WATERS' LAW OF TRUSTS IN CANADA

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By

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II. THE RULE IN *SAUNDERS v. VAUTIER*

A. Introduction

This rule is associated with *Saunders v. Vautier*[7] which was decided in 1841, but it originated much before that time as an implicit understanding of Chancery judges.[8] It is based upon the theory that, though title and management rest in the trustees, the significance of property lies in the right of enjoyment. This enjoyment is in the beneficiaries of the trust, and therefore, the theory goes, in the last analysis it is for them to decide how they will enjoy the property. It is most important to realize that this does not mean that, despite all the doctrine of the common law trust, the common law ultimately associates ownership with the trust beneficiary rather than with the trustee. This may be necessary in some civilian systems, but that is because of the civil law doctrine of *dominium* or single indivisible ownership directly relating the person and the object. The common law conceived of the divisibility of ownership into rights. Rights of management and of disposition were "owned" by the trustee, and the right of enjoyment was "owned" by the beneficiary. It is a simple, almost pragmatic, conclusion that, if one person has all the rights of enjoyment in the trust property, and he is of age and capacitated, he should be able to say what he wants done with the property over which he alone has and will have, rights of enjoyment. And, if that is so, then he should be able to call for the property from the trustee if he is not satisfied with the manner of the enjoyment dictated by the terms of the trust. The intention of the settlor, who after all had alienated the property by way of trust, thus gives way to the wishes of the "owner" of all the rights of enjoyment in the property.

The actual decision in *Saunders v. Vautier*, and the rule that has come to be associated with it, differ in scope. The rule is broader than the decision, and consequently the rule has been expressed both in a narrow and in a broader form. The narrow statement of the rule is this: where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee.[9] For instance, T leaves a legacy of $10,000 to his grandchild, A, with the direction that the trustees may pay for maintenance out of the income, accumulate the remainder, and pay capital and accumulations to A when he becomes twenty-five years of age. The result of the rule just given is that the donee, if he is of age and mentally capacitated, may call for the capital and any accumulated income, regardless of the settlor's directions to

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[7] (1841), 4 Beav. 115, 49 E.R. 282 (Eng. Rolls Ct.), *per* Lord Langdale M.R., affirmed (1841) Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.), *per* Lord Cottenham L.C. The decision was followed in *Gosling v. Gosling* (1859), Johns 265, 70 E.R. 423 (Eng. Ch. Div.). For a valuable judicial description of the rule, see *Re Doyle* (1976), 11 Nfld. & P.E.I.R. 83 (Nfld. T.D.) at 80-90.

[8] *Love v. L'Estrange* (1727), 5 Bro. Parl. Cas. 59, 2 E.R. 532 (U.K. H.L.); *Josselyn v. Josselyn* (1837), 9 Sim. 63, 59 E.R. 281 (Eng. Ch. Div.), *per* Shadwell V.C. See P. Matthews, "The Comparative Importance of the Rule in *Saunders v. Vautier*" (2006) 122 Law Q. Rev. 266, 267.

[9] *Wharton v. Masterman*, [1895] A.C. 186 (U.K. H.L.) at 198, *per* Lord Davey.

accumulate until the occurrence of an event which has not yet taken place. In the example involving T and his grandchild, if T dies when A is sixteen years old, A will come of age at eighteen (or nineteen) and then be able to stop the accumulations of surplus income by calling upon the trustees to transfer to him at eighteen (or nineteen) years of age both capital and the accumulations to date.

The broader statement of the rule is this: if there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees. This is *Underhill and Hayton's* presentation of the rule,[10] and it will be seen that two new elements exist in this broader perspective of the rule. It not only applies when there is one beneficiary, but when there are two or more, and they must agree to terminate the trust.[11] They too must all be fully capacitated, and together they must "own" all the rights of enjoyment in the trust property.[12] It is this exclusive "ownership" of rights of enjoyment which connects the narrower and the broader statement of the rule; the broader statement is a logical deduction from the reasoning behind the narrower.[13]

[10] *Underhill and Hayton* at para. 66. The statement of the rule in these terms in the 14th edition of *Underhill and Hayton* was cited in *Buschau v. Rogers Communications Inc.*, 2006 CarswellBC 1530, 2006 CarswellBC 1531, [2006] 1 S.C.R. 973, 269 D.L.R. (4th) 1 (S.C.C.) at para. 21.

