

A Modern Trustee Act for British Columbia

**A Report prepared for the
British Columbia Law Institute
by its Committee on the Modernization
of the Trustee Act**

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PART ONE

THE NEED FOR A MODERN *TRUSTEE ACT*

PART ONE

THE NEED FOR A MODERN *TRUSTEE ACT*

I. SCOPE AND ROLE OF A *TRUSTEE ACT*

A. Trusts Generally

Few legal concepts pervade as wide a range of common dealings as that of the trust. Trust principles are commonly in play when an employee pays into a pension fund, when a person makes a will that is anything other than of the simplest kind, and in a sale of land pending actual transfer into the purchaser's name. These are only a very few examples.

At the root of the trust concept is the idea that segregated property is held by one or more persons (*trustees*) for the benefit of one or more others (*beneficiaries*). A trust is the relationship between a trustee and the beneficiary, characterized by an obligation on the part of the trustee, which the beneficiary may enforce, to deal with property in the trustee's control for the benefit of the beneficiary.¹ A trust is established when an owner of property (called the *settlor*²) makes a disposition of property to a trustee on terms describing how the trustee is to administer the property to confer the benefits that the settlor intends. As an alternative to parting with the legal title, the settlor may declare that henceforth he or she holds the property in trust for the beneficiary. In either case, an alienation of property occurs because the beneficial ownership of the property is considered to be transferred to the beneficiary.

1. Underhill and Hayton, *Law Relating to Trustees*, 16th ed. (2002), p. 3; Waters, *Law of Trusts in Canada*, 2nd ed. (1984), p. 5. This definition describes the classic private trust. In the case of charitable trusts and non-charitable purpose trusts (to the extent the latter are permitted by law) there is, strictly speaking, no beneficiary and the object of the trust is the purpose that the settlor intended the trust to fulfil.

2. Trusts are often created under a will. The settlor under a will trust is more properly termed a *testator*. For the sake of simplicity, the term "settlor" is used in this Report to refer both to someone who creates a trust intended to take effect in the settlor's lifetime (an "*inter vivos* trust") and one who creates a trust under a will or other testamentary document ("*testamentary trust*").

B. Trustee Legislation

1. General

The law of trusts is primarily found in cases, but it is partly statutory. Statute law relating to trusts is mainly concerned with the administration of trusts rather than with the relationships between settlors, trustees, and beneficiaries. In British Columbia, the principal statute concerned with trust law is the *Trustee Act*.³ Like its counterparts in other provinces and territories, it is largely a re-enactment of English trustee legislation passed at various times in the nineteenth century.⁴

2. Historic Purposes of Trustee Legislation

One purpose of the nineteenth-century English legislation was to provide machinery to allow proper administration of trusts with a minimum of court involvement in cases where trustees had not been given adequate administrative powers at the time the trust was created.⁵ It therefore took the form of enabling legislation, conferring basic administrative powers on all trustees, executors, and administrators.

An important feature of trustee legislation was that its enabling provisions conferring powers on trustees did not override the express terms of a trust, will, or codicil. A settlor could exclude statutory powers by using express language. In other words, trustees were deemed by law to have the statutory powers unless the express terms of the trust stated otherwise.

Another purpose of trustee legislation was to give the court effective powers to deal with situations in which a trust had ceased to operate effectively and to define the court's power to assist trustees when necessary.⁶ Among the specific powers given to the court by the legislation were the power to appoint and remove trustees, to vest trust property in others when a trustee was incapacitated or otherwise unable to act, and to authorize the distribution of trust property among known beneficiaries, with or without ordering the trustee to pay a portion of the trust fund into court for the benefit of untraceable beneficiaries. The court was also empowered to give its opinion in non-litigious circumstances on a specific question

3. R.S.B.C. 1996, c. 464, as amended.

4. There have been some recent amendments to the *Trustee Act*, notably those dealing with investment powers and powers of delegation. (See ss. 23 and 24 of the *Trustee Investment Statutes Amendment Act*, 2002, S.B.C. 2002, c. 33.) These amendments substantially reflect the recommendations of this Committee made in *Report on Trustee Investment Powers* (1999) and *Report on Statutory Powers of Delegation by Trustees* (2000).

5. Waters, *supra*, n. 1 at 905.

6. *Ibid.*

connected with the administration of the trust if the trustees applied for direction regarding it.⁷ The court was further empowered to give relief to trustees from liability for breach of trust if they had acted honestly and reasonably “and ought fairly to be excused.”⁸

3. Contemporary Canadian Trustee Legislation

In England, numerous enactments concerning trustee powers and court jurisdiction over trusts were consolidated in the *Trustee Act, 1893*⁹ and again in the *Trustee Act, 1925*¹⁰. The *Trustee Act, 1925* also introduced some significant additions to trustee powers. Except in Manitoba and Prince Edward Island, few of the changes in the 1925 Act found their way into Canadian trustee legislation. The *Trustee Acts* of the various provinces and territories are interspersed with some modern amendments, but still consist predominantly of a hodgepodge of mid- to late-nineteenth century provisions, their language having a distinctly Victorian flavour. British Columbia’s *Trustee Act* is among the most unamended of the Canadian trustee statutes, reproducing some of the earliest of the English legislation.¹¹

C. A Shifting Context - Evolution in the Use of the Trust

Much of the *Trustee Act* is concerned with trusts under wills, and with giving trustees powers with respect to land and mortgages of land. This reflects the fact that in former times the trust was chiefly used as a means of preserving wealth in the form of land. The “strict settlement,” which frequently operated through a trust and was designed to keep land within a family through successive generations, was still prevalent when trustee legislation began to be passed in England in the mid-nineteenth century and re-enacted in common law regions of Canada. As restrictions on the alienation and advantageous management of land came to be seen as detrimental to general economic health, the strict settlement began to disappear in both countries. Industrialization proceeded at the same time, causing forms of wealth other than land to take on greater significance. Trusts requiring the active investment of capital, rather than passive preservation of historic fixed assets, became increasingly common as a result. Trustees required new and different powers in order to deal effectively with the new forms of holding wealth. Trustees’ statutory administrative powers, particularly in relation to investment, were incrementally expanded during the late nineteenth and the twentieth centuries in British Columbia, as elsewhere. The process of incremental expansion delayed comprehensive assessment of the adequacy of the *Trustee Act*, however, and allowed most of the Act to stagnate.

7. Waters, *supra*, n. 1 at 906-907.

8. Waters, *supra*, n. 1 at 909.

9. 56 & 57 Vict., c. 53.

10. 15 & 16 Geo 5, c. 19.

11. Waters, *supra*, n. 1 at 905.

The archaic content of much of the *Trustee Act*, and its preoccupation with testamentary trusts, contrasts with the dynamic adaptability of the trust concept to modern commerce. Among the more familiar examples of contemporary commercial applications of the trust is the pooling of funds for investment purposes. Pension funds, very influential players in present-day financial markets, are usually administered through some form of trust. Income trusts are currently among the most popular of investment vehicles. Beneficial interests under an income trust are divided into units and traded freely. They can usually provide a higher rate of return than is obtainable from corporate dividends, as their distributions are made from before-tax income. Real estate investment trusts are an important means of funding real property developments. Royalty trusts play a significant role in financing the oil and gas sector.

Trusts are often used in the commercial world as a form of security. In a common form of financing, bondholders will collectively appoint a trustee to hold mortgages and other charges on the assets and undertaking of the issuer of the bonds concerned, with power to enforce them on behalf of the bondholders if necessary. Another popular application of the trust as a security device is the mortgage syndicate trust, in which a trustee will hold mortgages for the benefit of investors who have contributed the funds for the acquisition and development of the mortgaged land. A trust may also be used as an alternative to a holding company to hold a segregated fund pending decisions as to its long-term application.

Recent years have seen a revival of use of the trust as an actual business vehicle. While trusts were used as a form of business association early in the industrial age, they were superseded as trading organizations by the introduction of limited liability companies.¹² The modern business trust can nevertheless provide significant tax advantages to investors desiring anonymity, since a trust is not required to make public disclosures. To those dealing with the trustee at arm's length, the trustee will appear to be carrying on business for itself. The trust instrument will offer appropriate protections to the third party.

Another modern development is the statutory non-charitable purpose trust. With few exceptions, trusts established for the fulfilment of specific purposes rather than to confer benefits on identifiable human beneficiaries were invalid under classic trust law, unless their purposes were legally charitable.¹³ Some Commonwealth jurisdictions, such as the

12. Gower, *Principles of Modern Company Law*, 4th ed., at 33 and 47-48.

13. *Bowman v. Secular Society*, [1917] A.C. 406 at 441; *Re Astor's Settlement Trusts*, [1952] Ch. 534, 545-546. The legal categories of charitable purposes are: relief of poverty, advancement of education, advancement of religion, and "other purposes beneficial to the community": *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.). Whether a given purpose will come within the last category depends on whether it is analogous to a purpose already held to be charitable: *Scottish Burial Reform and Cremation Society v. Glasgow City Corporation*, [1968] A.C. 138, 154.

Bahamas¹⁴, the Cayman Islands,¹⁵ and more recently in Canada the Yukon,¹⁶ have enacted legislation providing for fully valid non-charitable purpose trusts with indefinite duration, capable of a wide spectrum of quasi-charitable, private, and commercial applications. British Columbia has proceeded more hesitantly with reform in this area.¹⁷

D. Stretching the Boundaries of the Trust Concept

As the applications of the trust concept evolve, the boundaries between the trust and other categories of legal relationships are also moving. While most trust instruments and wills still require that trustees shall act “in their sole uncontrolled discretion,” it is not uncommon for settlors to reserve considerable powers over the trust property and the administration of the trust, and the appointment and removal of trustees. The trust legislation of some offshore jurisdictions allows extensive retention of control by the settlor over the trust property and administration of the trust, including the ability to give directions to trustees with respect to the trust property or the exercise of their powers.¹⁸ Writers have observed that these trends erode the distinctions between trusteeship and mere agency.¹⁹

The resurgent business trust in its modern form also blurs the dividing lines between the trust and the limited partnership or the corporation. A modern business trust is likely to form part of a complex integrated structure which involves one or more corporations. Trustees take on a role similar to that of directors of a company, while the beneficiaries as investors are in a position similar to that of shareholders or limited partners.²⁰ Settlor and beneficiary

14. *Trustee Act 1998*, No. 22 of 1998, s. 3.

15. *Trusts Law (2001 Revision)*, s. 14.

16. *An Act to Amend the Trustee Act*, S.Y. 2001, c. 11, ss. 57-61. These sections were not in force as of 1 September 2004.

17. Following Ontario's lead, British Columbia enacted the provision that is now s. 24 of the *Perpetuity Act* in 1979. It allows a trust for a specific non-charitable purpose that creates no enforceable equitable interest in a person to take effect as a power to appoint income and capital for that purpose only for a period of 21 years. The British Columbia and Manitoba Law Reform Commissions each recommended further reform to remove most of the constraints currently placed on non-charitable purpose trusts, but neither province has yet moved in this direction. See Law Reform Commission of British Columbia, *Report on Non-Charitable Purpose Trusts* (LRC 128, 1992); Manitoba Law Reform Commission, *Non-Charitable Purpose Trusts* (#77, 1992).

18. E.g., Bahamas, *Trustee Act 1998*, No. 22 of 1998, (Bahamas), s. 3; Cayman Islands, *Trusts Law (2001 Revision)*, s. 14.

19. Waters, “The Law of Trusts in the 80's” (1980), 7 E.T.R. 27 at 47; Flannigan, “Business Applications of the Express Trust” (1998), 36 Alta. L.R. 630 at 638, n. 33.

20. Flannigan, *supra*, n. 19 at 635 maintains that limited partnership is the closest analogue to the modern business trust. Hansmann and Mattei see in the statutory Delaware business trust, which enjoys limited liability, a counterpart of limited liability incorporation: “The Functions of Trust Law: A Comparative Legal and Economic Analysis” (1998), 73 N.Y.U.L.R. 434 at 475.

may be one and the same. The settlor-beneficiary may act like a major shareholder in a company, exerting considerable de facto influence over the administration of the trust, though the extent of control that may reside with the beneficiary without rendering him or her fully liable for the debts of the business is a matter of debate.

E. The Need for Reform of the *Trustee Act*

The vitality of the trust and its adaptability to present-day requirements stand in sharp contrast to the mid-Victorian legislation that forms much of the *Trustee Act*. In fact, it is common in British Columbia for trusts to be drafted so as to avoid some of the more archaic features of the Act. As there has been no comprehensive overhaul of the *Trustee Act*, the present Act is actually counteracting its original purpose of providing a statutory catalogue of implicit powers that would not have to be spelled out at length in the text of trust instruments and wills. Trust practitioners have been forced instead to find ways to circumvent it.

This does not mean that there is no longer a need for a *Trustee Act*. The provisions concerning the court's supervisory jurisdiction, its power to give its opinion to trustees on a matter arising in the course of trust administration, and to grant relief from liability to trustees who have acted reasonably, all derive from it. In addition, it supplies essential administrative powers where a trust is in existence but there is no trust instrument whatsoever. Trustees acting under older wills or instruments which lack grants of express powers adequate for efficient trust administration may also need to draw on the statutory powers. While modern wills and trust instruments do tend to contain extensive administrative powers, not all will be drafted with the same degree of skill and foresight. A statutory default mechanism can prevent the defeat of a settlor's intention through an oversight of the drafter. This is as true in the case of very large pension and employee benefit funds as in that of small family will trusts. The *Trustee Act* applies with equal vigour to them insofar as its terms are not displaced by specific provisions of pension and employment legislation. The *Trustee Act* can still fulfil its original purpose of supplying missing parts in the administrative machinery of trusts and reduce the complexity of trust documents - if it is kept abreast of modern conditions and practices.

Since the early 1980's, modernization of trustee legislation has been the focus of much law reform activity throughout the Commonwealth. The Ontario Law Reform Commission carried out a very detailed and comprehensive review of trust law generally. Its report, published in 1984, included a full review of the Ontario *Trustee Act* and a draft replacement statute.²¹ The Uniform Law Conference of Canada, which made its first recommendations for reform of trustees' statutory investment powers in 1970,²² returned to that subject in 1996 and generated the *Uniform Trustee Investment Act, 1997*.²³ Most Canadian provinces and

21. Ontario Law Reform Commission, *Report on the Law of Trusts* (1984).

22. 1970 Proceedings pp. 35 and 117.

23. 1996 Proceedings, pp. 53-54.

territories, including British Columbia,²⁴ have now moved to repeal the former “legal list” of authorized investment categories and replace it with the “prudent investor” standard of care. In England, the *Trusts of Land and Appointment of Trustees Act 1996*²⁵ and the *Trustee Act 2000*²⁶ have effected significant changes in the powers of trustees with respect to investment, delegation, acquisition and disposition of trust assets.

While the process of modernization of the British Columbia *Trustee Act* has begun with the amendments in 2002 respecting powers of investment and delegation, only a comprehensive overhaul can restore the Act to full usefulness.²⁷

F. Scope of a New *Trustee Act*

1. General

The great range of applications and new forms of trusts that may be found in the legal landscape raise the question of how far a new *Trustee Act* should go to accommodate them. A trustee statute possibly has greater value for settlors and trustees of smaller personal trusts (e.g., those created by will or during the settlor’s lifetime to benefit individuals or minimize personal or estate taxation) because of the reduction in the length and complexity of documentation that it can bring about. The growth of exotic uses and forms of the trust has not altered the fact that a great many trusts that are already in existence or being created are still of the estate planning or “family trust” type.

Trustee legislation has always had a generic character, however, and the Committee believes that this should also be true of a new *Trustee Act*. This entails that the Act should deal with features that the different species of trusts have in common, rather than attempt to classify trusts and deal with the specific attributes of the more specialized categories. Thus, the Committee’s view is that the *Trustee Act* should apply to commercial, pension, and charitable trusts as well as personal trusts, insofar as they are not regulated by other enactments.

2. Pension trusts

Pension trusts have a distinct character because they are closely intertwined with matters of employment law and may have very large numbers of beneficiaries, leading to situations not encountered by trustees in other settings. It is appropriate for separate pension legislation

24. *Supra*, n. 4.

25. 1996, c. 47.

26. 2000, c. 29.

27. The amendments to the *Trustee Act* made by S.B.C. 2002, c. 33, ss. 23 and 24 became effective on 28 February, 2003.

to prevail over the *Trustee Act* where pension funds are concerned.

3. Mutual fund trusts and income trusts

If mutual fund trusts and income trusts are considered in the future to require special legislative intervention, they will no doubt be viewed as closely linked with securities law. In the meantime the *Trustee Act* applies, and should continue to apply to them.

4. Charitable trusts

Most charities in Canada are organized as corporations rather than as trusts. Property owned by a charitable corporation is not subject to a trust merely because of the corporation's charitable objects. The present Act does not apply to charitable corporations when dealing with their own assets, and the Committee does not perceive a reason for extending a new *Trustee Act* to that kind of situation. Charitable trusts still in existence, however, should have the benefit of the *Trustee Act*, subject to their own terms. In addition, if a charitable corporation acts as a trustee, there is no reason why the powers conferred by the Act on other trustees should not be available to it.

5. Non-charitable purpose trusts

The extent to which the non-charitable purpose trust should be recognized in a new *Trustee Act* presents some troublesome questions. The limits placed on purpose trusts by the historic legal definition of charity and s. 24 of the *Perpetuity Act* have the flavour of a certain hidebound legalism. The arcane exceptions to the invalidity of non-charitable purpose trusts that exist apart from statute have no principled foundation. Without wishing to be taken as endorsing all possible uses to which a non-charitable purpose trust could be adapted, the view of this Committee is that nothing is to be gained by maintaining the constraints now placed on purpose trusts, in regard at least to purposes of a kind widely recognized as being legitimate and useful, such as those for which a society may be created under the *Society Act*.²⁸

Use of the non-charitable purpose trust for purely private purposes is currently possible in several offshore jurisdictions, and would be introduced under unproclaimed amendments to the Yukon *Trustee Act*. Development of a private (non-charitable) purpose trust has proved, however, to be conceptually controversial.²⁹ And there is another concern. No doubt all jurisdictions permitting such trusts require “enforcers” (those who are to compel the

28. See *Society Act*, R.S.B.C. 1996, c. 433, s. 2(1).

29. See for discussion Hayton, D.J. “Developing the Obligation Characteristic of the Trust” (2001), 117 L.Q.R. 96. The so-called STAR trust of the Cayman Islands, *supra*, note 18, introduced in 1997, allows for both person and purpose objects in the same trust instrument, and entirely divorces trust enforcement from beneficial enjoyment. For the latest writing, citing the various authors in the current debate, see Hilliard, J. “On the irreducible core content of trusteeship - a reply to Professors Matthews and Parkinson” (2003), 17 *Trust Law International* 144.

trustee to carry out the private purpose) to monitor the usage of these trusts carefully. In part because of the difficulty of defining “purpose,”³⁰ it nevertheless remains possible for a private purpose trust to be employed for the concealment of assets from tax or crime-prevention authorities. Other illegal uses, or activities contrary to public policy, may be possible. This apparent possibility would need to be examined closely.

Are the dangers that would accompany the introduction of a mechanism apparently adaptable to illicit domestic and international financial activities outweighed by the potential that it might bring for increased trust business within British Columbia? Quite apart from the conceptual controversy surrounding these trusts, this question raises significant policy issues. It properly lies outside the scope of a general revision of an essentially administrative statute such as the *Trustee Act*. In our view it constitutes a subject for independent consideration. The draft Act in Part Two therefore contemplates the creation of non-charitable purpose trusts for the categories of purposes only for which a society may legally be formed under the *Society Act*.

6. Trusts arising by operation of law

Trusts arising by operation of law, or that are declared by a court to exist (*constructive trusts*), are chiefly remedial in nature. They generally do not require the full administrative machinery of an express trust in order to fulfil their function. For example, it would not be desirable to equip a resulting or constructive trustee with powers to delegate authority to an agent or invest the trust property when the function of the trust is to confirm that the property is not the trustee’s own and to expedite its transfer to the rightful owner. Therefore, the Committee believes a new *Trustee Act* should not apply generally to resulting trusts, nor to constructive or similar trusts arising by operation of law or through a judgment or order of a court.³¹

G. Conclusion

The *Trustee Act* has been allowed to stagnate. Revision of this nineteenth-century legislation is overdue by many decades. The original purposes of the Act, namely to supplement the general law of trusts, confer necessary administrative powers on trustees where they are lacking, and guide the court in the exercise of its supportive and supervisory jurisdiction over trusts and trustees, nevertheless retain their validity and importance. A revised *Trustee Act*, with provisions matched to realities of present-day conditions and

30. Does “purpose” only refer to an object for the furtherance of which the trust fund is to be applied, or does it also include the authorization of acts, e.g. holding assets such as shares, or liabilities, such as debt, transferred to the trustee to be held until the trustee is instructed otherwise? See Matthews, “Shooting STAR: the new special trusts regime from the Cayman Islands” (1997), 11 *Tolley’s Trust Law International* 67.

31. The Committee concluded, however, that a resulting trustee who has acted reasonably should be able to apply for discretionary relief from liability for breach of trust, as an express trustee might do in similar circumstances. This is reflected in s. 59(1) of the draft *Trustee Act* in Part Two.

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practices, is needed to allow those purposes to be fulfilled in the twenty-first century. The Committee believes that the draft statute in Part Two of this Report, which represents the culmination of its efforts since 1997, will meet that need.

II. THE COMMITTEE'S APPROACH TO THE CREATION OF A NEW *TRUSTEE ACT* AND THE PREPARATION OF THIS REPORT

A. Retention of the *Trustee Act* as Representing a Basic Default Position

The Committee chose to retain the concept of the *Trustee Act* as a supplement to the general law of trusts and trust instruments. In other words, the draft Act retains the “default” character of the existing statute. The effect of most of its provisions can be modified or displaced by the terms of an instrument. A few provisions are exceptions to this principle and cannot be overridden by an instrument.³²

The Committee considered, and rejected, the approach of using the *Trustee Act* as a vehicle for a codification of trust law, similar to the U.S. Uniform Trust Code.³³ The Committee did not consider that codification of trust principles is necessary, or that it could be done within a reasonable timeframe.

