UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

UNIFORM TRUSTEE ACT
Progress Report

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Ottawa, Ontario
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UNIFORM TRUSTEE ACT

Report on the Uniform Trustee Act Project

[1] At the Annual Meeting of the Uniform Law Conference of Canada (ULCC) in August, 2008, Arthur Close, QC and Peter Lown, QC presented a proposal for a new project to prepare a Uniform Trustee Act to replace the existing provincial and territorial trustee statues in the provinces and territories.

[2] The current statutes are very outdated, increasingly problematic and costly, and hence badly in need of reform. Given the commonality of the principles of trust law and the patchwork nature of the existing statutes, harmonization would be both appropriate and beneficial.

[3] It was proposed that a uniform act should be capable of national enactment and without provisions specific to any individual jurisdiction; adapted to modern usage and needs; and based on the most recent comprehensive and critical examination of the law of trusts: the seven year study of the British Columbia Law Institute (BCLI) Committee on the Modernization of the Trustee Act, which resulted in the Report of 2004, entitled *A Modern Trustee Act for British Columbia*.

[4] It would also be informed by Saskatchewan's new *Trustee Act, 2008* and by the 2007 Symposium of the Society of Trust and Estate Practitioners of Canada entitled 'Trust Law Reform in Canada', which recommended that uniform trustee legislation be prepared on the basis of the British Columbia Law Institute Report.

[5] To accomplish a uniform act, it was proposed that a working group be established and directed to develop drafting instructions; report to the 2009 annual meeting on progress and on any policy issues it may determine to be necessary to bring before the

Civil Section; and prepare a draft Uniform Trustee Act and commentaries for presentation to the 2010 Annual Meeting.

[6] The Civil Section resolved that a working group be established and be so directed.

[7] The working group was established with the following members: Greg Blue of the BCLI, Arthur Close QC, Executive Director Emeritus of the BCLI, Rod Fehr of the BC Ministry of Attorney General, Russell Getz of the BC Ministry of Attorney General, John Gregory of the Ontario Ministry of the Attorney General, Joanna Knowlton, Public Trustee of Manitoba, Peter Lown QC, of the Alberta Law Reform Institute, Tim Rattenbury of the New Brunswick Department of Justice, Philip Renaud QC, of Duncan and Craig LLP, Edmonton, Alberta, Madeleine Robertson of Saskatchewan Justice, and Donovan Waters QC, of Horne Coupar, Victoria, BC.

[8] The working group has met a number of times by telephone conference. It has completed its review and analysis of the recommended provisions and commentary in the Proposed Trustee Act in the BCLI Report. A drafting sub-group comprised of Arthur Close, Greg Blue, Russell Getz and Rod Fehr as legislative counsel has begun the preparation of a draft.

[9] As anticipated, the working group has identified several issues of policy for the Conference's consideration.

Policy Issues

1. Ability of Trustees to Act by Majority

[10] The Proposed Trustee Act in the British Columbia Law Institute Report contains a provision, set out in Section 12 of the proposed Act, that if there is more than one trustee, they may act by majority unless the terms of the trust provide otherwise.

[11] This is a major change. It reverses the existing default rule that trustees must act with unanimity if the terms of the trust are silent on the matter. This proposed change brings the rule respecting private trusts into accord with the existing rule respecting charitable (or public) trusts under which trustees have been authorized since the late eighteenth century to act by majority decision. It also brings the default rule into accord with actual practice: it is common for trust instruments to empower trustees expressly to act by majority. The reason for this is that it promotes the efficient management of trust property and limits the need for court involvement in trustee decision making.

[12] A settlor would still be able to override the majority rule by requiring the trustees to act unanimously. Where there is no majority or the terms of the trust require unanimity and the trustees are deadlocked, any trustee may apply to the court for an order resolving the matter. A trustee who disagrees with the majority decision or action may state it in writing, but must join with the others in carrying out the majority decision, unless it is illegal. A trustee who states a disagreement in writing would not be liable for any breach of trust or any loss resulting from the majority act or decision.

[13] Several Commonwealth jurisdictions have changed the unanimity rule, as have the majority of U.S. states.

[14] This new rule would be a default rule which could of course be displaced by the terms of a given trust instrument.

[15] The consensus of the working group was in favour of this proposed change subject to its being made prospective in nature, and hence not affecting existing trust arrangements.

2. Variation and Termination of Trusts and the Rule in *Saunders v. Vautier*

[16] Changing or unforeseen circumstances can arise that might require a trust to be amended. Historically however, the courts have had a very limited power to amend the terms of a trust.

[17] The Rule in *Saunders v. Vautier* allows beneficiaries to terminate a trust 'prematurely', that is, before the occurrence of events contemplated in the trust instrument, without court approval, provided that all the beneficiaries are ascertained, of full age and capacity, and in agreement.

[18] The law is unclear as to whether beneficiaries may also *vary* the terms of a trust. A number of jurisdictions have legislation in which the power of the court is somewhat broadened. However, there remains a need for more comprehensive reform to allow trusts to be amended more effectively and efficiently. The relevant elements are: the kinds of amendments that may be made; by whom; and on whose behalf a court may approve an amendment.

[19] Section 55 of the Proposed Trustee Act in the British Columbia Law Institute Report embodies three significant changes to the law respecting the variation and termination of trusts:

[20] 1. It would provide that a trust may be *varied*, as well as terminated without court approval if all the beneficiaries having vested or contingent interests are ascertained, are of full age and capacity, and consent to the proposal. The term used is 'arrangement' which is broadly defined to include a resettlement and revocation of a trust as well as modification of trustee powers or beneficial interests.