[11] A single beneficiary among a number will be able to act alone if the trust fund is divided into shares, in which case there are effectively multiple trusts: see for example *Re Burger*, [1949] 1 W.W.R. 280 (Alta. S.C.). Even a beneficiary who holds an undivided share may be able to call for a division and transfer of his own share; this will turn on the nature of the trust property — that is, whether it is readily divisible. This possibility will not arise in the case of land, but it may arise in the case of shares of a publicly traded corporation or other easily marketable securities. See *Re Marshell*, [1914] 1 Ch. 192 (Eng. C.A.); *Sandeman v. Hawie*, [1937] 1 All E.R. 368; *Stephenson (Inspector of Taxes) v. Barclays Bank Trust Co. Ltd.*, [1975] 1 W.L.R. 882, [1975] 1 All E.R. 625; *Lewin* at 840-49; *Snell* at 843-44. For a different view of *Re Marshell*, see D.M. Paciocco and V. Krishna, "*Re Campeau Family Trust*: Two Wrongs Make a Right" (1985) 7 E. & T.L. 65.

[12] It is sometimes said that in order to terminate the trust, the rule requires only expressly or impliedly created beneficiaries of the trust to be capacitated and in agreement. That is, if the terms of the trust fail to dispose of trust property, and an interest or interests arise in trust property by operation of law, the agreement of any person acquiring such an interest, i.e., as a resulting trust or constructive trust beneficiary, is not required. This analysis is incorrect because the rule concerns any and all proprietary interests that exist in the trust property. The rule is not concerned with the manner in which any interest may have arisen. It is concerned with property interests.

[13] *Buschau v. Rogers Communications Inc.* (2002), 100 B.C.L.R. (3d) 327 (B.C.S.C.), at para. 22. This case stemmed from an attempt by beneficiaries of a pension plan capable of termination to secure the surplus in the trust fund. For later proceedings, see (2004), 236 D.L.R. (4th) 18, 6 E.T.R. (3d) 236 (B.C. C.A.), additional reasons at (2004), 239 D.L.R. (4th) 610, 9 E.T.R. (3d) 221 (B.C. C.A.), additional reasons at (2004), 241 D.L.R. (4th) 766 (B.C. C.A.), where the *Saunders v. Vautier* rule is discussed in detail, and the court held that, though they have multiple beneficiaries, the rule is fully capable of being applied to pension plans, and that, as long as its requirements are met, the rule does so apply. This ruling followed, said the B.C.C.A., from the judgment of the S.C.C. in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631 (S.C.C.), which decided that contractual terms between employer and employees are "subordinated to trust principles — of which the rule in *Saunders v. Vautier* is one" (para. 63). The subsequent history of this prolonged litigation is discussed immediately below.

The most recent review of *Saunders v. Vautier* in the Supreme Court of Canada occurred in *Buschau v. Rogers Communications Inc.*[14] This involved protracted litigation regarding the surplus in a defined-benefit pension plan. The employer had sought to benefit from the surplus by consolidating the plan with other plans. The plan members responded by attempting to collapse the plan and so secure the surplus, relying alternatively on the rule in *Saunders v. Vautier* and on the provincial *Trust and Settlement Variation Act.*[15] The British Columbia Court of Appeal held that *Saunders v. Vautier* could apply, but only with the agreement of all of the beneficiaries (plan members) who were *sui juris*; the court was not authorized, under the provincial statute, to give consent on behalf of such members.[16] On appeal, the Supreme Court of Canada held that in the context of a statutorily regulated pension plan, the rule in *Saunders v. Vautier* had no application.[17] The majority gave a number of reasons for concluding that while the rule might apply to "very small pension plans", it did not apply in the case at bar.[18] The minority judges suggested that the requirements of the rule could not actually be satisfied on its own terms, since the plan members' interest in the trust assets was only contingent;[19] but, ultimately, they too also indicated that the trust could not be dissociated from the terms of the governing pension plan and the legislation.[20]

In general, then, the rule will not apply to regulated pension plan trusts. It can be said that there are broadly three situations in which the rule in *Saunders v. Vautier* operates:

> (1) A beneficiary who is adult, of sound mind, and entitled to the whole beneficial interest may require the trustees to transfer the trust property to him.
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> For instance, to A $50,000 payable on his twenty-fifth birthday, the income to be payable to him annually until he attains that age.