In some cases, however, the boundary between revision of the existing statute and reform of rules of general trust law had to be crossed if modernization of standard trustee powers was to be achieved. When a judge-made rule no longer corresponded with the reality of present-day trust practice, the Committee considered it unacceptable as part of the default position the Act is intended to represent and included a provision altering it. For example, the draft *Trustee Act* alters the classic rule that trustees must act unanimously, and empowers them to act by majority unless the instrument provides otherwise.³⁴ At the same time the Committee retained the case law rule that a trust is irrevocable unless declared to be revocable, unlike the contrary rule contained in the Uniform Trust Code.³⁵

In other cases the Committee decided to give statutory form to a substantive principle because it was conceptually interrelated with other provisions, and its juxtaposition with them gave greater coherence to the Act as a whole. For this reason, the Act includes provisions

32. See for a discussion of default and mandatory provisions in U.S. law: Langbein, “Mandatory Rules in the Law of Trusts” (2004), 98 N.U.L.R. 1105.

33. National Conference of Commissioners on Uniform State Laws, 2001.

34. See Part Two, Draft *Trustee Act*, s. 12(1).

35. *Supra*, note 32, s. 602(a).

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delineating the trustee's duty of integrity and standard of care, which underlie the exercise of all the statutory powers.³⁶

The Committee also decided that some separate enactments dealing with trusts should be brought under the umbrella of a new *Trustee Act*. In particular, the Committee concluded that the *Trustee Act* was an appropriate location for provisions concerning the variation, resettlement, and termination of trusts, and incorporated the present *Trust and Settlement Variation Act*³⁷ into the draft *Trustee Act*, with changes to reflect the Committee's recommendations on the subject.

Considerable confusion surrounds the extent to which the existing *Trustee Act* and its counterparts in other provinces apply to personal representatives. Executors and administrators in intestacy are regarded in law as fiduciaries, and in many instances the same individual is appointed by a will as both executor of the will and trustee of the trusts which the will creates. A number of the provisions commonly found in the various provincial Trustee Acts expressly apply to executors and administrators, such as those dealing with statutory remuneration and passing of accounts. The application of provisions that do not make explicit reference to executors and administrators is much less certain. While it is fairly clear that the *Trustee Act* will apply to an executor and trustee in respect of *trustee* duties, case law on how the *Trustee Act* applies to personal representatives at a more general level is inconsistent.

The Committee believes greater clarity in the law would be achieved by bringing all trustee functions (*inter vivos* and testamentary) under the *Trustee Act*, and by keeping provisions relating to personal representatives as such in separate legislation, e.g. the *Estate Administration Act*. The proposed *Trustee Act* has been drafted along these lines. An exception is Part IX dealing with statutory compensation and passing accounts, which applies to trustees, personal representatives, testamentary guardians, and committees of mentally incapacitated persons appointed under the *Patients Property Act*. The distinctions between these different fiduciary offices are not particularly significant in relation to compensation, and the same procedural scheme is adaptable to all the categories. It is therefore appropriate for reasons of legislative economy to locate the compensation and account passing provisions in one statute.

36. Part Two, Draft *Trustee Act*, ss. 6(1)-(3).

37. R.S.B.C. 1996, c. 463. Other enactments pertaining to trusts such as the *Conflict of Laws Rules for Trusts Act*, R.S.B.C. 1996, c. 65 and the *International Trusts Act*, R.S.B.C. 1996, c. 237 might conceivably be incorporated into a *Trustee Act*, although the Committee did not see this as necessary or appropriate. The decision regarding what enactments should be consolidated with the *Trustee Act* is one that Legislative Counsel may properly make.

Consequential amendments should be made to the *Estate Administration Act* to relocate to it certain provisions of the current *Trustee Act* that relate only to personal representatives and which ought to be retained. These provisions are noted in the Appendix to this Report. Another consequential amendment to the *Estate Administration Act* could allow personal representatives to invoke or benefit from particular provisions of the proposed *Trustee Act*. Among these would surely be s. 58, which allows a trustee to obtain the opinion and directions of the court, and s. 59(1), which empowers the court to give relief from liability for breach of trust where the trustee has acted honestly and reasonably.

B. The Committee's Process

The Committee met regularly over a period of six years from 1997 to 2003. The Committee's process was twofold.

The first aspect involved identifying discrete aspects of the existing Act or trust law which raised important policy questions related to reform. Consultation Papers containing tentative recommendations were prepared with respect to these subjects and circulated to key organizations in the trust industry, the financial sector, the practising Bar, and academic specialists in trust law, as well as being made available to the general public in hard copy and on the internet. The Consultation Papers requested that comments be forwarded by a date several months following the date of issuance. The Committee formulated final recommendations on the subject in question after considering all responses. A report containing the final recommendations on the subject, intended for incorporation into a draft revised *Trustee Act*, was then published. The following Reports were generated in this manner:

Trustee Investment Powers
Statutory Powers of Delegation by Trustees
Statutory Remuneration of Trustees and Trustees' Accounts
Exculpation Clauses in Trust Instruments
Total Return Investing by Trustees
Variation and Termination of Trusts

In one case a Report was issued without being preceded by a Consultation Paper, namely *Report on Creditor Access to the Assets of a Purpose Trust*. The recommendations in that Report were self-standing and not necessarily intended to be implemented through a new *Trustee Act*, although provisions reflecting them have been included in the draft Act.

The second aspect of the process was to redraft the *Trustee Act* to incorporate changes the Committee considered necessary in a modernized statute. For this purpose the Committee used the draft *Trustee Act* prepared by the Ontario Law Reform Commission as a template, modifying the content and language as it thought necessary or desirable. The Committee

acknowledges its indebtedness to the Ontario Law Reform Commission for that agency's excellent work in the area of trusts.

C. Format of this Report

Part One of this Report is a general introduction explaining the need for reform of the *Trustee Act*, the process by which the Committee revised the Act, and a brief summary of key features of the draft *Trustee Act* recommended by the Committee.

Part Two contains the draft revised *Trustee Act* recommended by the Committee for enactment, with commentaries on its provisions.

The Appendix indicates which provisions of the present *Trustee Act* have been incorporated into the proposed Act and the views of the Project Committee on the appropriate disposition of the remainder.

D. Highlights of the Proposed *Trustee Act*

The proposed *Trustee Act* set out in Part Two of this Report differs in structure and language from the current Act. Contemporary statutory drafting conventions were applied, and provisions dealing with similar subject-matter were grouped into Parts for easier comprehension.

The ability of trustees to apply to obtain the opinion of the court on a matter affecting administration, and the court's power to give it, have been preserved. Likewise preserved is the power under s. 96 of the present Act to grant relief from liability for breach of trust to a trustee who has "acted honestly and reasonably" and "ought fairly to be excused."

The 2002 amendments to the present *Trustee Act* concerning investment powers have been carried over to the proposed Act.³⁸ Briefly summarized, these amendments:

- abolished the "legal list" of authorized trustee investments and substituted the "prudent investor" standard;
- empowered trustees to invest property in any form of property or security in which a prudent investor might invest;

38. *Supra*, n. 4. The amendments concerning investment powers are contained in Part V of the proposed *Trustee Act*, ss. 27-32.

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- defined the standard of care a trustee must exercise in investing the trust property as being the level of care, skill, diligence, and judgment that a prudent investor would exercise in making investments;
- empowered trustees to delegate to an agent the degree of authority with respect to investment of trust property that a prudent investor might delegate in accordance with ordinary business practice, provided that the trustee sets the investment objectives and selects and monitors the agent prudently;
- expressly authorized investment of trust property in mutual funds. (Investment in mutual funds previously would have been a prohibited delegation and a breach of trust, unless the trustee had an express power to invest in that manner);
- exonerated trustees from liability for breach of trust for investment losses if the overall investment strategy was prudent and the trustees' activities conformed to the investment strategy;
- abrogated the rule preventing investment losses from being set off by gains in assessing damages for breach of trust, unless the breach of trust was associated with dishonest conduct on the part of the trustee.

The proposed Act incorporates the recommendations for changes to the law made in the other six Reports issued in the course of the project. Some of the more significant changes reflected in the proposed Act are:

- trustees would have the same powers in relation to the trust property as they would have if the property were vested in them absolutely, subject of course to the obligations imposed on them by the trust;³⁹
- the trustee's duty to provide information to beneficiaries is clarified and expressed in statutory form;⁴⁰
- charitable trusts and non-profit organizations could invest on a "total return" basis, i.e. so as to gain an optimal return consistent with the requirements of prudence, without having to distinguish between income and capital sources

39. Part Two, Draft *Trustee Act*, s. 39(1).

40. *Ibid.*, s. 8.

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and receipts. An instrument could give trustees of a private trust the same power;⁴¹

- trustees would have the power to apportion expenditures between the income and capital accounts as they consider just and equitable, in accord with business practices, and in the best interests of the beneficiaries. They would also be empowered to transfer funds between the income and capital accounts to recover or reimburse an expenditure previously charged to the account that is to receive the funds. (These powers would not apply to certain trusts defined in the *Income Tax Act* (Canada) unless the instrument expressly stated they should apply);⁴²
- trustees of a private trust would be able to act by majority, as trustees of a charitable trust may now do, unless the settlor has provided otherwise;⁴³
- clauses in a trust instrument exempting trustees from liability for breach of trust would be effective according to their terms, but the court would retain a power to declare an exemption clause ineffective if it found that the conduct of a trustee who is in breach of trust was so unreasonable, irresponsible, or incompetent that in fairness to the beneficiary the trustee should not be excused;⁴⁴
- current ceilings on trustee remuneration would be removed, and instead the trustee would be allowed compensation that is fair and reasonable in the circumstances, as in some other provinces;⁴⁵
- trustees would be allowed to take interim compensation during the administration of the trust without an order of the court, subject to the obligation to repay any excess to the trust if the court finds the aggregate compensation to which the trustee is entitled is less than the aggregate of the amounts taken as interim compensation;⁴⁶

41. *Ibid.*, ss. 37(2), (3).

42. *Ibid.*, s. 35.

43. *Ibid.*, s. 12.

44. *Ibid.*, ss. 59(2), (3).

45. *Ibid.*, s. 61(2).

46. *Ibid.*, s. 62.

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- passing of accounts may be ordered on the application of a beneficiary or the trustee, or at intervals the court may set, rather than being required initially within two years of the date of the trustee's appointment or grant of probate or administration, as is now the case;⁴⁷
- an "arrangement" (including a variation, resettlement, or revocation) of a trust will take effect without court order if all beneficiaries are of full age and capacity, and give their consent;⁴⁸
- the court will be able to approve an arrangement deleting or amending an administrative power of a trustee, as well as one enlarging administrative powers;⁴⁹
- under certain circumstances, the court will be able to approve an arrangement varying, resettling, or revoking a trust even if one or more adult, capacitated beneficiaries refuse consent;⁵⁰
- where a charitable trust fails, the court will have the power to approve a *cy-près* scheme without a requirement that the settlor be found to have created the trust with a general charitable intent. The court may also approve a scheme to vary a charitable trust that has not failed so as to allow the fund to be applied for a similar charitable purpose, if this is desirable;⁵¹
- non-charitable purpose trusts may be validly created, with potentially perpetual duration, for purposes corresponding to the purposes for which a society could be created under the *Society Act*, and may be varied on a basis similar to *cy-près* if they fail or become obsolete.⁵²

Acknowledgments

47. *Ibid.*, s. 63(1).

48. *Ibid.*, s. 55(2).

49. *Ibid.*, s. 55(1).

50. *Ibid.*, s. 55(5).

51. *Ibid.*, s. 65.

52. *Ibid.*, s. 70.

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The Committee wishes to thank the many individuals, law firms and organizations who responded to the several consultation papers issued by the Committee, or who otherwise made their views on various aspects of reform of the *Trustee Act* known to the Committee in the course of this project. The thoughtful and detailed comments and representations received were of invaluable assistance in formulating the recommendations reflected in Committee's interim Reports and the draft Act contained in Part Two.

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PART TWO
PROPOSED *TRUSTEE ACT*

TRUSTEE ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

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Definitions and interpretation

1. In this Act,
 - (a) “court” means the Supreme Court;
 - (b) “mentally incapacitated person” means a person who is one or both of the following:
 - (i) a patient within the meaning of the *Patients Property Act* or who would be a patient within the meaning of that Act if resident in British Columbia,
 - (ii) a person who has been admitted to a designated facility under section 22 of the *Mental Health Act* or an equivalent facility in another province, territory or country, or
 - (iii) a person who under the *Adult Guardianship Act* has been found to be incapable of making decisions.

Comment: This term is used in sections 2, 57, 60 and 74. Each of the three Acts referred to in subparagraphs (b)(i) to (iii) of this definition is concerned with persons who have been certified by qualified practitioners or found by a court to be suffering from mental infirmity or incapacity which interferes with their ability to make rational decisions. While much of the *Adult Guardianship Act* is not currently in force, Part 3 of that Act is in force and provides for assessments of incapacity to make decisions under certain circumstances. Section 42, which is not in force, would allow orders made outside British Columbia appointing a decision maker or guardian for a mentally incapable adult to be resealed and thereby given effect in British Columbia. The *Enforcement of Canadian Judgments and Decrees Act*, which likewise has not been brought into force, may also allow for the registration and enforcement in British Columbia of similar orders of courts in other Canadian jurisdictions. If section 42 of the *Adult Guardianship Act* or the *Canadian Judgments and Decrees Act* are brought into force, subparagraph (1)(c)(iii) should be amended to include a person found to be incapable of making decisions under an order of a court outside British Columbia which has been resealed or registered in this province, as the case may be.

- (c) “outgoing” means payments and expenditures, whether paid or incurred by the trustee or a beneficiary, in administering the trust or trust property and, without limitation, includes payments and expenditures arising from or made with respect to repairs, maintenance, insurance, taxes, security interests, debts, calls on shares, annuities, and business and other losses;

Comment: This term is used in sections 35 and 36.

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- (d) “purchaser” means a purchaser for value, and includes a secured party and any other person who for value has received an interest in or claim on trust property;

Comment: This term is used in section 73.

- (e) “qualified beneficiary” means a beneficiary who, on the relevant date:
- (i) has a vested beneficial interest in the trust property and is currently entitled to receive a distribution of trust income or capital; or
 - (ii) has delivered to the trustee written notice that the beneficiary wishes to receive all notices, notifications and reports to which a qualified beneficiary is entitled under this Act;

Comment: This term is used in sections 8, 9, 62 and 63.

- (f) “rule against perpetuities” means the rule against remoteness of vesting commonly known as the modern rule against perpetuities, as modified by the *Perpetuity Act*;
- (g) “secured party” means a person who has a security interest;
- (h) “security interest” means an interest in real or personal property that secures payment or performance of an obligation;

Comment: The two terms “secured party” and “security interest” are conceptually linked. Either or both are used in sections 3, 39, 41, 46, 75 and the definition of “purchaser.”

- (i) “settlor” includes a testator;
- (j) “transfer” in relation to property means to transfer by any method and includes
- (i) to assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release, pay, apply or otherwise dispose of property,
 - (ii) to agree to do any of those things referred to in clause (i), and
 - (iii) to perform all acts and things necessary to transfer property;

Comment: This term is used in numerous sections of the Act. By using the word “dispose”, it will also incorporate the *Interpretation Act* definition:

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“dispose” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

(k) “trust instrument” means

- (i) a deed, will or other writing,
- (ii) an enactment, or
- (iii) an oral declaration

that creates or varies a trust, but does not include a judgment or order of a court;

Comment: This term is used in numerous sections of the Act. Note that it includes an enactment so it embraces various trusts created by statute. See the definition of “enactment” in section 1 of the *Interpretation Act*.

(l) “vesting” includes a vesting by court order, by the terms of an instrument or by the operation of this Act.

Comment: As to vesting by operation of the Act see section 23. The effect of vesting is set out in section 24.

When trustee is unqualified or unfit

2. (1) For the purposes of this Act a person is or becomes unqualified to hold the office of trustee when that person:
- (a) is dead,
 - (b) disclaims or refuses to accept the office of, or to act as, trustee,
 - (c) is a mentally incapacitated person,
 - (d) is convicted of an offence involving dishonesty,
 - (e) is an undischarged bankrupt,
 - (f) is removed as a trustee under a power conferred by a trust instrument or this Act,
 - (g) resigns from the trust or the office of trustee, or

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- (h) being a corporate trustee, is dissolved or is in liquidation.
- (2) For the purposes of this Act a person is or becomes unfit to hold the office of trustee when that person:
 - (a) is incompetent or otherwise incapable of making decisions necessary to discharge the office of trustee,
 - (b) is nonresponsive, or
 - (c) is otherwise unwilling, unable or unreasonably refuses to act cooperatively with other trustees

and that person's conduct hampers the efficient administration of the trust.

Comment: This section should be read in conjunction with sections 14 to 18 which provides machinery for the removal of a trustee who is unqualified or unfit. Subsection (2) addresses concerns often raised in relation to an intransigent trustee.

PART I

APPLICATION OF ACT

General Comment: Section 3 of the Act defines its scope. The Act provides rules that apply when the instrument creating the trust is silent. If a trust falls within its scope, it governs the trust subject to the provisions of the instrument creating the trust. The trust instrument can, in fact, modify most of the provisions of the Act. Those that cannot be modified are listed in section 4(2). Section 5 preserves the present law respecting trusts and trustees except where specifically modified by the Act.

Application of Act

3. (1) Subject to this or any other enactment, this Act applies to all trusts however created and to all trustees however appointed so far as a contrary intention is not expressed in the trust instrument, and subject to the terms of the trust instrument.

- (2) Except where this Act otherwise provides, this Act does not apply to
 - (a) a resulting trust, implied trust, constructive trust or a similar trust declared by a court to exist,
 - (b) a trustee of any property held under a trust listed in paragraph (a), or
 - (c) the rights or responsibilities of a secured party in possession of the subject matter of the security.

- (3) Sections 8 and 9 and Parts VI, IX and X do not apply to a trust that arises through the operation of an enactment.

Comment: The Act casts a wide net to encompass a broad spectrum of trusts. Section 3(1) declares that the Act applies to all trusts and trustees, regardless of the manner of their creation or appointment, except as provided in the Act itself, another enactment, or the trust instrument. However, section 3(2) narrows the scope of the Act's application by setting out certain trusts or relationships to which the Act does not apply.

Generally, a trust will arise in one of three different ways. The first is consensually, through the intention of the parties. This is usually referred to as an express trust, i.e. a trust arising by express intent, and is typically used to carry out a private transfer of property for estate planning or business purposes. Second, a statute may provide that a particular relationship gives rise to a trust. An example is section 227(4) of the *Income Tax Act* which deems a person who withholds tax to hold the tax in trust for the Crown. The third type of trust is one emerging from imputed or presumed intent, or one which is declared by a court to exist for reasons of fairness and justice or to give a remedy to a deserving party. Falling into this group are so called implied, resulting and

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constructive trusts. Details on trusts of this kind can be found in most standard treatises on the law of trusts. It is this third type of trust that is excluded from the Act by section 3(2)(a). The classification of trusts is sometimes a matter of controversy. Section 3(2)(c) makes it clear that the Act does not apply to mortgage relationships (unlike the current *Trustee Act* for example in sections 43, 44, 48, 49 and 79).

Subsection (3) sets out certain provisions that will not apply to statutory trusts.

A common subtype of consensual trust in use today is the pension trust. Pension trusts are usually created by companies and are pension plans in the form of investment trusts where the employers and commonly also employees of companies contribute to the trust funds. The trustees of the pension trust invest these funds, with a view to providing some measure of financial security for the employees on their retirement. In the absence of express provisions in the trust instruments creating pension trusts or pension legislation, pension trusts are governed by the Act.

Employee benefit trusts are another common type of consensual trust established and funded by companies to assist employees. These will be governed by the Act to the extent that they are not governed by separate legislation or specific terms in the instruments creating them.

Trusts created in a commercial context are also subject to the Act. These include business trusts, which are unincorporated business organizations carrying on revenue-generating commercial activities managed actively by trustees. The revenue flows back to the passive investors, who are the beneficiaries.

Default and mandatory rules

4. (1) This Act governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary, except as otherwise provided in the trust instrument and subject to subsection (2).
- (2) The following rules and provisions in this Act prevail over any contrary term or provision of a trust instrument that is not an enactment:
 - (a) Section 21
 - (b) Section 23
 - (c) Section 41
 - (d) Section 59
 - (e) Section 73.

Comment: As mentioned above (see “General Comment” below the heading to Part I), the Act provides guidance where the trust instrument or other governing legislation is silent. The ordinary rule is that the Act governs the relationship among trustees and

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between trustees and beneficiaries subject to any modifications by the trust instrument. However, certain provisions of the Act cannot be overridden by the terms of the trust. These are set out in section 4(2), and include issues that arise on the resignation of a trustee, vesting of an interest in trust property, disposition of insurance proceeds, an application to relieve a trustee of liability for breach of trust, and with respect to the protection of persons dealing with trustees. In these cases, the statutory rules are considered to be of such importance that they cannot be displaced by the settlor of the trust.

Continuation of existing law

5. (1) Except as otherwise provided, the law respecting trusts and trustees in force in British Columbia immediately before this Act comes into force continues in force.
- (2) Subsection (1) does not continue the effect of any part of an enactment repealed by section 79.

Comment: The Act is meant to support and complement the case law developed by the English and Canadian courts rather than provide a comprehensive restatement of the law of trusts. The purpose of modernizing the Act is to ensure that the Act deals adequately with trust issues that are not addressed or are surrounded by uncertainty in the case law or existing statutes, or that require the intervention of the court. Section 5 indicates that the Act complements, and does not replace, the current Canadian law of trusts. Upon the coming into force of this Act, the present *Trustee Act*, the *Trust and Settlement Variation Act*, section 21 of the *Perpetuity Act* and section 44 of the *Law and Equity Act* will be repealed, with some parts carried forward in this Act. Subsection (2) stipulates that this Act will be the sole source of the laws formerly declared in the repealed statutes.

PART II

GENERAL PRINCIPLES GOVERNING TRUSTEES

General Comment: Part II deals with the duties of a trustee and the trustee's ability to delegate these duties. Section 6 sets out the two general duties of a trustee – to act in good faith and act with care. Section 7 states when it is appropriate for a trustee to delegate trust powers to agents. Section 8 concerns a trustee's duty to keep beneficiaries informed. Section 9 addresses the special case of delegation of trust powers by power of attorney. Section 10 exonerates a trustee in certain cases involving the misconduct of an agent.

