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Committee on the Modernization of the Trustee Act

Consultation Paper on the Variation and Termination of Trusts

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- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

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I. Background

Trustees are compelled to carry out the terms of a trust and, unless expressly provided in the trust instrument, they are not empowered to vary the trust even if to do so would be desirable for the beneficiaries. It was recognized that this potential lack of flexibility could severely limit the usefulness of the trust, thus the law evolved by developing mechanisms to facilitate the variation and termination of trusts.¹

One development under the common law was the rule in *Saunders v. Vautier*² that overrode the trustee's duty to carry out the terms of the trust by allowing beneficiaries to prematurely terminate a trust provided that all beneficiaries were *sui juris* and consented to the agreement. This rule was not available in cases where some of the beneficiaries were unborn, infants, unascertained or incapacitated. In 1958, following the recommendations of the Law Reform Committee,³ England adopted the *Variation of Trusts Act*⁴ to complement the rule in *Saunders v. Vautier*. The Act provided courts with the discretionary power to approve a proposed arrangement on behalf of beneficiaries who were unable to consent for themselves or not yet ascertained.

The present *Trust and Settlement Variation Act*,⁵ which was originally enacted in 1968,⁶ is based upon the *Variation of Trusts Act* adopted by the Uniform Law Conference of Canada in 1961, which in turn was modeled on the English legislation. This Act enables the courts to approve any arrangement varying or revoking all or any of the beneficial interests under a trust or enlarging the powers of the trustees with regard to the management or administration of the property subject

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1. The courts had the power to vary the terms of a trust under the common law, however this jurisdiction was exceptionally limited covering only circumstances of conversion, compromise, emergency and maintenance: A.J. McClean, "Variation of Trusts in England and Canada" (1965) 43 Can. Bar Rev. 181 at 184. (*See also Chapman v. Chapman* [1954] A.C. 429, 1 All E.R. 798 (H.L.), in which it was held that the inherent jurisdiction of the court did not extend to the variation or rearrangement of beneficial interests under a trust.)
 2. (1841), 4 Beav. 115, affirmed Cr. & Ph. 240, 41 E.R. 482 (Ch.).
 3. Sixth Report, *Court's Power to Sanction Variation of Trusts*, Cmnd. 310 (1957). Hereinafter referred to as the "Sixth Report."
 4. 6 & 7 Eliz. 2, c. 53.
 5. R.S.B.C. 1996, c. 463. Hereinafter referred to as the "*Trust and Settlement Variation Act*" or the "Act."
 6. *Variation of Trusts Act*, S.B.C. 1968, c.57.

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to the trust. The court can consent to an arrangement so long as the proposal is for the benefit of each of the persons on whose behalf the court's approval is sought; and, in the view of the court, the arrangement is overall one that ought to be approved.⁷

The practical benefit of trust variation legislation is not in dispute. The scope and language of the *Trust and Settlement Variation Act* however has, in large part, not been reconsidered since its enactment.⁸ This Report will review the questions that arise under the existing Act and provide options for reform upon which comment is sought.

II. Areas of Concern

A. Scope of the Court's Power to Approve a Variation

1. Should the Act be revised so as to broaden the ability of beneficiaries to vary or prematurely terminate a trust?

The rule in *Saunders v. Vautier* is this: it permits the premature termination of a trust if the beneficiaries are all ascertained, of full capacity and in agreement with the proposal.⁹ The Manitoba Law Reform Commission noted that while both the *Chapman*¹⁰ case and the *Variation of Trusts Act, 1958*, seem to rest on the assumption that a trust can be varied as well as terminated by the combined action of all the beneficiaries, the case law does not support this view.¹¹

Trust variation legislation is broader than the rule in *Saunders v. Vautier* in that it permits the court to approve any arrangement not only to revoke a trust, but also to vary the terms of a trust. This raises the concern that beneficiaries who fall under the rule in *Saunders v. Vautier* have no power to vary a trust as they cannot invoke the *Trust and Settlement Variation Act*. This can present difficulties as the ability to vary a trust may be preferable, in certain respects, to terminating and creating a new trust, such as with regard to tax consequences. In light of this

7. The exception to this is that under section 1(d) of the Act the element of benefit need not be considered: D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 1078.

8. Amendments were made following recommendations by the Law Reform Commission of British Columbia in its *Report on the Land (Settled Estate) Act*, Report No. 99 (1988). The Act was renamed, and section 4 was added to accommodate the repeal of the *Land (Settled Estate) Act*.

9. Waters, *supra* n. 7 at 963, discusses the narrow and broad form of the rule.

10. *Supra* n. 1.

11. *Report on the Rule in Saunders v. Vautier*, Report No. 18 (1975) at 11. Hereinafter referred to as the "Manitoba Report."

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should the Act be revised with regard to the types of proposed arrangements that require approval by the court?