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[14] 2006 CarswellBC 1530, 2006 CarswellBC 1531, [2006] 1 S.C.R. 973, 269 D.L.R. (4th) 1 (S.C.C.).

[15] R.S.B.C. 1996, c. 463.

[16] On this point, three of seven judges in the Supreme Court of Canada agreed with the Court of Appeal. This point is addressed in chapter 27, Part IV C 4.

[17] In this case, the plan was governed by the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.)), because the employment was in relation to a federally regulated activity. Many other pensions would be governed by provincial legislation.

[18] At paras. 27-33. The reasons were that (1) pension plans are heavily regulated; (2) they are not independent trusts but are governed by a plan; (3) unlike classic trust settlors, employers may have an ongoing interest in plan continuity; (4) pension trusts are not gratuitous and they have a social purpose which (the court implies) transcends the financial interests of its members. The Court did not clarify the juridical status of the particular pension plan (as distinct from the trust fund), but presumably it was either a multilateral contract or was incorporated into employment contracts.

[19] At paras. 90, 98-99. The conclusion that their interests were only contingent meant, as a matter of the logic of trust law, that there were others who were defeasibly or contingently interested. As the minority judges suggested in para. 99, it might have been possible for the court to consent on behalf of these others under the *Trust and Settlement Variation Act*, but those in the minority were of the view that "a court would likely be reluctant to give its consent on their behalf."

[20] At paras. 90, 94-97.

expresses a contrary intent, annuitants have an interest in past and future surplus income to make up any deficiencies of annuity payment that may occur in a bad year.[101] As they have that interest, the charity cannot have a vested and indefeasible interest in the whole trust property; nor can the charity make independent arrangements to provide for annuitants, and thus secure the release of the income of the fund from providing these annuities. The annuitants are entitled to their charge on past and future surplus income of *that* fund the testator bequeathed.[102] The annuitants' charge does not only affect gifts to charities, it affects any donee with a gift in the same terms, but it seems to have had particular significance for charitable donees. It was a factor which aided the fulfillment of the testator's design in both *Berry v. Geen* and *Re Burns Estate*.

This factor played a part in keeping out a *Saunders v. Vautier* claim in *Re Robertson*.[103] But there another factor proved important. Unlike *Wharton v. Masterman*, the testator did not give all the excess income to the charity. He gave up to, but not more than, $10,000 *per annum*. This meant the charity had to wait till the last annuitant's death when, as the testator had planned, the capital and sundry accruals of interest became payable. The donee was only entitled to a part of a whole.[104]

From time to time the courts express their dislike of these attempts by beneficiaries to argue a vested and indefeasible interest and a consequent ability to frustrate the evident and well-laid intentions of the testator. The Manitoba Court of Appeal expressed such a concern in *Montreal Trust Co. v. Klein*,[105] and there can be little doubt that such a court will do all it legitimately can in construing the will to preserve the testator's intended arrangements. Such an approach can lead to some curious results. In *Re Birtwistle Estate*,[106] an *inter vivos* settlor required the income of a fund to be accumulated for twenty-one years, and the resultant sum to be transferred to a municipal corporation in England for the benefit of the aged poor of the town. On the settlor's death, when the accumulations were to commence, the corporation claimed that it had a vested and indefeasible interest in the income and capital, and asked for a transfer there and then. One would have thought this claim must succeed; but it did not. Rose C.J.H.C. held that the corporation was entitled to a fund, not the securities in the settlement, that the trustee, a trust company, was entitled to the scheme for its remuneration which the settlement had set up, and that the aged and poor were an unascertained class. No one of these objections bears examination, one

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[101] However, the annuitant is entitled only to have his annuity secured. He has no right to the surplus income as such. This was clearly established in *Harbin v. Masterman*, [1896] 1 Ch. 351 (Eng. C.A.).

[102] Nevertheless, under *Harbin v. Masterman*, *ibid.*, the court may agree to step in, and release surplus income falling into capital, or the capital itself, not needed to secure the annuity. For a full discussion, see chapter 27, Part II D.

