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I. Introduction

This report, the second made by the *Trustee Act* Modernization Committee of the British Columbia Law Institute, contains recommendations for changes to the provisions of the *Trustee Act* dealing with the remuneration of trustees and related matters. A description of the project on Modernizing the *Trustee Act*, the Committee and its approach is set out in Appendix B.

In all the provinces and territories, trustees and personal representatives have a statutory right to receive remuneration for their services from their trust estate.[1] This remuneration is received in addition to reimbursement for out-of-pocket expenses incurred in carrying out the trust. If the trust instrument or will specifies the way in which the trustee or executor is to be remunerated, the provision so made is usually considered to be in lieu of statutory remuneration, and no allowance will be made under the legislation.[2]

Statutory remuneration takes the form of an allowance from the trust capital and income, with a ceiling fixed by statute. Within that ceiling, the court is directed to allow an amount it considers fair and reasonable. The *Trustee Act* of British Columbia also provides specifically for a second, newer form of statutory remuneration termed "care and management fee" which may be allowed annually during the administration of the trust. The care and management fee is awarded in addition to the more traditional allowance from capital and income, and its precise amount is also set by the court, subject to a fixed ceiling.[3] It reflects a modern shift in emphasis in trusteeship from preservation of capital to active portfolio management to ensure adequate return and capital growth.

Despite the introduction of annual care and management fees in order to accommodate changing demands in trusteeship, much of the law and procedure surrounding statutory

1. Quebec's legislation is found in articles 789 and 1300 of the new *Civil Code*; S.Q. 1991, c. 64. Elsewhere, the relevant provisions are found in the *Trustee Act* of the province or territory.

2. *Re Edy*, [1983] 1 W.W.R. 453 (B.C.S.C.). There are some provincial variations of this principle. In Newfoundland, the trustee may elect between remuneration fixed by the instrument or will and remuneration under the statute: *Trustee Act*, R.S.N. 1970 c. 380, s. 54. Manitoba's *Trustee Act* provides that a remuneration clause is not valid until it has been approved by the court: R.S.M. 1986, c. T160, s. 90(5). There is also a common law presumption that if a will provides a legacy to an executor in that capacity, the legacy was intended in lieu of compensation. This presumption is easily rebutted, and it is occasionally possible for executors to obtain statutory allowances as well as receiving the legacy.

3. *Re Pedlar*, [1982] 34 B.C.L.R. 185 (S.C.). Only Newfoundland has a similar provision, although in other provinces, an annual care and management fee is awarded as part of "fair and reasonable" remuneration fixed by the court. Newfoundland, like B.C., has a ceiling on the income and capital allowance, necessitating a special provision for any additional component of trustee remuneration.

remuneration of trustees in B.C. remains complex and outdated. After the provisions of the *Trustee Act* dealing with investment of trust property, probably none are so frequently criticized as being in need of overhaul as those relating to remuneration.

II. Consultation Paper and Response

In September 1998 the Committee released a *Consultation Paper on Statutory Remuneration of Trustees and Trustee's Accounts*, seeking comment on proposals for reform of this portion of the *Trustee Act*. A number of relatively detailed responses were received. These were fully considered by the Committee in formulating the recommendations that appear in this report.

III. Statutory Remuneration of Trustees in British Columbia - Current Law and Proposed Reforms

A. General

The key section in the *Trustee Act* of British Columbia dealing with remuneration of trustees is section 88. It is reproduced in full in the Appendix at the end of this document. The operation of section 88 cannot be understood, however, without reference to case law and to the *Rules of Court*.

B. The Allowance on the Gross Aggregate Value of the Trust Estate

The first subsection of section 88 provides that a trustee, executor, administrator or court-appointed testamentary guardian, is entitled to receive a "fair and reasonable allowance" of not more than 5 per cent "on the gross aggregate value" of the trust assets, including capital and income. The subsection goes on to state "it is lawful for the Supreme Court or a registrar, if so directed by the court" to grant an allowance. Section 88(1) has stood almost unchanged since it was first enacted in British Columbia in 1897. The 5 per cent ceiling has remained in place ever since then. Contrary to what is often believed, the 5 per cent maximum is not awarded automatically. In most cases, a lower percentage will be allowed by the court. The criteria commonly applied in fixing the actual remuneration are:

(a) the magnitude of the trust;
(b) the care and responsibility involved;

(c) the time occupied in administering the trust;
(d) the skill and ability displayed;
(e) the success achieved in the final result.[4]

This list of criteria is not exhaustive.[5]

The court considers each case on its own merits and awards an allowance that it considers appropriate.

The allowance under section 88(1) need not be awarded all at once, and it is common for interim instalments of remuneration to be allowed at each passing of accounts during the administration of the trust.[6]

Interim instalments of remuneration must be set very carefully, as the most that can ever be allowed under section 88(1) is 5 per cent of the capital and income. Many contingencies must be taken into account. Room must be left for the possibility that a successor trustee may be appointed. The exercise is essentially a judgmental one.

C. The Care and Management Fee

Section 88(3) states that anyone entitled to the allowance under section 88(1) may apply annually to the Supreme Court for a care and management fee, and the court may allow a fee not greater than 0.4 per cent of the average market value of the trust assets. As previously noted, the care and management is in addition to the allowance from capital and income authorized by section 88(1).[7] The base on which this component of remuneration is calculated is the "average market value" of the trust estate. In other words, it is a figure related to the value of the trust estate during the period in which the annual fee is earned. Average market value is determined by adding the market value at the beginning of the period in question to that of the end of the period and then dividing by two.[8]

4. *Re Toronto General Trusts Corporation and Central Ontario Railway Company,* [1905] 6 O.W.R. 350 (S.C); *Re McColl Estate*, [1968] 65 W.W.R. 110 (S.C.); *Allen* v. *Allen Estate,* [1991] 57 B.C.L.R. (2d) 351 (S.C.).

5. Turriff, "Passing Estate Accounts and Fixing Remuneration for Fiduciaries," (1992) 50 Advocate 563 at 568.

6. Section 88(2) makes it clear that interim instalments of the statutory allowance may be granted.

7. *Re Pedlar,* (1982) 34 B.C.L.R. 185 (S.C.).

