

Report on the Variation and Termination of Trusts

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

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The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its mission is to:

- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

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Introductory Note

The British Columbia Law Institute has the honour to present:

Report on the Variation and Termination of Trusts

Trusts provide for the disposition of gifts according to the terms of the trust instrument and confer upon trustees the authority to administer the trust. This Report reviews the statutory and common law against which proposals to effect the terms of a trust and amend the powers of trustees operate. The law in this area has been left largely untouched since 1968 and is in need of reconsideration.

This Report embodies a number of recommendations to modernize this area of the law. The principal recommendation is that the law needs to be revised to allow trust instruments to be amended more effectively and efficiently than is possible under the present law. Recommendations for reform also address: the scope of the court's power to approve proposals to vary and terminate trusts; the persons on whose behalf the court is empowered to give approval; and, the application of trust variation legislation to charitable corporations and trusts.

This Report is the sixth of a series of reports that form part of a larger project on the *Trustee Act* and related laws. This project is being carried forward on behalf of the British Columbia Law Institute by the *Trustee Act* Modernization Committee. The recommendations of that Committee set out in this Report have the full support and endorsement of the British Columbia Law Institute and its Board and we commend them for implementation.

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TABLE OF CONTENTS

I. Background	1
II. Areas of Concern	2
A. Scope of the Court's Power to Approve a Variation	2
1. Variation and premature termination of trusts	2
2. Omission of "resettlement" in section 1	4
3. Altering the powers of trustees	5
B. Persons on Whose Behalf the Court is Empowered to Approve an Arrangement	5
1. Power of the court to disregard the refusal of a capacitated beneficiary to consent to a proposal.	5
2. Section 1(d) in the context of Canadian trust drafting	9
C. Other Matters	10
1. Persons who can bring a proposed arrangement before the court	10
2. Admissibility of evidence of the settlor's intentions	11
3. Application of the Act to charitable gifts	12
III. Framework for Revisions	14
IV. Summary of Final Recommendations	14
V. Conclusion	16
Appendix A - Trust and Settlement Variation Act	17
Appendix B - Draft Legislation	19
Appendix C - Earlier Documents Published by the Committee	24

Report on the Variation and Termination of Trusts

I. Background

Trusts provide a useful mechanism for settlors to distribute real and personal property to beneficiaries. In some cases, however, trusts are created that are not adequately drafted to address changing or unforeseen circumstances that may arise. When this occurs, mechanisms for varying the terms of a trust are necessary in order for the trust to remain an effective instrument.

Historically, the inherent jurisdiction of the courts provided a mechanism for altering the terms of a trust, but this power was very limited in its scope.¹ In 1841 the decision in *Saunders v. Vautier*² came to be associated with a rule applicable to the premature termination of trusts.³ The rule allowed beneficiaries to terminate prematurely a trust provided that all the beneficiaries were *sui juris* and consented to the agreement. This rule provided some flexibility in trust law, but was not available in cases where some of the beneficiaries were unborn, infants, unascertained or incapacitated. This limitation on the rule created a need for statutory intervention.

In the 1950s legislation was introduced authorizing the variation and termination of trusts in certain circumstances. England adopted its first trust variation legislation, the *Variation of Trusts Act*,⁴ in 1958 following the recommendations of the Law Reform Committee.⁵ The Act provided courts with the discretionary power to approve a proposed arrangement on behalf of beneficiaries who were unable to consent for themselves or not yet ascertained.

Trust variation legislation modelled on the English statute was enacted in British Columbia in 1968⁶ and is now found in the *Trust and Settlement Variation Act*.⁷ The Act enables the

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1. The court's inherent jurisdiction covered only circumstances of conversion, compromise, emergency and maintenance: A.J. McClean, "Variation of Trusts in England and Canada" (1965) 43 Can. Bar Rev. 181 at 184. (See also *Chapman v. Chapman*, [1954] A.C. 429, 1 All E.R. 798 (H.L.). In that case the court held that the inherent jurisdiction of the court did not extend to the variation or rearrangement of beneficial interests under a trust.)
 2. (1841) 4 Beav. 115, *affd.* Cr. & Ph. 240, 41 E.R. 482 (Ch.).
 3. D.W.M Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 962 and the Ontario Law Reform Commission, *Report on the Law of Trusts*, (1984) at 393 both note that while the common law rule governing the premature termination of trusts is associated with the decision in *Saunders v. Vautier*, the rule predates that case and can be traced back to at least 1727.
 4. 6 & 7 Eliz. 2, c. 53.
 5. Sixth Report, *Court's Power to Sanction Variation of Trusts*, Cmnd. 310 (1957), referred to below as the "Sixth Report."
 6. *Variation of Trusts Act*, S.B.C. 1968, c.57.
 7. R.S.B.C. 1996, c. 463, referred to below as the "*Trust and Settlement Variation Act*" or the "Act."
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Report on the Variation and Termination of Trusts

courts to approve any arrangement varying or revoking all or any of the beneficial interests under a trust or enlarging the powers of the trustees to manage or administer property subject to the trust. The court can only approve a proposal if it is for the benefit of each of the persons on whose behalf the court's approval is sought and, in the view of the court, the arrangement ought to be approved.⁸

In February 2003 the *Trustee Act* Modernization Committee of the British Columbia Law Institute published the *Consultation Paper on the Variation and Termination of Trusts*, which reviewed the law in this area and asked for comments on reform proposals.⁹ The British Columbia Law Institute would like to thank the individuals and organizations who responded to the Consultation Paper. The comments were of great benefit and were fully considered by the Committee in preparing the final recommendations in this Report.