[103] [1939] O.W.N. 569, [1939] 4 D.L.R. 511 (Ont. H.C.).

[104] An obvious method, should it be desired, of preventing surplus income or capital from getting into the hands of the donee before the death of the annuitant (or of the surviving annuitant) is the introduction of the condition precedent that the donee must survive that event, or, if a charity, be still in existence at that time. A gift over would then be created.

[105] [1971] 4 W.W.R. 644, (sub nom. *Re Schumacher*) 20 D.L.R. (3d) 487 (Man. C.A.), affirmed [1973] S.C.R. vi (S.C.C.).

[106] [1935] O.R. 433, [1935] 4 D.L.R. 137 (Ont. H.C.).

would respectfully suggest, yet the settlor's intentions were preserved, and this seems to be the key to the judgment.[107]

III. TRUST TERMINATION IN THE UNITED STATES

Curiously enough, the rule in *Saunders v. Vautier* was not born only of theoretical deduction, it was assumed by the English courts rather than consciously adopted, and at no time has there been justification of its far-reaching effects upon those trusts to whose circumstances it chances to apply. Even though some courts were, and are today, critical of the violation of the testator's intent,[108] there has been no developed critical argument. The rule travelled to all the Commonwealth common law jurisdictions, and in all of them it has become an established feature of the law of trusts. In the eighteenth century it also travelled to the American colonies, but in the closing half of the nineteenth century it began to give way to the age of *laissez-faire* economic thinking. One outcome of that period was the considerable significance attached by American courts to the settlor's ownership of the trust property prior to setting up the trust, and the consequent importance of giving every support to his intentions for that property as expressed in the trust terms.[109]

Despite all the pressures for ease of premature trust termination since 1945, the result of inflation and high taxation, that attitude towards the trust has in large measure remained and the contrast with the contemporary position in Canada, which is subject to the same influences, is striking. Today, in the great majority of states, trust terms may only be modified or terminated provided no purpose, or at least no material purpose, of the settlor remains to be carried out.[110]

Early in the nineteenth century spendthrift trusts had their roots in the belief that it was legitimate for the settlor to employ the trust as a mode of imposing a restraint on the alienability of transferred property. It followed that, if the settlor postponed the payment of a vested interest in a fund to a future age or event, or his trust required instalment payments of the beneficiary's vested entitlement, the beneficiary should neither be able to acquire the payment ahead of the designated time, nor be able to

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[107] An additional problem for *Saunders v. Vautier* claims is the curious deduction the English and Canadian courts have made that the *Accumulations Act* (or equivalent legislation) gives the next-of-kin a right to income arising after the permitted time of accumulation unless the named beneficiary is entitled to all undisposed-of property. It is considered that this interest of the next-of-kin should be kept in mind when the will is being construed. This almost perverse interpretation of wills can result in strange constructions of meaning. In England *Berry v. Geen*, *supra*, note 99, is evidence of this approach, and in Canada see *Re Hammond*, [1935] S.C.R. 550, [1935] 4 D.L.R. 209 (S.C.C.); *Re Robertson*, *supra*, note 103; *Re Tuckett* (1954), [1954] O.R. 973, [1955] 1 D.L.R. 643 (Ont. H.C.); *Re Burns Estate* (1960), 32 W.W.R. 689, 25 D.L.R. (2d) 427 (Alta. C.A.); *Re Owens* (1967), [1968] 1 O.R. 318 (Ont. H.C.); *Proctor v. Downey* (1979), 4 E.T.R. 264 (Ont. C.A.).

[108] E.g., *Re Livingston Estate (No. 2)*, [1923] 1 W.W.R. 358 (Man. C.A.).

[109] *Bainbridge's Appeal*, 97 Pa. 482 (1881), while not a trusts case, is an example of the philosophy that a testator should be free to do what he likes with his own, subject only to the limit of legality.