8. *Ibid.*

As with the allowance under section 88(1), the maximum annual fee of 0.4 per cent is not automatic. The court will determine the size of the fee allowed each year on the basis of criteria emerging from case law that are somewhat similar to those used in fixing remuneration under section 88(1).[9]

D. The Base for Calculating Remuneration

1. Gross v. Net Value

In Canada, the allowance from capital and income is calculated on the gross value of trust assets rather than on the value net of encumbrances. In the United States, the net value is commonly used.[10] There is room for argument that basing remuneration on the gross value overcompensates the trustee, since the beneficial interest may be said to be measured at any given point in time by the value net of encumbrances. As encumbrances may be redeemed, however, the beneficial interest may also be said to extend to the full gross value. In addition, the trustee is always liable for the gross value of trust assets, and must exercise the same degree of care whether the assets are encumbered or not. Basing the calculation on net value might complicate some remuneration hearings. The Committee is in favour of retaining the present practice of calculating remuneration on the gross value of trust assets.

9. In *Re Pedlar, ibid.*, the following criteria were enunciated for assessing the appropriate amount of the care and management fee under section 88(3):
   (a) the value of the estate assets being administered;
   (b) the nature of the estate assets being administered - such as an active business, a farm, real property held for investment or appreciation, a portfolio of investments and the type of such investments;
   (c) the degree of responsibility imposed upon the trustee by the terms of the will or other instrument, including the length or duration of the trust;
   (d) the time expended by the trustee in the care and management of the estate;
   (e) the degree of ability exhibited by the trustee in the care and management of the estate;
   (f) the success or failure of the trustee in the care and management of the estate;
   (g) whether or not some extraordinary service has been rendered by the trustee in the care and management of the estate.

10. *Scott on Trusts*, 4th ed., s. 242.

2. *Current Value vs. Value at Conversion or Distribution For Certain Categories of Assets*

Section 88(1) of British Columbia's *Trustee Act* requires the allowance from capital and income to be calculated on the "gross aggregate value" of the assets and income. Under the present law, arriving at "gross aggregate value" is not simply a matter of adding current values together. Assets are valued in different ways, depending on whether they were "original" in the sense of forming part of the initial estate at the inception of the trust, or whether they have been "realized" by the trustee or personal representative. "Realization," in this context, means converted to cash or invested in another form of property.

When the trustee converts an original asset, the value at the time of conversion is used to calculate gross aggregate value throughout the duration of the trust, whether or not there is any rise or fall in value in the interval between conversion and each time at which remuneration is fixed.[11] If original assets are distributed to beneficiaries in their original form, the value at the time of distribution is used.

When original assets are retained in their original form, their current value is used in determining gross aggregate value of the trust estate on each occasion remuneration is fixed.[12] This is also true with respect to any assets acquired by the trust in addition to the original ones obtained from the settlor or testator.

The following example shows how the different methods of valuation are used to arrive at the "gross aggregate value" whenever interim or final remuneration is fixed:

> The original assets of a testamentary trust are:
>
> - 500 bank shares valued at $100 each when the trust takes effect. The bank shares are each worth $150 when the trust is wound up.
> - a house valued at $350,000 when the trust takes effect.
> - an original painting valued at $10,000 at the date of the testator's death, $20,000 when it is distributed to a beneficiary, and $25,000 when the trust is wound up.
>
> The trustee has the power to convert or retain any asset, and to encroach on capital in favour of any beneficiary. The trustee sells the house at the beginning of the trust administration, converting it to cash that is later invested. The invested funds now amount to $500,000. The trustee retains the bank shares, which are now worth

11. *Re Laing Estate*, (1977) 3 B.C.L.R. 105 (S.C.).

12. *Stephens* v. *Miller*, (1918) 25 B.C.R. 388 (C.A.).

> $75,000. The painting is given to a beneficiary in the course of administration as an exercise of the power of encroachment.
>
> The current values of all assets, including the painting that had once been under administration and was then distributed in its original form to a beneficiary, is $600,000, but this is not the figure used as "gross aggregate value." Instead, the registrar will use the value of the house at the time of conversion ($350,000), the value of the painting at the time it was distributed to a beneficiary ($20,000) and the current value of the bank shares ($75,000). This produces a figure of $445,000 for the capital component of the gross aggregate value.

The rationale for using the conversion value for original realized assets is that the value remains constant on each occasion when remuneration is fixed. This helps to avoid exceeding the 5 per cent ceiling in awarding interim remuneration. The current law is inconsistent, however, as this rationale is not applied to original unconverted or subsequently acquired assets.

Restricting the base on which the section 88(1) allowance is calculated to historical conversion values irrespective of any capital growth in the interim is a disincentive to productive trust management. There is an also an element of unfairness in using historical values, as trustees are always liable for the current value of the entire trust fund. The current practice does not correlate trustees' remuneration with the extent of the personal liability that they bear.

Opinion was divided among correspondents as to the merits of changing the base for assessing remuneration to current asset values. One correspondent observed that basing remuneration on the current value would operate unfairly to a trustee whose remuneration was assessed during a market downturn after a long period of successful and productive management of the fund. That correspondent suggested that an average value over the entire period of trust administration be used instead. Another opposed changing to current value on the ground that this would overcompensate the trustee, since capital growth is recognized by the award of a care and management fee under Section 88(3) calculated by reference to current market value.

The Committee considered these objections carefully and concluded that unfairness resulting from assessment of remuneration during a market downturn could be offset through awards of interim remuneration while the market is higher. The unfairness of which our correspondent warned would really only be devastating where remuneration was only taken once at the conclusion of a trust lasting over a very lengthy period. It would be highly unusual not to take any interim remuneration during the administration. The Committee also disagreed that recognizing capital growth in both Sections 88(2) and (3)

would constitute double remuneration, as a care and management fee is not automatically awarded and is awarded in relatively small instalments in relation to the capital growth that might have been achieved.