Duty of integrity and care

6. (1) A trustee must administer the trust in good faith and in accordance with its terms and purposes, the interests of the beneficiaries, and this Act.
- (2) In the discharge of a duty and the exercise of a power, whether the duty or power is created by law or the trust instrument, a trustee must exercise that degree of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.
- (3) Without limiting subsection (2), if a trustee in fact possesses, or because of the trustee's profession, business or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, the trustee must employ that particular level of knowledge or skill in the administration of the trust.

Comment: Section 6(1) states the primary duty of a trustee to carry out the trust in good faith. Good faith, in this context, means an honest belief on the part of the trustee that what the trustee has done, or proposes to do, is proper, appropriate and in accordance with the interests of the beneficiaries of the trust.

Section 6(2) provides that in addition to acting in good faith, a trustee also has a duty to exercise care when managing a trust. In managing a trust, a trustee must meet the same standard as a person of ordinary prudence. The law assumes that an ordinary prudent person will be conscientious and diligent when managing the property of others. Section 6(2) sets out an objectively determined standard of care.

A key issue, however, is whether the general duty of care should vary depending on the type of trustee involved with managing the trust. Many trusts are created under a will to benefit a testator's family members. In these cases, a trustee is often a friend or family member who has little business experience, serves without remuneration, and acts as a trustee merely to help the family. While holding that any trustee must have a reasonable degree of knowledge and competence, courts have been willing to excuse trustees for breach of trust in some cases under a power analogous to that provided in section 59. These would be cases where specific circumstances would make it

inequitable for a trustee to be held liable for breach of trust.

Section 6(3) represents a change from the present law, which applies the same standard of care to all trustees, regardless of the degree of skill or knowledge they have or profess to have. Professional trustees managing trusts for a fee are common today. Professional trustees hold themselves out to the public as having particular skills to carry out estate and trust administration for remuneration. Section 6(3) requires that these trustees be held to a standard of care corresponding to the degree of knowledge or skills they bring, or ought to bring, to the task of trusteeship. The same criterion applies to trustees of commercial and business trusts. The duty to exercise special skills and knowledge under section 6(3) applies to trustees who have or should have them, regardless of whether they hold themselves out to the public as having them.

Power to employ agents

7. (1) If it is reasonable and prudent to do so, a trustee may engage one or more persons as agents within or outside the province to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer and receipt of money or other property, and the giving of discharges for receipts.
- (2) Subsection (1) does not authorize the delegation of authority to exercise any express, implied, or statutory discretion as to the transfer or distribution of trust property to or among the beneficiaries of the trust.
- (3) In engaging an agent, a trustee must personally select the agent, be satisfied of the agent's suitability to perform the act for which the agent is to be engaged, and carry out such supervision of the agent as is prudent and reasonable.
- (4) A trustee is liable for loss caused by the default of an agent engaged under subsection (1) only if the trustee is in breach of subsection (3) and the loss is a consequence of that breach.
- (5) A trustee must not engage a co-trustee as an agent under this section unless the engagement would have been reasonable and prudent if the co-trustee had not been a co-trustee.
- (6) A trustee who has engaged an agent under subsection (1) may authorize the agent in writing to engage another person to carry out any act for which the agent was engaged, unless the trust instrument expressly prohibits the trustee from authorizing the engagement of a sub-agent.

Comment: Generally, a trustee has two types of powers: administrative and dispositive. Administrative powers relate to the management of the trust property while dispositive powers relate to determining when and how much a beneficiary will receive under the

trust. The common law generally prohibits delegation of a power that involves the exercise of discretion. The Act draws a distinction between administrative and dispositive powers. In our view, whether a power is delegable should depend on whether the power is administrative or dispositive and not on whether the power is discretionary. Dispositive powers are at the core of the trustee's duties and should not be delegable unless the trust terms provide otherwise. On the other hand, administrative powers relate to the efficient administration of the trust property (and not so much as to the trustee's judgment.) The Act grants expanded powers of delegation to trustees with respect to administrative powers, especially those relating to investment. This will allow trustees to retain professionals for certain functions, such as engaging expert fund managers to purchase and monitor investments, which will usually both assist the trustee and benefit the trust. See generally the discussion in the British Columbia Law Institute's *Report on Statutory Powers of Delegation by Trustees* (No. 11, 2000).

Section 7(1) states that a trustee may delegate administrative powers to agents when it is reasonable and prudent to do so. It would be reasonable and prudent for a trustee to delegate a function where the trustee lacks any particular expertise needed to carry it out, and it is one that the agent performs in the agent's ordinary course of business. Subsection (2) makes it clear that dispositive powers are not delegable. Subsection (3) requires the trustee to be satisfied of a prospective agent's suitability for the task to be delegated, and to supervise the agent prudently. Subsections (1) and (3) preserve the existing common law rule governing delegation to agents by trustees. Section 7(4) states that if an agent's misconduct causes loss to the trust, the trustee will only be liable for the loss if the trustee has failed to select or supervise the agent with reasonable care. This too preserves the common law rule concerning trustee liability for losses caused by an agent.

At common law, a trustee may not delegate dispositive power to a co-trustee because trustees must act jointly. A delegation of this kind would be an abdication of trust powers and duties. However, a trustee may delegate to a co-trustee powers that can normally be delegated to an agent. Subsection (5) preserves this rule and permits a trustee to delegate to a co-trustee if the delegation complies with subsections (1) and (3).

The current law does not permit subdelegation by agents without authority from the trustee, and there is considerable doubt as to whether a trustee may approve subdelegation without an express power in the trust instrument. This is to prevent the trustee from losing control over the exercise of the delegated power or discretion. Subdelegation is often a practical necessity, however. Subsection (6) permits a trustee to approve a delegation by an agent to a sub-agent, whether or not an express power is contained in the instrument. Only an express prohibition on approval of subdelegation would displace this power. Responsibility for exercising reasonable care in the selection and supervision of a sub-agent would rest on the head agent, in accordance with agency principles.

Duty to inform

8. (1) The trustee must, for each calendar year in which the trust exists, deliver to every qualified beneficiary a report of the trust property that includes:
 - (a) in the first year in which the trust is in existence, a statement of the

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trust assets and liabilities at the time the trust is created and at the end of the year, and in each subsequent year a statement showing the trust assets and liabilities at the beginning and end of the year,

- (b) a statement of the values of trust assets and the basis of those valuations,
 - (c) a statement of receipts and their sources, and
 - (d) a statement of disbursements and who received them.
- (2) A report under subsection (1) must be delivered no later than 60 days after the end of the calendar year to which it relates.
 - (3) Subsection (1) does not limit the common law duty of a trustee on request to provide accounts or trust information to a beneficiary within a reasonable period of time.
 - (4) On the written request of a qualified beneficiary the trustee shall disclose to the beneficiary the source documents that evidence statements referred to in subsection (1).
 - (5) Subject to subsection (6), this section does not require a trustee to disclose information if, in the opinion of the trustee, that disclosure would:
 - (a) be detrimental to the best interests of any beneficiary,
 - (b) be prejudicial to the trust assets,
 - (c) conflict with any duty owed by a trustee as a company director;
 - (d) reveal a trustee's reasons for the exercise of discretion conferred by the trust instrument,
 - (e) place an unreasonable administrative burden on the trust, or
 - (f) place the trustee in breach of obligation, properly assumed by the trustee, to maintain confidence.

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- (6) On application of a qualified beneficiary or a beneficiary who has requested information that has not been provided by the trustee, the court may, on such terms as the court thinks fit, order the disclosure of any information regarding:
 - (a) the terms of the trust,
 - (b) the administration of the trust, or
 - (c) the trust assets.
- (7) A beneficiary may, by notice in writing to the trustee, waive the right to a trustee's report or other information that is required to be given under this section.
- (8) A beneficiary may, by notice in writing to the trustee, revoke a waiver previously given in relation to future reports and information.

Comment: At common law, a trustee has a duty to provide accounts within a reasonable time upon a beneficiary's request. Section 8(1) requires a trustee to provide certain financial information annually to each qualified beneficiary within a specified period of time. The expression "qualified beneficiary" is defined in section 1(e). Subsection (3) makes it clear that the duty in subsection (1) is not in lieu of the common law duty. Subsection (1) creates an additional duty to inform beneficiaries over and above the common law duty to provide accounts or other trust information requested by beneficiaries.

Subsection (4) permits a beneficiary to request access to the source documents - vouchers and the like - that underlie the financial statements provided under subsection (1).

The beneficiary's right to information is limited by the six exceptions set out in subsection (5). The exceptions permit the trustee to withhold requested information if disclosure would be unreasonable or would conflict with any other legal duties that the trustee may have. Under subsection (6), the court may order the disclosure of any information relating to the terms, administration and assets of a trust even if the request falls under subsection (5).

Subsection (7) permits a beneficiary to relieve a trustee of the obligation to account annually, but subsection (8) provides that any such waiver is revocable.

Power to delegate by power of attorney

9. (1) Despite any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate to an attorney the execution or exercise of all or any of the trusts, powers and discretions vested in the trustee, either alone or

jointly with any other person, for a period not exceeding twelve months from the time it is to take effect.

- (2) Despite sections 7(4) and 10, a trustee who creates a power of attorney under subsection (1) is liable for the acts or omissions of the attorney as if they were the acts or omissions of the trustee.
- (3) Not later than seven days after a trustee creates a power of attorney under subsection (1), the trustee must deliver written notice that an attorney has been appointed to exercise trusts, powers, and discretions vested in the trustee.
- (4) A notice under subsection (3) must be delivered to the following persons:
 - (a) any other trustee and any other person having the power under the trust instrument (whether alone or jointly) to appoint a new trustee,
 - (b) if there is no person to whom notice can be given under paragraph (a) then to every qualified beneficiary,
 - (c) if there is no person to whom notice can be given under either paragraph (a) or paragraph (b) then to the Public Guardian and Trustee.
- (5) The notice delivered under subsection (3) must include
 - (a) the identity of the attorney appointed under the power of attorney,
 - (b) a description of the extent of the trusts, powers and discretions affected by the power of attorney,
 - (c) the reason for the appointment,
 - (d) the date or event on which the appointment is to take effect, and
 - (e) the intended duration of the appointment.
- (6) A failure by a trustee to comply with subsections (3), (4) or (5) does not invalidate any act done or instrument executed by the attorney as against a third party dealing with the attorney in good faith.
- (7) If there are only two trustees and the terms of a trust specify that there should be a minimum of two trustees at any given time, neither trustee

may, by a power of attorney created under subsection (1), appoint the other trustee as attorney.

- (8) Subject to subsection (7) a trustee may appoint a co-trustee as attorney provided that appointment is both reasonable and prudent.

Comment: As to the delegation of trustee powers under a power of attorney, see generally the discussion in the British Columbia Law Institute's *Report on Statutory Powers of Delegation by Trustees* (No. 11, 2000).

Section 9 permits a trustee to delegate temporarily trust duties and powers by power of attorney to any person for any period not exceeding 12 months. This rule supersedes any rule of law or equity that prohibits the delegation of a trustee's duties. Subsection (1) permits a trustee to appoint an agent when the trustee is or may be temporarily unable to act but need not resign, such as where a trustee fears temporary physical or mental incapacitation or will be out of the jurisdiction for an extended period. Section 9 provides a convenient alternative to the resignation and replacement of a trustee in cases where resignation and replacement could create their own problems or where the continuing trustees or beneficiaries would prefer that the particular trustee remain in office.

Full delegation of powers by a power of attorney creates serious risks for mismanagement of a trust. A variety of safeguards are imposed by the Act. First, the donee agent receiving the power of attorney must be selected carefully. The best way to ensure that the agent is selected carefully is to place the risk of wrongful or negligent conduct by the agent squarely on the donor trustee. Subsection (2) provides that a donor trustee giving a power of attorney is liable for the acts and omissions of the donee agent. Second, the duration of the power of attorney is limited to 12 months under subsection (1). Third, persons who have an interest in the proper administration of the trust must be notified of the delegation (subsections (3), (4) and (5)).

Subsection (6) provides that failure of a trustee to comply with the notice requirements does not invalidate any acts done by the agent. This is to protect third parties dealing in good faith with the agent.

Subsections (7) and (8) address the circumstances in which a co-trustee may be appointed as an attorney.

Liability for trust property

10. (1) Subject to subsections (2) and (3) and sections 7 and 9, a trustee is liable only for the trustee's own acts or omissions in relation to trust property.
- (2) Subject to sections 7 and 9, a trustee is liable only for money, securities, or other property that the trustee actually receives even if the trustee joins in signing a receipt with a co-trustee because of a requirement imposed by the trust instrument that trustees must act unanimously.

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- (3) A trustee is liable for the conduct of a financial institution or an agent or custodian with whom trust property is deposited only if the trustee fails to exercise prudence in the selection and supervision of the financial institution, agent or custodian.

Comment: Section 10 is a modification of section 95 of the current *Trustee Act*. The modifications are intended to overcome some uncertainty created by the case law and to make clear that a trustee will be held liable when failing to exercise prudence in selecting and supervising the agent. This brings section 10 in line with section 7 and common law principles. See generally the discussion in the British Columbia Law Institute's *Report on Statutory Powers of Delegation by Trustees* (No. 11, 2000).

Conflicts of interest and duty

11. (1) A trustee must discharge the duties and exercise the powers of the office of trustee solely in the interests of the beneficiaries of the trust, and without limiting the generality of the foregoing a trustee must not knowingly permit a situation to arise
 - (a) in which the trustee's interest conflicts in any way with the trustee's discharge of duties and the exercise of powers, or
 - (b) in which the trustee may derive any personal benefit or a benefit for any other person, except so far as the law or the trust instrument expressly permits.
- (2) If, on application to the court by a trustee, it is shown that it would be for the benefit of the trust and its beneficiaries, whether or not any beneficiary withholds consent, the court may make an order, on such terms and conditions as appear just,
 - (a) permitting a trustee to act whether or not the trustee may be in a situation that contravenes subsection (1); or
 - (b) excusing a trustee from liability whether or not the trustee may be in breach of trust for having acted while in a situation that contravened subsection (1).
- (3) An order under subsection (2)(b) may be made any time after the occurrence of the breach of trust.
- (4) Unless otherwise ordered by the court, a trustee must deliver notice of an application under this section to every qualified beneficiary.

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- (5) If a minor or unborn person has an interest in the trust, the trustee must deliver notice of an application under this section to the Public Guardian and Trustee at least one month before the day fixed for the application.
- (6) If the trust is a charitable trust, the trustee must deliver notice of an application under this section to the Attorney General at least one month before the day fixed for the application.
- (7) If additional information becomes available after an order under this section is made, or the circumstances under which the order was made change, the court may, on application by the trustee or a qualified beneficiary, vary the order.
- (8) Nothing in this section limits the jurisdiction of the court under sections 55 to 57 and 59.

Comment: The trustee, being a fiduciary, is prohibited from being involved in conflicts of interest and profiting from office. Subsection (1) restates this fiduciary duty of a trustee. Section 11 requires trustees to act solely in the best interests of the beneficiaries when managing a trust, and avoid situations where their interests conflict with the best interests of the beneficiaries. Unless expressly authorized by the trust instrument, trustees may not use their office to profit personally or confer benefits on third parties. Trustees who do so will be in breach of section 11(1). Trustees cannot profit even if the trust could not itself have acquired the benefit, or where the trustees intended to benefit the beneficiaries and received an incidental benefit themselves. The only issue is whether a trustee's interest conflicted with trust duty when the profit was made. If so, the trustee must disgorge the profit.

Section 11(1)(b) permits a trustee to profit from trusteeship so long as the trust instrument or the law expressly permits it. A settlor may wish to tolerate certain situations involving a conflict of interest in order to obtain the benefit of the trustee's skills or familiarity with the affairs of the settlor. For example, a common term in a trust is a charging clause permitting the trustee to charge a fee to the trust for professional services. Absent such a clause, a trustee receiving money from the trust (other than the statutory compensation allowed under Part IX) would be in breach of section 11(1).

At common law, a trustee may act while in a conflict of interest, or profit where the trust instrument is silent, only if all the beneficiaries of the trust have consented before the trustee entered into the conflict, or any profit was made. If any beneficiary is incapacitated or not yet born, consent would not be obtainable. Section 11(2) addresses this problem by permitting an application to court for an order permitting the trustee to act in a conflict of interest, or to profit personally, so long as it would be for the benefit of the trust and its beneficiaries. Subsection (2) provides that the court can approve conflicts of interest and profits by trustees before or after the fact. The court's power under section 11 does not affect its power to relieve a trustee from breach of trust under section 59. Furthermore, the court may endorse the transaction even if beneficiaries do not consent, so long as the court thinks that it will benefit the trust and beneficiaries.

Notice requirements are dealt with in subsections (4) to (6). Subsection (7) permits a trustee or a qualified beneficiary to apply to the court to vary an order made under

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section 11. The court may vary the original order if new information comes to light, or circumstances change.

Trustees may act by majority

12. (1) If there is more than one trustee, the trustees may act by majority in the discharge of their duties and the exercise of their powers.
- (2) If trustees are deadlocked on a matter, one or more of them may apply to the court for an order resolving the matter.
- (3) A trustee who disagrees with a decision or act of the majority may state the disagreement in writing but, unless the decision or act is unlawful, must join with the majority in doing anything necessary to carry out the decision or act if it cannot be carried out otherwise.
- (4) A trustee who states a disagreement with a decision or act of the majority in writing under subsection (3) is not liable for any breach of trust or any loss resulting from that decision or act even if that trustee has joined with the majority in compliance with subsection (3) in order to carry it out.

Comment: Section 12(1) introduces a significant change by allowing trustees of a private trust to act by majority unless the trust terms provide otherwise. This reverses the existing default rule that trustees must act with unanimity if the terms are silent on the point. Section 12(1) brings the rule applicable to private trusts into line with that governing charitable (or public) trusts, under which trustees have been authorized since the late eighteenth century to act by majority decision. It also brings the default rule regarding private trusts into keeping with actual practice, as it is common for trust instruments to empower trustees expressly to act by majority. This promotes the efficient management of trust property and limits the need for court involvement in trustees' decision making. A few Commonwealth jurisdictions have abrogated the unanimity rule, as have the majority of U.S. states. (See *Restatement of the Law: Trusts 3d*, para. 39 and also the *Uniform Trust Code*, section 703, para. 1(a)). The settlor may still override section 12(1) by requiring trustees to act unanimously. Where no majority exists or the trust terms contain a unanimity clause and the trustees are deadlocked, any trustee may apply to the court for an order resolving the matter. Subsections (3) and (4) contain machinery providing for the protection of dissenting trustees.

Powers or duties of surviving trustees

13. If a power is conferred or a duty is imposed on two or more trustees jointly, the power may be exercised or the duty discharged by the survivors or survivor of them.

Comment: Section 13 concerns the position of surviving trustees. Where there are two or more trustees, and one or more dies, the survivor(s) can exercise trust powers and discharge trust duties. Section 14 provides for the appointment of new trustees.

PART III

APPOINTMENT AND DISCHARGE OF TRUSTEES BY ACT OF THE PARTIES

General Comment: Part III of the Act concerns the appointment and discharge of trustees without an order or declaration from the court. Section 14 lists the persons who have the power to appoint a substitute or additional trustee, should it be required by law or by the trust instrument. Section 15 provides for temporary appointments. Sections 16, 17 and 18 relate to the removal of unqualified or unfit trustees. Sections 19 to 22 address various issues in relation to continuity of trustee rights and duties. They carry forward the policy of section 27 of the current *Trustee Act*.

Appointment of substitute or additional trustees

14. (l) If
- (a) a trustee becomes unqualified to hold the office of trustee within the meaning of section 2(1), or
 - (b) the appointment of an additional trustee is authorized or required by law or by the trust instrument,
- the following who are able and willing to act, in the following order, may appoint a substitute trustee, including a person exercising the power to appoint under this subsection, in substitution for a trustee referred to in paragraph (a) or in addition to existing trustees under paragraph (b),
- (c) persons nominated by the trust instrument for the purpose of appointing substitute or additional trustees,
 - (d) the one or more surviving or continuing trustees,
 - (e) the personal representatives of the last surviving or continuing trustee,
 - (f) the beneficiary, if the trust is one that arises through the operation of an enactment, or
 - (g) the Public Guardian and Trustee.

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- (2) If two or more persons are nominated jointly in a trust instrument for the purpose of appointing substitute or additional trustees they may act by majority and if they cannot agree in naming an appointee, they are deemed to be unable to act.
- (3) An appointment under this section must be in writing.

Comment: Section 14 concerns the non-judicial appointment of substitute and additional trustees. Appointment of a substitute trustee will often amount to the removal of a current trustee. Where a trustee becomes unqualified to hold office or the law or the trust instrument authorizes or requires that an additional trustee be appointed, persons listed in sections 14(1)(c) to (g), in that order of priority, may appoint a substitute or an additional trustee. Section 2(1) states when a trustee is unqualified to hold office. Only one group of persons has the exclusive power to appoint a trustee at any given time. If that group is unable or unwilling to act, then the power to appoint passes to the next group.

Subsection (2) concerns the situation where the trust instrument names two or more persons to act in appointing new trustees. They may act by majority, and if they cannot agree, they are deemed to be incapable of acting. New trustees would then need to be appointed, either under subsection (1) by a holder of appointment authority ranking next in the hierarchy set out there, or by the court under section 52.

Temporary incapacity or absence of trustee

15. If a trustee is temporarily unable to participate in the administration of the trust by reason of an absence or disability that does not render the trustee unfit or unqualified to serve, and it is desirable to proceed immediately to administer trust property, the persons authorized to appoint substitute or additional trustees under section 14 may

- (a) authorize the remaining trustees, if any, or
- (b) appoint a person to act in substitution for the disabled or absent trustee

for the duration of the disability or absence, to take any steps required to deal with the trust property and any dealing with the trust property is as valid as if the disabled or absent trustee had been of full capacity and had joined in the dealing.

Comment: Section 15 provides for temporary appointments of substitute or additional trustees to deal with trust assets when an original trustee is not available to act.

Discharge of unqualified trustee

16. A trustee, upon becoming unqualified to hold the office of trustee within the meaning of section 2(1), ceases to be a trustee, whether or not a substitute trustee is appointed under section 14.

Comment: Section 16 provides that a trustee who is unqualified to hold office is automatically discharged from office, regardless of whether a substitute trustee is appointed. As a practical matter, where the discharged trustee was a sole trustee someone would have to take steps under section 14(1) to appoint a successor.