[110] See generally on this topic, *Scott and Ascher* at para. 34.1, G.G. Bogert, *The Law of Trusts and Trustees*, 2nd ed. (1965), para. 1007. See also P. Matthews, "The Comparative Importance of the Rule in *Saunders v. Vautier*" (2006) 122 Law Q. Rev. 266.

anticipate his interest by an assignment for value to a third party prior to the occurrence of that time. The leading case to that effect, *Claflin v. Claflin*,[111] remains a milestone in American trusts law; the intent of the settlor or testator can only be ignored when the terms of his trust are contrary to the law or public policy. If *Saunders v. Vautier* is the English doctrine, emphasizing the absolute interest of the beneficiary, and the invalidity of restraints upon the absolute, the *Claflin* doctrine is the dominant American approach, concentrating attention upon the settlor, and purposes evident from the terms of the trust which he had in mind. Unless those purposes are attained, which may well involve awaiting any express termination date created by the instrument, no termination is permitted.

However, in some jurisdictions the emphasis put by the *Restatement, Trusts 2d*,[112] upon the *material* purpose has acquired authority. This approach softens the *Claflin* doctrine a little; it attempts to meet both the settlor's intent and the beneficiaries' desire for capital in hand. The *Claflin* doctrine would normally involve the trust remaining in existence according to its terms until its natural ending, whereas the material purpose approach permits the court to consider whether circumstances have changed since the trust took effect, so that the settlor's intent, now inadequately mirrored in the trust terms, might be better met by termination and the transfer to beneficiaries of capital sums.[113]

In the United States, however, the scope of purpose, whether as stated expressly in the trust terms or as that which is held to be material, would cover all premature trust termination situations in Anglo-Canadian law. It can prevent a discretionary trust or support trust from being prematurely terminated, even if the beneficiaries are entitled to an ultimate distribution among themselves of the whole trust property. It prevents a power of appointment, exercisable by will only, from giving rise to the result that the donee of the power in his own lifetime can acquire the entire beneficial interest in the property concerned.[114] And, as the doctrine arrests any effort by a human beneficiary to acquire the property in a manner other than that which the settlor intended, so does it arrest the efforts of corporations and unincorporated associations, whether or not they are charitable.

What constitutes "material purpose" is in large measure a question of fact, but a number of its attributes can be isolated. It does not require that every term of the trust, however standard, must be adhered to; it merely means that the essential dispositive and administrative scheme of the settlor's intention must be allowed to run its course. Where the trust is principally concerned with a single beneficiary and there is a deliberate postponement of enjoyment, or dispositive discretions such as are found in discretionary (or sprinkling) trusts or trusts for maintenance are given to the trustees, the courts have had no difficulty in describing these as the features of a material purpose. Simple successive interests create more problems. The existence of conditions precedent or subsequent will reveal material purpose, but the administrative powers of the trustees may be routine; the sole object of the trust is

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[111] 149 Mass. 19, 20 N.E. 454 (1889); see also *Shelton v. King*, 229 U.S. 90 (1913).

[112] (1959), para. 334; see now *Restatement, Trusts 3d*, para. 65.

[113] For a comment on the American case law, see (1978) 9 Texas Tech. L.R. 748.

[114] *Will of Hamburger*, 185 Wis. 270, 201 N.W. 267 (1924); *Scott and Ascher* at para. 34.4, p. 2247.

to preserve the capital during the life tenant's lifetime, making it available to the remainderman thereafter. In such a case, material purpose exists only if the preservation of the capital is found to have been an object in itself, or the settlor intended to protect the life tenant because of sex, age, inexperience, physical or mental incapacity, or a factor of that kind.[115]

Material purpose may indeed raise difficult issues of fact in the search for the settlor's implied intent, but the construction difficulties are no more troublesome than those experienced in any construction action. Moreover, the effort in a case like *Montreal Trust Co. v. Klein*[116] to discover a contingency in order to preserve the settlor's intended scheme of things suggests that the American effort to preserve the material purpose of the trust is not peculiar to American jurisdictions. In view of the convenience of the rule in *Saunders v. Vautier* as an instrument in estate planning, it will not be a popular suggestion that common law jurisdictions outside the United States should closely examine the merits of that rule. For many lawyers of the common law tradition, there is no reason why the law should restore a more even balance between implementing the intentions of the settlor and gratifying the wishes of the beneficiaries to acquire the settlor's capital without his terms. Nevertheless, it should be said, the genius of the common law trust is that, alone among methods of transfer, it permits a person to provide for others in a manner which seems to that person best. There is much to be said for the Pennsylvania position that the modification or termination of trusts should only be possible if the terms are impracticable or impossible to carry out, or the proposed modification or termination would more nearly accomplish the settlor's intent.[117] Impracticability is not necessarily established by a demonstration that trust termination would result in a saving of tax to the beneficiaries, any more than that the beneficiary or beneficiaries would prefer to have capital here and now without restrictions.