II. Areas of Concern

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

1. Variation and premature termination of trusts

The rule in *Saunders v. Vautier* permits the premature termination of a trust if the beneficiaries are all ascertained, of full capacity and in agreement with the proposal.¹⁰ There is no clear decision on whether the rule also provides beneficiaries with the power to vary the terms of the trust.¹¹ This can be contrasted with the *Trust and Settlement Variation Act* which clearly provides courts with the authority not only to consent to a termination, but also a variation of the terms of a trust on behalf of those persons that fall under the Act.

This inconsistency appears to stem from a questionable assumption. The Manitoba Law Reform Commission commented on this when it noted that while the *Variation of Trusts Act, 1958* seems to rest on the assumption that a trust, even in the absence of authorizing

8. The exception to this is that under section 2 of the Act, the element of benefit need not be considered with respect to the potential entitlement of the gift-over discretionary class of beneficiaries described in section 1(d): Waters, *supra* n. 3 at 1078.

9. British Columbia Law Institute, *Consultation Paper on the Variation and Termination of Trusts* (February 2003). Hereinafter referred to as the "Consultation Paper."

10. Waters, *supra* n. 3 at 963, discusses the narrow and broad form of the rule.

11. While there are obiter dicta suggesting that the rule in *Saunders v. Vautier* does establish a right to vary a trust, there is no clear decision on this point that has seriously considered the issue at any length.

Report on the Variation and Termination of Trusts

legislation, can be varied as well as terminated by the combined action of all the beneficiaries, the prior case law supports only the capacity to terminate.¹²

Inability of beneficiaries who fall within the scope of the rule in *Saunders v. Vautier* to vary the terms of a trust can create practical difficulties. One example is that the alteration of a trust may be preferable, for tax reasons, to the termination and creation of a new trust. The Committee's view is that the power to vary or terminate a trust should be equally available to all beneficiaries, whether they fall under the Act or the common law rule. It is therefore recommended that the legislation clearly state that if all the beneficiaries under a trust are of full capacity and unanimously consent to a proposal, the terms of the trust may be varied as well as terminated.

There are two possible approaches for providing beneficiaries who fall under the rule in *Saunders v. Vautier* with this right. The first would be to provide that any proposed variation or premature termination could take effect if approved by the court. This approach has been adopted in Alberta and Manitoba.¹³ The reform agencies in those provinces supported judicial review of a proposal in order to ensure that there would be an inquiry into whether the arrangement would be contrary to the intentions of the settlor. This follows the American rule of "material purpose" (the rule in *Clafin v. Clafin*),¹⁴ which emphasizes the settlor's intent. One writer has commented that there is "some ambit of paternalism" in this type of provision as the court can withhold consent to an arrangement, even if all the beneficiaries are of full capacity and consent to it.¹⁵ Moreover, by abrogating the rule in *Saunders v. Vautier*, a rule which itself violates settlor intent, and requiring in effect that all proposals go through the courts, this approach would likely give rise to an increase in applications to the court, and consequent expense.

The alternative that we prefer, and which was strongly supported by the majority of correspondents in the consultation process, is to revise the *Trust and Settlement Variation Act* to provide that in cases where all the beneficiaries are of full capacity and agree with a proposal, they may vary or revoke a trust without having to obtain judicial approval. We endorse this position for several reasons. First, the rule in *Saunders v. Vautier* has worked

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

13. Waters, *supra* n. 3 at 979, observed that Alberta adopted this position in 1973 following recommendations by the Alberta Institute of Law Research and Reform, in *Report on the Rule in Saunders v. Vautier*, Report No. 9 (1972) (the "Alberta Report") and Manitoba adopted this position in 1983 following recommendations in the Manitoba Report.

14. (1889) 149 Mass. 19, 20 N.E. 454. For a discussion of the rule in *Clafin v. Clafin* see *Scott on Trusts*, vol. 4, 4th ed., (Boston: Little, Brown and Company, 1987) at para. 337.1 (pp. 443-444).

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

Report on the Variation and Termination of Trusts

well for the termination of trusts for over a century and there is no reason to think that the rule would not work equally well if it is extended to allow for the variation of trusts. Second, this approach would allow adult beneficiaries to deal with their property as they see fit, without having to get court approval to do so. Third, this would be a more efficient and cost effective means for amending a trust than a process requiring judicial review.

Recommendation 1

A revised Trust and Settlement Variation Act should confer upon the beneficiaries the power to vary, resettlement or revoke a trust without judicial consent where all the beneficiaries are of full capacity and unanimously approve of the proposed variation.