Removal of unfit trustee

17. (1) If a majority of trustees determine that one of the trustees is unfit to hold the office of trustee within the meaning of section 2(2) they may remove that trustee by a written resolution setting out the reasons for the removal.
- (2) Subject to subsection (3) a resolution under subsection (1) is effective 15 days after a copy is delivered to the trustee that is the subject of the resolution.
- (3) The trustee that is the subject of the resolution may, within the 15 day period referred to in subsection (2) request a meeting with the other trustees to respond to the reasons set out in the resolution and if such a request is made the effect of the resolution is stayed until it is confirmed or rescinded under subsection (4).
- (4) A meeting requested under subsection (3) must take place as soon as is practicable and the other trustees may
- (a) confirm the resolution, or
 - (b) rescind the resolution.

Comment: Section 17 deals with the power of trustees to remove a fellow trustee who is unfit to hold office. Unfitness to hold office is determined with reference to section 2(2). Section 2(2) provides that a trustee is unfit to hold office if the trustee's conduct hampers the efficient administration of the trust and the trustee is incompetent, unresponsive or intransigent.

Subsection (1) provides that if a majority of trustees determine that a fellow trustee is unfit to hold office, they may remove that trustee by written resolution setting out the reasons for removal. Subsection (2) requires that the majority of trustees deliver a copy of the resolution to the trustee that is the subject of the resolution. The resolution becomes effective 15 days after the subject trustee receives a copy of the resolution. Subsections (3) and (4) set out a "due process" mechanism which permits the subject trustee to respond to the allegations of unfitness.

Effect of purported discharge or removal

18. (1) If a substitute trustee is appointed under section 14(1) in place of a former trustee in the belief that a former trustee had become unqualified to hold the office of trustee, any subsequent steps taken by the substitute trustee and any remaining trustees in the administration of a trust are valid
- (a) whether or not the belief is mistaken, and
 - (b) whether or not the mistaken belief is based on a mistake of fact or law.
- (2) If, in the belief that a former trustee had become unqualified to hold the office of trustee and that the former trustee had been discharged through the operation of section 16, a remaining trustee takes any steps in the administration of a trust, those steps are valid
- (a) whether or not the belief is mistaken, and
 - (b) whether or not the mistaken belief is based on a mistake of fact or law.
- (3) If a former trustee is removed by resolution made under section 17, any acts or steps taken after the resolution is effective by remaining trustees and any substitute or additional trustee appointed under section 14(1) are valid whether or not the resolution under section 17(1) is based on a mistake of fact or law.

Comment: Section 18 addresses the legal position where a trustee is removed because the trustee is unqualified or unfit to hold office. It ensures that any actions taken by substitute and remaining trustees are valid even if a trustee was removed on mistaken belief of fact or law. The section operates to protect these trustees as well as bona fide third parties dealing with the trustees.

Power of surviving trustee to appoint successor

19. A sole trustee, or the last surviving or continuing trustee, may appoint in writing one or more persons to act as a successor after the trustee's death.

Comment: A sole trustee, or the last remaining trustee, has the power to appoint successors to assume the office of trustee after the trustee's death. Section 19 does not address the situation where a trustee wishes to resign (see section 21).

Powers of new trustees

- 20.** Every substitute or additional trustee appointed pursuant to this Act has the same power, authority and discretion and may in all respects act as if originally appointed a trustee by the trust instrument both before and after the trust property becomes vested in that trustee.

Comment: Section 20 makes it clear that substitute and additional trustees appointed are to be treated like trustees appointed by the trust instrument. This ensures the efficient management of trust property where there is a change of trustees.

Resignation by trustee

- 21.** A person may resign the office of trustee by delivering written notification to a person mentioned in paragraphs (c) to (g) of section 14(1) who is most immediately entitled to appoint a substitute trustee.

Comment: Section 21 sets out the procedure to be followed in the resignation of a trustee.

Liability of trustee on discharge

- 22.** Unless the court orders otherwise, if a trustee ceases to be a trustee, any consequential vesting or transfer of trust property to a substitute or additional trustee does not relieve the former trustee from liability for a breach of trust occurring while that person was a trustee.

Comment: A trustee leaving the office as a result of discharge, retirement, removal or replacement remains liable for a breach of trust committed when in office. Changes to the title of the trust property after a trustee leaves office will not affect the trustee's liability.

PART IV

VESTING

General Comment: This Part brings together a group of provisions that concern vesting and its effect.

Vesting

23. (1) When a person ceases to be a trustee, the trust property ceases to be vested in that person without any further declaration or order.
- (2) If a person is added or substituted as a trustee of the trust, the trust property vests in that person without any further declaration or order.
- (3) If a sole trustee ceases to be a trustee and a new trustee has not been appointed, the trust property vests in the court until a new trustee is appointed.
- (4) This section applies whether a person ceases to be a trustee, or is added or substituted as a trustee, in accordance with the trust instrument or this Act.

Comment: When a trustee leaves office, title is divested and where a new trustee is appointed, title to the trust property vests in that new trustee. The divesting and vesting occur automatically through the operation of the Act and no declaration or order from the court is required. This promotes the efficient management of trust property where there is a change in trustees and permits substitute trustees to deal with the trust property immediately upon taking office. This section operates in the same fashion to transfer title to trust property regardless of whether the trustee left office as a result of a term of the trust instrument or the operation of the Act. This is one of the provisions that cannot be excluded by the settlor (see section 4(2)).

Effect of vesting

24. (1) A vesting under section 23 has the same effect as if the legal or other estate or interest in the property had been actually transferred to the person in whom the property is to be vested.
- (2) The provisions of the *Land Title Act* applicable to a transmission of land apply to a vesting of trust property that includes land.

Comment: Section 24 restates the effect of vesting in terms of a transfer to the vested person of the legal estate in the trust property, or if the legal estate is not the subject of the vesting (as in the case of a trust of an equity of redemption), such other estate or interest as is being vested. This does not displace the application of the *Land Title Act*.

Vesting of leasehold property

25. The vesting of leasehold property in a substitute or additional trustee is not a breach of any provision of the lease prohibiting a disposition of the lessee's interest and does not give rise to any forfeiture, right of re-entry or other claim for breach of the prohibition.

Comment: Self-explanatory.

Vesting orders

26. If the court considers it to be in the best interests of the beneficiaries or purposes of a trust, it may, on application
- (a) vest all or part of the trust property in, or
 - (b) appoint a person to make or to join in making a transfer of all or part of the trust property to
- a person in a manner, for an estate or interest, and on terms, as the court orders.

Comment: Section 26 preserves the right of the court to make vesting orders. It will likely be invoked only where vesting by operation of the Act is not available or is surrounded with difficulty in particular circumstances.

PART V

INVESTMENT AND ADMINISTRATIVE POWERS OF TRUSTEES

General Comment: Part V carries forward the recently enacted policy of adopting a prudent investor standard in relation to trustee investments. It also introduces a total return investment regime. Section 27 permits trustees to invest in any prudent investment. Sections 29 and 30 define prudence in investment with reference to the overall investment strategy. Section 31 permits trustees to delegate investment powers to agents. Section 33 restates the trustees' duty to act impartially as between income and capital beneficiaries. Sections 34 to 38 implement various aspects of the total return investment approach. Section 41 dictates how insurance proceeds may be used.

Investment of trust property

27. (1) A trustee may invest trust property in any form of property or security in which a prudent investor might invest, including a security issued by a mutual fund as defined in the *Securities Act*.
- (2) Subsection (1) does not authorize a trustee to invest in a manner that is inconsistent with the terms of the trust instrument.
- (3) Without limiting subsection (1), a trustee may invest trust property in a common trust fund managed by a trust company, whether or not the trust company is a co-trustee.
- (4) Except as provided in subsection (3), a corporation that is a trustee must not invest trust money in its own securities.

Comment: Section 27 concerns the power of trustees to invest trust property. Until recently under the *Trustee Act*, if the trust instrument was silent on authorized investments, trustees could invest only in a narrow range of assets listed in the Act which strongly favoured the preservation of capital. This approach was replaced as a result of the enactment of the *Trustee Investment Statutes Amendment Act, 2002*. The provisions of the 2002 amending Act are carried forward in sections 27 to 32 of this Act with only minor wording changes in sections 27(2), 31(4), (5) and (6). These provisions are based on recommendations made by the British Columbia Law Institute in its *Report on Trustee Investment Powers* (No. 6, 1999). More detailed information as to the operation of these sections may be found in the *Report*.

Section 27(1) permits a trustee to make the same investments that a prudent investor would make, including the purchase of mutual funds. Subsection (2) reiterates that the trust instrument may restrict this power. The settlor may prefer a portfolio that is more conservative than that contemplated by subsection (1).

Subsection (3) expressly permits a trustee to invest trust property in a common trust fund managed by a trust company, even if the trust company is a co-trustee. This reverses case law holding that such an investment would amount to an abdication of the trustee's powers to the corporate co-trustee. Subsection (3) would also permit trust

property of which the trust company is not a trustee to be invested in that trust company's common trust fund. (In order for the common trust funds of nationally active trust companies to be used as investment vehicles by trustees generally, however, s. 72 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141 and similar legislation of other provinces would also have to be amended to clarify that a trust company's common trust fund need not be restricted to assets held in trust by the trust company.)

Standard of care

28. In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

Comment: Section 28 sets out the degree of care that a trustee must exercise in investing trust property. The standard is that of the prudent investor.

Trustee not liable if overall investment strategy is prudent

29. A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor would adopt under comparable circumstances.

Comment: Section 29 exonerates a trustee from liability for loss to the trust if the overall investment strategy is sound.

Abrogation of common law rules: anti-netting rules

- 30.** (1) The rule of general trust law that requires the assessment of the decisions of a trustee on an investment by investment basis if the decisions are called into question is abrogated.
- (2) The rule for the assessment of damages for breach of trust that prohibits losses from being offset by gains is abrogated except in respect of circumstances in which the breach is associated with dishonesty on the part of the trustee.

Comment: At common law, a trustee's investment strategy is scrutinized on an investment by investment basis to determine its prudence. Section 30 changes this rule. Subsection 30(1) supports the rule in section 29 – a trustee's investment strategy is scrutinized on an overall basis to determine the prudence of investments made. Therefore, a trustee will not be liable for breach of trust if the trustee's overall investment strategy is prudent, even if a particular investment viewed in isolation may seem speculative or imprudent.

At common law, where a breach of trust results in loss, the trustee must make up for that loss. Where the trust profits from a breach of trust, this cannot be taken into

account in assessing the trustee's liability. If there is both a profit and a loss to the trust, the loss cannot be set off against the profit. Subsection 30(2) changes this rule and permits a trustee to set off any losses against any profits resulting from a breach of trust, provided that the breach of trust was an honest one.

Delegation of authority with respect to investment

- 31.** (1) In this section, “agent” means any person to whom a trustee delegates investment responsibility.
- (2) A trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice.
- (3) A trustee who delegates authority under subsection (2) must determine the investment objectives for the trust and exercise prudence in
- (a) selecting an agent,
 - (b) establishing the terms and limits of the authority delegated,
 - (c) acquainting the agent with the investment objectives, and
 - (d) monitoring the performance of the agent to ensure compliance with the terms of the delegation.
- (4) In performing a delegated function, an agent has the duty to exercise reasonable care to comply with the terms of the delegation.
- (5) A trustee who complies with the requirements of subsection (3) is not liable for the decisions or actions of the agents to whom the function was delegated.
- (6) This section does not authorize a trustee to delegate authority under circumstances in which the trustee is required to act personally.
- (7) Investment in a mutual fund referred to in section 27 (1) or a common trust fund referred to in section 27 (3) is not a delegation of authority with respect to the investment of trust property.

Comment: Section 31 permits trustees to engage agents to invest trust property, provided the delegation is prudent and consistent with ordinary business practice. This implies that a trustee may delegate investment powers to an agent if it is necessary or in the agent's ordinary course of business to exercise those powers. Subsection 31(3) requires a trustee delegating investment powers to agents to determine the investment

objectives first. Agents merely carry out administrative powers in order to accomplish the investment objectives of the trustees.

Subsection 31(3) sets out the standard of care for trustees in delegating investment powers to agents. First, the trustee must exercise prudence in selecting the agent. Second, the trustee must carefully establish the terms and limits of the authority delegated to the agent. Third, the trustee must inform the agent of the investment objectives. Finally, the trustee must monitor the agent to ensure that the agent acts within the scope of the delegated authority.

Subsection 31(4) requires an agent to act within the delegated investment powers. This is a separate duty owed by the agent.

Subsection 31(5) exonerates a trustee from liability for misconduct of an agent if the trustee exercised prudence in delegating authority to the agent. Investing in a mutual fund or a common trust fund (permitted under ss. 27(1) and (3) does not constitute a delegation of investment power. As with any of the provisions of this Act, other than those listed in section 4(2), the trust instrument may limit a trustee's ability to delegate investment responsibilities. Subsection 31(7) affirms that investing in a mutual fund as defined under the *Securities Act* or a common trust fund managed by a trust company does not amount to a delegation of investment power.

Interpretation of trust instrument in relation to sections 27 to 31

32. For the purposes of sections 27 to 31 and any investment made after the coming into force of this section, if the terms of the instrument that created a trust express the powers of the trustee as powers to invest property of the trust in the investments permitted under a former *Trustee Act*, or a particular provision of a former *Trustee Act* as it read at any time before its repeal, the instrument is to be interpreted as authorizing the investments permitted under sections 27 to 31, unless a particular investment is expressly authorized or expressly prohibited by the terms of the instrument.

Comment: Section 32 carries forward transition provisions of the *Trustee Investment Statutes Amendment Act 2002*. After the Act comes into force, if a trust instrument authorizes a trustee to invest trust property in investments permitted under a former *Trustee Act*, it is to be interpreted as authorizing the investments permitted under sections 27 to 31 (subject to any contrary directions contained in the trust instrument.)

Duty to act impartially and prudently

33. Nothing in sections 35 to 39 affect the overriding duty of a trustee
- (a) to act impartially as between different classes of beneficiaries in the administration of a trust, or
 - (b) to invest prudently as provided in section 28.

Comment: When there is only one class of beneficiaries sharing the same interests, trustees may administer the trust with only these beneficiaries in mind. However, where there is more than one class of beneficiaries, the issue becomes more complicated. For example, one beneficiary may have a life interest in the trust (usually income) while another beneficiary has an interest in the remainder of the trust (usually capital). In this context, “income” refers to the periodic revenues gained from use of the trust property while “capital” refers to the growth over time of the value of the trust property.

Where there are two or more classes of beneficiaries, trustees run the risk of favouring one class over another when administering the trust. Section 33 requires trustees to treat all classes of beneficiaries fairly when administering trusts. Therefore, trustees must invest carefully to bring similar returns to both the income and capital of the trust. Sections 36 to 38 of the Act propose a new total return investment regime for trustees. Under this regime, evenhanded treatment is achieved without having to draw a clear distinction between income and capital accounts for trusts.

Abrogation of common law rules: apportionment

34. The rules of general trust law known as the first and second branches of the rule in *Howe v. Lord Dartmouth*, and the rule in *Re Chesterfield's Trusts* are abrogated.

Comment: Section 34 abolishes several common law rules that oblige trustees to convert particular forms of assets to authorized trustee investments and to apportion income from these assets between the income and capital beneficiaries. These rules apply during the period of administration of a deceased person's estate. The first branch of the rule in *Howe v. Lord Dartmouth* states that where a will contains a residuary gift of personal property, or a future or reversionary property interest for persons in succession, the trustee must convert all wasting, hazardous and speculative assets to authorized trustee investments. The second branch of the rule in *Howe v. Lord Dartmouth* states that whenever original assets of the estate other than authorized investments in the legal list are to be converted under an express or implied trust for sale, the income from those assets must be apportioned between the capital and income beneficiaries until conversion to the authorized investments actually takes place. The income beneficiary should receive the income that the assets would yield if they had already been converted. The balance of the actual income from the unauthorized assets, if any, is added to capital. Finally, the rule in *Re Chesterfield's Trusts* states that if future or reversionary property is included in a residuary gift under a will, and it is not yielding income before it is sold, the proceeds of sale after it comes into possession must be apportioned between the income and capital beneficiaries. The amount that would be equivalent to the sale proceeds, if invested at the testator's death at the rate payable on the legal list investments, compounded annually or semiannually before income tax, is treated as capital and the rest is treated as income.

The Act abolishes these common law rules because they are closely tied to the outdated closed list of “authorized” trustee investments and, in particular, do not mesh well with the principles of total return investing.

Apportionment of outgoings between income and capital beneficiaries

35. (1) A trustee may apportion any outgoing between the income and capital accounts, or may charge the outgoing exclusively to or from either income or capital as the trustee considers to be
- (a) just and equitable in all the circumstances,
 - (b) in accordance with sound business practice, and
 - (c) in the best interests of the beneficiaries or the purposes of the trust.

Comment: “Outgoing” is a defined term and essentially means any payment or expenditure made by or on behalf of the trust (see section 1). Subsection (1) explains how expenses are apportioned between capital and income accounts of trusts. Benefits from trust property must be apportioned between the income and capital beneficiaries. Similarly, expenses incurred while administering the trust must also be shared between income and capital beneficiaries unless the trust instrument states otherwise. If the trust instrument is silent on apportionment, at common law, the type of expense determines who bears it. Generally, expenses of an income nature are borne by income beneficiaries while expenses of a capital nature are borne by capital beneficiaries. The common law rule also depends on other factors, such as for whose benefit the expense was incurred, to determine expense apportionment. This creates uncertainty surrounding the allocation of expenses between income and capital beneficiaries, as it is often difficult to determine who benefited from a particular expense. The Act changes the common law rule by giving trustees the discretion to allocate expenses between income and capital. When exercising their discretion, trustees must act in a just and equitable manner, in accordance with sound business practices and in the best interests of the beneficiaries, or the purposes of the trust, considered as a whole.

- (2) A trustee may transfer funds between the capital account and the income account to recover or reimburse an outgoing previously charged to the account that is to receive the transferred funds.

Comment: Subsection (2) describes how the expense allocation is administered. Currently, trustees would be in a breach of trust if they paid for expenses out of income when the expenses were chargeable to capital. The trustees would be personally liable for the expenses and cannot be reimbursed by the income beneficiaries at a later date. When managing the trust on a day to day basis, there are situations where it would be sound business practice for the trust to meet expenditures out of a beneficial interest that might not ultimately bear the cost. The Act recognizes the need for trustees to have this power in order to exercise their discretion to allocate expenses. Subsection (2) allows trustees to transfer funds between income and capital accounts to make necessary adjustments after paying expenses. For example, if the trustees wanted to charge the expense to capital account but paid for the expenses with funds from income account, they may later transfer funds from the capital account to the income account to reimburse the income beneficiaries.

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- (3) A trustee may deduct from the income derived from trust property that is subject to depreciation or obsolescence such amounts as are fair and reasonable and add them to the capital of the trust to protect the capital of the trust from loss.

Comment: Where the trust capital is subject to depreciation or obsolescence, a trustee may deduct an amount that is fair and reasonable from the income account and add that amount to the capital account to protect the trust property from loss.

- (4) If a trust is a pre-1972 spousal trust, a post-1971 spousal or common-law partner trust, an alter ego trust, or a joint spousal or common-law partner trust within the meaning of the *Income Tax Act* (Canada), this section does not apply unless the trust instrument expressly provides to the contrary.

Comment: Section 35 does not apply to certain kinds of trusts as defined in the federal *Income Tax Act*. Under the *Income Tax Act*, these trusts are eligible to benefit from rollover provisions for receiving capital property if certain requirements are met. One such requirement is that the settlor, and/or the settlor's spouse or common-law partner, as the case may be, must be entitled to receive the entire income of the trust that arises during the lifetime of that person or during the joint lifetimes, and no one else may receive income or capital of the trust during that period. If section 35 were to apply, trustees could use their discretionary power to allocate funds between income and capital accounts, thereby decreasing the income that the income beneficiary may receive. This would disqualify the trust from receiving the benefit of the rollover. Subsection 35(4) preserves the benefit of the rollover provisions under the *Income Tax Act* by preventing an unintended application of s. 35 to these trusts. Section 35 or portions of it will operate, however, if the trust instrument expressly says so.

Discretionary allocation trusts of receipts and outgoings

- 36 . (1) A trustee who is expressly directed by the trust instrument to hold trust assets on discretionary allocation trusts, may allocate receipts and outgoings to the income and capital accounts as the trustee considers just and equitable in all the circumstances.
- (2) Despite section 35(4), if a trustee is expressly directed by the trust instrument to hold trust assets on discretionary allocation trusts, subsections 35(2) and (3) apply.

Comment: Under a discretionary allocation trust, trustees may exercise discretion as to when, where, how much, from which account and to whom benefits are distributed. Section 36(1) allows trustees to allocate or apportion receipts and outgoings justly and equitably between income and capital accounts under such a trust, and to disregard the traditional legal categories for income and capital accounts for that purpose. This power assists trustees in maintaining an even hand between different classes of beneficiaries. Furthermore, it facilitates efficient investment by relieving the trustee of having to distinguish between different forms of trust property on the basis of the strict legal classifications of income receipts (like cash dividends) and capital ones (like capital gains from the sale or redemption of mutual funds). Section 36(1) effectively displaces

the rule of trust law that the characterization of distributions by a corporation to trustee-shareholders as income or capital necessarily depends on the form of the distribution by the corporation, insofar as discretionary allocation trusts are concerned.

Section 36(1) applies only where the trust instrument expressly states “discretionary allocation trust” in order to eliminate situations in which the provision might be unintentionally invoked, which could result in a beneficiary of what was actually intended to be an alter ego, spousal, or joint spousal or common-law partner trust being deprived of the benefits of the rollover provisions of the *Income Tax Act*. By definition, a discretionary allocation trust cannot be a trust for the exclusive benefit of the settlor’s spouse, an alter ego trust, or a joint spousal and common-law partner trust. Subsection (2) overrides s. 35(4) and instead makes sections 35(2) and (3) applicable where the settlor has expressly created a discretionary allocation trust.

Total return investment

General Comment: Section 37 implements the policy of total return investment. It also introduces the concept of percentage trust. The percentage trust facilitates implementation of the total return investment policy. A percentage trust is a trust where trustees distribute a fixed percentage of the total value of the trust property in specified periods. In this case, the trustees do not distinguish between income and capital. The payment comes first from the revenues of the trust in the fiscal period, with any deficiency being made up from capital. Revenues in excess of what is needed to meet the percentage payout are added to capital. The trust assets must be valued on a regular basis in order to ensure that the distribution is equitable.