IV. TRUST TERMINATION IN ALBERTA AND MANITOBA

In view of the marked difference of philosophy between American and Commonwealth common law jurisdictions, it is of particular interest that Alberta and

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[115] Only if there is no material purpose still to be accomplished may one beneficiary sell his interest to another (see, *supra*, note 24) with a view to the trust being prematurely terminated.

[116] [1971] 4 W.W.R. 644, (sub nom. *Re Schumacher*) 20 D.L.R. (3d) 487 (Man. C.A.), affirmed [1973] S.C.R. vi (S.C.C.).

[117] See, e.g., *Pennsylvania Estates Act, 1947*, s. 2 [now 20 Pa. C.S. §6102], discussed in *Scott and Ascher* at para. 34.1.3. An accumulation trust in favour of a beneficiary will not be stopped unless the accumulation is unreasonable, unnecessary, or against public interest. If the trust no longer serves the settlor's evident intention, it may be prematurely terminated: *St. Paul's Church v. A.G.*, 164 Mass. 188, 41 N.E. 235 (1895).

Manitoba have legislatively departed from the rule in *Saunders v. Vautier*.[118] There were three positions which these provinces could have taken if greater significance was to be given to the settlor's intent: the first was to adopt the American material purpose doctrine, the second was to prohibit the termination of trusts in those factual circumstances which have excited judicial criticism of *Saunders v. Vautier*, and the third was to make all trust termination subject to judicial consent under the terms of the variation of trusts legislation.

The last of these is a compromise between the prohibition of the American position which heavily favours the settlor's intent, and the *Saunders v. Vautier* rule which as heavily favours the beneficiaries' contrary wishes. At the same time it avoids the "tinkering" with the problem that is implicit in merely prohibiting *Saunders v. Vautier* termination in certain circumstances. Moreover, it follows the principle already established in the variation of trusts legislation that the court will give its consent to an arrangement varying or revoking a trust where in its discretion the court "thinks fit" to do so.

Alberta in 1973[119] and Manitoba in 1983[120] adopted this third position. The object of the legislation may best be seen in the words accompanying the Alberta bill:

> This amendment will replace the rule to the extent of giving the court power to decide whether to permit termination or variation of the trust so that cognizance may be taken of the donor's intent, ignored in the application of the rule, and also of the interest of the donee.

The existing variation of trusts legislation is incorporated in the new legislation, so that the court continues to be concerned that any proposed arrangement is for the benefit of infants and unascertained, unborn or missing persons. But the legislation goes on to say that the court may consent only if

> in all the circumstances at the time of the application to the court the arrangement appears otherwise to be of a justifiable character.[121]

This means that the court may refuse its consent where, though all the beneficiaries are ascertained, capacitated, and have consented to the proposed arrangement, the alteration of the settlor's terms does not seem to be warranted.[122] It also means that

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[118] Implementing the recommendations of the Institute of Law Research and Reform, University of Alberta, in its Report No. 9 (The Rule in *Saunders v. Vautier*), February, 1972, and of the Manitoba Law Reform Commission in its Report No. 18 (The Rule in *Saunders v. Vautier*), January 1975, and its Report No. 49 (The Rules against Accumulations and Perpetuities), Appendix C, February 1982.

[119] S.A. 1973, c. 13, s. 12; now *Trustee Act*, R.S.A. 2000, c. T-8, s. 42.

[120] S.M. 1982-83-84, c. 38, s. 4, now *Trustee Act*, C.C.S.M., c. T160, s. 59.

[121] *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(7); *Trustee Act*, C.C.S.M., c. T160, s. 59(7)(b).

[122] The legislation in each of the two provinces applies to all trusts, arising before or after the amendments. Without limiting the generality of that, the legislation then sets out the precise circumstances in which application to the court must be made (*Trustee Act*, R.S.A. 2000, c. T-8, s. 42(3); C.C.S.M., c. T160, s. 59(3)). The enumeration is intended to provide for all the circumstances in which, or the methods by which, premature termination could be obtained under *Saunders v. Vautier*. By a

3. Essential Validity

If the settlor or testator had the required capacity, and the instrument creating the trust was formally valid, the question remains whether the actual trusts purportedly set up are permissible; that is a question of essential validity. Voidness for perpetuity, or the inability to create a non-charitable purpose trust, are examples of failures of essential validity.