[21] Allowing a trust to be changed by the unanimous action of the beneficiaries if they are all of full age and capacity would recognize that there can be practical reasons why all such beneficiaries may wish and agree to effect changes to a trust rather than to terminate it; and to so enable them would also be consistent with the existing ability of such beneficiaries, by their combined action, prematurely to terminate a trust. It would

enable capable, adult beneficiaries to deal with what is after all their property as they determine. The BC Law Institute *Report on the Variation and Termination of Trusts* concluded that the Rule in *Saunders v. Vautier* 'has worked well 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' (page 4). The report also submitted that it would also be more efficient and less expensive than requiring court approval; and noted that most correspondents in the consultation process supported this approach.

[22] 2. It is also important that there should be machinery to amend a trust where not all beneficiaries have the above mentioned characteristics. Section 55 would, with one major addition indicated below, follow existing legislation in giving the court power to approve a termination or variation on behalf of the following persons, having regard to their benefit and interests: a minor or otherwise incapable person, a person whose existence or whereabouts cannot be established despite reasonable measures, an unborn person, a person in respect of an interest that may arise by reason of an immediate or postponed discretionary trust, or as a result of a mere power of appointment.

[23] It would provide a significant addition by expressly conferring on the court the power to consent to an arrangement on behalf of *a charitable purpose or charitable organization*, whether it is organised either as a trust or a corporation. By making this express provision, this change would clarify that the court has the power to approve arrangements on behalf of beneficial interests in this crucial field.

[24] 3. The third change is that a power would be conferred upon the court to approve an arrangement on behalf of a beneficiary of full age and competence who *opposes* the proposed arrangement, but only under the following conditions: the arrangement would not be detrimental to that beneficiary's financial interest; it has been approved by a substantial majority of the beneficiaries representing a substantial majority of the trust's monetary obligations (or where necessary, by the court on behalf of incapable beneficiaries); and where not to do so would be detrimental to the administration of the trust and the interests of the other beneficiaries.

[25] As the commentary in the British Columbia Law Institute Report notes, these conditions would not be easily met and would likely be used only where the beneficial interests are widely distributed and a very small number of intransigent beneficiaries are blocking a change desired by all the other beneficiaries. This reform would permit the court to approve an arrangement in such circumstances if all the above described conditions are met. An example of its use might be the restructuring of a pension trust.

[26] Alberta and Manitoba have reformed the Rule in *Saunders v. Vautier,* to allow for variation as well as termination of trusts. However, they have adopted a different approach of providing that court approval of any proposed variation or premature termination would be necessary in *all* circumstances, even where all the beneficiaries are ascertained, of full age and capacity, and are in agreement. The purpose and benefit of this approach is to allow an inquiry and consideration to be made of the settlor's intentions, so as to be able to determine if the proposed arrangement is consistent with or contrary to those intentions. It may however give rise to an increase in the number of court applications, and hence an increase in expense for trusts. The working group has concluded that the BCLI recommendations would be preferable.

3. Charitable Trusts and Non-Charitable Purpose Trusts

[27] In considering this subject, the working group discussed the potential alternative of recommending that this area of trust law be addressed in a uniform general charitable law statute that would embody the reforms of recent statutes in several other commonwealth jurisdictions.

[28] Having discussed this option, the working group decided to continue to include the recommended reforms in Part X of the proposed Uniform Trustee Act in the BCLI Report. The Uniform Trustee Act project mandate, pursuant to the 2008 resolution of the Conference, is that the British Columbia Law Institute Report of 2004 should be the basis for the project. The development of a uniform general charitable law statute would be a major undertaking, and there is of course no such project presently underway. The

recommendations for reform contained in Part X of the British Columbia Law Institute's Report constitute substantial and much needed improvements to the law and the opportunity afforded by this project to effect such needed reforms to this area of law should not be lost.

[29] Having so concluded, the working group wanted to indicate that it recognizes the significance and promise of thoroughgoing legislative reform as has occurred in this area of the law and that it would be worthwhile to explore the possibility of a modern and comprehensive uniform act respecting the law of charities.

4. The Rule against Perpetuities and the Rule against Accumulations

[30] In recent years, the rules against perpetuities and accumulations have been the subject of considerable critical scrutiny. Some jurisdictions such as Alberta, British Columbia and Ontario have legislated reforms of the rule against perpetuities. Despite such efforts, the rule is still widely regarded as highly technical and complex. As the 1987 Report of the Saskatchewan Law Reform Commission *Proposals Relating to the Rules against Perpetuities and Accumulations* states*:* 'Nevertheless, the reformed rule cannot, by its very nature, eliminate all of the problems that exist under the common law.'

[31] In 1982, Manitoba abolished the rules against perpetuities and accumulations, pursuant to the Manitoba Law Reform Commission's 1982 *Report on the Rules Against Perpetuities and Accumulations.* The Saskatchewan *Trustee Act, 2008*, also abolished the rules against perpetuities and accumulations, as recommended by the 1987 Report of the Saskatchewan Law Reform Commission, *Proposals Relating to the Rules against Perpetuities and Accumulations*. Also, the rule against accumulations is no longer operative in Alberta and British Columbia.

[32] The reason for these recommendations is that the social and economic conditions of seventeenth and eighteenth century English landed society that gave rise to the rules no

longer obtain, and it is a matter of concurrence that it is no longer a concern of any significance as settlors do not generally seek to tie up property by trying to control trans-generational dispositions ‘in perpetuity’. It has been more likely the case that bequests might inadvertently fail due to the application of the rules.

[33] The Manitoba and Saskatchewan Law Reform Commissions concluded that potential instances, however unlikely, of someone endeavouring to do so are better addressed by means of modern trust variation legislation, rather than by relying on the application of a complicated rule and technical body of law, with its attendant difficulties. This is also the conclusion of the working group.