provide for the orderly administration of the estate.**

…

43 As we read it, **s. 37(4) does not constrain the power of the court to remove a sole remaining trustee and provide for an alternative mechanism for administering the trust in those rare cases where a replacement trustee is not available and the exercise of inherent jurisdiction is required.**

44 The purpose of s. 37(4) is to give the court discretion to decide not to replace a removed trustee when one or more trustees remain. In other words, there is no obligation to ensure that the "status quo" is maintained by appointing a replacement. In the spirit of simplifying the trusteeship regime, s. 37(4) also provides for how the powers and rights of the removed trustee devolve in the event that he or she is not replaced. The authority of the removed trustee vests in the remaining trustees.

45 Such a clarification is understandable. **Older decisions, such as *Mitchell*, express a judicial preference against moving from multiple estate trustees to a single trustee on the premise that a testator's choice to appoint more than one trustee initially represents a desire to avoid their estate falling into the control of a single person: see *Mitchell*, at p. 449. This may be a relevant consideration in appropriate circumstances.**

Section 37(4) merely provides that such considerations need not predominate in all cases.

46 In summary, it appears to me that no single provision of the *Trustee Act*, nor the Act as a whole, ousts the inherent equitable jurisdiction of the court to remove a trustee. This is true even if such a removal would leave the trust without a trustee, so long as the court ensures proper administration of the estate in the best interests of the beneficiaries.

…

56 The motion judge had before him two motions: one for removal, and another for directions. In the latter motion, the respondents sought to have the court order the sale of the home. While the motion judge dismissed the motion for directions as moot, having already released the respondents from their trusteeship, for the reasons given above, this was not the correct approach. Without commenting on the merits of the motion for directions, the difficulties caused by the removal of the respondents as estate trustees might have been addressed by an order for a sale.

57 A practical impediment to the sale of the home is the presence of a certificate of pending litigation registered on title. So long as it remains, no one would realistically purchase the property.

58 On a new motion for removal, the respondents might renew the request to sell the property and seek an order discharging the certificate. This should be done on notice to all potentially interested parties and may require additions to the record. As an equitable instrument, a certificate may be discharged by the court "on any ... ground that is considered just": see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 103(6)(c). On such a motion, "the Judge must exercise his discretion in equity and look at all of the relative matters between the parties in determining whether or not the certificate should be vacated": see *Clock Investments v. Hardwood Estates Ltd. et. al.* (1977), 16 O.R. (2d) 671 (Div. Ct.), at p. 674.

59 Because no motion was brought under r. 42.02 of the *Rules of Civil Procedure*, for a discharge of the certificate, there is insufficient information before the court to speculate on whether the equities would ultimately favour a discharge.

…

64 A second potential option would be to address the problems that the life interest in the house are currently creating by resort to the court's inherent "salvage and emergency jurisdiction": see Waters, at pp. 1293-96. The court possesses an inherent jurisdiction to vary the terms of a trust in support of the settlor's intentions when circumstances "might 'reasonably be supposed to be one not foreseen or anticipated' by the testator, or one where his trustees were 'embarrassed by the emergency'": see *Tornroos v. Crocker*, [1957] S.C.R. 151, at p. 158.

…

CONCLUSION

68 The removal of a sole trustee without appointment of a replacement is an extreme remedy, and will be inappropriate in most cases. It will only be available when no other option is realistically available. In our view, given the limited value of the estate, the conflict of interest that the respondents are now in as creditors of the estate, and the lack of viable replacement trustees, this is one such exceptional case.

69 That said, the motion judge was wrong to remove the respondents as trustees without also crafting a mechanism by which the estate could continue to be administered.

70 This is a case that cries out for a practical solution. It is in that spirit that the judge hearing this matter should approach the task.

71 The suggestions for solutions that we have outlined above are merely that: suggestions. Nothing in these reasons should be read as preventing the motion judge from finding other equitable mechanisms for ensuring the proper administration of the estate and the protection of the interests of the beneficiaries.

72 On further evidence, it may be clear that some of these options are illusory, while other as of yet not contemplated solutions may exist. What is necessary is that, together with any order removing the trustees, there must be an order that protects the best interests of the beneficiaries.

73 We also note that the true core of the dispute in this case is between the appellant and the respondents in their capacity as beneficiaries, not as trustees. The dispute should proceed with this reality in mind.