If the Act should be revised, two approaches are possible. The first would be to provide that any proposed variation or premature termination requires approval by the court. This would abolish the rule in *Saunders v. Vautier* and bring those beneficiaries that fall under the rule within the scope of the Act. This approach has been adopted in Alberta and Manitoba.¹² In both jurisdictions the legislation requires judicial consent of proposed arrangements, but does not give the court the power to overrule the wishes of adult capacitated beneficiaries, as an arrangement can only be brought before the court if the written approval of all the beneficiaries under the trust who are capable of giving consent has been obtained.¹³ This, in effect, ensures that the court cannot force variations or terminations on adult capacitated beneficiaries.¹⁴

This option gives rise to several considerations. If the Act is revised in this manner, it would constitute a reversal of the existing rule in *Saunders v. Vautier* which allows adult capacitated beneficiaries to terminate a trust without judicial consent. One writer has commented that there is “some ambit of paternalism” in this type of provision.¹⁵ This is a reference to the fact that, if it is of the view that the “arrangement” proposed is not of an overall justifiable character, the courts in both Alberta and Manitoba can withhold consent to the “arrangement” despite the fact that all of the beneficiaries are ascertained, adult and capacitated.¹⁶ Moreover, this option - once *Saunders v. Vautier* is abolished - would likely give rise to an increase in applications to the court, and consequent costs. On the other hand, the reform agencies in those provinces were interested in the settlor’s purpose or purposes being considered by a disinterested judicial inquiry. This is the American rule of “material purpose” (the rule in *Claflin v. Claflin*).¹⁷ The U.S. court will consider whether there is a settlor purpose evident in the trust instrument, and, if so, whether at the time of the application to the court the purpose has been achieved. The Alberta and Manitoba reform agencies envisaged that the courts in those provinces would consider whether

12. Waters, *supra* n. 7 at 979, observed that Alberta adopted this position in 1973 following recommendations by the Alberta Institute of Law Research and Reform, Report on the *Rule in Saunders v. Vautier*, Report No. 9 (1972) (Hereinafter referred to as the “Alberta Report”) and Manitoba adopted this position in 1983 following recommendations in the Manitoba Report, *ibid.*

13. *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(6), *Trustee Act*, R.S.M. 1987, c. T160, s. 59(6).

14. W. S. Bernstein, “The Rule in *Saunders v. Vautier* and its Proposed Repeal” (1986), 7 *Est. & Tr. Q.* 251 at 276.

15. *Ibid.*

16. Waters, *supra* n. 7 at 979 and K. Farquhar, “Recent Themes in the Variation of Trusts” (2001), 20 *E.T. & P.J.* 181 at 200.

17. (1889), 149 Mass. 19, 20 N.E. 454. For a discussion of the rule in *Claflin v. Claflin* see Scott on Trusts, vol. 4, 4th ed., (Boston: Little, Brown and Company, 1987) at para. 337.1 (pp. 443-444).

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any unachieved purpose, such as spendthrift protection, continues to exist, and, if it does, whether it should in the circumstances be overridden.

The alternative would be to revise the Act so that, where all the beneficiaries are adult and capacitated, and they are all in agreement with the proposed variation, it would confer power upon the beneficiaries without judicial approval to vary the trust as well as terminate it.¹⁸ The Act would thereby adopt the rule in *Saunders v. Vautier* which permits premature termination, and extend its principle to cover the variation of trusts.

Clearly there would be no power in the court to approve a proposed variation (or termination) where a capacitated adult beneficiary withholds his or her consent. That is the situation now outside of the area of pension trusts. However, whether the court should be expressly empowered to disregard the refusal of a capacitated adult to consent to a proposal of variation or termination is an independent question. It is addressed later in this Consultation Paper.

Should the law as to the ability of capacitated adult beneficiaries to vary or prematurely terminate a trust be changed, and, if so, which of the two approaches discussed would be preferable?

Discussion Proposal 1

*Option A: The Trust and Settlement Variation Act should be revised so that any proposed variation or premature termination of a trust requires approval by the court. (This abolishes the rule in *Saunders v. Vautier*.)*

Option B: The Trust and Settlement Variation Act should be left as it stands with regard to the proposed “arrangements” that require approval by the court. (This would mean that beneficiaries have no power to vary when the Act can not be invoked.)

*Option C: The Trust and Settlement Variation Act should be revised so that it confers power upon the beneficiaries to vary or prematurely terminate the trust without judicial consent where all the beneficiaries are *sui juris* and there is unanimous consent to the proposed variation. (This would mean that the rule in *Saunders v. Vautier* would be extended to allow for the variation of trusts.)*

18. If this option is preferred a secondary issue that should be considered is whether there ought to be a requirement that the terms of the trust, as varied, be set out in a final document. If the arrangement is only set out in correspondence between the beneficiaries, for example, this may cause later confusion as to the exact terms of the varied trust.

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2. Is the omission of “resettlement” in section 1 justified?

Section 1 of the *Trust and Settlement Variation Act* grants courts the remedial power to consent to a variation or revocation of the terms of a trust. This power is limited to the extent that the courts are not empowered to revoke and resettle the trust under a proposal that bears no comparison to the original trust.¹⁹ Is this limitation on resettlement justified?

The court in *Re T's Settlement Trusts*²⁰ was of the view that the limitation on the courts with regard to resettlement was warranted and stated:²¹

The Court of Chancery has never claimed for itself a power to direct a settlement of an infant's property. Indeed, it has more than once been stated authoritatively that it cannot do so.

It is obviously not possible to define exactly the point at which the jurisdiction of the court under the Variation of Trusts Act, 1958, stops or should not be exercised. Moreover, I have no desire to cut down the very useful jurisdiction which this Act has conferred on the court, but I am satisfied that the proposal as originally made to me falls outside it. Though presented as a variation it is in truth a complete new resettlement. The former trust funds were to be got in from the former trustees and held on totally new trusts such as might be made by an absolute owner of the funds. I do not think that the court can approve this. Alternatively, if it can, I think it should not do so, because to do so represents a departure from well and soundly established principles.