(a) Common Law Rules

Once again, in the case of immovables, the traditional view is that the *lex situs* governs.[84] As far as movable property is concerned, the leading Canadian case regarding the common law rules is *Jewish National Fund v. Royal Trust Co.*[85] By the law of British Columbia a testamentary disposition of movables, purporting to create a charitable trust, was invalid; in New York, where the trust was to be set up and administered, it was valid. Under British Columbia law, the gift was too indefinite to constitute a charity, and it contravened the rule against perpetuities. New York law accepted its validity as a charitable trust, and therefore found no perpetuity objection. The majority in the Supreme Court came to the view that, had the terms of the trust required the New York trustees to maintain the trust fund and its administration within the state, they might have acceded to the argument that the law of the place of administration of the trust should govern the question of its essential validity, both as to charitable character and as to perpetuity. Since the trustees also were empowered to use the fund to purchase lands in places other than New York state, and thus to set up new trusts which might contravene the laws of other jurisdictions in the same manner as the terms of the testamentary trust contravened British Columbia law, the law of British Columbia as the law of essential validity of the dispositive instrument should prevail. The trust thus failed, and the property in question passed to the next-of-kin. The minority in the court would have taken the view that, once the administration of the deceased's estate has ended, it is irrelevant what the law governing the essential validity of the will would have said about the trust. The essential validity and the administration of the trust, as a trust, were matters for New York to determine. The minority would have decided that New York, as the place of intended administration, should determine matters of essential validity, and that once transfer had been made to the trustees it is for the law of the place of administration to determine any subsequent questions.[86]

There is much to be said for the minority view. It is crisp and draws clear lines; it decides when the law of the place of administration shall prevail over the law governing the essential validity of the dispositive instrument, and it confirms the clear line which is emerging between administration of a deceased's estate and

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[84] *Parkhurst v. Roy* (1882), 7 O.A.R. 614; Castel and Walker, *supra*, note 81, at §28.3.a.

[85] *Supra*, note 52.

[86] The minority was particularly attracted toward this view because New York would have regarded the disposition as valid.

administration of the testamentary trust. The first ends when, the estate being wound up, the property intended for the trust is transferred to the trustees. It ends for all purposes, including the relevance of any of the laws governing the validity of the will. The trust is a form of property enjoyment which follows after estate administration; it is as independent of the will as the decision of the absolute legatee with regard to how he will enjoy his legacy on receipt from the executors. Unfortunately, however, this was not the judgment that prevailed.

The law as it appears from the majority judgment is that as a general rule the essential validity law of the will governs any disposition made by the will, including a trust disposition, except *perhaps* where the trust is to be wholly carried out in one jurisdiction, or possibly in one or more jurisdictions, specified in the will, which would hold the trust to be valid. However, it is highly questionable in Canada – says the majority – whether the residence or domicile of the trustees would be permitted to determine the essential validity of a testamentary trust. Such a thing is contrary to the general rule already explained, and would produce uncertainty and inconvenience in the administration of estates; for instance, the residence or domicile of trustees may change from an initial jurisdiction which invalidates the trust to one which validates it, and *vice versa*.[87] Logically, of course, this uncertainty argument would apply to *inter vivos* trusts also. One can only say, with respect, that this judgment is contrary to all current thinking on the subject, indeterminate in its applicability, and wanting in analysis.[88] It is more than disappointing as the only major reported decision of the Supreme Court of Canada on the subject of trusts and the conflict of laws.[89]

While there remain few decisions, there is a detectable movement, at least in academic commentary, towards an approach based on the "proper law of the trust." This is a test which certainly takes account of the expressed or implied intention of the settlor or testator.[90] In the absence of a clear intention, the proper law is the law

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[87] [1965] S.C.R. 784 (S.C.C.) at 792.

[88] The majority considered that the New York trustees might seek to purchase lands in other jurisdictions where also the terms of the trust were invalid. But surely, if the place of the intended land purchase would rule the terms of the trust imposed on the land to be invalid, the New York trustees simply would not purchase there. And, even if they did, any such problem would be for the *lex situs* in the normal manner. Potential *leges situs* do not require advance protection provided by the law of essential validity of the will.