74 Taking all these circumstances into account, in our view, the appropriate order is that the appeal be allowed and remitted to the Superior Court to consider the application for removal in conjunction with a motion for directions assessing how to administer the estate. Any person having a claim to the property or the estate should be served with the motion for directions and this judgment. We would order that the issue of the costs of the motion under appeal be reserved to the judge hearing the motion. We would make no order as to the costs of the appeal.

75 Given our finding on the first issue raised by the appellants, it is unnecessary to comment on the passing of accounts.

76 Regrettably, this disposition resolves very little and essentially remits the matter to the Superior Court for resolution. Given the amounts at issue and the cost of further litigation, this appears to be a case that cries out for early resolution and some form of consensual out-of-court resolution. If the parties are prepared to consider that avenue and require the court's assistance, we may be approached through the Registrar to make appropriate arrangements

(c) Removal:

The Court may remove trustees through its inherent jurisdiction to supervise trusts and its statutory jurisdiction to remove and replace trustees as an extreme response to trustee wrongdoing or trustee conflict. In such cases, removal and replacement is necessary to ensure the proper administration of the trust and protect the beneficiaries. In **Radford v. Radford Estate (2008), 43 E.T.R. (3d) 74, para. 113 (Ont. S.C.J.),** Quinn J. held:

> Friction between co-estate trustees is likely to warrant the removal of either or both of them because it is prone to impact the decision-making process. However, this is a more remote likelihood where the friction is between a trustee and a truculent beneficiary. Of course, in either case, the friction must be of such a nature or degree that it prevents, or is likely to prevent, the proper administration of the trust.

Conroy v Stokes
[1952] 4 DLR 121 (BCCA)

The beneficiary has no power to compel a trustee to act in a certain way and the court ought not to intervene merely to force the trustee to act in a manner that meets the beneficiary's expectations. Where the trustee acts in bad faith or in a manner that endangers the trust property, the court may intervene to safeguard the interests of the beneficiary (the collective interests of the beneficiaries rather than their individual or collective desires). Most important in such a determination is a lack of honesty or fidelity on the part of the trustee; in such cases, the court may invoke its jurisdiction to replace the trustee by court order. Per Bird JA:

> The learned trial judge has recited in his reasons for judgment the various grounds for the applicants' dissatisfaction with the administration of the trust, which need not be repeated here. Suffice it to say that the learned judge does not find misconduct or breach of trust on the part of the trustees, or that the acts or omissions complained of are such as to endanger the trust property, but founds the order for removal of the trustees appointed by the testator upon the sole ground that friction had developed between the applicants and the trustees, relative to the latter's conduct of the affairs of the estate, arising out of dissension between the applicants and the widow of the testator, the latter being his second wife, and the former the children of his first wife. The learned judge held therefore: 'It is in the interest of all parties under the circumstances that the administration should be placed in the hands of an independent administrator..
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> …
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> Here the acts or omissions complained of do not, in my opinion, support a conclusion that the conduct of the trustees has endangered the trust property, or show a want of honesty or of proper capacity to execute the duties, or a want of reasonable fidelity. The failure of the trustees to account to the beneficiaries annually and to pass their accounts annually are perhaps matters for criticism on the basis of neglect of duty, but such omissions, as is said by Story, are not

> such as to induce the court to remove trustees unless persisted in. Moreover, it appears that since the initial complaint in this regard by the applicants, the trustees have remedied the omissions except in respect of moving the court to confirm the registrar's report on the passing of the accounts for the years 1950 and 1951, which we are told have been submitted to the beneficiaries, passed by the registrar and, but for these proceedings, would have been the subject of an application for confirmation by the court.
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> …
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> In the circumstances I find nothing in the evidence to support a conclusion that the "welfare of the beneficiaries," and that phrase I think must be taken to mean the "benefit of the beneficiaries collectively," has not been impaired by any act or omission of the trustees.
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> Consequently, I think, with great respect, that the discretion of the learned trial judge has been exercised on wrong principles and that he has omitted to apply the correct and guiding principles laid down in the decisions cited. In these circumstances the order made below cannot be sustained…

2. Powers Of The Trustee: To Seek The Court's Direction

Superior courts have a number of specialized functions. Normally, a judge is thought of in terms of exercising his or her adjudicative functions; that is, to decide a court case between adversaries. In the law of probate, a judge has an "inquisitorial jurisdiction" to determine whether a Will or other testamentary instrument is valid, which is important given that rights to the property of a deceased person will vest in an executor who will at some point transfer title, directly or indirectly, to a creditor or dependant or beneficiary. It is important that such transactions remain unimpeachable as a matter of ordinary business. In the law of trusts, the Court has an "advisory" jurisdiction that is special. Conceptually, the jurisdiction allows the trustee to bring a contemplated course of conduct before a Judge before action is taken to ensure that so acting will not be a breach of the trustee's fiduciary obligations and expose the trustee to personal liability. Thus, this advisory jurisdiction was (and remains) principally one that was oriented to trustee protection. It was not (and is not) a jurisdiction oriented at determining competing interests in the trust. It is a natural companion to the special trustee's defence to breach of trust (that is, breach of the trustee's duty or care) where he or she did not seek direction from the Court but still acted "honestly" and "reasonably".