Given the advantages of using the same base for valuing all asset categories and the desirability of a significant incentive to good financial management by trustees, the Committee concludes that the allowance on principal and income under Section 88(2) should be based, like the care and management fee under Section 88(3) on current values for all asset categories.

The Committee therefore proposes:

1. *Remuneration in the form of an allowance from the capital and income of the trust should be calculated on the basis of the current gross market value of all capital assets and the current gross income of the trust.*

E. Fixed Ceilings on Remuneration

Only British Columbia and Newfoundland impose a fixed ceiling on the allowance from capital and income that may be awarded to the trustee.[13] In each case, the fixed ceiling is five per cent of the gross aggregate value of capital and income. Elsewhere in the common law provinces, the determination of what constitutes "fair and reasonable" compensation is entirely a matter within the court's discretion. Many U.S. states follow the model of the *Uniform Probate Code*, which merely provides that a trustee is entitled to a "reasonable compensation".[14]

Should a ceiling on remuneration remain in British Columbia's *Trustee Act*, and if so, should it remain at five per cent of the capital and income? There are arguments both for and against retention. Trust companies operating in British Columbia have learned to live with the ceiling, though possibly preferring it to be slightly higher. In a 1991 submission to the Attorney General, several major trust companies suggested the maximum allowance

13. *Trustee Act*, R.S.B.C. 1996, c. 424, s. 88(1); *Trustee Act*, R.S.N. 1990 c. T-10, s. 52(2).

14. National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code*, s. 3-719. All claims of remuneration are subject to review by the court on a petition of an interested party; s. 7-205.

on trust income be revised upward to six per cent, but did not urge the abolition of the ceiling.[15]

As the statute creates an inherent conflict of interest by permitting compensation from the trust estate, a legislative expression of the upper limit of fair and reasonable compensation may serve as a check on outlandish demands. On the other hand, to the knowledge of some members of this Committee, the ceiling has led to a widespread misconception that trustee s are entitled to five per cent in all cases. Thus, it may encourage trustees to seek the maximum allowance in more cases.

The ceiling undoubtedly creates some fairly intractable difficulties in awarding interim remuneration under section 88(2). The maximum percentage cannot be exceeded, regardless of how long the trust lasts or how many successor trustees may subsequently need to be compensated. A partial solution to the problem the ceiling creates in granting interim allowances would be to base the maximum percentage on the average of the gross aggregate values used on each previous occasion on which remuneration was allowed. If the sum of the interim allowances exceeded the final, overall assessment of reasonable remuneration made in light of the maximum permissible amount calculated in this manner, the trustee could be required to reimburse the trust estate in the amount of the excess balance. In this way a fixed ceiling could be retained, without preventing use of current asset values as the base for assessing remuneration. This approach is not adequate to deal with cases in which there have been successive trustees, however, and in itself gives rise to greater complexity.

The absence of a fixed ceiling in the provinces other than British Columbia and Newfoundland has not led to controversy, and the practice there seems to be to grant allowances at levels that are fairly consistent with those granted in British Columbia.

In the Consultation Paper, the Committee made no recommendation on retention or repeal of the fixed ceiling in Section 88(1) and instead merely sought comment on retention or repeal. As anticipated, views among correspondents were sharply divided between those strongly in favour of repeal and those strongly supporting retention, though not necessarily at a level of five per cent. One response favouring repeal emphasized the problems resulting from the ceiling where there is a succession of trustees, and observed that the ceiling was unnecessary as long as beneficiaries could apply to court for a review of any remuneration that was allowed or appropriated.

15. Canada Trust, Central Guaranty Trust, Montreal Trust, National Trust, Royal Trust, "Submission to the Attorney General, Province of British Columbia" (June 1991).

Those correspondents who favoured retention of a ceiling noted that challenging remuneration can be an expensive process and maintained that a balancing mechanism is necessary if trustees were to be allowed to take remuneration without prior order from the court.

Given the fact that remuneration awards in other provinces not having the ceiling are apparently consistent with those in British Columbia, the problems caused by the ceiling in relation to assessing interim remuneration and dealing with cases of successive trustees outweigh the theoretical checks on demands for inflated remuneration that the ceiling might have. While the Consultation Paper raised the issue of repeal of fixed ceilings only in relation to the allowance on trust capital and income under Section 88(1), the problems arising from a fixed ceiling and the arguments favouring repeal that were raised there and in the responses to the Consultation Paper apply equally to the ceiling placed by Section 88(3) on the annual care and management fee. The Committee therefore recommends:

2. *The maximum percentages of trust capital and income now fixed at five per cent in Section 88(1) and 0.4 per cent of average market value in Section 88(3) should be repealed.*

F. Interim Remuneration Without Prior Court Approval

As late as the 1970s, it was fairly common for trustees to estimate the amount of remuneration they had earned and would be allowed, and appropriate it to themselves in advance of an application to the court for approval of that amount. A series of cases in Ontario and British Columbia, however, established that this practice was prohibited as a matter of law unless all the beneficiaries consented to the proposed interim remuneration.[16] While a recent Ontario decision signals some retreat from this position,[17] the prohibition remains firmly in place in British Columbia.[18] While trustees would not be prohibited from retaining estimated future remuneration in the trust fund pending court approval to pay it to themselves, this would be disadvantageous from a tax standpoint for both the trust and the trustee. The *Income Tax Act* does not allow a deduction for such reserves.

Where the beneficiaries do not agree on a pre-billing of remuneration by the trustee, or where there are unborn or minor beneficiaries, trustees are required to wait until the trust

16. The practice is referred to in many of the judgments, and in the trust industry, as "pre-taking."

17. *Re William George King Trust*, (1994) 2 E.T.R. (2d) 123 (Ontario General Division).

18. *Re Prelutsky*, (1982) 11 E.T.R. 233 (B.C.S.C.).

winds up to obtain remuneration, or else apply for it periodically. Thus, the prohibition serves to increase the need for applications to court, even though applications for remuneration are normally made in conjunction with passings of accounts.