2. Omission of “resettlement” in section 1

Historically courts did not have inherent jurisdiction to order a resettlement of trust property on terms bearing no comparison to the original trust.¹⁶ Trust variation legislation did not alter this position, as the Act allowed courts to consent to a proposal to vary or revoke a trust, but did not provide courts with the authority to resettle a trust.¹⁷

It has been suggested that failing to provide courts with the power to resettle a trust has created a number of difficulties. The rule is hard to apply as the difference between a resettlement and a variation is often less than distinct in light of the fact that any variation can have far reaching consequences. This can result in similar cases having diverse outcomes. Moreover, courts often strain to find that a revocation and resettlement constitutes a variation so that it falls within the scope of their jurisdiction.¹⁸ In the limited number of cases where a proposal is characterized as a resettlement, the courts must withhold consent on grounds that are irrelevant to whether the proposed variation is beneficial.¹⁹ This is inconsistent with the notion that the best interests of the beneficiaries are paramount under the Act.

In our view, the inability of the courts to consent to a resettlement of a trust is an unnecessary limitation on the judicial power to approve what may otherwise be a desirable arrangement. We recommend that the courts be given the power to resettle a trust.

16. Waters, *supra* n. 3 at 1074 refers to the following cases in this regard: *Re T's Settlement Trusts*, [1963] 3 All E.R. 759 (Ch. D.), [1964] 1 Ch. 158; *Re Holt's Settlement*, [1969] 1 Ch. 100, [1968] 1 All E.R. 470; *Re Ball's Settlement*, [1968] 1 W.L.R. 899, 2 All E.R. 438.

17. See: McClean, *supra* n. 1 at 243, Waters, *ibid.*, and K. Farquhar, “Recent Themes in the Variation of Trusts” (2001), 20 E.T. & P.J. 181 at 191.

18. Waters, *supra* n. 3, at 1085.

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

Recommendation 2

A revised Trust and Settlement Variation Act should authorize the court to approve a settlement or resettlement of a trust, in addition to the existing power to approve a variation or revocation of a trust.

3. Altering the powers of trustees

Section 1 of the *Trust and Settlement Variation Act* authorizes the courts to consent to an arrangement that would enlarge the powers of the trustees to administer and manage the trust. It is not clear why the court should be limited to “enlarging” but not otherwise amending the powers of trustees. In practice the term “enlarge” has been liberally interpreted by the courts which have, in exercising this jurisdiction, consented to proposals that not only enlarge but also restrict or otherwise vary the administrative powers of trustees.²⁰ This broad interpretation has been necessary to give courts the flexibility to deal with the changing administrative needs of trusts.

We recommend that section 1 of the Act be amended to authorize the courts to consent to a proposal that would “vary, delete, add to or terminate” the powers of trustees to manage or administer trust property.

Recommendation 3

A revised Trust and Settlement Variation Act should authorize the court to approve any arrangement “varying, deleting, adding to or terminating” the powers of a trustee to manage or administer any of the property subject to the trusts.

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

1. Power of the court to disregard the refusal of a capacitated beneficiary to consent to a proposal

Until relatively recently it had been the practice of the courts that an arrangement would not be approved if any adult, fully capacitated beneficiaries withheld consent.²¹ This is

20. For further discussion on this point see Waters, *supra* n. 3 at 1077 and McClean, *supra* n. 1 at 244.

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

22. Manitoba Report, *supra* n. 12 at 11.

Report on the Variation and Termination of Trusts

consistent with the position that under trust variation legislation the court has the authority to provide consent that is otherwise unobtainable, but does not have the power to overrule capacitated beneficiaries and vary the trust.²²

Bentall Corp. v. Canada Trust Co. has called this position into question, at least in relation to pension trusts.²³ In that case the court approved a variation despite the opposition of a small number of adult beneficiaries.²⁴ The facts of the case are as follows: a trust had been constituted under the Bentall Corporation Retirement Plan (the “Plan”), which was established to provide pension benefits to employees. In order to deal with a surplus of funds an application was made under section 1 of the Act for an order approving a proposed variation of the trust. Of the 279 members under the Plan, 7 refused to provide consent to the proposed variation. The court allowed the application to vary the trust despite this opposition. The court concluded that notwithstanding the absence of unanimous consent it had the jurisdiction under section 1(b) of the Act to approve the variation on behalf of contingent beneficiaries, even if the beneficiaries also had an independent vested interest,²⁵ so long as the vested interest was not affected by the variation.²⁶ The court’s decision, and specifically whether the Act confers jurisdiction on the courts to approve a variation in such circumstances, has been the subject of some debate.

The confusion about the jurisdiction that the Act gives the courts under section 1(b) stems, at least in part, from the wording of the section. Our section is based on the English *Variation of Trusts Act, 1958*, which reads:²⁷

any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, *so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court.* [Emphasis added]

23. (1996) 26 B.C.L.R. (3d) 181, [1997] 4 W.W.R. 414 (S.C.).

24. For a further discussion of this case see Farquhar, *supra* n. 17 at 183 and 184.

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

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

27. *Variation of Trusts Act, 1958*, *supra* n. 4, section 1(b).