On the other hand, the following concerns have been raised with regard to the limitation on resettlement. The rule is difficult to apply as the difference between resettlement and variation is often less than distinct.²² This can result in similar cases having diverse outcomes which, in turn, creates uncertainty in the law. The interpretation of the trust can be problematic as courts often strain to find that a revocation and resettlement constitutes a variation so that it falls within

19. Waters, *supra* n. 7 at 1074. See also Farquhar, *supra* n. 16 at 191, where the author notes, with regard to the limitation on resettlement, that “the concern about altering the substratum of the trust would appear to stem from the apparently limiting jurisdiction in the words of the statute, rather than from a view about the necessity of adhering to the intention of the settlor or testator.”

20. [1963] 3 All E.R. 759 (Ch. D.), [1964] 1 Ch. 158. *Re T's Settlement Trusts* provides an example of a proposal that was characterized as a resettlement. In that case a minor was to receive an absolute interest in a trust fund on attaining the age of 21 or marriage. The court found that a proposal by the mother of the minor under which her daughter's share in the trust fund would be held by new trustees in protective trust for the minor for life, remainder to her children or issue and a remainder over in default of children to another minor, was not a variation of the trust but a resettlement of the minor's property. (For a further discussion of this case see McClean, *supra* n. 1 at 242.)

21. *Ibid.*, at 761.

22. M. E. Hoffstein and J.Y. Lee, “Restructuring the Will and the Testamentary Trust: Methods, Underlying Legal Principles and Tax Considerations” (1994), 13 E.T.J. 42 at 73.

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their jurisdiction.²³ It would arguably simplify cases and reduce the time and costs of litigation if it was not necessary to go through this exercise. In the limited number of cases where a proposal is characterized as a resettlement the courts must withhold consent on grounds that are irrelevant to whether the proposed variation is beneficial.²⁴ This is inconsistent with the notion that the best interests of the beneficiaries are paramount under the Act.

Does the omission of the power to resettle a trust serve a practical purpose or does it unnecessarily limit the judicial power to approve what may otherwise be a desirable arrangement?²⁵ If the restriction on resettlement is removed should it be possible to amend a trust to reflect completely new terms with no connection to the provisions of the original trust?

Discussion Proposal 2

The Trust and Settlement Variation Act should be revised to provide courts with the power to approve a settlement or resettlement of a trust, in addition to the existing power to approve a variation or revocation of a trust.

3. Should the court be able to add new powers or restrict the existing powers of trustees?

The language used under section 1 of the *Trust and Settlement Variation Act* provides the courts with the jurisdiction to consent to the enlargement of trustees' powers to administer and manage a trust. A literal reading of the term "enlarge" would not allow the court to sanction an arrangement whereby a reduction in, or new addition to, the powers of the trustees was being sought.²⁶ These types of applications may be made in a variety of circumstances.

Example 1: A pension trust instrument sets out that the trustees have an express power to amend the trust. The beneficiaries under the trust wish to bring an application to limit the trustees' authority by requiring that the power only be exercised after notice of a proposed amendment is provided to the beneficiaries.

23. Waters, *supra* n. 7 at 1085.

24. The Law Reform Commission of Ireland, *Report on the Variation of Trusts*, Report No. 63 (2000) at para. 3.16.

25. Manitoba and Alberta amended their legislation to permit the court to approve the resettling of any interest under the trust. The Law Reform Commission of Ireland has made a similar recommendation in its *Report on the Variation of Trusts*, *ibid.*, at para. 3.17.

26. Professor McClean, *supra* n. 1 at 244 observed, "Generally one would suppose that an arrangement would in fact seek an enlargement of these powers. On occasion, however, it might be sought to decrease them, but this the Act apparently does not allow."

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Example 2: A trust prohibits the disposition of a trust asset that, in the view of the trustees, should be sold. A proposal is brought before the courts under which the trustees would be given the power to sell the asset.

Example 1 illustrates the type of situation in which a reduction in the trustees' powers may be sought. In Example 2 the power sought under the proposal, rather than expanding upon an existing power, would be a wholly new power. A literal interpretation of the term "enlarge" would not allow the court to approve either of these applications.

While the courts have not taken such a narrow view of the word "enlarge" on the face of it the term is inconsistent with the jurisdiction that the courts in fact exercise.²⁷ Would section 1 of the Act better reflect the court's jurisdiction if it provided courts with the power to enlarge, add to or restrict the powers of trustees to manage or administer trust property?

Discussion Proposal 3

The Trust and Settlement Variation Act should be amended with regard to the powers of trustees by providing that the Supreme Court may, if it thinks fit, by order approve any arrangement "adding to or restricting" as well as enlarging the powers of the trustees to manage or administer any of the property subject to the trusts.

B. Persons On Whose Behalf the Court Is Empowered to Approve an Arrangement

1. Should the court be expressly empowered to disregard the refusal of a capacitated adult to consent to a variation or revocation of a trust?

Under the *Trust and Settlement Variation Act* the court can approve arrangements on behalf of those unable to consent for themselves or who are unascertained. Until relatively recently it had been the practice of the courts that an arrangement would not be approved if any adult capacitated beneficiaries withheld consent.²⁸ This is consistent with the position that under trust variation legislation the court has the authority to provide consent that is otherwise unobtainable, but does not have the power to overrule *sui juris* beneficiaries and vary the trust.²⁹

27. For a further discussion of how this power has been used see Waters, *supra* n. 7 at 1077 - 1078.

28. E.E. Gillespie and A.H. Oosterhoff, *Text, Commentary and Cases on Trusts*, 5th ed. (Toronto: Carswell 1998) at 267. The exception to this being that under s. 1(d) of the Act the court can consent on behalf of all persons in the gift-over discretionary class, whether or not they are capacitated adults.