The extent to which adopting a total return investment policy is attractive will, initially at least, be driven by the terms of the *Income Tax Act*. Maintaining the distinction between income and capital is a basic feature of that Act so where tax is levied on “income”, record keeping and accounting for a trust must continue to reflect that distinction. This makes it difficult to adopt a total return policy in the context of private family and similar trusts. Achieving the objectives of total return investing while satisfying the requirements of the *Income Tax Act* would be possible only by adopting some quite complex accounting measures. It is hoped that by providing a legal framework (as this Act does) for total return investing, taxing authorities may be encouraged to adopt legislation that facilitates use of this approach in a wide range of trust situations. It will be of value when the trust terms do not create distinct income and capital interests, as is typically true of discretionary trusts.

Initially, therefore, adoption of a total return investment policy will be most attractive to charitable trusts and non-profit organizations that normally do not pay income tax. This is reinforced by subsection 37(3).

These provisions, together with sections 33 to 38, are based on recommendations set out in the British Columbia Law Institute’s *Report on Total Return Investing by Trustees* (No. 16, 2001).

37. (1) In this section

- (a) “assets” means the capital of the trust property subject to a total return investment policy, plus the income arising from the trust property accumulated and accrued at the time of valuation,

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- (b) “stipulated percentage” means the percentage payable or to be applied under subsection (4),
- (c) “total return investment policy” means the investment of assets so as to obtain the optimal return without regard to whether the return is characterized as income or capital,
- (d) “trust property” includes the subject matter of a gift to a non-profit organization referred to in subsection (3),
- (e) “trustees” includes the directors of a non-profit organization referred to in subsection (3),
- (f) “valuation” means the fair market value of the assets less the liabilities outstanding at the time of valuation, and
- (g) “valuation period” means the period of time between one valuation and the next.

Comment: Subsection 37(1) defines various terms relating to total return investment. “Total return investment policy” is the investing of assets to obtain a good rate of return without distinguishing between income and capital receipts.

- (2) A settlor may, in a trust instrument, direct the trustees to adopt a total return investment policy with respect to trust assets and
 - (a) the words “on percentage trusts” or
 - (b) the words “total return” with reference to investmentsconstitute such a direction to the trustees.

Comment: Where the phrase “on percentage trusts” or “total return” is used in a trust instrument, it constitutes a direction to trustees to adopt a total return investment policy.

- (3) The trustees of a charitable trust, with respect to trust assets, and the directors of a non-profit organization, with respect to assets that are endowments or similar gifts to the organization, may adopt a total return investment policy with respect to those assets whether or not the terms of the trust or gift contain a direction that they do so.

Comment: Trustees of charitable trusts and directors of non-profit organizations are permitted to adopt a total return investment policy even if the terms of the charitable trust or gift to the non-profit organization is silent on the issue.

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- (4) Where assets are invested in accordance with a total return policy the trustees must value the assets periodically and, instead of any income arising from the assets,
- (a) pay to the persons who would otherwise be the income beneficiaries, or
 - (b) apply to the purposes associated with income
- a stipulated percentage of that valuation in each year of the valuation period.
- (5) The payment to be made or applied under subsection (4) must be made from income arising during the accounting year and, if income is insufficient, from capital, and any income derived from the trust property during the accounting year that is in excess of the amount to be paid or applied must be added to capital.

Comment: Subsections 37(4) and (5) provide guidance on the administration of percentage trusts. They require trustees investing under a total return policy to value trust assets periodically and to pay a stipulated percentage of that valuation to the income beneficiaries or the income account annually. Subsection 37(5) requires subsection 37(4) payments to be made from income produced during the accounting year. If that is insufficient, the remaining balance must be paid from the capital. On the other hand, if the income is greater than the required payment, the amount in excess will be added to the capital.

- (6) The valuation period is the shorter of
- (a) three years,
 - (b) a period specified in the trust instrument, or
 - (c) a period selected by the trustees in their discretion
- running initially from
- (d) one year from the date of the testator's death in the case of a testamentary trust or gift made in a will, or
 - (e) in all other cases, the date of the settlement or the gift.

Comment: Subsection 37(6) defines the valuation period for percentage trusts as the shorter of the period specified in the trust instrument and the period selected by the trustees in their discretion up to a maximum of three years. If the trust or gift arose from a will, the valuation period starts from one year from the date of the testator's death.

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Otherwise, the valuation period starts from the date of the settlement of the trust or the gift.

- (7) The stipulated percentage is
 - (a) a percentage specified for this purpose in the trust instrument, or
 - (b) if no percentage is specified in the trust instrument, the discount rate fixed under section 56(2)(b) of the *Law and Equity Act* for the relevant period.
- (8) The valuation period set out in subsection (6)(a) and the stipulated percentage set out in subsection (7)(b) may be varied by regulation.

Comment: Subsection (7) defines the stipulated percentage for payments made under a percentage trust. If the trust instrument specifies a percentage, then that will apply. Otherwise, the stipulated percentage is the discount rate fixed under the *Law and Equity Act*. The valuation period and the stipulated percentage may be varied by regulation under subsection (8).

Application of sections 36 and 37

38. (1) Section 25 of the *Perpetuity Act* does not apply to the operation of section 36 or 37.
- (2) A trust instrument employing section 36 or 37 may also confer on the trustees a power to encroach on capital in favour of a beneficiary.
- (3) Section 37 applies to all charitable trusts and non-profit organizations, whenever created, that are subject to the laws of British Columbia, as determined by applicable conflict of laws rules.
- (4) Sections 36 and 37 may expressly be adopted in a private trust governed by the law of British Columbia.

Comment: Section 38 concerns miscellaneous issues relating to discretionary allocation and percentage trusts including the application of the *Perpetuity Act*, power to encroach on trust capital in favour of a beneficiary, and conflict of laws rules.

Powers of trustee

39. (1) Subject to this Act, a trustee has the same powers in relation to trust property that the trustee would have if the property were vested in the trustee absolutely and to the trustee's own use.

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- (2) Without limiting subsection (1) a trustee may
- (a) sell or lease trust property,
 - (b) borrow money and create a security interest in trust property,
 - (c) with the consent of, and for the purpose of providing a home for, a beneficiary
 - (i) purchase or rent a living accommodation, or
 - (ii) construct a house on land that is part of the trust property or purchased for the constructionif the beneficiary is entitled to the income of the money expended in respect of the purchase or construction, and
 - (d) with the consent of a beneficiary, appropriate, at fair market value, specific trust property in or towards satisfaction of the share or interest of that beneficiary.

Comment: Section 39 sets out certain administrative powers of trustees with a view to clarifying and, in some cases, broadening them. The strategy of the section is to define the powers widely in subsection (1) by assimilating them to those of a vested legal owner of property. Subsection (2) elaborates on subsection (1) by listing certain powers that will provide particular comfort to those dealing with the trustee (paragraphs (a) and (b)) or which may not clearly be caught by the general formulation (paragraphs (c) and (d)).

Subsection (2)(a) allows trustees to sell or lease trust property. At common law, a trustee's power to sell trust property may arise expressly or by implication. An express power to sell arises where, in the trust instrument, the settlor expressly permits trustees to sell or retain at their discretion. Where the trust instrument is silent, trustees have an implied power of sale if their duty to maintain an even hand between income and capital beneficiaries requires that they sell wasting, hazardous, or speculative assets, or assets that unduly favour capital beneficiaries. The Act, in contrast, permits the trustee to sell or lease trust property whether or not there is an express or implied power to do so. Of course, the settlor may limit this power by express provisions in the trust instrument.

Paragraph (2)(b) permits trustees to borrow money and create security interests in trust property. The Act confers a general power to borrow (as opposed to listing specific purposes for which borrowing would be permissible) to ensure that nothing is omitted. The power to create security interests in trust property includes mortgaging, pledging or charging any of the trust property.

Paragraph (2)(c) allows trustees to use trust property to buy, rent or build a house for the use of a beneficiary. Although the power of investment is already an enumerated power under the Act, the common law draws a distinction between the power to invest

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in land and the power to purchase land for use as a beneficiary's home, as the land for the home would not generate income. This provision reverses the common law position and permits trustees to purchase, rent or build a house for the use of a beneficiary who is entitled under the trust to the money spent for that purpose.

Paragraph (2)(d) permits trustees to value and appropriate property to satisfy the interest of a beneficiary. Such property must be assessed at its fair market value.

Power of court to confer further powers on trustees

- 40.** Without limiting section 39, if in the administration of trust property a transfer or other transaction that is expedient and in the best interests of the beneficiaries or purposes of a trust cannot be carried out because the trustee lacks the power, the court may by order confer the necessary power on the trustee, either generally or in any particular instance and on such terms as the court thinks fit.

Comment: This section is included out of an abundance of caution. Section 39 confers wide powers on trustees in a general fashion and specifies some particular powers on matters where persons dealing with the trustee may want particular reassurance of the trustee's powers. It is unlikely, therefore, that section 40 will be used frequently. The kind of case where it would be useful is where the trust instrument expressly withholds certain powers from the trustee (thereby trumping section 39) but a change of circumstances requires that the trustee have those powers if the best interests of the trust are to be served.

Disposition of insurance proceeds

- 41.** (1) If a contract of property insurance has been entered into and premiums have been paid by the trustee, the proceeds receivable by the trustee under the policy in respect of damage to or loss of the property must be held as capital of the trust, subject to the terms of the trust.
- (2) All or part of the proceeds may be applied by the trustee, with the consent of the court, for rebuilding, reinstating, replacing or the major repair of trust property that has been lost or damaged.
- (3) If a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, or any other risk or liability to which the trustee is or might be exposed, whether or not the beneficiary is required by the trust instrument or by a third party to obtain the insurance,
- (a) the proceeds received under the policy must be held as capital and transferred by the insured to the trustee, and
 - (b) if the trustee receives the proceeds, the insured must be reimbursed by the trustee for the expenses incurred by the insured in obtaining the

insurance, in such amount as the trustee in the trustee's discretion considers reflects the interests of beneficiaries other than the insured in the trust property.

- (4) Nothing in this section affects the rights of a secured party, lessor, lessee or other person
 - (a) in the proceeds received from an insurer, or
 - (b) to require that the proceeds be applied for rebuilding, reinstating, replacing or the major repair of trust property that has been lost or damaged.
- (5) This section applies only to proceeds under a contract of insurance that are received by a trustee after this Act comes into force.

Comment: Section 41 governs the disposition of insurance proceeds. Insurance proceeds received by a trustee under a fire insurance policy must be held in the trust capital account. The proceeds are treated as capital of the trust to be invested by the trustee to earn income for the income beneficiary. Subsection (2) permits a trustee to apply to court to use all or part of the insurance proceeds for restoring the trust property that was lost or damaged. Court consent ensures that the insurance proceeds will be applied in an appropriate and equitable manner.

Subsection (3) addresses cases where beneficiaries take out their own insurance policies on trust property. A typical situation might be where trust property is insured by a life tenant rather than by the trustee. At common law, the benefit of the insurance goes to that beneficiary. The Act, in contrast, requires that the proceeds under the policy should be held as capital and transferred by the insured beneficiary to the trustee. This is subject to a right of the insured beneficiary to claim reimbursement of the premium paid, to the extent that the trustee determines that the beneficiary has insured others' interests as well as his or her own.

In some cases, a lender or landlord, for example, will have required the beneficiary to have obtained insurance to secure certain obligations, and will have insisted that the proceeds be payable to the lender or landlord in priority to other interests, or will have the right to require that the proceeds be used to restore the property that was lost or damaged. These are legitimate commercial arrangements and are protected under subsection (4).

Subsection (4) states that section 41 does not affect the rights of any secured party, lessor, lessee or other person in relation to claiming insurance proceeds or requiring that insurance proceeds be applied for rebuilding, reinstating, replacing or the major repairing of trust property that has been lost or damaged.

Section 41 only applies to insurance proceeds received by a trustee after the Act comes into force.

Discharge of persons paying trustee

- 42.** A receipt given by a trustee for any money or other property received by the trustee is a sufficient discharge to the person paying or transferring the money or other property and exonerates that person from seeing to its application or being answerable for its misapplication.

Comment: Section 42 states that a receipt issued by a trustee, or one of several trustees, for money or property received by the trustee is conclusive evidence that the person transferring the money or property has discharged the duty to transfer. Once the trustee issues a receipt, the person transferring the money or property to the trustee has no duty to oversee whether the money or property is used properly and will not be liable for any misuse of the money or property by the trustee.

Part VI

DISPOSITIVE POWERS OF TRUSTEES

General Comment: A dispositive power is a power to allocate trust property to a beneficiary or class of beneficiaries. There are two forms of dispositive power: mere power and trust power. The holder of a mere power has the authority to act, but may decide not to act. The holder of a trust power has both the authority and obligation to act. Failure by a trustee to exercise the authority mandated in the trust instrument is a breach of trust. Common examples of dispositive powers are a power to maintain or support, a power of advancement, and a power of appointment, whereby authority is given to a person to choose who is to receive trust property.

Application of Part VI

43. (1) For the purposes of this Part, a vested interest includes an interest that is vested absolutely, defeasibly, whether in whole or in part, determinably, or deferred as to possession.
- (2) If a trust is a pre-1972 spousal trust, a post-1971 spousal or common-law partner trust, an alter ego trust or a joint spousal and common-law partner trust (within the meaning of the *Income Tax Act* (Canada)), sections 44 to 48 do not apply unless the trust instrument expressly provides otherwise.
- (3) For the purposes of sections 44 to 48, a direction to accumulate income is not in itself evidence of a contrary intent.
- (4) For the purposes of subsections 44(3) and 47(1), “subtrust” means a new and separate trust to which trust property is transferred in accordance with the terms of a trust or the law for the benefit of a beneficiary alone or with others.
- (5) The powers conferred on a trustee by this Part are to be exercised in the sole discretion of the trustee.
- (6) In this Part, “spouse” means a person who
- (a) is married to another person, or
 - (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

Comment: Section 43 addresses issues of interpretation and application for Part VI of the Act. Subsection (1) sets a broad definition of vested interest, including both absolute and defeasible interests. Subsection (2) excludes the application of Part VI for spousal

and alter ego trusts under the *Income Tax Act* unless the trust instrument expressly directs Part VI to operate. Subsection (6) defines “spouse” as a person married to another or cohabiting in a marriage-like relationship.

Power to apply income for maintenance or advancement

44. (1) If property is held by a trustee in trust for a beneficiary, whether or not the interest may ultimately prove to be invalid under the rule against perpetuities, but subject to any interests or charges affecting that property,
- (a) during the minority of the beneficiary the trustee may pay to the parent, guardian or other person having custody or control of the beneficiary, or otherwise apply for or towards the beneficiary’s past, present or future maintenance, education, advancement in life or benefit, the whole or such part of the income of that property as may, in the circumstances, be reasonable, and
 - (b) if the beneficiary has attained the age of majority and does not have an income or capital interest vested in interest and in possession, the trustee may, until the beneficiary either attains such an interest or dies or until failure of the interest, pay to, or apply for the benefit of, the beneficiary the whole or any part of the income as the trustee thinks fit.
- (2) Income from trust property may be applied under subsection (1) for the benefit of a beneficiary, whatever interest the beneficiary may have in the trust property, whether the interest is vested or contingent, and whether or not there is
- (a) any other fund available for the same purpose, or
 - (b) any person bound by law to provide for the beneficiary’s benefit.
- (3) If a beneficiary referred to in subsections (1) or (2) has a spouse, former spouse, or child, the trustee may exercise the power under those subsections, by way of a subtrust or otherwise, in favour of the spouse, former spouse or child, if the trustee considers the circumstances appropriate and to the benefit of the beneficiary.

Comment: Section 44 gives trustees the power to apply the income from trust property to beneficiaries for their maintenance and advancement. This is generally known as the power of maintenance. Section 44(1)(a) provides that where the beneficiary is a minor, the trustee may pay the income to the parent, guardian or other person having custody or control of the beneficiary, or apply the income towards the beneficiary’s past, present or future maintenance, education, advancement in life or other benefit. The trustee may

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determine what is the reasonable amount to give without considering whether there is any other fund available to the beneficiary or whether any person is legally obliged to support the beneficiary.

Section 44(1)(b) states that if the beneficiary reaches majority but neither the income or capital interest has vested in the beneficiary, the trustee may pay or apply income from trust property to the beneficiary until the interest vests in someone other than the beneficiary or the beneficiary either attains an interest in the trust or dies. The trustee has the discretion as to how much, if any, income is to be given for the beneficiary's maintenance and advancement, and to apply the income in that manner, without considering whether there is any other fund available to the beneficiary.

Subsection (2) indicates that the power to pay or apply income under subsection (1) may be exercised regardless of the nature of the beneficiary's interest in the trust property, the availability of another fund which could be used for the same purpose, or the legal obligations of a third party toward the beneficiary.

Subsection (3) provides that where a beneficiary has a spouse, a former spouse or a child, the trustee may pay the income to the spouse, former spouse or child, if the trustee considers this would be to the benefit of the beneficiary. "Spouse" is defined in s. 43(6).

Interests that carry intermediate income

45. Subject to an express disposition of intermediate income to another, a beneficiary entitled to any vested or contingent interest in trust property, however created and whatever the nature of the property subject to the interest, is entitled to the intermediate income earned from that trust property from the date the interest arises.

Comment: Intermediate income is the income that arises from the trust property between the date of execution of the trust instrument and the date of vesting of the trust interest. Section 45 provides that a person who is entitled to any type of vested or contingent interest in trust property is also entitled to the intermediate income generated by that trust property. For example, if an instrument conferred on trustees "my XYZ common shares or the reinvestment thereof on trust for my nephew, George, if and when he attains 30 years of age", George would have only a contingent interest until he attains the age of 30, at which time the interest vests. Under the case law, most contingent interests do not carry intermediate income. Income earned by trust property between the date of execution and the date of vesting generally forms part of the trust capital and does not become intermediate income for the contingent income beneficiary on the vesting of that interest. Section 45 reverses the common law. Any contrary provisions in the trust instrument will prevail, however.

Section 45 is not intended to alter the rule that a legacy to an adult beneficiary does not attract interest until the end of the "executor's year," i.e. one year from the date of the testator's death, or the date of the grant of administration in an intestacy.

Power to apply capital for maintenance or advancement

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General Comment: Section 46 gives trustees the power to distribute trust capital to beneficiaries. This is generally known as the power of advancement. Power of advancement refers to the power to make a lump sum payment of capital to set a person up in life. The power usually applies to minor beneficiaries or adult beneficiaries with special needs. It permits a trustee to pay or apply the capital or part of it, create a security interest with trust capital or transfer any capital assets for the maintenance, education, advancement in life or benefit of a minor beneficiary. Maintenance and education include past maintenance and education. If the beneficiary is an adult, the trustee is commonly called to pay capital for any purpose that benefits the beneficiary. For adult beneficiaries, the Act adopts the term “benefit” rather than “maintenance, education, advancement in life, or benefit.” Those specific purposes are often irrelevant for adult beneficiaries. A trustee dealing with an adult beneficiary must exercise the power of advancement with prudence, keeping in mind the adult beneficiary’s benefit.

46. (1) If property is held by a trustee in trust for a person for any interest in capital, whether vested or contingent, and whether the interest is in possession or in remainder or reversion, then, whether or not the interest may ultimately prove to be invalid for violating the rule against perpetuities, the trustee may, subject to subsections (2) and (3) and to interests or charges affecting that property,
- (a) pay or apply the capital or part of it;
 - (b) in order to make such payment or application of capital, sell or create a security interest in any capital asset, or
 - (c) transfer any capital asset,
- as the trustee thinks fit
- (d) where the person is a minor, for the maintenance, education, including past maintenance or education, advancement in life or benefit of the person, or
 - (e) where the person is an adult, for any purpose which is to the person’s benefit.

Comment: Subsection (1) allows a trustee to pay capital to, or apply it for, a beneficiary regardless of whether that beneficiary’s interest is vested, contingent, in possession, in remainder or in reversion. Absent the statutory power of advancement in section 46, the courts have no jurisdiction to approve a trustee paying capital to a beneficiary if the beneficiary does not have an indefeasibly vested interest. If an interest is contingent or vested but defeasible, any payment of capital may prove to be at the expense of the person entitled to the gift over because the beneficiary may ultimately not be entitled to the interest. A statutory power of advancement is beneficial because when contingencies and defeasances are created, most testators and settlors have in mind only what will happen to the gift if the beneficiary were, for instance, to die. The power of advancement under subsection (1) may be exercised without the

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consent of a beneficiary who is entitled to receive income from the trust capital before the capital beneficiary's interest vests in possession, although such an income beneficiary may be entitled under subsection (4) to receive notice of its exercise. In dispensing with the consent of the income beneficiary, subsection (1) departs from existing law and trust drafting practice concerning the exercise of powers of advancement.

- (2) The trustee may transfer to a person entitled under subsection (1) a sum not exceeding \$10,000, or one-half the value of the interest of the person, whichever is the greater.

Comment: Subsection (2) limits the amount a trustee may transfer to a beneficiary under the power of advancement. A trustee may transfer to a beneficiary no more than \$10,000 or one-half the value of the interest of the beneficiary, whichever is greater. Limiting the amount a trustee may pay out from capital protects remainder interests of the trust in case the capital-receiving beneficiary's interest divests or never vests.

- (3) The trustee may, with the consent of the court, transfer a sum greater than that permitted under subsection (2).

Comment: If trustees wish to transfer a sum greater than the limit set under subsection (2), they may apply to court under subsection (3).

- (4) If the trustee transfers a sum with leave of the court under subsection (3), the trustee must promptly give to any beneficiary who, at the time of the transfer, is entitled to receive income from the capital from which the sum was transferred, written notice of
 - (a) the terms of the order made by the court under subsection (3),
 - (b) the fact that the transfer has been made, and
 - (c) the amount transferred pursuant to the order.

Comment: If the trustee obtains leave from the court under subsection (3) to transfer a sum from capital greater than the limit in subsection (2) and makes such a transfer, subsection (4) requires the trustee to notify an income beneficiary having a presently enjoyable right to be paid income from the capital of the terms of the court order, the fact of the transfer, and the amount transferred.

- (5) Capital must not be transferred under subsection (1) or (2) unless the income or accumulated surplus income is not available under the terms of the trust instrument for the maintenance, education, advancement in life or benefit of the beneficiary, or the available income or accumulated surplus income is insufficient or exhausted.