28. Waters, *supra* n. 3 at 1070.

Report on the Variation and Termination of Trusts

The English provision limits the jurisdiction of the courts to the extent that it requires that all fully capacitated beneficiaries consent to an arrangement for the court to give its approval.²⁸ For example, under the English legislation if a trust provided “to A for life, remainder to her children,” and at the date of the application to vary the trust A was still the life tenant and one of A’s children was an adult and opposed the arrangement, the court could not consent on that person’s behalf and the application would fail. The policy underlying this is that if a beneficiary would be in a position to approve a proposal if the future event bringing the beneficiary’s interest into possession had occurred at the time of the application, then that person should be able to consent or withhold consent to the arrangement on his or her own behalf without interference from the court.

Section 1(b) of our *Trust and Settlement Variation Act*²⁹ differs from its English counterpart in that it omits the italicized portion of the above provision.³⁰ This has created some uncertainty in British Columbia about whether a court may disregard the refusal of a capacitated beneficiary to consent to a proposal under the Act. The *Bentall* case did consider this question, but it is unclear how far that decision extends.

It is our view that the parameters of the court’s jurisdiction ought to be clarified in this regard. The question we considered was whether in a revised Act the court should be expressly empowered to disregard the refusal of an adult vested or contingent beneficiary to consent to a proposal to vary, resettle or revoke a trust. On the one hand, providing courts with the power to overrule an adult beneficiary who is blocking a proposal that would benefit the trust as a whole gives the courts the ability to dismiss unreasonable objections. On the other hand, each beneficiary has an interest in the trust and arguably should have the right to protect that interest as he or she sees fit, which may extend to vetoing proposed changes to the trust.³¹

The majority of respondents to our Consultation Paper were of the view that the courts should have the power in some circumstances to approve an arrangement even if an adult, capable beneficiary withholds consent. There was division, however, with regard to whether

29. The *Trust and Settlement Variation Act* is attached to this Report as Appendix A.

30. One writer has noted that there is no apparent reason for the deletion in Canada of the exception that exists in the English legislation: Waters, *supra* n. 3 at 1068.

31. The essence of this debate was set out by the Manitoba Law Reform Commission in the Manitoba Report, *supra* n. 12 at 25 and by the Ontario Law Reform Commission, *Report on the Law of Trusts*, *supra* n. 3 at 419.

32. One respondent to the Consultation Paper raised a concern that by stating that trusts cannot be changed unless there is unanimous consent to the arrangement by all the adult beneficiaries with capacity, we could be ousting the court’s inherent jurisdiction to vary a trust. It is our view that nothing in the recommendations we have made would interfere with the inherent jurisdiction of the courts to vary a trust.

this should apply to pension and commercial trusts only or to all trusts.³² Those in favour of giving the courts this authority only when dealing with proposals involving a pension or commercial trust noted that it would legitimize the jurisdiction that the courts have already assumed. Further, in the case of pension trusts it would recognize the employment context in which the trust was created. Those respondents who favoured having this rule apply to all trusts (commercial and private estate planning) noted that the power to overrule intransigent adults should be equally available to all beneficiaries of a trust no matter what category the trust falls under. Those opposed to a judicial power to override non-consenting beneficiaries of a private trust are concerned with the taking away of property rights.

Having considered these differing views, we have concluded that the power to amend a trust in the face of obstruction should be consistent whether the trust is a private estate planning vehicle or a commercial trust. In both cases the courts should have some avenue to deal with the intransigent beneficiary. At the same time, this remedial power should be restricted to cases where, based on an objective test, it is clear that the beneficiary is blocking an arrangement that is of benefit to the trust as a whole and the vast majority of beneficiaries support the proposal. We accordingly recommend that the *Trust and Settlement Variation Act* should be revised to state expressly that the courts have the power to approve a proposal to vary a trust even if an adult beneficiary, whether vested or contingent, withholds consent to the proposed arrangement. This power should be exercised only where a substantial majority of beneficiaries in number and interest agree, there would be no detriment to the person who withheld consent, and a failure to approve the arrangement would be detrimental to the administration of the trust and the interests of other beneficiaries.

Recommendation 4

A revised Trust and Settlement Variation Act should state expressly that the courts have the power to approve a proposal to vary, revoke or resettle a trust even if an adult beneficiary, whether vested or contingent, withholds consent to the proposed arrangement provided that:

- (a) the proposed arrangement will not be detrimental to the interests of the person who has withheld consent,*
- (b) a substantial majority of the beneficiaries, representing a substantial majority of the monetary obligations of the trust fund have approved the proposed arrangement through a written consent or the approval of the court under the Act, and*
- (c) it would be detrimental to the administration of the trust and the interests of other beneficiaries not to approve the arrangement.*

The Committee has also considered the language of section 1(b) of the Act and concluded that it should be revised for clarity to provide the courts with the clear jurisdiction to consent to a proposal on behalf of a person whose continued existence or whereabouts is unknown and cannot be determined despite reasonable measures having been taken to discover such information.