[89] In the Canadian jurisdictions that have adopted the Hague Convention, the authority of this decision is gone, except perhaps in those jurisdictions where common law rules may still govern intra-Canadian conflicts (on which see, *supra*, Part I B).

[90] *Chellaram v. Chellaram*, *supra*, note 57; *Branco v. Veira*, *supra*, note 76; Castel and Walker, *supra*, note 81, at §28.2. See also the *dictum* of Lawrence Collins J. in *Chellaram v. Chellaram (No. 2)*, [2002] 3 All E.R. 17 (Eng. Ch. Div.) at para. 166. The settlor's intention is thought to be particularly determinative regarding the legal system governing construction of the instrument: see, for example, *Re Wilkison* (1933), [1934] O.R. 6, [1934] 1 D.L.R. 544 (Ont. H.C.). Note, however, the suggestion in *Royal Trust Corp. of Canada v. S. (A.S.)*, 2004 CarswellAlta 437, 35 Alta. L.R. (4th) 32, 7 E.T.R. (3d) 213 (Alta. Q.B.), at para. 31, that rules of construction are universal in nature. Nevertheless, these rules can still produce something less than universality of result. In *Kelemen v. Alberta (Public Trustee)*, 2007 CarswellAlta 117, 71 Alta. L.R. (4th) 366, 32 E.T.R. (3d) 255 (Alta. Q.B.), the instrument referred to the "age of majority", and this varies between systems.

with which the trust has the closest and most real connection."[91] A frequently expressed view is that intention cannot govern if the chosen legal system has no significant relationship to the trust."[92] If the settlor's choice were disqualified on this ground, the court would have to find the proper law of the trust, objectively determined.

In order to find the proper law, the court will consider a range of objective factors. These are likely to be similar to the factors that are listed in art. 7 of the Hague Trusts Convention, and the slightly different list of factors in provincial legislation governing intra-Canadian conflicts."[93] The factors mentioned in the Convention are the place of administration of the trust designated by the settlor; the *situs* of the assets of the trust; the place of residence or business of the trustee; and the objects of the trust, together with the places where they are to be fulfilled."[94]

Where a trust comprises both movables and immovables, can there be different governing laws? It is arguable that the *lex situs* of the immovables should not necessarily be determinative."[95] There is surely much force in this argument."[96] In *Vermont Loan & Trust Co. v. Ennis*,"[97] which involved a trust for bondholders and a vesting of the title to mortgaged land in the trustee, the mortgaged land was in Saskatchewan. The Saskatchewan court refused the trustee's request for a declaration ending the trusteeship. The main reason was that the trustee had placed itself in a position of profit conflicting with its duty, but Mackenzie J.A. also thought it might not be right to determine the trust since there might be personal actions available to the bondholders against the trustee in Vermont. This at least recognizes the significance of the place of administration, even in a case of an immovable.

(b) The Convention and the Statutes

Under the Convention, the law governing the trust is determined by arts. 6 and 7:

> 6. A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

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[91] The law of Quebec also defers to settlor choice, and then, in the absence of an effective choice, looks to the law with which the trust is most closely connected: *Civil Code of Quebec*, arts. 3107-3108.

[92] Castel and Walker, *supra*, note 81, at §28.2.b; *Lewin* at 417.

[93] Both lists are discussed in the next section.

[94] See the discussion of the common law rules for trust administration, and in particular a more detailed discussion of common law connecting factors, including whether recent developments in taxation cases might influence the conflict of laws analysis, *infra*, Part II.B.1.a.

[95] *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed. (2006) at para. 29-037; McClean and Beevers, *Morris: The Conflict of Laws*, 7th ed. (2009) at 496.

[96] The *Conflict of Laws Rules for Trusts Acts* do however specify that different legal systems can govern different assets in the same trust (S.N.B., s. 5(1); R.S.B.C., s. 4(1)). The Convention (art. 9) contemplates that different systems can govern "severable aspects," and this could be read as contemplating that different legal systems could govern different assets in the same trust.

[97] [1933] 2 W.W.R. 397 (Sask. C.A.).