The operative phrase used in most statutes - the "opinion, advice or direction" of the Court - can be traced to the mid-nineteenth century statutory reforms of the law of property and trusts enacted by the British parliament. Section 30 of the *Law of Property and Trustees Relief Amendment Act* (1859), 22 & 23 V., c.35 ("Lord St. Leonards' Act") provided:

> Any Trustee, Executor, or Administrator shall be at liberty, without the Institution of a Suit, to apply by Petition to any Judge of the High Court of Chancery, or by Summons upon a written Statement to any such Judge at Chambers, for the Opinion, Advice or Direction of such Judge on any Question respecting the Management or Administration of the Trust Property or the

> Assets of any Testator or Intestate, such Application to be upon or the Hearing thereof to be attended by all Persons interested in the Application, or such of them as the said Judge shall think expedient; and the Trustee, Executor or Administrator acting upon the Opinion, Advice or Direction given by said Judge shall be deemed, so far as regards his own Responsibility, to have discharged his Duty as such Trustee, Executor, or Administrator in the subject matter of said Application; provided, nevertheless, that this Act shall not extend to indemnify any Trustee, Executor, or Administrator in respect of any Act done in accordance with such Opinion, Advice or Direction as aforesaid, if such Trustee, Executor, or Administrator shall be guilty of any Fraud or wilful Concealment or Misrepresentation in obtaining such Opinion, Advice or Direction; and the Costs of such an Application as aforesaid shall be in the Discretion of the Judge to Whom the Application was made.

Lord St. Leonards called his Bill "a great benefit to trustees, and, by substituting a cheap and simple process of determining questions, prevent the necessity of expensive suits." Notwithstanding the fact that "cheap" and "simple" processes are few and far between in the law, the objective has considerable merit.

The jurisdiction is now contained in Ontario's *Trustee Act*, section 60(1):

> 60. (1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.

Re Wright
(1976), 14 O.R. (2d) 698 (Ont. H.C.J.)

Here the Court refused an attempt to force non-consenting trustees to act where the majority of trustees favoured action, nor would the Court replace the non-consenting trustee.

Per Craig J.:

> This is a case where the executors and trustees are in agreement to sell these shares [subject of a testamentary trust], and they only differ as to the adequacy of the price…
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> I adopt the language of Middleton, J., in the case of *Re Fulford* (1913), 29 O.L.R. 375 at p. 382 as follows:
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> 'The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to

> legal matters or legal difficulties arising in the discharge of the duties of executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.'

In *Wright*, Craig J also approved dicta in **Tempest v Lord Camoys (1882), 21 Ch D 571 (Eng CA); cb, p.947** for the 'principle that the Court has no power, save in the case of *mala fides* or a refusal to discharge the duty undertaken, to put a control on the exercise of the discretion which the testator has left to the trustees.'

3. The General Duty Of Care

The trustee has many obligations to fulfil and powers that he or she can exercise in fulfilling those obligations. The trustee may act honestly and in the best interests of the beneficiaries; that is the nature of his or her fiduciary duty. However, one should not regard the fiduciary principle as the sole means to control the administration of the trust as it really is more about the conduct of the trustee in acting where there is quite serious misconduct. The trustee is also liable in respect of breaches of his or her general duty of care – but the standard of conduct is a familiar one, reasonable performance ('ordinary prudence' is the traditional test). As we will see, there are limits – for example delegation of powers by the trustee.

> **A trustee should have errors & omissions insurance if at all possible, and a person approached to act as trustee may be wise to agree only on the condition that such insurance is purchased and maintained using trust funds.**

Fales v Canada Permanent Trust Company
[1977] 2 S.C.R. 302

The residue of the testator's estate went to his wife for life, remainder to children. There were two trustees, the wife and a trust company. There was an obligation to sell the assets held on death and convert them to other assets, with a power to postpone the sale. Half the assets were sold and shares purchased – the purchased shares were inappropriate investments and eventually were worth nothing. The children sued the trust company; the trust company brought a contribution action against the wife.