Recommendation 5

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

2. Section 1(d) in the context of Canadian trust drafting

The *Trust and Settlement Variation Act* enables the court to approve an arrangement on behalf of those persons with a future discretionary trust interest that is contingent on the failure or determination of the existing interest under section 1(d), without having to consider the benefit to those persons. Section 1(d) of our Act is worded differently than its English counterpart as British Columbia has never adopted the statutory protective trust, which the English section was drafted to address.³³ This is an important distinction. The English provision only applies to a discretionary interest arising on the premature termination of an existing interest because it is intended to protect life tenants of protective trusts from their own bankruptcy. The Ontario Law Reform Commission explained the policy underlying the English provision as follows:³⁴

The present provision is derived from the English *Variation of Trusts Act, 1958*, which no doubt contains this exception because the statutory protective trust in England installs the next-of-kin of the protected life tenant as the discretionary trust beneficiaries, if he is without children and unmarried. The next-of-kin are there merely to enable the statutory trust to provide protection for the life tenant.

33. Waters, *supra* n. 3 at 1068.

34. The Ontario Law Reform Commission, Report on the Law of Trusts, *supra* n. 3 at 421.

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

Report on the Variation and Termination of Trusts

The discretionary interest under the English provision was thus thought to be too remote to deserve consideration under a trust variation application.³⁵

In British Columbia the language of section 1(d) is much broader and applies to any future discretionary trust interest that is contingent on the failure or determination of an existing interest, so that if an interest is left “To A for life, remainder to his children at the discretion of the trustees” and A’s interest has not yet failed or determined, the court can approve a variation on behalf of the children of A without considering if there is benefit to them.

In the Consultation Paper we proposed that section 1(d) of the *Trust and Settlement Variation Act* be repealed.³⁶ The alternative approach that was set out in the Consultation Paper was to revise section 1(d) of the Act so that it is tailored in scope to provide that the court is expressly empowered to consent on behalf of beneficiaries of an immediate discretionary trust and appointees of a mere power of appointment. After considering this issue further we have concluded that section 1(d) should be retained, but the language should be revised and simplified to reflect this alternative approach. This decision was made in response to concerns that a court, if asked to consider interests covered by the present section 1(d), might in applying the usual test of benefit require money to be set aside for holders of those interests, even where the likelihood of such a person taking was very small. To address this concern we prefer a broader test whereby the court could consent to an arrangement on behalf of a person coming within section 1(d), provided that there would be no detriment to the interests of that person.

Recommendation 6

In a revised Trust and Settlement Variation Act the provision comparable to section 1(d) of the current Act should provide that the court is authorized to consent on behalf of any person in respect of an interest of the person that may arise by reason of an immediate or postponed discretionary power, or as a result of a mere power of appointment except where the arrangement would be detrimental to the interests of that person.

36. Waters, *supra* n. 3 at 1073 states in this regard:

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

C. Other Matters

1. Persons who can bring a proposed arrangement before the court

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

An alternative approach would be to list in the statute the categories of persons who can bring a proposed arrangement before the court.³⁷ This approach however affords less flexibility than the current position as it would not allow the courts to hear applications by, for example, a person who is a caregiver but not the guardian of a beneficiary.³⁸ There does not appear to be any policy reason for restricting a proposal by such a person as, regardless of who brings the application, the court will look to the merits of the arrangement in making its decision.

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

Recommendation 7

A revised Trust and Settlement Variation Act should carry forward the language of the current Act with regard to the question of who can bring an arrangement before the court.

2. Admissibility of evidence of the settlor’s intentions

Prior to the adoption of trust variation legislation the central premise of the law of trusts was to uphold the intent of the settlor. The jurisdiction of the courts was restricted under this approach to the extent that a proposal could not be approved if it was contrary to the settlor’s basic intent, unless the settlor’s intentions were in violation of the law or public policy. The enactment of trust variation legislation marked a significant departure from this position as

37. The Law Reform Commission of Ireland observed in its *Report on the Variation of Trusts* that the South Australian *Trusts Act, 1973* is one exception where the categories of persons who may apply to the court for approval of a proposal are enumerated: *Supra* n. 19 at para. 7.10.

38. *Ibid.*, at para. 7.11.

Report on the Variation and Termination of Trusts

the primary concern of the court became whether the proposal would be desirable for the individual beneficiaries upon whose behalf the court was asked to consent.³⁹

The courts in British Columbia have considered the question of whether their jurisdiction to approve an amendment to a trust is still restricted to some degree by the settlor's original intent.⁴⁰ In *Sandwell & Co. Ltd. v. Royal Trust Corp. of Canada*,⁴¹ the Court of Appeal concluded that the Act allows a court to approve an amendment to a trust provided it benefits those persons on behalf of whom the court's approval is sought, even if the arrangement offends the original terms of the trust. In the 1994 decision of *Russ v. British Columbia (Public Trustee)*⁴² the court applied the reasoning from *Sandwell*.⁴³ In that case the appellant Public Trustee cited a number of cases to support the position that the chambers judge had erred in failing to take account of the settlor's intentions, sufficiently or at all, in deciding whether to allow the trust variation application. In response to this argument Finch J.A., for the court, concluded that there was no obligation on the courts to weigh the settlor's original intention in deciding whether to approve a proposed variation and, further, that to find otherwise would be inconsistent with the language of the Act.⁴⁴