29. Manitoba Report, *supra* n. 11 at 11.

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Case law in the area of pension trusts has called this position into question. In *Bentall Corp. v. Canada Trust Co.*³⁰ the court approved a variation despite the opposition of a small number of adult capacitated beneficiaries.³¹ In that case a trust had been constituted under the Bentall Corporation Retirement Plan (the “Plan”), which was established to provide pension benefits to employees. In order to deal with a surplus of funds an application was made under section 1 of the Act for an order approving a proposed variation of the trust. Of the 279 members under the Plan, 7 refused to provide consent to the proposed variation. The court allowed the application to vary the trust despite this opposition. The court concluded that notwithstanding the absence of unanimous consent it had the jurisdiction under section 1(b) of the Act to approve the variation on behalf of contingent beneficiaries, even if the beneficiaries also had an independent vested interest,³² so long as the vested interest was not affected by the variation.³³ The court’s decision, and specifically whether the Act confers jurisdiction on the courts to approve a variation in such circumstances, has been the subject of some debate.³⁴

Section 1(b) of the *Trust and Settlement Variation Act* is based on the equivalent section found under the English *Variation of Trusts Act, 1958*, which reads:³⁵

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 any specified description or a member of any specified class of persons, *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.*

[Emphasis added]

This subsection applies where the trust instrument confers an interest, e.g., upon the widow of a living life tenant, or upon the heirs of a life tenant should the life tenant die unmarried, without

30. (1996), 26 B.C.L.R. (3d) 181, [1997] 4 W.W.R. 414 (S.C.).

31. For a further discussion of this case see Farquhar, *supra* n. 16 at 183 and 184.

32. Specifically, a member may have a vested right to a pension, and also a contingent right under the same pension plan to share in surplus funds on the winding-up of the plan. The contingency is that the person be a member at that time.

33. The court referred to *Re Versatile Pacific Shipyards v. Royal Trust Corp. of Canada* (1991), 84 D.L.R. (4th) 761 (B.C.S.C.). In that case Esson C.J.S.C., as he then was, consented to a variation where approximately 90% of the members, representing more than 90% of the fund’s obligations, had approved the settlement.

34. In *Continental Lime Ltd. v. Canada Trust Co.* (1998), 44 C.C.E.L. (2d) 158, 25 E.T.R. (2d) 128 (B.C.S.C.), the jurisdiction issue was raised for the purpose of arguing in the Court of Appeal that the *Bentall* case should be overruled.

35. *Supra* n. 4, section 1(b).

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children, and intestate. The provision, while obscurely drafted, in effect, requires the consent of capacitated adult beneficiaries to the proposed arrangement. Section 1(b) of our *Trust and Settlement Variation Act* differs from its English counterpart to the extent that it omits the italicized section in the above provision.³⁶ This has created some uncertainty in British Columbia as to the scope of the section and, in turn, the extent to which the court may disregard the refusal of a capacitated adult to consent to a variation or revocation. This lack of clarity is further compounded by the complexity of the language used.

In order to set out clearly the parameters of the court’s jurisdiction should the court be expressly empowered to disregard the refusal of a capacitated adult to consent to a variation or revocation, or should all proposed arrangements proceed to effect only if all capacitated adult beneficiaries, vested or contingent, have consented to that course of action? Arguments similar to those on either side of this debate were set out by the Manitoba Law Reform Commission as follows:³⁷

To expand a bit on this “balance,” it could be said in support of the proposal, that to allow trust variation over the objections of one or more of the *sui juris* beneficiaries would be to allow the court too wide a power. It should be remembered 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. On the other hand, “much may be said for the argument that the courts should have a residual authority to overrule the recalcitrant adult when his objections are blocking a proposal obviously beneficial to the trust as a whole; in such a case his is not the only interest involved.”

What is the appropriate balance between these competing positions?

Another question that arises is whether the Act should distinguish between pension or other commercial sector trusts and private estate planning trusts. Do the features of commercial sector trusts that make them distinct from private estate planning trusts warrant special treatment in this regard?

Further, aside from the substantive issues that arise with regard to section 1(b) of the Act, should the language of the section be revised for clarity?

36. The *Trust and Settlement Variation Act* is attached to this Consultation Paper as Appendix A.

37. Manitoba Report, *supra* n. 11 at 25. This comment was made with regard to the recommendation in the Alberta Report that the consent of all the *sui juris* beneficiaries should be required before a court would have jurisdiction to approve or withhold consent to a proposed variation.

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Discussion Proposal 4

(1) *Option A: The Trust and Settlement Variation Act should be revised to state expressly that the courts have the power to approve a proposal to vary a pension or other employee benefit trust [or any other trust with over 100 beneficiaries that is not a private estate planning trust³⁸] even if an adult beneficiary, whether vested or contingent, withholds consent to the proposed arrangement provided that any one of the following threshold conditions is met:*

- (i) *the court considers it is reasonable to do so in all of the circumstances;*
- (ii) *exceptional circumstances exist; or*
- (iii) *90% of the *sui juris* beneficiaries have consented to the variation.*

Option B: The above, plus a provision that no other trust shall be varied or revoked without the consent of each capacitated adult vested or contingent beneficiary.