The Committee considers that the current prohibition on the taking of interim remuneration prior to court approval is out of touch with reality because of the expense of obtaining that approval on each occasion. Expenses of this kind diminish the trust estate. The practice of pre-billing was widespread until the early 1970s and there seems to be little evidence of abuse. Because of practical considerations, pre-billing occurs in fact where all beneficiaries are adult, capacitated and ascertained, and is only rarely the subject of objection by beneficiaries.

The potential for abuse of pre-billing certainly exists, and certain safeguards are necessary if it is to be allowed. The Ontario Law Reform Commission recommended that trustees be allowed to appropriate remuneration without court order, subject to prior notification to all beneficiaries and to supply to them full details of the services for which the interim remuneration is claimed. The Alberta Law Reform Institute has proposed a scheme for personal representatives' compensation involving a similar procedure, with provision for objection to the court by a beneficiary within a specified period.[19] A similar procedure exists for proposed increases of trustees' fees in California.[20] In the view of the Committee, a procedure for notification of beneficiaries, coupled with an adequate period for making an objection to the court regarding any proposed remuneration, is a fair and adequate safeguard.

The Committee's proposal as stated in the Consultation Paper provided that the trustee who wished to take remuneration without seeking prior court authorization should have to give notice to adult ascertained beneficiaries, who could then object to the proposed remuneration within a 60 day period. An objecting beneficiary would then be able to apply to court within that period to review the trustee's proposed remuneration. This proposal obtained strong support and strong opposition from among our correspondents. One correspondent opposed the notion of pre-billing without court authorization on the ground that the present law is satisfactory in light of the ability of beneficiaries to agree to proposed remuneration and avoid the need for recourse to the court. Another response accepted the concept of pre-billing without pre-authorization, but thought the Committee's proposal placed an unfair onus on the beneficiary to apply,

19. Alberta Law Reform Institute, Report For Discussion 10, *Revision of the Surrogate Court Rules* (1991) 21. The proposal was not carried forward into the revised Alberta Surrogate Court Rules.

20. *Probate Code*, section 15686, as amended by Cal. Stats. 1992, c. 178, s. 43.2.

suggesting instead that the onus should be on the trustee to seek the court's approval if a beneficiary filed an objection.

The Committee's purpose in placing the onus on the objecting beneficiary is to conserve the trust estate. The trustee who is compelled to submit a claim for interim remuneration to the court pursuant to a beneficiary's objection will obtain costs out of the estate if the interim remuneration is allowed. Thus, a groundless objection by one beneficiary may adversely affect the interests of the other beneficiaries, while a beneficiary making a groundless objection under the Committee's proposal as outline in the Consultation Paper would be compelled to pay his or her own costs if the objection is dismissed. We believe that a system requiring the trustee to make the application would not be an improvement over the present law, which produces unnecessary expense and diminution of the trust estate.

The Committee recommends:

3. (a) *The* Trustee Act *should allow a trustee to receive fair and reasonable remuneration for services already rendered, without previous court authorization.*
   (b) *A trustee intending to take remuneration without previous court authorization, though there be minor, unborn or incapacitated beneficiaries, should be required to give notice, with full details of the remuneration sought and of the services to which it relates, to adult ascertained beneficiaries.*
   (c) *The notice given under paragraph (b) should state that the recipient of the notice may object to the proposed taking of remuneration within a stated period, which should not be less than 60 days from the date of the notice.*
   (d) *Anyone entitled to notice under proposal 2(b) who objects to the remuneration proposed, should be entitled to apply to the Supreme Court within the period stated in the notice to fix the remuneration, if any, that the trustee should receive.*
   (e) *If a person entitled to notice makes an application under proposal 2(d), the trustee should be prohibited from taking remuneration until the Supreme Court has disposed of the application.*
   (f) *If the trustee's remuneration, as finally determined by the court, is less than the aggregate of the amounts previously obtained by the trustee without court authorization during the administration*

of the trust, the trustee should be liable to repay the balance to the trust.

G. Remuneration of Professionally Qualified Trustees

Settlors and testators frequently appoint trustees because of the special skills that they may bring to the administration of the trust. Accountants and solicitors are often appointed for this reason. Trustees with professional qualifications are nevertheless only entitled to the statutory allowances unless the will or trust instrument expressly authorizes them to charge their normal fees for necessary professional services. So-called "charging clauses" of this kind are very common.

A curious feature of charging clauses in testamentary trusts, however, is that they are treated as general legacies instead of administrative powers. This has a number of significant effects. The fees of the professionally qualified trustee will rank behind any claims against the estate by creditors, and behind any specific legacies. If there were no charging clause, the trustee's remuneration and expenses would have priority over the claims of any unsecured creditors and legatees. Thus, the position of a trustee rendering professional services to a testamentary trust may actually be made worse by the presence of a charging clause.

The trustee legislation of five provinces and the Yukon Territory allow increased remuneration to solicitor-trustees for legal services rendered by them to the trust. The Ontario Law Reform Commission recommended more than a decade ago that the provision for increased remuneration be expanded to other trustees possessing special knowledge or skills, such as accountants.[21] Nowadays, the need for accounting services to the trust is at least as important as legal services. In certain situations, other professional services may be required, and a trustee who renders them within the scope of the trustee's professional expertise should receive adequate remuneration accordingly. In the view of the Committee, the *Trustee Act* should provide for this. No objection was made to this change in the responses to the Consultation Paper.

Charging clauses in wills and trust instruments normally specify that the privilege of charging professional fees applies only to work that only the professional is qualified to perform, and not to general trustee or executorship services. To avoid overcompensation stemming purely from a trustee's professional status, the statutory charging clause should be similarly restricted. At the present time, registrars and masters who conduct

21. Ontario Law Reform Commission, *Report on the Law of Trusts*, (1984) 257.

remuneration hearings are accustomed to delineating between ordinary trustee and executorship services and professional ones. Thus, the registrar's role should be an adequate means of ensuring that a statutory charging clause is applied only to true professional services. By "professional services" we mean services provided by persons holding qualifications recognized by statute that may not be provided by anyone not holding such a qualification.

