

UNIFORM TRUSTEE ACT

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PART 1 – DEFINITIONS AND APPLICATION

Definitions

1 In this Act:

“**alter ego trust**” has the same meaning as in the *Income Tax Act* (Canada);

Comment: This term is used in sections 38 (1) and 42 (2).

“**court**”, except in reference to a court of competent jurisdiction, means the *[superior court of the enacting jurisdiction]*;

Comment: This term is used throughout the Act.

“**fiscal period**”, in relation to a trust, means the following:

- (a) the period identified in the trust instrument as the period adopted for accounting purposes;
- (b) if paragraph (a) does not apply, the period specified by the trustee as the period adopted for accounting purposes;
- (c) if paragraphs (a) and (b) do not apply, the calendar year;

Comment: This term is used in sections 28 (1) and (2) and 40 (9) and (10).

“**incapacitated person**” means *[to be defined by the jurisdiction]*;

Comment: This term is used in sections 14, 46, 61 (1), 67 (3) and 99 (1).

“**joint spousal or common-law partner trust**” has the same meaning as in the *Income Tax Act* (Canada);

Comment: This term is used in sections 38 (1) and 42 (2).

“**objects**”, in relation to the objects of a trust, means beneficiaries or purposes;

Comment: This term is used throughout the Act.

“**post-1971 spousal or common-law partner trust**” has the same meaning as in the *Income Tax Act* (Canada);

Comment: This term is used in sections 38 (1) and 42 (2).

“**pre-1972 spousal trust**” has the same meaning as in the *Income Tax Act* (Canada);

Comment: This term is used in sections 38 (1) and 42 (2).

“**qualified beneficiary**”, in relation to a trust, means a beneficiary who

- (a) has a vested beneficial interest in the trust property, or
- (b) has delivered notice to a trustee under section 101 (1) and has not withdrawn the notice under section 101 (2);

Comment: This term is used in sections 27 (5) and (6), 28 (1) and (3), 29 (2), 50 (6), 65 (2) and (3), 67 and 101.

“**secured party**” means a person who has a security interest;

Comment: This term is used in sections 2 (7), 55 (5), 85 and 96 (1).

“security interest” means an interest in property that secures payment or performance of an obligation;

Comment: This term is used in sections 1 [“secured party”], 2 (7), 24 (2), 35 [“outgoing”], 44 (2) and 85.

“settlor”, in relation to a trust created by a will, includes a testator;

Comment: This term is used in sections 40 (4) and (6), 64 (7), 70 (2) and (4) and 74 (7) to (9) and (11).

“transfer”, in relation to property, means to transfer by any method, including

- (a) to assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest or release, or
- (b) to agree to do any of the things referred to in paragraph (a);

Comment: This term is used throughout the Act.

“trust instrument” means any of the following that create or vary a trust:

- (a) a deed, will or other legal instrument;
- (b) an enactment, other than this Act;
- (c) an oral declaration,

but does not include a judgment or an order of a court of competent jurisdiction;

Comment: This term is used throughout the Act. In most jurisdictions, the term “enactment” includes regulations.

“vest” includes to vest by means of any of the following:

- (a) an order of a court of competent jurisdiction;
- (b) the terms of a trust instrument or other legal instrument;
- (c) the operation of section 21 (1) or (3).

Comment: This term is used throughout the Act.

Application of Act

- 2 (1) Subject to this section, this Act applies in respect of a trust created before, on or after the date this section comes into force.
- (2) Subsection (1) is subject to the following provisions of this Act:
 - (a) section 38 (1) [*apportionment of outgoings between income and capital*];
 - (b) section 40 [*total return investment*];
 - (c) section 42 (2) [*application of distributive powers to specified trusts*];
 - (d) section 53 (1) [*trustees may act by majority*];
 - (e) section 54 [*trustee abstentions*];
 - (f) section 55 [*allocation of insurance proceeds*];
 - (g) section 63 [*application of Part 6*];
 - (h) section 70 (1) [*power of court to vary charitable gifts and charitable trusts*];
 - (i) section 76 [*disposition purporting to create non-charitable purpose trust construed as power to appoint*];
 - (j) section 90 [*application of Part 9 – unreformed provinces*];