Comment: Subsection (5) limits the circumstances in which trustees may exercise the power of advancement under subsection (1) and (2). The Act favours income as the primary source of payments for the maintenance, education, advancement in life and benefit of a beneficiary. Subsection (5) requires income to be paid out first. No capital should be paid or applied for these purposes unless the income or accumulated income generated by the trust is insufficient or not available for this purpose under the terms of the trust instrument.

Payment of capital other than to beneficiary

47. (1) If the person qualified for payments under subsection 46 (1) has a spouse or child, the trustee may exercise the power under that subsection, by way of a subtrust or otherwise, in favour of a spouse or child of the person, if the trustee considers the circumstances appropriate and to the benefit of the person.
- (2) When the person qualified or any other person is or becomes indefeasibly entitled to the share in the trust capital, in which the person qualified had a vested or contingent interest when the money or asset was transferred, that money or asset must be brought into account as part of that share of the trust capital.
- (3) A transfer must not be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money or asset paid, transferred or applied, unless that person is in existence and of full age and consents in writing to the transfer or unless the court, on the application of the trustee, so orders.

Comment: Section 47 confers power on a trustee to pay capital to persons other than the beneficiary. If a beneficiary may receive benefits from capital under section 46, it is open to the trustee to exercise the power of advancement in favour of the existing spouse or the children of the beneficiary. A trustee must be satisfied that the circumstances are appropriate and it is to the benefit of the beneficiary before paying capital to someone other than the beneficiary.

Subsection (2) provides that benefits paid out under s. 46 or s. 47(1) must be taken into account when interests finally vest in the trust capital. This is the principle of “hotchpot.”

Subsection (3) declares that no transfer of capital under sections 46 or 47(1) may be made if it would prejudice another person entitled to a prior interest (unless that person consents or, if the person is not capable of consenting, the court consents on that person’s behalf.)

Power to impose conditions

48. (1) A trustee who may, under this Act or the terms of the trust, apply capital for the benefit of a beneficiary or other person has and is deemed always to have had, authority to impose conditions on the person receiving the
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capital or the benefit of the capital, whether as to repayment, payment of interest, giving security, or otherwise, and at any time after imposing such a condition, the trustee may either wholly or in part waive the condition or release any obligation undertaken or any security given by reason of the condition.

- (2) Capital that has been repaid or recovered by the trustee pursuant to a condition imposed under subsection (1) must be considered for the purposes of section 46(2) not to have been previously transferred in exercise of the powers conferred by sections 46 and 47.
- (3) When imposing a condition as to security, a trustee is not bound by any restrictions on the investment of the trust funds.
- (4) Nothing in this section imposes on a trustee any obligation to impose conditions on a transfer of property.
- (5) A trustee who has acted with due care in applying capital for any of the purposes set out in sections 46 or 47 is not liable for any loss arising from the transaction, including loss arising because of a breach of a condition imposed by the trustee.

Comment: Section 48 permits a trustee to impose conditions upon persons receiving payments or applications of trust capital. Such conditions may require repaying over a period of time, paying interest, or granting security to which the trustee could have recourse if the capital paid out is not expended as intended. At common law, if the capital paid out is not applied properly by a beneficiary for the purpose described to the trustee, the trustee can only refuse to make further payments. Section 48 changes the common law and gives the trustee more power to place controls on how property is used.

Subsection (1) states that where a trustee has the power to transfer trust capital to a beneficiary under section 46(1) or the trust instrument, the trustee may impose conditions on the beneficiary receiving the capital payment. Furthermore, the trustee is deemed always to have had such powers. Subsection (1) also permits a trustee who has already imposed a condition, either wholly or in part, to waive the condition or release any obligation undertaken or any security given by reason of the condition.

Subsection (2) makes it clear that capital previously transferred under sections 46 and 47 which has been repaid to or recovered by the trustee is not to be taken into account in determining under section 46(2) the maximum amount the trustee can transfer in further exercise of those powers. Subsections (3) and (4) provide more detailed guidance on particular issues. Subsection (5) insulates the trustee from liability for any loss incurred in respect of any application of capital under sections 46 and 47 if the trustee has acted with due care, including loss arising from the failure of the beneficiary to fulfill a condition imposed by the trustee.

Part VII

**PROTECTION OF TRUSTEES AND LIABILITY OF CO-TRUSTEES
BETWEEN THEMSELVES**

General Comment: Part VII deals with the contribution and indemnity between trustees when a trustee commits a breach of trust. Section 49 requires notice to be actual notice relating to a particular trust. Section 50 describes in detail how trustees contribute and indemnify co-trustees. Section 51 discusses the responsibilities of beneficiaries where they contributed to the breach of trust.

No notice from other trust

49. A trustee acting

- (a) for more than one trust, or
- (b) as a personal representative of an estate,

is not, in the absence of fraud, affected by notice of any instrument, matter, fact or thing in relation to any particular trust if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

Comment: A trustee acting for more than one trust or acting as a personal representative of an estate is not affected by notice obtained by acting as trustee for another trust or as personal representative of an estate. Notice relating to the particular trust in question would be required. What will amount to notice to the trustee in a particular case will depend on the circumstances.

Contribution and indemnity

- 50.**
- (1) In this section, “breach of trust” includes any act or omission, whether intentional or negligent, giving rise to any liability of a trustee to the trust beneficiaries.
 - (2) The individual responsibility of co-trustees for making good a loss to the trust, and the amount of contribution which a trustee may recover from a co-trustee, must be determined by the court in such amounts as may be just and equitable, having regard to the extent of the responsibility of each trustee in breach for the loss caused.
 - (3) The court may exempt a trustee from liability to make contribution or may order that any contribution due to or to be recovered from a trustee amounts to a complete indemnity.

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- (4) The powers conferred on the court by this section may be exercised even if the trustee claiming contribution or the trustee against whom the claim is made, or both of them, have acted fraudulently in breach of trust.
- (5) If a trustee in breach of trust is insolvent, the court may apportion liability for making good the loss to the trust and any further damages as is appropriate among the solvent co-trustees.
- (6) If the beneficiaries have settled with a trustee who is in breach of trust and who subsequently seeks contribution from a co-trustee, the court in making any contribution order may determine whether the settlement was reasonable.
- (7) Except as provided in this section, a trustee is not obligated to make contribution or to indemnify a co-trustee.
- (8) This section applies only with respect to a breach of trust that is the subject of a proceeding commenced after this Act comes into force or, where there is no proceeding for breach of trust, to a claim for contribution or indemnity commenced after this Act comes into force.

Comment: Section 50 addresses the contribution and indemnity of trustees for breach of trust. At common law, when there is a breach of trust, each trustee must contribute an equal share. However, if a trustee is in breach of trust because of fraud, the trustee would be responsible for the entire loss incurred by the trust. In terms of indemnification of trustees, there are three situations at common law where trustees have the right to be indemnified. A trustee must indemnify co-trustees if that trustee fraudulently appropriated trust property or if that trustee was a solicitor who gave incorrect legal advice to co-trustees. If a trustee is also a beneficiary, the trustee must indemnify co-trustees to the extent of that trustee's beneficial interest. For other situations, the common law is unclear whether trustees can be indemnified. Under the Act, the court has the discretion to excuse trustees for breach of trust. Under section 59, the court may relieve a trustee who is in breach of trust from personal liability, either wholly or partly, provided that the trustee acted honestly and reasonably and ought fairly to be excused for the breach. As an extension of the court's powers under section 59, section 50 permits the court, where there are co-trustees, to adjust the obligations to contribute that would arise ordinarily among trustees.

Subsections (2) and (3) give the court a wide power to determine the proportions in which co-trustees in breach of trust are liable as between themselves for making good the loss to the trust and the amount of contribution that may be recovered by a trustee from a co-trustee where there is a breach of trust. The court's determination would be based on the court's view of what is just and equitable in the circumstances. Subsequent subsections provide more detailed guidance in relation to particular issues.

Beneficiaries instigating breaches of trust

- 51.** If a trustee commits a breach of trust, and the act was at the instigation or request or with the consent in writing of a beneficiary, the court may impound all or any part of the interest of the beneficiary in the trust estate by way of contribution or indemnity to the trustee or persons claiming through the trustee.

Comment: If all beneficiaries are adults and competent, their authorization for the trustee to act would not constitute a breach of trust. But if a trustee commits a breach of trust while acting on the authorization of only one beneficiary, when there are others, the beneficiary's sanction would not excuse the breach of trust. In that instance, it may be appropriate for the beneficiary's interest in the trust to be made available to make good the loss. Section 51 empowers a court to make such an order in an appropriate case.

Part VIII

FURTHER POWERS OF THE COURT

Power of court to remove trustees and to appoint new trustees

52. (1) If the removal or appointment of a trustee would be inexpedient, difficult or impracticable under Part III, the court may, if it is in the best interests of the beneficiaries or purposes of the trust
- (a) remove a trustee, with or without appointing a substitute trustee,
 - (b) appoint a trustee, or
 - (c) appoint any person, including a court official, as a judicial trustee to act as a sole trustee or as a co-trustee with others, or in place of all existing trustees.
- (2) Subject to subsections (3) and (4), the legal consequences of the removal or appointment of a trustee under this section are the same as if the trustee were removed or appointed under Part III.
- (3) A judicial trustee appointed under subsection (1)(c) is an officer of the court.
- (4) The court may give directions to a judicial trustee in regard to the trust or its administration, with or without an application for directions under section 58(1).

Comment: Section 52 permits the court to appoint and remove trustees. It carries forward the policy of section 31 of the current *Trustee Act*.

Subsection 1(c) preserves the ability under section 97(1) of the current Act to appoint a judicial trustee acting directly under the court's supervision as an officer of the court. This might be done, for example, if the existing trustees are completely unable to agree on important matters in the administration of a trust.

Power of court to reinstate trustee

53. (1) If the discharge or removal of a trustee under Part III is based on a mistake of fact or law the former trustee may apply to the court for relief.
- (2) On an application under subsection (1) if the court is satisfied of the mistake and considers it appropriate the court may, subject to section 18

- (a) order that the former trustee be reinstated as trustee as of the date of reinstatement, and the earlier discharge or removal should have effect for the interim period,
 - (b) declare that the former trustee had not ceased to hold the office of trustee during the period following the earlier purported discharge or removal, or
 - (c) dismiss the application if that is in the best interests of the beneficiaries or purposes of the trust.
- (3) Where the court makes an order or declaration under subsection (2) it may also give directions or make a declaration as to the status and liability of
- (a) a substitute trustee appointed under section 14(1),
 - (b) a former trustee who is the subject of an order or declaration under subsection (2), or
 - (c) any other person who was a trustee during the period when the former trustee's status was thought to be in question.
- (4) No application may be made under subsection (1)
- (a) in the case of the removal of the former trustee under section 17, more than 60 days after the resolution became effective, or
 - (b) in any other case, more than 60 days after the earlier of:
 - (i) the appointment of a substitute trustee under section 14(1), or
 - (ii) the time that the purported discharge came to the attention of the former trustee.

Comment: Section 53 should be read in conjunction with sections 14-18. It empowers the court to grant relief to the trustee who was wrongfully removed or incorrectly thought to have been discharged.

Complaints by beneficiaries against trustee inactivity

54. If a trustee refuses or fails to
- (a) perform a trust duty, or

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- (b) consider in good faith and decide accordingly on the exercise of a power conferred on the trustee,

on the application of a beneficiary the court may

- (c) order the trustee to
 - (i) satisfy the court that the trustee has given due consideration to the exercise of the power, or
 - (ii) perform the duty, or
- (d) remove the trustee.

Comment: Section 54 allows a beneficiary to ask the court to determine whether a trustee has failed to discharge the duties and powers of the trustee's office. At common law, beneficiaries have the right to seek removal of trustees for inactivity where the inactivity endangers the welfare of the beneficiaries or the trust. Section 54 empowers the beneficiaries in a wider range of circumstances.

Variation and termination of trusts

General Comment: Sections 55 to 57 carry forward, with modifications, the policies of the *Trust and Settlement Variation Act*. They reflect recommendations of the British Columbia Law Institute in the *Report on the Variation and Termination of Trusts* (No. 25, 2003).

- 55.** (1) In this section “arrangement” means a variation, resettlement or revocation of all or any of trusts in relation to property or varying, deleting, adding to or terminating the powers of a trustee in relation to the management or administration of the property subject to the trust.

Comment: The term “arrangement” is defined broadly to include a resettlement and revocation of a trust as well as the modification of the powers of a trustee or the beneficial interests of beneficiaries.

- (2) An arrangement will take effect without court approval if all the beneficiaries of the trusts having vested or contingent interests are of full age and capacity and consent to the arrangement.

Comment: Subsection (2) introduces a significant change in the law. Under current law the competent beneficiaries of a trust can only terminate it. (The rule in *Saunders v. Vautier*.) They have no power to vary the trust. Nor will the *Trust and Settlement Variation Act* assist them since, by definition, it can be invoked only where consent must be given by the court on behalf of persons who cannot consent for themselves.

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- (3) An arrangement that cannot take effect under subsection (2) because one or more persons are incapable of giving consent will take effect if the court approves the arrangement on behalf of:
- (a) any person with a vested or contingent interest under the trusts who by reason of minority or other incapacity is incapable of assenting,
 - (b) 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,
 - (c) any person unborn,
 - (d) any person in respect of an interest of the person that may arise by reason of an immediate or postponed discretionary trust, or as a result of a mere power of appointment, or
 - (e) a charitable purpose or charitable organization incapable of consenting in its own right.
- (4) The court must not approve an arrangement on behalf of a person
- (a) coming within subsection (3)(a), (b) or (c) unless the arrangement appears to be for the benefit of that person, or
 - (b) coming within subsection (3)(d) if the arrangement would be detrimental to the interests of that person.

Comment: Subsection (3) generally follows the *Trust and Settlement Variation Act* in giving the court power to approve an arrangement on behalf of the persons described in paragraphs (a) to (d). Paragraph (e) is a significant change in that the court will be able to consent to an arrangement on behalf of a charitable beneficiary, whether or not it is organized as a trust or a corporation. Subsection (4) sets out criteria that will guide the court in granting or withholding its approval.

- (5) An arrangement that cannot take effect under subsection (2) or (3) because one or more persons who are of full age and capacity refuse their consent will take effect if the court approves the arrangement on behalf of those persons.
- (6) The court may approve an arrangement under subsection (5) only if:
- (a) the arrangement will not be detrimental to the pecuniary interest of the person who has withheld consent,

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- (b) a substantial majority of the beneficiaries, representing a substantial majority of the monetary obligations of the trust fund have approved the arrangement through a written consent of those beneficiaries or the approval of the court under subsection (3), and
- (c) it would be detrimental to the administration of the trust and the interests of other beneficiaries not to approve the arrangement.

Comment: Subsections (5) and (6) depart from the current legislation in permitting the court to approve an arrangement on behalf of a competent adult who opposes the arrangement. The circumstances in which the court may do this are set out in subsection (6) and will not be easily met. This power is likely to be used only where the beneficial interests are widely distributed and a handful of intransigent beneficiaries hold out against change. The restructuring of a pension trust is an example of where it might be invoked.

Deemed Trusts

- 56.** The court may approve an arrangement under section 55(3) in respect of land the ownership of which is the subject of a legal life interest and for the purposes of section 55(3) and this section
- (a) the holder of the legal life interest is deemed to hold the land in trust for the holder personally and for those holding successive interests in the land, and
 - (b) the beneficiaries of the trust are deemed to be incapable of consenting to the arrangement.

Comment: Section 56 carries forward the “settlement” aspect of the current *Trust and Settlement Variation Act* in permitting the court to treat successive legal interests in land as a trust interest and to approve arrangements accordingly. It is a highly simplified successor to settled estates legislation that has been part of Anglo-Canadian law since the middle of the nineteenth century. Section 56 deems the life tenant and holders of remainder interests to be beneficiaries of a trust who are incapable of consenting to an arrangement varying its terms, even if they are all adult and capacitated. This brings the situation within the court’s power under s. 55(3) to approve an arrangement on behalf of such persons, despite the fact that the successive interests were constituted without the mechanism of an express trust.

Public Guardian and Trustee

- 57.** (1) If approval of an arrangement is sought
- (a) on behalf of a person referred to in section 55(3) (a) or (c),
 - (b) on behalf of a person referred to in section 55(3) (b) or (d) who is a minor or is a mentally incapacitated person,

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- (c) under section 56 in relation to a beneficiary who is a minor or is a mentally incapacitated person,

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 unless the person is a mentally incapacitated person to whom section 74 applies.

- (2) If approval of an arrangement is sought on behalf of an entity referred to in section 55(3)(e), 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 Attorney General not less than 10 days before the date of the application.
- (3) The Public Guardian and Trustee or Attorney General is entitled to appear and be heard on the application and is entitled to such costs as the court may order.

Comment: Subject to section 74, which permits representation by the committee of a mentally incapacitated person, section 57 carries forward the policy of the current legislation concerning the role of the Public Guardian and Trustee in relation to arrangements involving the interests of vulnerable persons. Where a consent on behalf of charity is sought the Attorney General must be notified.

Trustee may apply to court for advice or directions

- 58.** (1) A trustee may apply to the court for directions on any question concerning the trust, including the administration of the trust property.
- (2) The duty of a trustee who acts on directions given under subsection (1) is discharged with respect to the subject-matter of the directions, unless the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

Comment: Section 58 carries forward the ability of a trustee to apply to the court for directions. It preserves the policy of section 86 of the current *Trustee Act*.

- (3) Without limiting the generality of subsection (1), a trustee may apply to the court for an order that the trustee be at liberty to distribute trust property among the persons entitled to receive it, having regard only to the persons whom, or the claims or interests which, the trustee has been able to locate or ascertain after making diligent efforts.

Comment: Subsection (3) allows a trustee to obtain authorization from the court to distribute trust property among creditors or beneficiaries of whom the trustee is then

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aware, having made diligent efforts to discover potential claims and interests and locate interested persons. It preserves the policy of section 39(1) of the current *Trustee Act*.

- (4) On an application under subsection (3), the court may give directions regarding the procedure to be followed by the trustee in relation to a distribution, including directions concerning the notice to be given to persons who may be interested in the distribution.

Comment: Subsection (4) is self-explanatory.

- (5) An order under subsection (3) does not prejudice the right of any creditor or claimant to follow the trust property into the hands of a person who has received it.

Comment: While a trustee who has distributed trust property in light of the claims that are known in accordance with an order under subsection (3) will have no liability towards creditors or beneficiaries having proper claims that were not ascertained at the time of the distribution, the trust property remains subject under subsection (5) to their claims in the hands of those who received it. Subsection (5) carries forward the policy of section 39(3) of the current *Trustee Act*.

Trustee may be relieved of liability for breach of trust

General Comment: Section 59 implements the recommendations of the British Columbia Law Institute set out in its *Report on Exculpation Clauses in Trust Instruments* (No. 17, 2000). An exculpation clause (referred to in this legislation as an “exemption clause”) is a provision contained in a trust document that purports to excuse the trustee from liability for conduct that may constitute a breach of a trust. The section seeks to clarify the role and effect of exculpation clauses and to strike an appropriate balance between legal policies aimed at the protection of beneficiaries and the rights of settlors to include provisions in trust instruments aimed at the protection of trustees. The strategy of the section is to declare exemption clauses to be effective according to their terms but give a beneficiary the right to apply to a court in certain circumstances for relief from the clause.

59. (1) If it appears to the court that a trustee, including a trustee under a resulting trust, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but
 - (a) has acted honestly and reasonably, and
 - (b) ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach,

the court may relieve the trustee either wholly or partly from that personal liability.

Comment: Subsection (1) carries forward section 96 of the current *Trustee Act* which permits a trustee to apply for and obtain relief from the consequences of a breach even where the trust instrument contains no exemption clause. Trustees under a resulting trust may apply for and receive relief under subsection (1), although the rest of the Act does not apply to them.

- (2) Without limiting subsection (1) and subject to subsection (3) an exemption clause in a trust instrument is effective according to its terms to relieve a trustee of liability for a breach of trust.
- (3) If it appears to the court that the conduct of a trustee
 - (a) would constitute a breach of trust, and
 - (b) has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be excused,

the court may declare that any exemption clause contained in the trust instrument is ineffective in relation to the breach of trust, and that the liability of the trustee for breach of trust be as if the trust instrument did not contain the clause.

Comment: Subsection (2) declares that an exemption clause will, as a general rule, take effect as it is written. Subsection (3) permits an application to the court in specified circumstances for a declaration that the exemption clause is not effective and that the trustee should be held liable.

- (4) In this section, “exemption clause” means a provision of a trust instrument that excludes or restricts liability including one that
 - (a) makes liability or its enforcement subject to restrictive or onerous conditions,
 - (b) permits a trustee to act despite a conflict between the trustee’s interest and duty,
 - (c) excludes or restricts any right or remedy in respect of liability, or prejudices any person who pursues such right or remedy, or
 - (d) excludes or restricts rules of evidence or that purports to negative a duty that, in the absence of such provision, would otherwise lie on the trustee.

Comment: Subsection (4) defines “exemption clause” to include a number of trust provisions that would operate indirectly to excuse the trustee of liability.

Payment into court

- 60.** (1) Subject to subsections (5) and (6), a trustee may pay trust money or trust securities into court.
- (2) Where a trustee is not available to give a discharge, the court may, on the application of a person in possession or control of trust money or trust securities, order that the trust money or trust securities be paid into court.
- (3) The receipt or certificate of the proper officer of the court is a sufficient discharge to a trustee or other person for money or securities paid into court under subsections (1) or (2).
- (4) The court may, on application, make orders it considers necessary or appropriate regarding the trust money or trust securities paid into court under subsection (1) and for the administration of the trust to which they are subject.
- (5) If a minor or mentally incapacitated person is entitled to trust money or trust securities, a trustee may pay the same to the guardian of the minor or the committee of that person.
- (6) If there is no guardian of a minor or committee of a mentally incapacitated person who is entitled to trust money or trust securities, or if the trustee cannot locate the guardian or committee after making diligent inquiries, the trustee may pay the trust money or trust securities to the Public Guardian and Trustee in trust for the minor or mentally incapacitated person.

Comment: Section 60 provides a means by which a trustee may be relieved of the trust through payment of money and securities into court, or in some cases to the guardian or committee of the person entitled. It might be used in circumstances where the resignation procedure in section 21 is not available or appropriate. Section 60 also allows anyone in possession or control of trust funds to obtain a discharge for trust funds or securities where there is no trustee available to give one. It carries forward the policy of section 40 of the current *Trustee Act*.