Should evidence of the settlor's intentions or views on the proposed arrangement be admissible (without binding the court)? The Law Reform Committee of England was of the view that once having parted with the beneficial interest in the property, the settlor should not retain any right to prohibit variations with regard to dispositions which the court considered to be desirable in the interests of the beneficiaries.⁴⁵ Although that Committee concluded that the interests of the beneficiaries ought to prevail, it was also of the view that the settlor should be entitled to be heard on an application. As one writer has noted, this

39. McClean, *supra* n. 1 at 229 and Ontario Law Reform Commission, *Report on the Law of Trusts*, *supra* n. 3 at 413.

40. For a recent review of the Canadian case law dealing with the issue of the weight to be given to the original intention of the settlor see Farquhar, *supra* n. 17 at 186.

41. (1985) 17 D.L.R. (4th) 337 (B.C.C.A.).

42. (1994) 89 B.C.L.R. (2d) 35, 3 E.T.R. (2d) 170 (C.A.), application for leave to appeal to S.C.C. dismissed without reasons [1994] S.C.C.A. No. 271.

43. (1994) 89 B.C.L.R. (2d) 35 at 46, 3 E.T.R. (2d) 170 at 183.

44. In other provinces there is authority supporting the contrary position that the settlor's original intent does have to be taken into consideration when deciding whether to approve a proposal: *See (Re) Irving*, (1975) 66 D.L.R. (3d) 387, 11 O.R. (2d) 443 (Ont. H.C.J.) and *(Re) Hessian*, (1996) 14 E.T.R. (2d) 188, 153 N.S.R. (2d) 122 (N.S.S.C.). It should be noted, however, that this proposition has been questioned in other cases: *Finnell v. Schumacher Estate*, (1990) 37 E.T.R. 170, 74 O.R. (2d) 583 (Ont. C.A.) (Also referred to as *Finnell v. Canada Trust Co. et al.*)

45. Sixth Report, *supra* n. 5 at 6.

compromise did not give the settlor a veto power but did allow the settlor to be heard and state any objections to, or approval of, the proposed arrangement.⁴⁶

We have given this issue further consideration and our Committee as a whole does not believe that a case for change has been made out. For the time being, at least, the law should remain as stated by the Court of Appeal in *Russ*.

3. Application of the Act to charitable gifts

(i) *Terms of a charitable trust*

While the *Trust and Settlement Variation Act* applies to trusts for persons, it is silent as to whether it also applies to charitable purpose trusts. The Ontario Law Reform Commission observed that while the courts have acted as if they had the jurisdiction to approve a variation to the terms of a charitable trust it was, in their view, “highly questionable” whether the wording of the Act actually conferred this jurisdiction on the courts.⁴⁷

In the Consultation Paper we asked for comments on whether the Act should be amended to state expressly that it confers jurisdiction on the courts to approve a proposal to vary a charitable trust. The majority of respondents were in favour, for reasons of clarity, of expressly bringing charitable trusts within the scope of the Act. We are in agreement with this position and recommend that the Act should expressly state that it confers jurisdiction on the courts to approve an amendment to the terms of a charitable trust.

An issue was raised in the Consultation Paper that if the Act confers on the courts the power to consent to a proposal to vary a trust purpose it would be necessary to consider how that power would interact with the inherent *cy-près* powers of the court.⁴⁸ We have concluded that the Act should allow the courts to vary any terms of a trust, including trust purposes, but this power should be broader than *cy-près* and should not be subject to the limitations on that doctrine.⁴⁹

Recommendation 8

46. McClean, *supra* n. 1 at 257.

47. Report on the Law of Trusts, *supra* n. 3 at 423, footnote 146.

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

49. The Ontario Law Reform Commission came to a similar conclusion, *supra* n. 3.

Report on the Variation and Termination of Trusts

A revised Trust and Settlement Variation Act should include a restatement of the cy-près power of the Court which:

- (a) contains a limited power to vary the purposes of a charitable trust by adding additional charitable purposes, and*
- (b) eliminates the need to prove that the settlor had a particular or general charitable intent.*

(ii) Interest of a charitable beneficiary

The second issue that arises with regard to charities is whether the Act should authorize the court to consent on behalf of a charitable trust or charitable corporation where the trust purpose or corporation is a beneficiary under a trust that is itself being varied. An example might be where a testator provides that the trust fund is to be held by the executors and trustees, X and Y, for A for life, remainder to a charity for the relief of poverty. It is proposed by A that, with a certain percentage taken by each, the capital be divided between A and the charitable gift.

In the above scenario, if the charity is a named charitable corporation it will have full legal capacity and can consent or withhold consent to a proposal on its own behalf, without the aid of the court.⁵⁰ If, however, the named charity takes the form of a trust and the trustees of the charity have no power to consent to a termination, or the choice of the charitable recipient is to be decided by the trustees in the future when A's interest terminates, the trust could not be varied unless the court can consent on behalf of the charitable trust or the as yet to be selected charity.