Option C: The first proposal save that it shall apply to any trust.

(2) *Section 1(b) of the Trust and Settlement Variation Act should be revised by replacing the current wording with the following, “any person, whether ascertained or not, who has a vested or contingent interest and whose continued existence or whereabouts cannot be established despite reasonable measures having been taken to discover such information.”*

2. Is section 1(d) of too limited significance in the context of Canadian trust drafting?

The *Trust and Settlement Variation Act* enables the court to approve an arrangement on behalf of those persons with a future discretionary trust interest that is contingent on the failure or determination of the existing interest under section 1(d), without having to consider the benefit to those persons. This section arose out of the English *Variation of Trusts Act, 1958*. The Ontario Law Reform Commission explained the policy underlying the English provision as follows:³⁹

38. This bracketed alternative would expand Option A to apply to any trusts, other than private estate planning trusts, with a large number of beneficiaries.

39. Ontario Law Reform Commission, *Report on the Law of Trusts*, (1984) at 421. For a further discussion of the English section see Lewin on Trusts, 17th ed., (London: Sweet & Maxwell, 2000) at paras. 45-42, 45-43 and 45-74 to 45-76 and J.W. Harris, “Ten Years of Variation of Trusts” (1969), 33 *The Conveyancer and Property Lawyer* 113 at 119.

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The present provision is derived from the English *Variation of Trusts Act, 1958*, which 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-of-kin are there merely to enable the statutory trust to provide protection for the life tenant.

In light of the fact that statutory protective trusts do not exist in British Columbia and protective trust provisions are rarely employed in trust instruments in this jurisdiction, is section 1(d) of too limited significance in the context of trust drafting in this province? If the provision is unnecessary should this occasion be taken to repeal it? One writer in support of this option observed:⁴⁰

In the author's submission the wisest and simplest correction would be to repeal it [section 1(d)]. It is not difficult for an arrangement to make the degree of benefit proportionate to the likelihood of the interest arising, and a repeal would allow the courts to consider in the normal manner the position under the proposed arrangement of those persons who but for clause (d) would fall within the legislation, and on behalf of whom the court might consent.

Alternatively, should section 1(d) be tailored in scope so that the court is expressly empowered to consent on behalf of beneficiaries of an immediate discretionary trust? If so, should that empowerment extend to possible appointees of a mere power of appointment (e.g., children or grandchildren)?⁴¹

Discussion Proposal 5

Section 1(d) of the Trust and Settlement Variation Act should be repealed.

C. Other Matters

1. Should the Act state by whom any proposed arrangement is to be brought before the court?

The final paragraph of section 1 of the *Trust and Settlement Variation Act* currently states that an arrangement “proposed by any person” can be brought before the court. This is consistent with legislation in other jurisdictions in Canada and abroad as it leaves open the categories of persons who may bring forward a trust variation proposal.

40. Waters, *supra* n. 7 at 1073.

41. It should be noted that under a mere power there is no obligation upon the donee of the power to make any appointment, and if none is made the default beneficiaries take.

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An alternative approach would be to list in the statute the categories of persons who can bring a proposed arrangement before the court.⁴² The difficulty with this approach is that it would not allow the courts to deal with any anomalous situations that are not provided for, but may arise. For example, a person who is a caregiver but not the guardian of a beneficiary may wish to bring an arrangement before the court.⁴³ There does not appear to be any policy reason for restricting an application by the caregiver as, regardless of who brings the application, the court will look to the merits of the proposal in making its decision. It would be difficult however to list every such person.

Furthermore, trustees aside, the current wording of the Act does not appear to have given rise to an unacceptably large number of applications for variation being made by persons with no beneficial interest in the trust. Accordingly, it is arguable that the existing language of section 1 should remain as it stands rather than attempt to enumerate those classes of persons permitted to bring a trust variation proposal before the court.

Discussion Proposal 6

The language of the present Trust and Settlement Variation Act should remain as it stands with regard to the question of who can bring a proposed arrangement before the court.

2. Should the trust creator's intentions be taken into consideration by the court?

Prior to the adoption of trust variation legislation the central premise of the law of trusts was to uphold the intent of the trust creator. The enactment of trust variation legislation marked a significant departure from this position as the primary concern of the court became whether the proposal would be desirable for the individual beneficiaries upon whose behalf the court was asked to consent.⁴⁴

This raises the question of what, if any, weight ought to be given to the wishes of the trust creator under the current legislation. The Law Reform Committee of England was of the view that once the settlor had parted with the beneficial interest in the property he or she should not retain any right to prohibit variations with regard to dispositions which the court considered to be desirable

42. The Law Reform Commission of Ireland observed in its *Report on the Variation of Trusts* that the South Australian *Trusts Act, 1973* is one exception where the categories of persons who may apply to the court for approval of a variation are enumerated. The relevant provision limits the categories of persons to "a trustee or any person who has a vested, future or contingent interest in property held in trust": *Supra* n. 24 at para. 7.10.

43. *Ibid.*, at para. 7.11.