The Committee therefore recommends:

4. *The* Trustee Act *should contain a provision allowing trustees who are professionally qualified to charge their regular fees for professional services within the scope of their qualifications, provided those services may reasonably be regarded as necessary for the fulfillment of the trust.*

In our view, the anomalies created by the archaic rule that a charging clause in a testamentary trust is to be treated as a general legacy justify abandoning it. The fees charged under such a provision should be treated as expenses of the estate, just as if the services had been rendered by a professional who is not a trustee.

The Committee therefore recommends:

5. *The* Wills Act *should be amended to provide that a provision in a will authorizing a trustee to charge regular professional fees for services rendered to the estate or testamentary trust is in the nature of an administrative power and not a legacy. Fees charged under such a provision should be treated as expenses of the estate or testamentary trust.*

H. Remuneration of Judicial Trustees

Section 97(5) of the *Trustee Act* states that a judicial trustee (i.e., a trustee appointed by the court) may be paid remuneration as the court assigns in each case out of the trust property, but not exceeding "prescribed limits". Section 98(c) empowers the Lieutenant Governor in Council to make rules regarding the remuneration available under section 97(5), but none have been made. Section 97(5) is ambiguous as to whether the ceilings in section 88 apply to the remuneration of judicial trustees. One reported decision holds that

the ceilings in section 88 do not apply and the matter is entirely within the discretion of the court.[22] Another reported decision implies that the section 88 ceilings may be applicable.[23]

While the appointment of a judicial trustee is very rare, the *Trustee Act* should be clear as to whether or not the general sections concerning remuneration apply. The situations in which an appointment might be made could vary greatly.

The Committee believes it would be appropriate to leave the remuneration of judicial trustees entirely as a matter of discretion for the court. The party applying for the appointment of a judicial trustee should see that appropriate provisions regarding remuneration are included in the terms of the order.

The Committee therefore recommends:

6. *The* Trustee Act *should provide that the remuneration of a judicial trustee is entirely in the discretion of the court, and the general provisions of the Act respecting remuneration of trustees do not apply.*

I. Should A Remuneration Clause in An Instrument Always Displace Statutory Remuneration?

The strict rule under the current law that prevents statutory remuneration from being awarded where there is an express clause respecting remuneration in the trust instrument or will can lead to injustice. Sometimes remuneration clauses are obviously outdated or simply unrealistic. One way of dealing with these situations would be to follow the example of Newfoundland's *Trustee Act* and allow the trustee to choose between remuneration fixed by the trust instrument and that available under the statute. Another way would be to provide that the court has a discretion to override a provision in the trust instrument or will that does not provide fair and reasonable remuneration, and allow remuneration that is fair and reasonable within the terms of the Act.[24]

The proposal made in the Consultation Paper would have provided a discretion to the court to vary a term of a will or a trust instrument fixing a trustee's remuneration if the

22. *Re Burr*, (1968) 1 D.L.R. 3d 78 (B.C.S.C.).

23. *Wright* v. *Canada Trust Company*, (1984) 55 B.C.L.R. 349 at 355 (S.C.).

24. In England, it is now recognized as a matter of general trust law that the court has a discretion to vary a remuneration clause that produces unfair results, although there is no legislation giving trustees a right to remuneration. *See Re Duke of Norfolk's Settlement Trusts*, [1992] Ch. 61 (C.A.).

remuneration, so fixed, was obviously insufficient. All those who commented on the Consultation Paper agreed with this proposal, but also emphasized that fee agreements between a settlor or testator and a trustee should not be subject to variation by the court. One correspondent favoured a residual discretion to vary a fee agreement if it no longer accorded with contemporary business practice. The Committee agrees that fee agreements should be upheld. This should be the case whether or not the agreement is incorporated by reference into the trust instrument or will.

The Committee therefore recommends:

7. *(a)* *The* Trustee Act *should be amended to provide that on application, the court may vary a term of a will or instrument creating a trust that fixes the remuneration of a trustee (other than by contract), if that term does not provide for sufficient remuneration. Where the court varies such a term, it may fix the remuneration the trustee should receive at the level the court considers appropriate, subject to the other provisions of the* Trustee Act.

(b) *The amendment referred to in Recommendation 7(a) should not extend to the variation of a contract between a settlor or testator and a trustee extraneous to the trust instrument or will, whether or not the contract is incorporated by reference in the instrument or will.*

J. Procedural Reform

Remuneration must be fixed by the court only where the consent of all beneficiaries to a proposed allowance or care and management fee cannot be obtained. When consent cannot be obtained, the application to fix the remuneration is generally made as part of a passing of accounts, although section 89 of the *Trustee Act* allows an application to settle the remuneration to be made at any time.

Obtaining a hearing on remuneration currently involves at least two stages, and sometimes three. The first stage is merely an application for an order directing a passing of accounts or an inquiry into remuneration, or both. The application is made by petition under section 89 of the *Trustee Act* or, if it arises in connection with the administration of a testamentary trust and the estate has not yet been fully administered, by notice of motion

under Rule 61(58) of the *Rules of Court*. If the court grants an order, it directs a hearing by a master or registrar under Rule 32.

The second stage is the actual hearing, which takes place before a master or registrar. A third stage is necessary if the court, when giving directions for the hearing, does not also order under Rule 32(2) that the findings be certified by a master or registrar.

If the order empowers the master or registrar to give a certificate with respect to the appropriate remuneration, the certificate is binding on the parties when it is filed, according to Rule 32(2). It is subject to appeal under Rule 53(6) and the appeal must be launched within 14 days.

The need for multiple attendances by solicitors under the current procedure makes the quantification of remuneration considerably more expensive than it should be. There are also certain inequities in the different procedures for making the initial application of the court. The fee for filing a notice of motion under Rule 61(58), for example, is $60. If the application must be made by petition under section 89 of the *Trustee Act*, the fee is $208. The fact that executors and trustees will normally be fully indemnified for all reasonable legal and accounting expenses involved in these proceedings, and that the procedure must be followed whenever interim as well as final remuneration is sought, contributes greatly to the cost ultimately born by the beneficiaries.