We see no reason why a beneficiary should not be able to invoke the Act simply because the settlor has chosen to provide a gift to a charitable purpose under the trust. We recommend that the Act expressly allow the courts to approve a proposal on behalf of a charity if there is no one legally capable of consenting on behalf of the charity.

Recommendation 9

A revised Trust and Settlement Variation Act should provide expressly that the court is authorized to consent on behalf of a charitable beneficiary when the gift is an interest in a trust that is itself being varied, revoked or resettled, in cases where consent cannot otherwise be obtained.

50. The Ontario Law Reform Commission was of the view that a charitable beneficiary can consent or withhold consent without the assistance of the court as the courts have never questioned the capacity of a charitable corporation or trust to take advantage of the rule in *Saunders v. Vautier: Report on the Law of Trusts*, *supra* n. 3 at 423. See also *Waters*, *supra* n. 3 at 972.

III. Framework for Revisions

The Committee on the Modernization of the *Trustee Act* is in the process of preparing a new *Trustee Act* and the draft legislation found in Appendix B will be part of that legislative package. Nonetheless, as it is not clear when the new Act will be adopted we recommend that any changes at this time be made through the enactment of a revised *Trust and Settlement Variation Act* that incorporates the recommendations made in this Report.

IV. Summary of Final Recommendations

These are the Committee's final recommendations for revisions to the *Trust and Settlement Variation Act* aimed at improving the law governing the variation, termination and resettlement of trusts, and in relation to the powers conferred on trustees.

Recommendation 1

A revised Trust and Settlement Variation Act should confer upon the beneficiaries the power to vary, resettle or revoke a trust without judicial consent where all the beneficiaries are of full capacity and unanimously approve of the proposed variation.

Recommendation 2

A revised Trust and Settlement Variation Act should authorize the court to approve a settlement or resettlement of a trust, in addition to the existing power to approve a variation or revocation of a trust.

Recommendation 3

A revised Trust and Settlement Variation Act should authorize the court to approve any arrangement "varying, deleting, adding to or terminating" the powers of a trustee to manage or administer any of the property subject to the trusts.

Recommendation 4

A revised Trust and Settlement Variation Act should state expressly that the courts have the power to approve a proposal to vary, revoke or resettle a trust even if an adult beneficiary, whether vested or contingent, withholds consent to the proposed arrangement provided that
:

- (a) *the proposed arrangement will not be detrimental to the interests of the person who has withheld consent,*

Report on the Variation and Termination of Trusts

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

Recommendation 5

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

Recommendation 6

In a revised Trust and Settlement Variation Act the provision comparable to section 1(d) of the current Act should provide that the court is authorized to consent on behalf of any person in respect of an interest of the person that may arise by reason of an immediate or postponed discretionary power, or as a result of a mere power of appointment except where the arrangement would be detrimental to the interests of that person.

Recommendation 7

A revised Trust and Settlement Variation Act should carry forward the language of the current Act with regard to the question of who can bring an arrangement before the court.

Recommendation 8

A revised Trust and Settlement Variation Act should include a restatement of the cy-près power of the Court which:

- (a) *contains a limited power to vary the purposes of a charitable trust by adding additional charitable purposes, and*
- (b) *eliminates the need to prove that the settlor had a particular or general charitable intent.*

Recommendation 9

Report on the Variation and Termination of Trusts

A revised Trust and Settlement Variation Act should provide expressly that the court is authorized to consent on behalf of a charitable beneficiary when the gift is an interest in a trust that is itself being varied, revoked or resettled, in cases where consent cannot otherwise be obtained.

V. Conclusion

The Committee on the Modernization of the *Trustee Act* is of the view that the time has come to reconsider this area of the law of trusts. We believe that if adopted the recommendations in this Report will result in the modernization and rationalization of the law governing changes to the administrative powers of trustees and the dispositive provisions of trusts. This will ensure that trusts continue to provide a useful mechanism for the distribution of property and assets in the future.

We wish to thank all those who responded to the Consultation Paper that preceded this Report. We also wish to acknowledge the contribution of Caroline Carter, a former Staff Lawyer with the British Columbia Law Institute, who carried out the background research and prepared the Consultation Paper and an earlier draft of this Report.

Appendix A

Trust and Settlement Variation Act

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

Court approval of variation

1. If property is held on trusts arising before or after this Act came into force under a will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of
 - (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,
 - (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons,
 - (c) any person unborn, or

Report on the Variation and Termination of Trusts

- (d) any person in respect of an interest of the person that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined,

any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

Benefit to parties interested

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

Public Guardian and Trustee

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

Deemed trust

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

Court appearances

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

Appendix B

TRUST VARIATION AND TERMINATION ACT, 2003

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

Definition

1. In this Act,

“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” receives a broad definition to include a resettlement and revocation of a trust as well as modifying the powers of a trustee.

Where court approval not required

2. An arrangement will take effect without court approval if all the beneficiaries of the trusts are of full age and capacity and consent to the arrangement.