44. McClean, *supra* n. 1 at 229 and Ontario Law Reform Commission, *Report on the Law of Trusts*, *supra* n. 39 at 413.

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in the interests of the beneficiaries.⁴⁵ Although the Committee concluded that the interests of the beneficiaries ought to prevail, it was also of the view that the settlor should be entitled to be heard on an application. It has been suggested that these two positions are not incompatible.⁴⁶ This holds true if the court, by hearing evidence of the intentions of the trust creator, is provided with a more complete evidentiary basis upon which to make a decision, but it only need consider the information to the extent that it is relevant to the issue of benefit, and would not be constrained by the intentions of the trust creator in reaching its final decision. In this regard, this type of provision can provide guidance both on the issue of the admissibility of the intentions of the trust creator and the weight to be accorded to those intentions.

The present *Trust and Settlement Variation Act* is silent as to the weight to be given to the intentions of the settlor or testator in creating the trust. The courts, having no statutory guidance on this matter, have accorded varying degrees of significance to the trust creator's intentions.⁴⁷ In the 1994 decision of *Russ v. British Columbia (Public Trustee)*⁴⁸ the appellant Public Trustee cited a number of cases to support the position that the chambers judge had erred in failing to take account, sufficiently or at all, of the settlor's intentions in deciding whether to allow the trust variation application. In response to this argument Finch J.A., for the court, concluded that there was no obligation on the courts to weigh the settlor's intention in deciding whether to approve a proposed variation and, further, that to find otherwise would be inconsistent with the language of the Act.⁴⁹ This can be contrasted with the view of the courts in *(Re) Irving* and *(Re) Hessian*.⁵⁰ In those cases the courts took the opposing standpoint that the trust creator's intent ought to be considered.

Should the *Trust and Settlement Variation Act* be amended to provide expressly that the intentions of the trust creator are a factor to be considered by the court, but only as part of the evidentiary basis upon which the court will make a determination?

45. Sixth Report, *supra* n. 3 at 6.

46. Bernstein, *supra* n. 14 at 264.

47. For a recent review of the Canadian case law dealing with the issue of the weight to be given to the intention of the trust creator see Farquhar, *supra* n. 16 at 186.

48. (1994), 89 B.C.L.R. (2d) 35, 3 E.T.R. (2d) 170 (C.A.), application for leave to appeal to S.C.C. dismissed without reasons [1994], S.C.C.A. No. 271.

49. While the court commented on the weight to be given to the evidence of the settlor it did not expressly address the issue of the admissibility of such evidence. Presumably if the court need not consider if the basic intention of the settlor is preserved, there would be little reason for the court to hear the settlor's evidence on an application under the Act to vary or revoke a trust.

50. *(Re) Irving* (1975), 66 D.L.R. (3d) 387, 11 O.R. (2d) 443 (Ont. H.C.J.) and *(Re) Hessian* (1996), 14 E.T.R. (2d) 188 at 197, 153 N.S.R. (2d) 122 (N.S.S.C.).

Discussion Proposal 7

The Trust and Settlement Variation Act should provide for the settlor, if still living and capacitated, to be heard on an application under the Act to vary or revoke a trust. Evidence of a deceased trust creator's intent may be admitted for the purposes of the Act. While the evidence would be admissible, the court would not be constrained by the trust creator's intention or wishes, even if established to its satisfaction, in reaching a decision as to the order that the court thinks appropriate.

3. Should the Act expressly state whether it applies to charitable gifts?

Charitable purposes can be furthered either through the creation of a trust or by a corporation.⁵¹ While the *Trust and Settlement Variation Act* applies to a trust for persons, it is silent as to whether it also applies to purpose trusts. For clarification should the Act expressly state that it confers jurisdiction on the courts to approve a variation to the terms of a charitable trust?

For example, a testator may set up a trust for the purpose of funding initiatives to improve literacy among lower income families. An express statement that the Act applies to charitable gifts would clearly provide a court with the jurisdiction to consent to a proposal that would vary the terms of that trust. The alternative is to leave the language of the Act as it presently stands. The difficulty with this option is that at least one law reform body has noted that while in some cases the courts have varied charitable trusts it was, in its view, “highly questionable” whether the wording of the Act actually conferred the jurisdiction to do so on the courts.⁵²

If the statute is so revised, a collateral issue that arises is whether the Act should apply so that the court is empowered to consent to a proposal to vary a trust purpose. If so there would be a duplication of the inherent *cy-près* power of the court.⁵³ For example, if a charitable trust is created for the Society for Sick Children but cannot be fulfilled, the trust property may be applied to another charitable purpose under the *cy-près* doctrine. Similarly, if the courts are expressly given the power to approve a proposal to vary trust objects and the trust property cannot be applied to the named charity, it may be applied to a different charitable purpose. It would therefore be necessary to consider how the statutory power to vary a charitable trust would interact with the inherent *cy-près* power of the court. For example, would the Act's authorization

51. There is more familiarity with gifts to incorporated bodies with charitable purposes due to the Canada Customs and Revenue Agency (“CCRA”) registration requirements and the CCRA’s dislike of gifts for charitable purposes with no entity.

52. *Report on the Law of Trusts*, *supra* n. 39 at 423, footnote 146.

53. Halsbury's Laws of England 4th ed., vol. 5, p. 163, para. 201, sets out the *cy-près* doctrine as follows:
Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode *cy-près* that is, as near as possible to the mode specified by the donor.

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be wider than, or the same as, *cy-près*?⁵⁴ Would the case law surrounding the doctrine of *cy-près* be applicable to the Act? Alternatively, would this cause more problems than it would solve so that the better course would be to keep the *Trust and Settlement Variation Act* out of the realm of *cy-près*?