While the very expense of the procedure may have some deterrent effect in preventing applications from being brought too frequently, it is questionable whether this outweighs the benefits of a streamlined procedure.

The initial application required simply to obtain an order directing a hearing could be replaced by an application made in writing, much along the lines of the procedure for obtaining consent orders under Rule 44(13).

The requirement for court confirmation of a registrar's report or recommendation is also an unnecessary and expensive step. In many cases, the application for confirmation is never made. The report and recommendation procedure should be eliminated in favour of certification by the registrar or master. While doubts have been expressed concerning the constitutional validity of the certificate procedure on the ground that it may amount to a delegation of superior court jurisdiction,[25] Rule 32(2) might be reworded to provide simply that the certificate becomes binding at the end of a 14-day period during which a party to

25. Turriff, *supra* n. 5 at 564.

the hearing could apply to the court to have the certificate varied. This would make the procedure less like a delegation of superior court jurisdiction over trusts and trustees.

The cost of the proceedings to approve remuneration should not depend on whether the matter proceeds by petition or notice of motion. A unitary procedure should exist so that remuneration hearings could be arranged in the same manner, whether the trust arises under a will or otherwise.

Our correspondents expressed strong support for these changes as outlined in the Consultation Paper. The Committee was also asked to consider whether a trustee whose proposed remuneration is reduced on a review by an arbitrarily set percentage should automatically be required to pay the full costs of the review. A provision similar to this is found in Section 72 of the *Legal Profession Act*.[26] The Committee believes, however, that a costs penalty of this sort might discourage people from taking on the role of trustee, and thus have a detrimental effect outweighing any value it might have as a deterrent to exorbitant claims for remuneration.

As these procedural changes would be accomplished through amendments to the *Rules of Court*, the Rules Committee is the proper forum for debating them in detail.

The Committee accordingly recommends:

8. The Rules Committee should consider the matter of the interaction of the Trustee Act *with the Rules of Court in connection with approval of trustee remuneration. The Rules Committee is invited to consider the following suggested changes, in particular:*

(a) The procedure for obtaining an order for a remuneration hearing, and any directions concerning the procedure for the hearing, should not require appearance by counsel in chambers. A remuneration hearing should be obtainable on an application made entirely in writing, resembling the procedure for obtaining orders by consent.

(b) A single procedure should be available for fixing remuneration, whether the matter arises in the course of administration of an estate or otherwise.

26. S.B.C. 1998, c. 9.

(c) The procedure under Rule 32(3) whereby the master or registrar makes a report and recommendation requiring confirmation by the court should be abandoned in favour of the procedure under Rule 32(2) whereby the registrar or master certifies the findings at the hearing.

(d) The registrar's certificate should become final and binding unless an application to vary the certificate is made to the court within 14 days after the certificate is filed. Rule 32 should be reworded to provide accordingly. No application to simply confirm the certificate should be necessary.

K. Statutory Requirements for Passing of Accounts

Section 99(1) of the *Trustee Act* requires a trustee under a will, executor, administrator, or judicial trustee to apply for an order for passing first accounts within two years from the grant of probate or administration, or from the date of appointment. This requirement may only be avoided if all beneficiaries approve the accounts in writing.[27] Section 99 further states that other trustees may obtain orders for passing accounts at any time.

The requirement is frequently ignored, either because personal representatives and testamentary trustees are simply unaware of it, or because of the expense of the initial application for an order and of the passing of accounts itself.

As the requirement of section 99(1) may only be waived legally by the written consent of *all* beneficiaries, it requires passing of accounts in every case in which there are minor or unborn beneficiaries. These beneficiaries cannot consent for themselves, and the Public Trustee will not consent on their behalf because of lack of authority to do so.

Section 99(2) allows anyone beneficially interested in property covered by a trust or estate to serve a notice on the trustee or personal representative demanding annual passings of accounts. The beneficiary serving the notice needs no particular grounds to impose this very onerous and costly requirement. The court may override the requirement imposed by the notice and provide for passings at other intervals, but the ability of a single beneficiary to demand annual passings without establishing a need for it is hard to justify.

27. Section 99(1) does not apply to official administrators appointed under Part 5 of the *Estate Administration Act* or to personal representatives and testamentary trustees whose grants or appointments date before May 1, 1949: s. 99(4).

In the view of the Committee, these provisions impose an unreasonable burden of expense on testamentary trusts and estates without providing sufficiently countervailing benefit in additional security to the beneficiaries. Beneficiaries would receive adequate protection if sections 99(1) and (2) were replaced with a simple provision allowing the court to order a passing of accounts, either on a single occasion or at fixed intervals, on the application of a beneficiary under any trust. The court could then assess the grounds for the application and determine whether a real need for a passing of accounts exists.

These changes as proposed in the Consultation Paper were supported by the majority of our correspondents. One correspondent favoured retention of the requirement to pass accounts every two years, but suggested an amendment to deal with the specific problem of the inability to waive the passing of accounts where there are minor or unborn beneficiaries. The Committee remains of the view, however, that Sections 99(1) and (2) should simply be repealed and that trustees be required to pass accounts only when ordered to do so by the court on application.

The Committee recommends:

9. *Sections 99(1) and (2) should be repealed and replaced with a provision stating that the court may order, on the application of a beneficiary, a passing of accounts on a single occasion or at intervals it may fix, if it sees fit to do so.*

L. Form of Accounts

The only guidance now provided for the preparation of trustees' accounts is found in Rule 32(13) of the *Rules in Court*. It is that each item in an account must be numbered consecutively. This requirement is frequently ignored, and accounts are presented in various formats. Financial statements are sometimes presented, which cannot be interpreted easily by non-experts and which do not itemize each receipt and disbursement. Unless receipts and disbursements are shown, it becomes difficult to trace the handling of funds by the trustee, and to determine a proper level of remuneration based on the degree of activity required on the part of the trustee.