Comment: Section (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 would 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.

Where court may approve arrangement

3. An arrangement that cannot take effect under section 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 having, directly or indirectly, an interest, whether vested or contingent, 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

Report on the Variation and Termination of Trusts

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 power, 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.

Comment: Section 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.

Where court must not approve arrangement

- 4. The court must not approve an arrangement on behalf of a person
 - (a) coming within section 3 (a), (b) or (c) unless the carrying out of it appears to be for the benefit of that person, or
 - (b) coming within section 3 (d) if the carrying out of it would be detrimental to the interests of that person.

Comment: Section 4 sets out criteria that will guide the court in granting or withholding its approval.

Approval on behalf of competent beneficiary

- 5.(1) An arrangement that cannot take effect under section 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.
- (2) The court may approve an arrangement under subsection (1) only if:
 - (a) the arrangement will not be detrimental to the pecuniary interest of the person who has withheld consent,
 - (b) a substantial majority of the beneficiaries, representing a substantial majority of the monetary obligations of the trust fund have approved the

Report on the Variation and Termination of Trusts

arrangement through a written consent or the approval of the court under section 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: Section 5 departs 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 (2) 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

- 6. The court may approve an arrangement under section 3 in respect of land the ownership of which is the subject of a legal life interest and for the purposes of this subsection
 - (a) the holder of the legal life interest is deemed to hold the land in trust for himself or herself and the holders of successive interests in the land, and
 - (b) the beneficiaries of the trust are deemed to be incapable of consenting to the arrangement.

Comment: Section 6 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.

Variation of charitable trusts

- 7.(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,
 - (a) that an impracticability, impossibility or other difficulty has arisen, whenever it arose, that hinders or prevents the carrying out of the intention of the terms of the trust;
 - (b) it would be desirable to amend the terms of the trust to include one or more additional charitable purposes that the court might have selected under subsection (2)(b) had the circumstances described in paragraph (a) of this subsection occurred and an application based on paragraph (a) had been made, or

Report on the Variation and Termination of Trusts

- (c) that 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 where 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 7 restates the power of the court to make a *cy prè*s order but with two important changes.

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 subsection (2) abrogates that requirement.

Second, the court is empowered to order the addition or substitution of a purpose similar in spirit to the original purpose even where the original purpose has not become impossible or impracticable. An example might be a charitable trust established for the construction of a swimming pool at an educational institution. It may turn out that when the trust takes effect, a swimming pool is already virtually complete, having been built with other funding that became available at an earlier time. The institution requires, however, the replacement of a dilapidated gymnasium. Under section 7(1)(b), the court could order that this purpose be added to or replace the purposes of the trust.

Notice to Public Guardian and Trustee or Attorney General

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

Report on the Variation and Termination of Trusts

- (c) under section 6 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.

- (2) Where

- (a) approval of an arrangement is sought on behalf of an entity referred to in section 3 (e), or

- (b) an application is made under section 7

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, as the case may be, is entitled to appear and be heard on the application and is entitled to any costs that the court orders.

Comment: Section 8 carries forward the policy of current legislation concerning the role of the Public Guardian and Trustee in relation to arrangements involving the interests of vulnerable persons. It should be noted that notice to the Public Guardian and Trustee is required whether or not the interests of the beneficiary are the responsibility of a committee appointed under the *Patients Property Act*. It is expected that the new *Trustee Act*, which will ultimately embrace the legislation concerning the termination and variation of trusts, will expressly address the issue of the committee as representative of an incapacitated beneficiary for a variety of purposes under the Act. Depending on how the details are developed, the requirement for notice to the Public Guardian and Trustee where a committee has been appointed may be deleted.

Where a consent on behalf of charity is sought, the Attorney General must be notified.

Repeal

9. The Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463 is repealed.

Comment: This Act would repeal and replace the current legislation.

Commencement

10. This Act comes into force on

Report on the Variation and Termination of Trusts

Comment: Section 10 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 C

Earlier Documents Published by the Committee

This report was prepared by the *Trustee Act* Modernization Committee for the British Columbia Law Institute. Earlier documents that have been published by the Committee are:

- Consultation Paper on Trustee Investment Powers (April 1998)
- Consultation Paper on Statutory Remuneration of Trustees and Trustees' Accounts (September 1998)
- Consultation Paper on Statutory Powers of Delegation by Trustees (November 1999)
- Consultation Paper on Total Return Investing by Trustees (July 2000)
- Consultation Paper on Exculpation Clauses in Trust Instruments (October 2000)
- Consultation Paper on Variation and Termination of Trusts (February 2003)

- Report on Trustee Investment Powers (April 1999)
- Report on Statutory Remuneration of Trustees and Trustees' Accounts (April 1999)
- Report on Statutory Powers of Delegation by Trustees (July 2000)
- Report on Total Return Investing by Trustees (November 2001)
- Report on Exculpation Clauses in Trust Instruments (March 2002)
- Report on Creditor Access to the Assets of a Purpose Trust (March 2003)

Please visit our website at <http://www.bcli.org> for more information about these documents.

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