Part IX

TRUSTEE COMPENSATION AND ACCOUNTS

General Comment: Part IX implements the recommendations made by the British Columbia Law Institute in its *Report on Statutory Remuneration of Trustees and Trustees' Accounts* (No. 7, 1999). It sets out the statutory right of a trustee to be compensated and the basis on which that compensation is to be calculated. It also sets out machinery in relation to the passing of accounts.

Compensation of trustees

61. (1) In this part “trustee” includes:
- (a) an executor or administrator of the estate of a person, whether or not the property included in the estate is subject to a trust,
 - (b) a committee of a patient appointed under the *Patients Property Act*,
 - (c) a testamentary guardian.

Comment: The Act defines trustee broadly, but the definition in subsection (1) includes additional persons who are in a position similar to trustees, so that the same principles respecting compensation apply to them.

- (2) A trustee is entitled to fair and reasonable compensation for services rendered in relation to the trust.
- (3) A trustee may, during the term of the trust or upon the passing of accounts, apply to the court for an order awarding compensation under subsection (2) and in fixing the trustee’s compensation the court may have regard to the gross aggregate value of the trust property at the time compensation is claimed and the average value of the trust property over the period since compensation was last claimed or the trust was created as the case may be.

Comment: Subsections (2) and (3) establish the trustees’ right to reasonable compensation and the factors that are relevant in its calculation.

- (4) A trustee who
 - (a) has special professional skills or qualifications, and
 - (b) has rendered professional services to the trust, apart from those generally associated with the office of trustee

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is entitled to charge fees at reasonable professional rates for those services that are reasonably necessary for the fulfilment of the trust.

Comment: A trustee is entitled to compensation for services rendered that call upon special skills or qualifications possessed by the trustee.

- (5) If a trust instrument fixes the compensation of a trustee but does not provide for sufficient compensation, the trustee may apply to the court to fix the compensation of the trustee at a level the court considers appropriate.
- (6) Subsection (5) does not authorize the variation of a contract with respect to compensation between a settlor and a trustee that is extraneous to the trust instrument, whether or not the contract is incorporated by reference in the trust instrument.

Comment: Where a trustee's compensation is fixed in the trust instrument at a level that is unreasonably low the trustee can apply to the court for relief except where the term is set out in a collateral contract.

- (7) An order appointing a judicial trustee or a further order of the court may contain provisions concerning the compensation of the judicial trustee.
- (8) Provisions concerning compensation of a judicial trustee in an order prevail over the provisions of this Part to the extent of any inconsistency.

Comment: As judicial trustees are officers of the court, their compensation should be a matter for the discretion of the court. For this reason, subsection (7) allows for special provisions concerning compensation to be contained in an order under section 52(1)(c) appointing a judicial trustee. Subsection (8) allows these to override the general provisions of Part IX.

Interim compensation of trustees

62. (1) Subject to subsections (2) to (5), a trustee may, from time to time during the administration of the trust and without previous authorization of the court, take payment from the assets of the trust of an amount that, in the trustee's opinion, is fair and reasonable compensation for services rendered in relation to the trust during the period to which the payment relates.

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- (2) A trustee who takes a payment under subsection (1) must immediately deliver to all qualified beneficiaries a notice stating
 - (a) the amount of the payment,
 - (b) an account of the services to which the payment relates, and
 - (c) that the recipient of the notice may object to the payment within a specified period of not less than 60 days from the date of the notice.
- (3) A person entitled to receive notice under subsection (2) who objects to the payment taken, may apply to the court within the period stated in the notice to fix the compensation, if any, that the trustee should receive.
- (4) If an application is made under subsection (3) the trustee must not take any further payment under subsection (1) until the court has disposed of the application.
- (5) If the trustee's compensation as finally determined by the court, either on an application under subsection (3) or on another accounting by the trustee, is less than the aggregate of the payments previously taken by the trustee without court authorization during the administration of the trust, the trustee must repay the balance to the trust.

Comment: Trustees sometimes wish to claim their fees in relation to services already rendered without receiving previous court authorization. This practice is sometimes referred to as “pre-taking.” Section 62 regularizes this practice and sets out the procedures to be followed.

Passing of accounts

- 63.** (1) The court may, on the application of a beneficiary or of the trustee, order that trustee's accounts be passed, either on a single occasion or at intervals as the court may set.

Comment: Section 63 concerns the passing of accounts. Passing of accounts refers to the process whereby a trustee, either voluntarily or as required by law, renders a true and just account of trust administration to the court. There is a passing of accounts from time to time because trustees have a duty to keep ongoing records concerning their activities with respect to the trust property. This provision reflects a recommendation made by the British Columbia Law Institute in its *Report on Statutory Remuneration of Trustees and Trustees' Accounts* (No. 7, 1999).

- (2) Any qualified beneficiary is entitled to notice of an application to pass accounts, and to appear in the proceedings.

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Comment: Qualified beneficiaries are entitled to be notified of and appear at a passing of accounts conducted either pursuant to an order or by consent. Section 74(5) provides for the representation of beneficiaries who are minors or mentally incapacitated persons at a passing of accounts.

Registrar

64. Anything that might be done by the court under this Part may be done by the registrar if directed by the court.

Comment: Section 64 is self-explanatory.

Part X

CHARITABLE TRUSTS AND NON-CHARITABLE PURPOSE TRUSTS

Power of court to vary charitable trusts

65. (1) If the court on application by the trustee of a charitable trust, or, in the absence of a trustee, by the personal representatives of a donor of a charitable gift, finds that
- (a) an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust,
 - (b) it would be desirable to amend the terms of the trust to include one or more additional charitable purposes that the court could approve or select under subsection (2)(b) on an application made under this subsection based on the circumstances referred to in paragraph (a), or
 - (c) a variation of the terms of the trust or an enlargement of the powers of the trustee would facilitate the carrying out of the intention of the terms of the trust,
- the court may amend, replace, delete or otherwise vary any term of the trust or may enlarge the powers of the trustee to administer the trust.
- (2) For the purposes of a variation under subsection (1),
- (a) it is irrelevant whether the donor had a particular or general charitable intent, except that if an instrument of gift expressly provides for a gift over or a reversion in the event of the lapse or other failure of a charitable object, the gift over or reversion, if otherwise valid, may take effect; and
 - (b) the court must approve or select one or more purposes as close as is practicable or reasonable to the original or previously varied purpose or purposes.

Comment: At common law when a trust for a charitable purpose fails the court may order that the trust assets be applied to a charitable purpose similar to the one that had failed. This is known as the *cy-près* doctrine. Section 65 restates the power of the court to make a *cy-près* order but with two important changes.

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First, it is a precondition to the application of the *cy-près* doctrine that the donor had a “general charitable intent.” This was not always easy to establish and section 65 abrogates that requirement.

Second, the court is empowered to make an order modifying the purposes of the trust even where the original purpose has not failed. The order may add a purpose similar in spirit to the original purpose, where the need may be predominantly greater. An example might be a charitable trust established to provide a scholarship to a particular educational institution. It may turn out that large numbers of scholarships are already available but non-scholarship forms of financial assistance to students at that institution, such as bursaries, are urgently required. Under subsection (1)(b) the court could order that other forms of financial assistance be added to the purposes of the charitable trust.

Surplus moneys from public appeals

66. (1) If as a result of an appeal to the public for support of any purpose, whether charitable or otherwise, property is held by a trustee for that purpose, the provisions of section 65 apply, so long as the purpose when varied is exclusively charitable.
- (2) Subsection (1) does not limit the right of a person to apply to the court under section 70 if the purpose of the trust is not charitable.
- (3) An identifiable donor, who indicates in writing at the time he or she makes a donation that the unexpended portion of the donation is to be refunded in the event that the trustee is unable to fully expend the trust property on the purpose for which the appeal is made, is entitled in that event to receive a refund of the unexpended portion of the donation before an application is made under subsection (1), or if that portion of the donation cannot be readily determined, a refund calculated on a prorated basis from the unexpended portion of the fund resulting from the appeal.

Comment: Section 66 provides a partial solution to the problem which arises when money is collected through a public appeal for a non-charitable purpose that fails. This was explored by the Law Reform Commission of British Columbia in its 1993 *Report on Informal Public Appeal Funds* (LRC 12) and will be pursued further by the Law Institute in its forthcoming Report “A Legal Framework for Informal Public Appeal Funds.”

The difficulty is that where the purpose is non-charitable, and the public appeal has been constituted without provision for the disposition of a surplus, nothing can be done with the surplus except to let it accumulate interest indefinitely or else pay it into court. Section 66 would permit the court the trustee to apply to the court for an order that the surplus be applied to a charitable purpose. Subsection (3) provides for the return of funds to an identifiable donor in particular circumstances. If the donation has been commingled with other money raised through the appeal and thus the identity of the unexpended portion of the donation has been lost, which would likely be the case, a prorated refund would be calculated by multiplying the amount of the unexpended fund by the ratio of the donation to the value of the total amount collected as a result of the

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appeal. An alternative procedure for dealing with the surplus may be found in section 70(5).

Power to order a sale

- 67.** If land held in trust for a charitable purpose can no longer be used advantageously for the charitable purpose or should for any other reason be sold, the court may authorize its sale and give directions concerning its conduct and the application of the proceeds from the sale.

Comment: Occasionally land will be held for a charitable purpose that is frustrated by changing circumstances. For example, land may have been conveyed to a trustee to hold it on trust for use as a public park. Subsequent environmental degradation in the area might make the land unsuitable for public use. Section 67 permits the trustee to apply to the court for sale of the land and the court might order that the proceeds be used to purchase another piece of land more suitably located for the same purpose.

Notice to Attorney General

- 68.** An order must not be made under sections 65 to 67 unless the trustees have given at least 30 days notice of the application to the Attorney General.

Comment: The Attorney General is the guardian of the public interest in all matters relating to charities and it is appropriate that notice be given to the Attorney General of any court application that may affect the charity.

Imperfect trust provisions: application to charitable purposes

- 69.** (1) Subject to subsection (2), if the objects of a trust consist of a charitable purpose linked conjunctively or disjunctively with a non-charitable purpose that is not described specifically, but is referred to only by an indefinite qualifying term, such as “benevolent,” “worthy,” or “philanthropic,” the trust is not void for that reason alone.
- (2) A trust described in subsection (1) operates solely for the benefit of the charitable purpose to the exclusion of the non-charitable purpose, and the trustee shall apply all of the property of the trust as if no non-charitable purpose had been set out in the trust instrument.
- (3) If the objects of a trust consist of both specific charitable and specific non-charitable purposes, the trust is not void for that reason alone, but if it is practicable to separate the charitable from the non-charitable purposes,
- (a) the specific charitable purposes constitute the objects of a separate charitable trust,

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- (b) the specific non-charitable purposes constitute the objects of a separate non-charitable purpose trust, and
 - (c) subject to any terms in the trust instrument regarding apportionment of the trust property or the manner in which a power of apportionment may be exercised, the property of the trust shall be divided in the trustee's discretion between the charitable trust and the non-charitable purpose trust mentioned in paragraphs (a) and (b), respectively.
- (4) If the objects of a trust consist of both specific charitable and specific non-charitable purposes and it is not practicable to separate the charitable from the non-charitable purposes, the trust is not void for that reason alone, but shall take effect and be treated as a non-charitable purpose trust.

Comment: Sometimes a trust will be created for two or more purposes that are both charitable and non-charitable. In that case, apart from curative legislation, the trust will fail in whole or in part. Sometimes this reflects a confusion over language. A testator, for example, may use words like “benevolent” or “philanthropic” thinking they imply charity when, as a matter of law, they do not and simply taint the trust. The Act provides that such a trust operates solely for the benefit of the charitable purpose. Subsections (1) and (2) would replace section 47 of the *Law and Equity Act* which addresses the same issue in less detailed terms.

Subsections (3) and (4) address the case where a charitable purpose is linked with a second purpose that is obviously non-charitable. If it is possible to separate the two purposes they operate as two separate trusts, one charitable and the other non-charitable and the trustee has a discretion to divide the trust assets between the two trusts. When the two purposes cannot be separated the trust is valid and takes effect as a non-charitable purpose trust.

This section is based on recommendations made by the Law Reform Commission of British Columbia in its 1992 *Report on Non-charitable Purpose Trusts* (LRC 128.)

Non-charitable trusts for a public purpose

Comment: Under the current law, only a very narrow range of gifts for non-charitable purposes can take effect as trusts *per se*. Section 24 of the *Perpetuity Act* stipulates that such trusts must be construed as a power to appoint the income or capital. Section 70 of this draft Act validates the creation of trusts for certain non-charitable purposes and defines some of their characteristics. This section is based on recommendations made by the Law Reform Commission of British Columbia in its 1992 *Report on Non-Charitable Purpose Trusts* (LRC 128.)

70. (1) In this section,

“non-charitable purpose trust” means a trust for a non-charitable purpose that does not create an equitable interest in a particular person;

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- (2) Subject to this section, a person may create a non-charitable purpose trust if the purpose is
- (a) sufficiently certain to allow the trust to be carried out,
 - (b) not contrary to public policy, and
 - (c) a national, patriotic, religious, philanthropic, provident, scientific, fraternal, benevolent, artistic, educational, social, professional, agricultural, sporting or other similar useful purpose.

Comment: Subsection (2) sets out the purposes for which a non-charitable trust may be created. Paragraph (c) sets out a list of “public purposes” where such trusts would be acceptable and useful. The list was drawn from the *Society Act* which sets out the purposes for which non-profit bodies can be incorporated.

- (3) The rule against perpetuities applies to a non-charitable purpose trust.
- (4) A non-charitable purpose trust may exist indefinitely unless the trust instrument that creates it specifies a maximum duration or provides otherwise.

Comment: Subject to the rule against perpetuities and any contrary stipulation in the trust document, a non-charitable purpose trust may be of unlimited duration.

- (5) Subject to subsection (9), if a non-charitable purpose trust is impossible to perform or its purposes cannot be effectively fulfilled, the court may at any time
- (a) approve a scheme substituting a purpose for the non-charitable purpose trust that is as similar to the original purpose as is reasonably practicable, or
 - (b) if the court is unable to find a purpose that is reasonably similar to the original purpose of the trust, approve a scheme substituting a purpose that is not contrary to the spirit of the original settlement.
- (6) Subject to subsection (9), the court may vary a non-charitable purpose trust by approving a scheme substituting a new purpose for the trust that is not contrary to the spirit of the original settlement if the purpose of the trust is obsolete, or no longer useful or expedient, due to a change in circumstances since the creation of the trust.

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- (7) In exercising the power to vary a non-charitable purpose trust under subsection (6), the court may consider the views, if any, of the settlor and the trustee concerning the continued usefulness or relevance of the trust and the proposed variation.
- (8) If a suitable substitute purpose for a non-charitable purpose trust is not identified, the court may order that the trust property be returned to the settlor or to the settlor's personal representative.
- (9) Subsections (5) and (6) do not apply if
 - (a) the trust instrument contains a legally valid direction concerning the ultimate disposition of the trust property, or
 - (b) the intention of the settlor concerning the ultimate disposition of the trust property can be inferred from the trust instrument and is legally valid.

Comment: Subsections (5) to (9) provide machinery that deal with the situation where the purpose of the trust has failed. They allow the court to approve a substitute purpose (which may also be non-charitable) or order the other disposition of trust property.

- (10) On an application by
 - (a) the Attorney General,
 - (b) a person appointed specifically by the settlor in the trust instrument to enforce the trust,
 - (c) the settlor,
 - (d) the personal representative of the settlor,
 - (e) the trustee, or
 - (f) any person appearing to have a sufficient interest in the matter,the court may make an order that it considers just in the circumstances
 - (g) for the enforcement of a non-charitable purpose trust,
 - (h) varying a non-charitable purpose trust under subsections (5) or (6), or

- (i) enlarging or otherwise varying the powers of the trustee of a non-charitable purpose trust.

Comment: One reason for the traditional hostility of the law to non-charitable purpose trusts has been the fact that, because the beneficiary is the public at large (or a large segment of it), there is no obvious person who can enforce the trust against the trustee if it should become necessary. Subsection (10) sets out a list of persons who are entitled to apply to the court to enforce the trust and identifies what the court may do on such an application.

Other non-charitable trusts

71. (1) A purported trust that
- (a) creates no enforceable equitable interest in a specific person, and
 - (b) is for a specific non-charitable purpose other than a purpose described in section 70(2)(c)
- must be construed as a power to appoint the income or the capital, as the case may be.
- (2) Unless a trust described in subsection (1) is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is fully administered within a period of 21 years, even if the disposition creating the trust showed an intention, either expressly or by implication, that the trust should or might continue for a longer period.
 - (3) Despite subsection (2), if the trust is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by doing so the result would be closer to the intention of the creator of the trust than the period of validity provided by this section.
 - (4) To the extent that the income or capital of a trust described in subsection (1) is not fully expended within a period of 21 years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person who would have been entitled to the property comprised in the trust, if the trust had determined at the expiration of the 21 year period, is entitled to that unexpended income or capital.
 - (5) Nothing in this section applies to any discretionary power to transfer a beneficial interest in property to any person as a gift.

Comment: While non-charitable trusts for public purposes will now be validated by section 70 something is necessary to deal with other non-charitable purpose trusts. Thus section 24 of the *Perpetuity Act* retains some residual utility with respect to such trusts. Section 71 carries it forward with appropriate modifications.

Trust property held for purposes not to be seized

72. (1) Property held on trust by a charitable corporation or a trustee for a specific purpose, as opposed to property held generally for the purposes of the corporation or trust, is exempt from execution, seizure or attachment to satisfy a judgment against that corporation or trustee except to the extent that the judgment is based on a liability incurred by the corporation or the trustee in relation to that purpose.
- (2) This section declares what has always been the law of the province and is retroactive to the extent necessary to give it effect according to its intent.

Comment: This section addresses the distortion in trust law created by the decision of the Ontario Court of Appeal in relation to the liquidation of the assets of a religious order, the Christian Brothers of Ireland in Canada (CBIC), to satisfy claims arising out of activities in Newfoundland. CBIC also held, on separate purpose trusts, two schools in the Vancouver area that were unconnected to the Newfoundland activities. It was held that the two schools were assets that might be liquidated to satisfy the Newfoundland claims.

In its *Report on Creditor Access to the Assets of a Purpose Trust* (No. 24, 2003), the Law Institute recommended that the law on this issue be restated so as to ensure that the Ontario decision is not followed in British Columbia. Section 72 embodies the recommended restatement.

Subsequent to the preparation of this Report, the Legislative Assembly of British Columbia passed the *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59, which has the same principal objectives as section 72.

Part XI

GENERAL

Protection from liability

73. (1) A person who receives notice of the existence of a trust affecting property by reason only of the production or registration of a document evidencing
- (a) the appointment or discharge of a trustee, or
 - (b) a vesting,
- may assume without inquiry that the former trustees possessed any powers they exercised over the trust property and that current trustees similarly have the powers they have exercised or purport to exercise over the trust property.
- (2) A purchaser of trust property who at the time of the purchase has notice that former trustees lacked, or current trustees lack, a power purported to be exercised with respect to the trust property, or otherwise acted in breach of trust, takes the trust property subject to the terms of the trust, unless the purchase is from a person who obtained title to the trust property without such notice.
- (3) This Act or an order made under it is a complete indemnity and discharge to all persons for anything done or permitted to be done under the Act or order.
- (4) This section applies to any transaction that occurs after this Act comes into force.

Comment: A third party dealing with trustees should be able to assume the trustees are properly exercising the authority they purport to have. The third party should not be prejudiced by an improper exercise of trustee powers in the absence of circumstances or information that would raise doubts in the mind of a reasonable person as to the sufficiency of the trustees' authority or the propriety of a transaction with them. Section 73(1) protects third parties dealing with trustees by providing that a person who learns of a trust only through a document evidencing a trustee's appointment or discharge, or a vesting of property, is not required to look behind the document in dealings with the trustee.

Conversely, it is equitable that the title of a third party who is aware when purchasing trust property that it is being transferred in breach of trust should remain encumbered by the interest of the beneficiary. Section 73(2) declares that this is the result when a purchaser of

trust property has notice (actual or constructive) that the trustees lack power to transfer it or are not doing so in a proper exercise of their powers. No change from current case law is intended.

Section 73(3) clarifies that liability cannot arise from anything done or authorized by the Act or an order made under the Act.

Representation by committee

74. (1) If a beneficiary is a mentally incapacitated person for whom a committee has been appointed under the *Patients Property Act*, the committee is the representative of that beneficiary for all purposes under this Act.

Comment: The *Patients Property Act* provides for the appointment of a person called a “committee” to manage the affairs of a mentally incapacitated individual. If none is appointed, the Public Guardian and Trustee is the committee. Subsection (1) affirms that the committee of a mentally incapacitated beneficiary has the power to act on behalf of the beneficiary for the purposes of the *Trustee Act*.

(2) Without limiting subsection (1),

- (a) any action required or permitted to be taken by the beneficiary,
- (b) any notice, report or notification required or permitted to be given to the beneficiary, and
- (c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if given to, given by or taken by the committee on behalf of the beneficiary.

Comment: Subsection (2) affirms that notices a mentally incapacitated beneficiary is entitled or permitted to receive are effective if given to that beneficiary’s committee. Furthermore, a committee may give a consent or signify agreement on behalf of the beneficiary. These explicit examples of representation do not detract from the general confirmation in subsection (1) of a committee’s authority for the purposes of the *Trustee Act*.

(3) The guardian of a beneficiary who is a minor is the representative of that beneficiary for the purpose of receiving or taking delivery of any report, notice or notification required or permitted under this Act.

Comment: Subsection (3) confirms that any report, notice or notification under the *Trustee Act* to which a minor beneficiary is entitled is to be given to the guardian of the minor.

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- (4) If the guardian of the person of a beneficiary referred to in subsection (3) is not also the guardian of the estate of the beneficiary, the reference to “guardian” in subsection (3) means the guardian of the estate.

Comment: Normally the parents of the minor will be joint guardians of both the person and the estate of the minor. Where the guardian is someone other than a parent, that person is usually the guardian of both the person and the estate of the minor. In some cases there may be a separate guardian of the minor’s estate and in those cases it is that guardian who must receive notices, etc. given under the *Trustee Act*. (See *Family Relations Act*, R.S.B.C. 1996, c.128, ss. 25-31.)