The Committee believes that considerable benefits would flow from having a standardized format for trustee accounts, set out in the *Rules of Court*. A standard format would enable passings of accounts and remuneration hearings to be conducted more easily and expeditiously. While the format would obviously have to be capable of adaptation to individual cases, this is also true of most other court forms.

The Committee proposes:

10. *The Rules Committee should be invited to consider amendments to the Rules of Court specifying the nature of the information that trustees' accounts must contain and setting out a recommended format. The Rules should also state that the use of this format, or a similar one adapted to the circumstances of the trust, shall be deemed sufficient compliance with the requirements for preparation of accounts.*

IV. Summary of Recommendations

1. *Remuneration in the form of an allowance from the capital and income of the trust should be calculated on the basis of the current gross market value of all capital assets and the current gross income of the trust.*

2. *The maximum percentages of trust capital and income now fixed at five per cent in Section 88(1) and 0.4 per cent of average market value in Section 88(3) should be repealed.*

3. (a) *The* Trustee Act *should allow a trustee to receive fair and reasonable remuneration for services already rendered, without previous court authorization.*
   (b) *A trustee intending to take remuneration without previous court authorization, though there be minor, unborn or incapacitated beneficiaries, should be required to give notice, with full details of the remuneration sought and of the services to which it relates, to adult ascertained beneficiaries.*
   (c) *The notice given under paragraph (b) should state that the recipient of the notice may object to the proposed taking of remuneration within a stated period, which should not be less than 60 days from the date of the notice.*
   (d) *Anyone entitled to notice under proposal 3(b) who objects to the remuneration proposed, should be entitled to apply to the Supreme Court within the period stated in the notice to fix the remuneration, if any, that the trustee should receive.*

(e) *If a person entitled to notice makes an application under proposal 2(d), the trustee should be prohibited from taking remuneration until the Supreme Court has disposed of the application.*

(f) *If the trustee's remuneration, as finally determined by the court, is less than the aggregate of the amounts previously obtained by the trustee without court authorization during the administration of the trust, the trustee should be liable to repay the balance to the trust.*

4. *The* Trustee Act *should contain a provision allowing trustees who are professionally qualified to charge their regular fees for professional services within the scope of their qualifications, provided those services may reasonably be regarded as necessary for the fulfillment of the trust.*

5. *The* Wills Act *should be amended to provide that a provision in a will authorizing a trustee to charge regular professional fees for services rendered to the estate or testamentary trust is in the nature of an administrative power and not a legacy. Fees charged under such a provision should be treated as expenses of the estate or testamentary trust.*

6. *The* Trustee Act *should provide that the remuneration of a judicial trustee is entirely in the discretion of the court, and the general provisions of the Act respecting remuneration of trustees do not apply.*

7. (a) *The* Trustee Act *should be amended to provide that on application, the court may vary a term of a will or instrument creating a trust that fixes the remuneration of a trustee (other than by contract), if that term does not provide for sufficient remuneration. Where the court varies such a term, it may fix the remuneration the trustee should receive at the level the court considers appropriate, subject to the other provisions of the* Trustee Act.

(b) *The amendment referred to in Recommendation 7(a) should not extend to the variation of a contract between a settlor or testator and a trustee extraneous to the trust instrument or will, whether or not the contract is incorporated by reference in the instrument or will.*

8. *The Rules Committee should consider the matter of the interaction of the* Trustee Act *with the Rules of Court in connection with approval of trustee remuneration. The Rules Committee is invited to consider the following suggested changes, in particular:*

   (a) *The procedure for obtaining an order for a remuneration hearing, and any directions concerning the procedure for the hearing, should not require appearance by counsel in chambers. A remuneration hearing should be obtainable on an application made entirely in writing, resembling the procedure for obtaining orders by consent.*
   (b) *A single procedure should be available for fixing remuneration, whether the matter arises in the course of administration of an estate or otherwise.*
   (c) *The procedure under Rule 32(3) whereby the master or registrar makes a report and recommendation requiring confirmation by the court should be abandoned in favour of the procedure under Rule 32(2) whereby the registrar or master certifies the findings at the hearing.*
   (d) *The registrar's certificate should become final and binding unless an application to vary the certificate is made to the court within 14 days after the certificate is filed. Rule 32 should be reworded to provide accordingly. No application to simply confirm the certificate should be necessary.*

9. *Sections 99(1) and (2) should be repealed and replaced with a provision stating the court may order, on the application of a beneficiary, a passing of accounts on a single occasion or at intervals it may fix, if it sees fit to do so.*

10. *The Rules Committee should be invited to consider amendments to the Rules of Court specifying the nature of the information that trustees' accounts must contain and setting out a recommended format. The Rules should also state that the use of this format, or a similar one adapted to the circumstances of the trust, shall be deemed sufficient compliance with the requirements for preparation of accounts.*

V. Conclusion

The recommendations for amendment of the *Trustee Act* and the *Rules of Court* set out in this Report should rationalize the legislation dealing with trustee remuneration in a manner that should encourage careful and productive trusteeship. The Committee hopes that the legislature and Rules Committee will give them early and favourable attention.

List of Persons and Organizations Responding to the Consultation Paper

- Canadian Bankers Association Fiduciary Committee
- McCarthy Tetrault (N. Brox)
- Canadian Bar Association (Vancouver Wills and Trusts Subsection Review Committee)
- Watson, Goepel Maledy (M. Leckie)

Appendix A

Trustee Act
R.S.B.C. 1996, Chapter 464

Selected provisions

Setting remuneration of trustees and guardians

88 (1) A trustee under a deed, settlement or will, an executor or administrator, a guardian appointed by any court, a testamentary guardian, or any other trustee, however the trust is created, is entitled to, and it is lawful for the Supreme Court, or a registrar of that court if so directed by the court, to allow him or her a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the trusteeship, executorship, guardianship or administration of the estate and effects vested in him or her under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper.

(2) The court or a registrar of the court if so directed by the court, may make an order under subsection (1) from time to time, and the amount of remuneration must be allowed to an executor, trustee, guardian or administrator, in passing his or her accounts, in addition to any other allowances for expenses actually incurred to which the trustee, executor, guardian or administrator may by law be entitled.