The second issue that arises with regard to charities is whether the Act should authorize the court to consent on behalf of a charitable trust or charitable corporation where the trust purpose or corporation is a beneficiary under a trust that is itself being varied. Take an example where a testator provides that the trust fund is to be held by the executors and trustees, X and Y, for A for life, remainder to a charity for the relief of poverty. It is proposed by A that, with a certain percentage taken by each, the capital be divided between A and the charitable gift. If the charity is a named charitable corporation, it will have full legal capacity and can consent or withhold consent to a proposal to vary the trust on its own behalf, without the aid of the court.⁵⁵ If however the named charity takes the form of a trust and the charity trustees have no power to consent to a termination, or the choice of the charitable recipient is to be decided by the trustees, X and Y, on the termination of A's interest, the testator's trust could not be varied unless the court can consent on behalf of the named charitable trust or the as yet not selected charity.

Professor McClean has suggested that the Act be revised to provide clearly that in cases where private individuals and a charity are beneficiaries under the trust the court is empowered to approve the arrangement on behalf of a charity. In this regard he stated:⁵⁶

54. The Ontario Law Reform Commission recommended that for the purpose of a variation of a charitable trust, the courts be given the statutory authority to vary any term of the trust if the court finds (a) that any impracticability, impossibility or other difficulty has arisen, whenever it arose, that hinders or prevents the carrying out of the intention of the terms of the trust; or (b) that a variation of the terms of the trust or an enlargement of the powers of the trustees would facilitate the carrying out of the intent of the terms of the trust. It further recommended that whether the donor had a particular or general charitable intent should be irrelevant; and, the court should be required to approve or select one or more purposes as close as is practicable or reasonable to the original or previously varied purpose or purposes: *Supra* n. 39 at 475-476.

55. The Ontario Law Reform Commission was of the view that in terms of whether a charitable beneficiary can consent or withhold consent without the aid of the court, judicial consent should not be necessary as the courts have never questioned the capacity of a charitable corporation or trust to take advantage of the rule in *Saunders v. Vautier: Report on the Law of Trusts*, *ibid.*, at 423. Waters, *supra* n. 7 at 972, made the following comment in this regard, “Can ‘charities,’ meaning charitable corporations and trusts, take advantage of the rule in *Saunders v. Vautier*? As a legal personality there is no reason why a charitable corporation should not do so, and the law has not been prepared to put charitable trusts, acting through their trustees, in any different position. The leading case on this subject in England is *Wharton v. Masterman*.”

56. McClean, *supra* n. 1 at 246.

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However where private individuals and a charity are beneficiaries under the trust it would be unfortunate if a private beneficiary could not take advantage of the Act because the settlor had also wished to benefit charity. As the Act stands the court is again without jurisdiction and all that there is to fall back on are the rather dubious powers of the Attorney General and the equally dubious and in any event extremely narrow power of individuals to exclude themselves from the benefits of the charity. The Act could well provide that in a case involving this type of trust the court has power to approve the arrangement on behalf of a charity on the usual ground of benefit to it.

A clear statement of the law on these issues is needed.

Should the Act be amended both to provide the courts with the express jurisdiction to approve a variation to the terms of a charitable trust and to consent to a variation on behalf of a charitable gift when that gift is an interest in the trust that is to be varied?

Discussion Proposal 8

(1) The Trust and Settlement Variation Act [should] [should not] be revised to provide expressly that it confers jurisdiction on the courts to approve a variation to the terms of a charitable trust, and, if the Act should so be revised, it [should][should not] expressly address how the statutory power to vary a charitable trust is to interact with the inherent cy-près power of the court.

(2) The Trust and Settlement Variation Act should be amended to provide expressly that the court is authorized to consent on behalf of a charitable gift when that gift is an interest in a trust that is itself being varied

[only if charitable trust objects and individual beneficiary trust objects are contained in the same trust disposition.]

[only when the gift is in the form of a trust object, or to the trustees of a charitable trust.]

[both as to gifts covered by the previous alternative and also gifts to charitable corporations.]

[If Discussion Proposal 8(2) is adopted which of the three alternatives in square brackets would be appropriate?]

III. Framework for Revisions

It is useful to incorporate remedial legislation into a statute which clearly relates to the issues that it addresses. This would be achieved by adding the *Trust and Settlement Variation Act* as a distinct section to the *Trustee Act*. While this is the ultimate objective of the Committee, it is

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recommended that any changes at present be made to the existing *Trust and Settlement Variation Act* as the speed with which a new *Trustee Act* may be adopted is unknown.⁵⁷

IV. Summary of Proposals for Reform

A summary of the proposals to revise the *Trust and Settlement Variation Act* is set out below. The Committee asks that respondents comment on whether they agree or disagree with the proposal in those cases where only one option is listed. If more than one option is listed, please indicate which option is preferred.

Discussion Proposal 1

Option A: The *Trust and Settlement Variation Act* should be revised so that any proposed variation or premature termination of a trust requires approval by the court. (This abolishes the rule in *Saunders v. Vautier*.)

Option B: The *Trust and Settlement Variation Act* should be left as it stands with regard to the proposed “arrangements” that require approval by the court. (This would mean that beneficiaries have no power to vary when the Act can not be invoked.)