At trial, held for the children. The trial judge held that the professional trustee failed to advise the non-professional trustee and failed to sell the shares when they ought to have and calculated damages based on the average price at that time.

At first appeal, the damages were reduced and the wife was held liable in breach of trust. The BCCA re-calculated the sale price as an average during the period commencing when the shares should have been sold until the time the shares were de-listed by the stock exchange. The wife was held liable to make a contribution and her claim for damages for lost income was dismissed.

On further appeal to the SCC, the trial judge's assessment of damages was restored and the wife excused for breach of trust. She had acted honestly and reasonably while the

professional trustee had not; as such, she had no obligation to contribute to the damages award.

Per Dickson J.:

> **Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs** (*Learoyd v. Whiteley* [(1887), 12 App. Cas. 727.], at p. 733; Underhill's Law of Trusts and Trustees, 12th ed., art. 49; Restatement of the Law on Trusts, 2nd ed., para. 174) **and traditionally the standard has applied equally to professional and non-professional trustees. The standard has been of general application and objective though, at times, rigorous.** There has been discussion of the question whether a corporation which holds itself out, expressly or impliedly, as possessing greater competence and ability than the man of ordinary prudence should not be held to a higher standard of conduct than the individual trustee. It has been said by some that a higher standard of diligence and knowledge is expected from paid trustees: Underhill's Law of Trusts and Trustees, art. 49, relying upon obiter of Harman J. in *Re Waterman's Will Trusts; Lloyds Bank, Ltd. v. Sutton* [[1952] 2 All E.R. 1054.], at p. 1055, and upon dicta found in *National Trustees Co. of Australasia v. General Finance Co. of Australasia* [[1905] A.C. 373 (P.C.)., a case which did not turn upon the imposition of a greater or lesser duty but upon the relief to which a corporate trustee might be entitled under the counterpart of s. 98 of the Trustee Act of British Columbia, to which I have earlier referred.
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> In the case at bar the trial judge held that the law required a higher standard of care from a trustee who charged a fee for his professional services than from one who acted gratuitously. Mr. Justice Bull, delivering the judgment of the Court of Appeal, was not prepared to find, and held it unnecessary to find that a professional trustee, by virtue of that character and consequential expertise, had a greater duty to a cestui-que trust than a lay trustee.
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> The weight of authority to the present, save in the granting of relief under remedial legislation such as s. 98 of the Trustee Act, has been against making a distinction between a widow, acting as trustee of her husband's estate, and a trust company performing the same role. Receipt of fees has not served to ground, nor to increase exposure to, liability. **Every trustee has been expected to act as the person of ordinary prudence would act. This standard, of course, may be relaxed or modified up to a point by the terms of a will and, in the present case, there can be no doubt that the co-trustees were given wide latitude. But however wide the discretionary powers contained in the will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.**
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> …

Applying the foregoing principles to the facts of this case, I do not think it can be doubted that Canada Permanent breached the duty which it owed the residuary beneficiaries of the Wohlleben estate. It is not necessary to decide whether a higher standard of diligence should be applied to the paid professional trustee, for Canada Permanent failed by any test. No one in that organization would seem to have brought his mind to bear upon the relative merits, and dangers, of retention and disposition of the shares with which we are concerned. It is not with the prescience of hindsight that one may conclude that the Inspiration shares should have been sold during the period of two and one-half years following acquisition. Notwithstanding recognition by Canada Permanent during the negotiations antedating the exchange that the Inspiration shares would be speculative and that it would be desirable to extract an undertaking from Pembertons to take them off the hands of the shareholders of Boyles Bros. who received them, the trust officers in Vancouver sat idly by and allowed the shares progressively to decline in worth until they became valueless. Despite gathering storm clouds and successive presages of disaster, no attempt was made to market the shares. **The vigilance, prudence and sagacity which the law expects of trustees was never apparent.** After the acquisition, the Vancouver trust officers charged with supervision of the account, initially Mr. Donnelly and later Mr. Jakeway, would seem never to have consulted a senior officer of the company concerning the shares of Inspiration. There was no communication between Vancouver and Toronto as to retention or sale. The Vancouver advisory committee, the head office management, the head office investment committee, the board of directors were available but never consulted. Internal procedures proved inadequate and sterile. Apart from the annual review of the Vancouver investment committee which produced cryptic, handwritten, practically illegible notations, there would appear to have been no meetings at which sale was considered. No minutes are in evidence.

Order to Pissue accordingly.