(3) A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets.

Application for remuneration

89 The court may, on application to it for the purpose, settle or direct the registrar to settle the amount of the compensation, although the estate is not before the court in an action.

Review of order or certificate of registrar

91 (1) An order or certificate made by a registrar under section 88 or 89 is subject to review by the court on application by summons to be made before the

expiration of 14 clear days after the entering of the order or the filing of the certificate.

(2) Unless varied or discharged by the court, the order or certificate is binding on the trustee, executor, administrator or guardian, and all parties interested in the trust estate.

Appointment and remuneration of judicial trustees

97 (1) If an application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a judicial trustee to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all existing trustees.

(2) The administration of the property of a deceased person, whether a testator or intestate, is a trust, and the executor or administrator a trustee, within the meaning of this section and sections 96 and 98.

(3) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and in the absence of a nomination, or if the court is not satisfied of the fitness of a person so nominated, an official of the court may be appointed, and in any case a judicial trustee is subject to the control and supervision of the court as an officer of it.

(4) The court may, either on request or without request, give to a judicial trustee general or special directions in regard to the trust or its administration.

(5) A judicial trustee may be paid out of the trust property the remuneration, not exceeding the prescribed limits, that the court assigns in each case, subject to any rules under this Act respecting the application of that remuneration where the judicial trustee is an official of the court, and the remuneration so assigned to a judicial trustee, except as the court may for special reasons otherwise order, must cover all his or her work and personal outlay.

(6) Once in every year the accounts of every trust of which a judicial trustee has been appointed must be audited, and a report on them made to the court by the persons specified by the rules made under section 98, and, in any case if the court so directs, an inquiry into the administration by a judicial trustee of a trust, or into a dealing or transaction of a judicial trustee, must be made in the manner specified by those rules.

(7) Until the rules are made and promulgated, the accounts of a judicial trustee must be audited and passed in accordance with this Act and the rules made under section 100.

Passing of trustee's accounts

99 (1) Unless his or her accounts are approved and consented to in writing by all beneficiaries, or the court otherwise orders, an executor, administrator, trustee under a will and judicial trustee must, within 2 years from the date of the granting of the probate or letters of administration or within 2 years from the date of his or her appointment, and every other trustee may at any time obtain from the court an order for passing his or her first accounts, and he or she must pass his or her subsequent accounts at the times the court directs.

(2) Despite subsection (1), an executor, administrator and trustee, including a judicial trustee, if so required by notice served on him or her at the instance of a person beneficially interested in the property covered by the trust, must pass his or her accounts annually within one month from the anniversary of the granting of the probate or letters of administration or of his or her appointment, but the court may on application make an order it considers proper as to the time and manner of passing the accounts.

(3) If an executor, administrator or trustee fails to pass any accounts under this section, or if his or her accounts are incomplete or inaccurate, he or she may be required to attend before the court to show cause why the account has not been passed or a proper proceeding in connection with it taken and proper directions may be given at chambers or by adjournment into court, including the removal of a trustee and appointment of another, and payment of costs.

(4) Subsection (1) does not apply to official administrators appointed under Part 5 of the *Estate Administration Act*, or to any executor, administrator or trustee under a will if the date of the granting of probate or letters of administration or of his or her appointment is before May 1, 1949.

Appendix B

Further Information on the Project and the Committee

(a) General

This report is the second made by the *Trustee Act* Modernization Committee of the British Columbia Law Institute. The first report made by the Committee recommended changes to the provisions of the *Trustee Act* dealing with investment by trustees. As that report was the first of a series that the Committee will issue as the *Trustee Act* project progresses, the Committee thought it appropriate to provide a brief explanation of project and the Committee's objectives and methodology. That explanation is reproduced below.

(b) The Trustee Act Reform Project

One of the projects undertaken by the British Columbia Law Institute after its formation in 1997[28] was an overall reform of the British Columbia *Trustee Act* so as to allow the Act to meet the present-day requirements of trusteeship. While the *Trustee Act* remains an important statute affecting a great variety of legal relationships, many of its provisions are out of keeping with present-day conditions and practices and some provisions are so seriously outdated as to be significant obstacles to efficient trust administration. Other provinces and territories have moved to reform their trustee legislation, but the British Columbia statute remains in need of substantial revision.

(c) The Trustee Act Modernization Committee

The *Trustee Act* Modernization Committee ("the Committee") is one of the Project Committees through which the Institute carries out its program. Its members were appointed by the Board of the Institute to reflect the wills and trusts Bar, the professional fiduciary sector, and academic specialists in trust law.

28. The British Columbia Law Institute was formed in 1997 under the *Society Act* to carry on the work of the former British Columbia Law Reform Commission. Its objectives are to promote the clarification and simplification of the law and its adaptation to modern social needs, to promote improvement of the administration of justice and respect for the rule of law, and to promote and carry out scholarly research.

(d) The Committee's Methodology

The Committee intends to address various aspects of the *Trustee Act* that are in need of reform in a series of short consultative documents and reports. The consultative documents, which will contain proposals for reform and the explanation for them, will be circulated to interested sectors such as the trust and fiduciary industry, the Bar, the Public Trustee's Office, and non-profit foundations to obtain comment on the proposals. They will also be made available to the public upon request. Following this consultation phase, the Committee will finalize its position on the matters addressed by the proposals and present recommendations for legislative change in a series of reports. The reports will receive similar circulation, and will also be sent to the Attorney General.

The ultimate aim of the Committee is to prepare a comprehensive draft of a reformed *Trustee Act* in modern, easily comprehended language. The Statute will contain new provisions required for the legal and financial climate in which trustees now fulfil their duties as well as those elements of the existing Act that must be retained.

The members of the *Trustee Act* Modernization Committee are:

Professor Donovan Waters, Q.C. (Chair)
Professor James MacIntyre, Q.C.
Arthur L. Close, Q.C.
Margaret Mason
Kathleen Cunningham
Greg Blue (Reporter)