Option C: The *Trust and Settlement Variation Act* should be revised so that it confers power upon the beneficiaries to vary or prematurely terminate the trust without judicial consent where all the beneficiaries are *sui juris* and there is unanimous consent to the proposed variation. (This would mean that the rule in *Saunders v. Vautier* would be extended to allow for the variation of trusts.)

Discussion Proposal 2

The *Trust and Settlement Variation Act* should be revised to provide courts with the power to approve a settlement or resettlement of a trust, in addition to the existing power to approve a variation or revocation of a trust.

Discussion Proposal 3

The *Trust and Settlement Variation Act* should be amended with regard to the powers of trustees by providing that the Supreme Court may, if it thinks fit, by order approve any arrangement “adding to or restricting” as well as enlarging the powers of the trustees to manage or administer any of the property subject to the trusts.

57. The Committee on the Modernization of the *Trustee Act* is in the process of drafting a new *Trustee Act*.

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Discussion Proposal 4

(1) *Option A:* The *Trust and Settlement Variation Act* should be revised to state expressly that the courts have the power to approve a proposal to vary a pension or other employee benefit trust [or any other trust with over 100 beneficiaries that is not a private estate planning trust⁵⁸] even if an adult beneficiary, whether vested or contingent, withholds consent to the proposed arrangement provided that any one of the following threshold conditions is met:

- (i) the court considers it is reasonable to do so in all of the circumstances;
- (ii) exceptional circumstances exist; or
- (iii) 90% of the *sui juris* beneficiaries have consented to the variation.

Option B: The above, plus a provision that no other trust shall be varied or revoked without the consent of each capacitated adult vested or contingent beneficiary.

Option C: The first proposal save that it shall apply to any trust.

(2) Section 1(b) of the *Trust and Settlement Variation Act* should be revised by replacing the current wording with the following, “any person, whether ascertained or not, who has a vested or contingent interest and whose continued existence or whereabouts cannot be established despite reasonable measures having been taken to discover such information.”

Discussion Proposal 5

Section 1(d) of the *Trust and Settlement Variation Act* should be repealed.

Discussion Proposal 6

The language of the present *Trust and Settlement Variation Act* should remain as it stands with regard to the question of who can bring a proposed arrangement before the court.

Discussion Proposal 7

The *Trust and Settlement Variation Act* should provide for the settlor, if still living and capacitated, to be heard on an application under the Act to vary or revoke a trust. Evidence of a deceased trust creator's intent may be admitted for the purposes of the Act.

58. This bracketed alternative would expand Option A to apply to any trusts, other than private estate planning trusts, with a large number of beneficiaries.

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While the evidence would be admissible, the court would not be constrained by the trust creator's intention or wishes, even if established to its satisfaction, in reaching a decision as to the order that the court thinks appropriate.

Discussion Proposal 8

(1) The *Trust and Settlement Variation Act* [should] [should not] be revised to provide expressly that it confers jurisdiction on the courts to approve a variation to the terms of a charitable trust, and, if the Act should so be revised, it [should][should not] expressly address how the statutory power to vary a charitable trust is to interact with the inherent *cy-près* power of the court.

(2) The *Trust and Settlement Variation Act* should be amended to provide expressly that the court is authorized to consent on behalf of a charitable gift when that gift is an interest in a trust that is itself being varied

[only if charitable trust objects and individual beneficiary trust objects are contained in the same trust disposition.]

[only when the gift is in the form of a trust object, or to the trustees of a charitable trust.]

[both as to gifts covered by the previous alternative and also gifts to charitable corporations.]

[If Discussion Proposal 8(2) is adopted which of the three alternatives in square brackets would be appropriate?]

V. Conclusion

The Committee on the Modernization of the Trustee Act is of the view that addressing the issues discussed in this Consultation Paper will result in legislation that is more modern and comprehensive. We encourage readers to send in their comments with regard to these proposals, as well as any suggestions for further reform in this area of the law. The responses will be fully considered when the Committee forms its definitive recommendations.

The Committee asks that comments be sent by March 28, 2003 to the following address:

British Columbia Law Institute,
1822 East Mall, University of British Columbia,
Vancouver, BC, V6T 1Z1

Or by fax to (604) 822 - 0144 or email to bcli@bcli.org

Appendix A

Trust and Settlement Variation Act

R.S.B.C. 1996, c. 463

Court approval of variation

- 1 If property is held on trusts arising before or after this Act came into force under a will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of
 - (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,
 - (b) 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,
 - (c) any person unborn, or
 - (d) any person in respect of an interest of the person that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined,
any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

Benefit to parties interested

- 2 The court must not approve an arrangement on behalf of a person coming within section 1 (a), (b) or (c) unless the carrying out of it appears to be for the benefit of that person.

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Public Guardian and Trustee

- 3 If a person comes within section 1 (a) or (c), or if a person coming within section 1 (b) or (d) is a minor or is mentally disordered, notice in writing of an application under this Act together with a copy of the material filed in support of it must be served on the Public Guardian and Trustee not less than 10 days before the date of the application.

Deemed trust

- 4 (1) The Supreme Court may exercise its powers under this Act in respect of land the ownership of which is the subject of a legal life interest.
- (2) For the purposes of this section
- (a) the holder of the legal life interest is deemed to hold the land in trust for himself or herself and the holders of successive interests in the land, and
- (b) the beneficiaries of the trust are deemed to be incapable of consenting to the arrangement.

Court appearances

- 5 The Public Guardian and Trustee is entitled to appear and be heard on the application and is entitled to any costs that the court orders.

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