- (5) If a beneficiary referred to in section 63(2) is a minor or a mentally incapacitated person and the guardian or committee of the beneficiary is not present at the passing of accounts, that beneficiary may be represented by and bound by another person who is legally competent, who has a substantially identical interest in the trust property and who is not in a conflict of interest with the person represented in relation to any aspect of the accounts.

Comment: At the present, trustees sometimes have to arrange for separate legal representation for a beneficiary under disability at a passing of accounts. This is expensive and unnecessary if fully capacitated beneficiaries of the same class are present who can speak for the interests of the class. Subsection (5) makes it unnecessary to arrange for separate representation of a minor or legally incapacitated beneficiary in a passing of accounts if the guardian or committee of that beneficiary does not attend. Where the guardian or committee is in attendance, he or she will be the exclusive representative of the beneficiary under disability.

- (6) For the purposes of this Act,
- (a) any action required or permitted to be taken by a beneficiary,
 - (b) any notice, report or notification required or permitted to be given to a beneficiary, and
 - (c) any consent or agreement required or permitted to be given by a beneficiary

is validly taken or given if given to, given by or taken by an agent of the beneficiary acting within the scope of the authority conferred by the beneficiary.

Comment: Subsection (6) clarifies that beneficiaries may act through agents for the purpose of the *Trustee Act*.

Who may apply for orders

- 75.** Subject to this Act, an order of the court under this Act may be made on the application of:
- (a) any person who is beneficially interested in the trust property,
 - (b) a trustee of the trust, or
 - (c) a secured party who has a security interest in trust assets.

Comment: Section 75 sets out a default rule as to who is entitled to apply under the Act for various orders that may be made. It lists beneficiaries, trustees, and secured parties. The list does not include the settlor or the settlor's estate.

Costs may be ordered to be paid out of trust property

- 76.** The court may order costs of any proceeding under this Act, or of any transfer or other transaction respecting trust property, in such amounts and in such proportions as the court may direct, to be paid by or from one or more of the following:
- (a) by a party bringing the application,
 - (b) by a party against whom the application is brought, or
 - (c) out of the trust property or any other property of the trust in respect of which the order is made, or out of its income.

Comment: Ordinarily costs are paid by the party who is unsuccessful in the proceeding. In proceedings under this Act, there may well be no one opposed to the application, or a party may question the application solely to ensure that the terms of the trust are taken into account in the proceedings. In these cases it is often appropriate for the court to award costs from trust property or income, indemnifying the parties to the proceeding. Section 76 goes beyond the question of costs of legal proceedings and also empowers a court to address responsibility for the costs of any transaction respecting trust property.

Application of *Perpetuity Act* presumptions

- 77.** If in the administration of a trust any question arises relating to the disposition, transmission or devolution of trust property, including the termination of a trust or an accumulation directed under a trust or other disposition, and it becomes relevant to inquire whether a person is or at a relevant date was or will be

capable of procreating or giving birth to a child, section 14 of the *Perpetuity Act* applies to any such question.

Comment: Occasionally identifying the beneficiaries of a trust may raise a question that turns on the ability of a person to have a child at some future time. Section 14 of the *Perpetuity Act* sets out some presumptions that provide guidance in this exercise and avoid anomalies such as the “fertile octogenarian.” These presumptions, through section 77, are incorporated by reference into the Act.

Application of Act

Comment: The transition between the existing *Trustee Act* and the implementation of the new one raises a variety of complex issues and competing policies. Various provisions throughout the Act contain specific rules as to their application or non-application to trusts or events occurring before the Act comes into force. Section 78 provides a general transition provision.

The competing policies are those that surround the issue of retroactivity. Generally law-makers are very cautious about providing for the retroactive application of statute law. This reflects a bias that persons who order their affairs in conformity with a particular body of law should be able to continue to rely on it. On the other hand, where that body of law is over a hundred years old and has been replaced by a more modern regime with features that would be beneficial to both trustees and beneficiaries of existing trusts it does not seem sensible to deny them access to the modern legal scheme.

There is a second aspect to retroactive operation. This Act addresses in detail a number of issues in relation to trustees and their powers which are either unclear, doubtful, or not addressed under the current law. Nonetheless, many trustees, in practice, carry out their duties and administer their trusts as if their actions are clearly authorized by law. In many cases this simply reflects good sense and good management practice. It is therefore desirable to retrospectively validate certain actions taken in relation to a trust administration that would be authorized by the new Act but occurred before it came into force.

- 78.** (1) In this section, “effective date” means the date this Act comes into force as provided in section 80.
- (2) This Act applies to every trust referred to in section 3(1) whether created before, on, or after the effective date.
- (3) Subject to subsection (4), this Act does not affect the legality or validity of any act or thing done before the effective date that was in conformity with the law in force immediately before the effective date.

Comment: Sections 78 (1) and (2) reflect a policy decision that the new Act should apply to all trusts, including trusts which came into being before the effective date of the new Act. Subsection (3) clarifies the application of this policy by preserving the legality and validity of any act or thing done earlier that conformed to the law in force at the time.

- (4) An act or thing done by a trustee that
- (a) occurred before the effective date,
 - (b) but for this subsection, would not be valid, effective or authorized solely because the trustee lacked a power listed in subsection (5), and
 - (c) would have been valid, effective or authorized if it occurred after the effective date,
- is valid for all purposes and the trustee is under no liability for the act or thing.
- (5) The following are the powers referred to in subsection (4):
- (a) the power to employ an agent as provided in section 7,
 - (b) the power to delegate by power of attorney as provided in section 9,
 - (c) the power conferred on a surviving trustee as provided in section 13,
 - (d) the power to appoint a successor trustee as provided in section 19,
 - (e) the power to invest trust property in conformity with sections 27 to 31,
 - (f) the powers to allocate and apportion as provided in sections 35 and 36, and
 - (g) the powers to apply income and capital as provided in sections 43 to 48.
- (6) Subsection (4) does not apply if the act or thing is the subject matter of a proceeding that was commenced before the effective date.
- (7) If an act or thing is purportedly validated by the operation of subsection (4) then all provisions of this Act apply that are
- (a) relevant to the issue of validity or invalidity, or
 - (b) necessary to give effect to the validation.

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Comment: Subsections (4) to (7) provide for the retroactive validation of certain earlier acts by trustees. The strategy is to identify, in subsection (5), a group of “designated features” of the new Act. Subsection (4) then validates the actions of a trustee that would have been effective through the operation of a designated feature had it been in force at the time. Where an act or thing is validated under subsection (4) other supplementary provisions may be invoked in aid under subsection (7). Subsection (6) preserves the position of anyone who has questioned the trustees’ action in a proceeding commenced before the effective date of the new legislation.

- (8) This Act is retroactive to the extent necessary to give effect to subsections (2) and (4).

Comment: Subsection (8) contains a general statement as to retroactivity.

Repeals

79. The following Acts are repealed:

1. *Trustee Act*,
2. *Trust and Settlement Variation Act*,
3. *Perpetuity Act*, section 21, and
4. *Law and Equity Act*, section 47.

Comment: Section 79 lists the enactments that will be replaced by the new Act.

Commencement

80. This Act comes into force on

Comment: Section 80 stipulates the technique that will be used to bring the legislation into force. Some options include bringing it into force on royal assent, on a specific date set out in the section, or in a date set by regulation. It is the last option that is used most often in British Columbia.

APPENDIX

APPENDIX

DISPOSITION OF PROVISIONS OF THE PRESENT *TRUSTEE ACT*

The table appearing immediately below correlates provisions of the present *Trustee Act* with those dealing with similar or related subject-matter in the proposed Act set out in Part Two of this Report. The table does not reflect an exact concordance between the present and proposed Acts. The degree of similarity between juxtaposed provisions will vary. In some cases, the provision of the proposed *Trustee Act* in the column on the right represents a functional substitute, rather than a conceptual counterpart, for the existing provision referenced in the opposite column.

Individual provisions of each Act are identified in the table by their section numbers and marginal subheadings.

<i>Trustee Act</i> R.S.B.C. 1996, c. 464		Proposed New <i>Trustee Act</i>	
1	Definitions and interpretations	1	Definitions and interpretations
2	Application	3	Application of Act
		4(1)	Default and mandatory rules
3	Receipts of trustees	42	Discharge of persons paying trustees
4	Purchaser not bound to see to application	42	Discharge of persons paying trustees
5	Power to sell vested in trustee for sale	39	Powers of trustee
6	Power to sell subject to depreciatory conditions	39	Powers of trustee
7	Power to authorize receipt of money	7	Power to employ agents
8	Power to insure property	39	Powers of trustee
9	Power to compound	39	Powers of trustee
10	Abolition of rule in <i>Allhusen v. Whittel</i> ¹		

1. Not carried forward into the proposed *Trustee Act* as being exclusively related to administration of estates of deceased persons. Relocation of s. 10 of the present Act to the *Estate Administration Act* is recommended as a consequential amendment.

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464	<i>Proposed New Trustee Act</i>
11 Power to spend money on repairs and improvements	39 Powers of trustee
12 Powers of trustees may be exercised by survivor	13 Powers or duties of surviving trustees
13 Interpretation	Deleted as being merely ancillary to s. 14 of present Act
14 Trustee engaged on war service	9 Power to delegate by power of attorney
15 Repealed	
15.1 Investment of trust property	27(1)-(3) Investment of trust property
15.2 Standard of care	28 Standard of care
15.3 Trustee not liable if overall investment strategy prudent	29 Trustee not liable if overall investment strategy prudent
15.4 Abrogation of common law rules: anti-netting rules	30 Abrogation of common law rules: anti-netting rules
15.5 Delegation of authority with respect to investment	31 Delegation of authority with respect to investment
15.6 Interpretation of trust instrument in relation to sections 15.1 to 15.5	32 Interpretation of trust instrument in relation to sections 27 to 31
16 Repealed	
17 Repealed	
17.1 Corporate trustee not to invest money in own securities	27(4) Investment of trust property
18 Repealed	
19 Depositories	39 Powers of trustee
20 Repealed	
21 Instrument creating the trust	3(1) Application of Act

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464	<i>Proposed New Trustee Act</i>
22 Variation of trustee investments ²	
23 Reorganization of corporation	39 Powers of trustee
24 Income for maintenance of infant	44 Power to apply income for maintenance or advancement
25 Sale of property to maintain infant	46 Power to apply capital for maintenance or advancement
26 Conveyance and receipt of trustees gives good title	73(3) Protection from liability
27(1), (2) Power to appoint new trustees	14 Appointment of substitute or additional trustees 19 Power of surviving trustee to appoint successor
27(3) Power to appoint new trustees	20 Powers of new trustees
27(4) Power to appoint new trustees ³	
27(5) Power to appoint new trustees	3(1) Application of Act
28 Retirement of trustee	21 Resignation by trustee
29 Vesting of trust property in trustees	23 Vesting
30 Removal of trustees on application	52 Power of court to remove trustees and to appoint new trustees
31 Power of court to appoint new trustees	52 Power of court to remove trustees and to appoint new trustees
32 Rights and powers of new trustees	20 Powers of new trustees
33 Power of court to vest land in new trustees	26 Vesting orders
34 Power of new trustees to transfer stock or chose in action	20 Powers of new trustees

2. Spent as a result of the repeal of the authorized “legal list” of investments in the former s. 15 by the *Trustee Investment Statutes Amendment Act, 2002*, S.B.C. 2002, c. 33, s. 23.

3. Considered to be surplusage.

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464		Proposed New <i>Trustee Act</i>	
35	New trustees in place of persons convicted of an indictable offence	2 52	When trustee is unqualified or unfit Power to remove trustees and to appoint new trustees
36	Persons who may apply for orders	75	Who may apply for orders
37	Old trustees not discharged from liability	22	Liability of trustee on discharge
38	Distribution of estate after notice ⁴		
39	Distribution of estate under direction of court	58(3)-(5)	Trustee may apply to court for advice or directions
40	Payment by trustees	60(1)-(3), (6)	Payment into court
41	Supreme Court orders for application of trust assets in court	60(4)	Payment into court
42	Power to make orders on application by majority of trustees	12	Trustees may act by majority
43	Power to vest land of person of unsound mind ⁵	26	Vesting orders
44	Power to deal with contingent rights of person of unsound mind	16 23 52	Discharge of unqualified trustee Vesting Power to remove trustees and appoint new trustees

4. Section 38 of the present Act nowadays concerns only executors and administrators in practice, although it also refers to "...a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or a particular class or classes..." Deeds and general assignments for the benefit of creditors were long ago superseded by bankruptcy and insolvency legislation. Section 38 should be relocated to the *Estate Administration Act* by a consequential amendment, with the references to trustees and assignees under a deed or general assignment for the benefit of creditors or a class of creditors deleted.

5. Section 43 and several other provisions of the current *Trustee Act*, e.g. sections 43, 44, 45, 48, and 49, apply to non-trustee mortgagees "of unsound mind," as well as to trustees in the same condition. The vesting provisions of the proposed *Trustee Act* do not apply to mortgagees who are not trustees. Today problems arising from the legal disability of a mortgagee could be addressed by other means, e.g. by securing the appointment of a committee under the *Patients Property Act*, R.S.B.C. 1996, c. 349.

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464	<i>Proposed New Trustee Act</i>
45 Power to deal with stock of person with unsound mind	26 Vesting orders
46 Power to deal with stock vested in personal representative	26 Vesting orders
47 Power to deal with stock of infant trustee ⁶	26 Vesting orders
48 Power to vest land of infant trustee or mortgagee	26 Vesting orders
49 Power to deal with contingent rights of infant trustee or mortgagee	26 Vesting orders 55 Variation and termination of trusts
50 Payment of money of minors and persons of unsound mind	60(5), (6) Payment into court
51 Court may convey estate of trustee out of jurisdiction	26 Vesting orders
52 Order if parties seised of land jointly with parties out of jurisdiction	26 Vesting orders
53 Contingent rights of sole trustee out of jurisdiction	26 Vesting orders
54 Order if persons are jointly entitled with others out of jurisdiction to contingent right	26 Vesting orders
55 Uncertainty as to survivorship	26 Vesting orders 52(1) Power of court to remove trustees and to appoint new trustees
56 Uncertainty whether last trustee alive	26 Vesting orders 52(1) Power of court to remove trustees and to appoint new trustees

6. The subject-matter of s. 47 of the present Act is also capable of being addressed through orders under sections 21(1)(b) and 40(1) of the *Infants Act*, R.S.B.C. 1996, c. 223 authorizing an infant or the infant's guardian to carry out a transaction relating to a stock or receive income from it.

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464	<i>Proposed New Trustee Act</i>
57 If trustee dies without heir	26 Vesting orders 52(1) Power of court to remove trustees and to appoint new trustees
58 Releasing contingent right of unborn trustee	26 Vesting orders 55(3) Variation and termination of trusts
59 Order for vesting estate on refusal of trustee to convey or release	26 Vesting orders 52 Power to remove trustees and to appoint new trustees 54 Complaints by beneficiaries against trustee inactivity
60 Court may make decree in absence of trustee ⁷	
61 Power to convey in place of mortgagee ⁸	
62(1)-(3) Power to appoint person to convey ⁹	26 Vesting orders
62(4)	73(3) Protection from liability

7. The subject-matter of s. 60 is covered now by rules of court providing for substitutional service.

8. Section 61 allows a mortgagor who has fully paid a mortgage to obtain a vesting order releasing the mortgage in several specified circumstances, which may be summarized as ones in which the mortgagee or someone claiming through the mortgagee is not available or refuses to execute a discharge. It has not been carried forward into the proposed *Trustee Act* because it concerns mortgagors and mortgagees, rather than trustees. Sections 241, 243 and 244 of the *Land Title Act*, R.S.B.C. 1996, c. 250 provide an alternate means for a mortgagor to obtain an order releasing a fully satisfied charge in some of the same circumstances. Any residual utility that s. 61 may retain to secure an order perfecting the redemption of mortgaged property could be preserved through consequential amendments to these sections of the *Land Title Act*, clarifying that they may be invoked in any case to which s. 61 of the present *Trustee Act* now extends.

9. The scope of ss.62(1)-(3), which empower the court to appoint a person to convey or assign land, or to release or dispose of a contingent right, is not restricted to trusts. To the extent that ss. 62(1)-(3) apply outside the context of a trust, they should be relocated through a consequential amendment to either the *Law and Equity Act*, R.S.B.C. 1996, c. 253 or the *Property Law Act*, R.S.B.C. 1996, c. 377.

A Modern Trustee Act for British Columbia

<i>Trustee Act</i> R.S.B.C. 1996, c. 464	<i>Proposed New Trustee Act</i>
63 Failure to transfer stock for 28 days	26 Vesting orders 54 Complaints by beneficiaries against trustee inactivity
64 Executor's failure to transfer stock ¹⁰	
65 Trustee of stock out of jurisdiction	26 Vesting orders
66 Trustee of stock refusing to transfer	26 Vesting orders 54 Complaints by beneficiaries against trustee inactivity
67 One of several trustees of stock refusing to transfer or deal with dividends	26 Vesting orders 54 Complaints by beneficiaries against trustee inactivity
68 Stock standing in name of deceased person ¹¹	
69 Effect of order vesting legal right to transfer stock	24 Effect of vesting
70 Effect of order vesting chose in action	24 Effect of vesting
71 Inheritance if person holds in trust or by mortgage ¹²	
72 Conveyance of real estate or agreement for sale by deceased ¹³	
73 Court to declare trusts in certain cases	26 Vesting orders 55(3) Variation and termination of trusts
74 Power to direct stock transfers ¹⁴	

10. Not carried forward into the proposed *Trustee Act* as it relates exclusively to personal representatives.

11. See footnote 10.

12. Now covered by Part 9 of the *Estate Administration Act*, R.S.B.C. 1996, c. 122.

13. See footnote 12.

14. Considered to be surplusage.

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464	<i>Proposed New Trustee Act</i>
75 Presentation of petition, evidence and notice ¹⁵	
76 Procedure on hearing ¹⁶	
77 Court may dismiss petition ¹⁷	
78 Power to make order in a cause ¹⁸	
79 Order as conclusive evidence ¹⁹	
80 Application to trustees of charities and societies	3(1) Application of Act
81 Court may order vesting of estate after decree or order for sale ²⁰	26 Vesting orders
82 Effect of orders vesting rights to stock	24 Effect of vesting
83 Indemnity to companies obeying	73(4) Protection from liability
84 Trial of petitioners (<i>sic</i>) rights ²¹	
85 Costs of proceedings	76 Costs may be ordered to be paid out of trust property
86 Application for directions	58(1) Trustee may apply to court for advice or directions

15. Considered to be surplusage. Procedure on motions is now covered by rules of court.

16. See footnote 15.

17. See footnote 15.

18. Considered to be surplusage.

19. Considered to be surplusage.

20. Section 81 is essentially ancillary to orders for sale of land. It should be grouped with other remedial provisions in the *Law and Equity Act* by a consequential amendment when the proposed *Trustee Act* is enacted.

21. Considered to be surplusage.

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464	<i>Proposed New Trustee Act</i>
87 Effect and exception	58(2) Trustee may apply to court for advice or directions
88 Setting remuneration of trustees and guardians	61 Compensation of trustees
89 Application for remuneration	61(1)-(4) Compensation of trustees
90 Application	61(5), (6) Compensation of trustees
91 Review of order or certificate of registrar ²²	
92(1), (2) Loans by trustees not breach of trust ²³	6(2) Duty of integrity and care 28 Standard of care 29 Trustee not liable if overall investment strategy is prudent
92(3) ²⁴	
93 Improper advance of trust money on mortgage	6(2) Duty of integrity and care 28 Standard of care 29 Trustee not liable if overall investment strategy is prudent

22. Considered to be surplusage as appeals from orders and decisions of registrars are now covered by rules of court. See Supreme Court Rules 53(6)-(9) inclusive.

23. Sections 92(1) and (2) are spent, as their subject-matter is conceptually related to the list of authorized investments formerly found in s. 15, which was repealed by the *Trustee Investment Statutes Amendment Act 2002*. The general prudential standard of care expressed in ss. 6(2) and 28 of the proposed Act, together with s. 29 and other trustee investment provisions of the proposed Act incorporating the main elements of portfolio theory, would supplant the few provisions relating to the repealed s. 15 that remain in the present Act.

24. Section 92(3) relates to pre-Torrens concerns about acceptance of “short title” and is considered to be surplusage in light of the conclusiveness of the register under the Torrens-based British Columbia land registration system.

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<i>Trustee Act</i> R.S.B.C. 1996, c. 464		Proposed New <i>Trustee Act</i>	
94	Exoneration of trustees on powers of attorney ²⁵		
95	Implied indemnity of trustee	10	Liability for trust property
96	Jurisdiction of court to relieve trustee for breach of trust	59	Trustee may be relieved of liability for breach of trust
97	Appointment and remuneration of judicial trustees	52	Power of court to remove trustees and to appoint new trustees
98	Power to make rules ²⁶	52(4)	Power of court to remove trustees and to appoint new trustees
		61(7),(8)	Compensation of trustees
99	Passing of trustee's accounts	63	Passing of accounts
100	Power to make rules ²⁷		

25. Section 94(1) absolves trustees of liability when acting in good faith under or in pursuance of a power of attorney without knowledge that the donor of the power is dead or has revoked it. This result would also flow from ss. 3 and 4(1) of the *Power of Attorney Act*, R.S.B.C. 1996, c. 370. It is therefore considered unnecessary to retain a specific provision like s. 94(1) having the same effect, but referring only to trustees. Section 94(2) is a saving provision dependent on s. 94(1) and should be repealed together with it.

26. No provision like s. 98 enabling the making of rules governing judicial trustees and their compensation is included in the proposed *Trustee Act*. The appointment of a judicial trustee today is a sufficiently rare occurrence that matters of trust administration by, and compensation of, a judicial trustee are capable of being addressed through special directions from the court that are tailored to the requirements of the case. Section 52(4) of the proposed Act provides the court may, in appointing a judicial trustee, give directions concerning the trust or its administration. Sections 61(7) and (8) provide that the terms of an order concerning compensation of a judicial trustee prevail over the general provisions of Part IX of the proposed Act to the extent of any inconsistency.

27. Section 100, which enables the making of rules regarding proceedings relating to compensation of trustees and passing of accounts, is not carried forward into the proposed *Trustee Act* because the procedure is addressed in Part IX of the proposed Act and the Supreme Court Rules.