- (k) section 91 [*rule against perpetuities – reformed provinces*];
 - (l) section 92 [*accumulations of income*].
- (3) This Act, except Part 9 [*Perpetuities and Accumulations*], does not apply in respect of the following trusts:
- (a) an implied trust;
 - (b) a resulting trust;
 - (c) a constructive trust;
 - (d) any other trust that arises by operation of law other than an enactment.
- (4) Subject to subsection (5), the provisions of a trust instrument prevail over any contrary provision of this Act.
- (5) The following provisions of this Act prevail over any contrary provision of a trust instrument that is not an enactment:
- (a) section 9 [*power of court to appoint trustee*];
 - (b) section 13 [*resignation by trustee*];
 - (c) section 16 [*power of court to remove trustee*];
 - (d) section 17 [*power of court to reinstate trustee*];
 - (e) section 20 [*joint tenants*];
 - (f) section 21 [*vesting*];
 - (g) section 23 [*vesting orders*];
 - (h) section 25 [*power of court to confer further powers on trustees*];
 - (i) section 55 [*allocation of insurance proceeds*];
 - (j) section 59 [*arrangement effective on unanimous consent*];
 - (k) section 60 [*arrangement effective with court approval*];
 - (l) section 64 [*compensation of trustee*];
 - (m) section 70 [*power of court to vary charitable gifts and charitable trusts*];
 - (n) section 72 [*power to order sale of property – charitable trust*];
 - (o) section 76 [*disposition purporting to create non-charitable purpose trust construed as power to appoint*];
 - (p) section 79 [*trustee may apply to court for directions*];
 - (q) section 80 [*trustee may apply to court for order respecting distribution of trust property*];
 - (r) section 81 [*trustee may be relieved of liability for breach of trust*];
 - (s) section 84 [*payment into court*];
 - (t) Part 9 [*Perpetuities and Accumulations*];
 - (u) section 95 [*assumptions if notice of trust*];
 - (v) section 96 [*purchaser takes property subject to trust if notice of defect*];
 - (w) section 97 [*person not liable if compliant with Act or order*].
- (6) The following provisions of this Act do not apply to a trust that arises by operation of an enactment:
- (a) Part 2 [*Appointment and Removal of Trustees*];

- (b) section 28 [*duty to report to qualified beneficiary*];
 - (c) section 29 [*duty to provide information*];
 - (d) Division 5 [*Distributive Powers*] of Part 4;
 - (e) section 50 [*power to delegate by power of attorney*];
 - (f) Part 6 [*Trustee Compensation and Accounts*];
 - (g) Part 7 [*Charitable Gifts, Charitable Trusts and Non-Charitable Purpose Trusts*].
- (7) This Act does not apply to a secured party in possession of the subject matter of the security interest.
- (8) If a person is both a personal representative and a trustee with respect to all or part of the same estate, this Act does not apply in respect of a matter relating to the person in his or her capacity as personal representative.

Comment: This section defines the scope and limits of the application of the Act.

Subsection (1) embodies the general policy that, subject to the limits that are set out in the subsequent subsections, the Act applies to trusts whether created before, on or after the coming into force of this section.

Subsection (2) provides that the scope of the general rule in subsection (1) is subject to a number of listed provisions which contain their own specific application rules.

Subsection (3) provides that, except for Part 9 respecting perpetuities and accumulations, the Act does not apply to implied trusts, resulting trusts or constructive trusts. Such trusts arise not by express intent, but rather by an intent imputed or presumed by law or declared by a court to exist, for reasons of fairness and justice or to give a remedy to a deserving party. Because these kinds of trusts pertain to specific and limited purposes and circumstances, it would not be appropriate that the provisions of this general statute apply to them. Similarly, the Act does not apply to any other type of trust that arises by operation of law (other than by enactment, which is the subject of subsection (6)).

Subsection (4) provides that, subject to certain provisions listed in subsection (5), the terms of a trust instrument prevail over any contrary provision of the Act. This subsection expresses the foundational characteristic of the Act: it provides for rules that apply when a trust instrument creating a trust is silent. That is, the Act governs a trust that is within its scope of application, subject to the terms of the given trust instrument. Accordingly, with the exception of a limited number of specified provisions in the Act, a trust instrument can prevail over the Act. Those provisions of the Act that are mandatory and cannot be displaced or modified by a trust instrument are set out in subsection (5).

Subsection (5) sets out the provisions of the Act that prevail over any contrary term of a trust instrument that is not an enactment. Each of the provisions listed embodies a rule considered to be of such importance that it ought not to be able to be displaced by the settlor of a trust.

Subsection (6) provides that certain listed provisions of the Act do not apply to a trust that arises by operation of an enactment. A statute may provide that a particular relationship gives rise to a trust. An example is a provision of the *Income Tax Act* (Canada) that deems a person who withholds tax to be a trustee holding the amount of the tax in trust for the benefit of the Crown. The provisions set out pertain to matters that are not properly applicable to statutory trusts.

Subsection (7), in providing that the Act does not apply to a secured creditor in possession of the property that is the subject matter of the security interest, makes it clear that the Act does not apply to mortgage relationships, which are governed by other rules of law.

Subsection (8) is intended to clarify that if a person who is a trustee with respect to testamentary disposition is also a personal representative, the Act applies only in respect

of matters pertaining to the trust, and not in respect of any matter relating to the person's role as personal representative.

Note: Each jurisdiction should examine its succession law statutes to determine if there might be provisions that would be exceptions to which subsection (8) would be subject.

Continuation of existing rules

3 The rules of common law and equity, except insofar as they are inconsistent with the provisions of this Act, continue to apply.

Comment: This section provides that this Act does not affect the application of any existing rules of law that are not inconsistent with this Act.

Trust is not a person

4 For greater certainty, nothing in this Act makes a trust a person.

Comment: This section clarifies that no provision of this Act is intended or is to be construed as conferring legal personality on a trust, which in law is a justiciable relationship of obligations and entitlements with respect to property.

PART 2 – APPOINTMENT AND REMOVAL OF TRUSTEES

Division 1 – Appointment of Trustee

Designated person

- 5** (1) In this Division, “**designated person**”, in relation to a trust, means
- (a) the person determined under subsection (2), or
 - (b) if no person is determined under subsection (2), the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]*.
- (2) The person determined for the purposes of paragraph (a) of the definition of “designated person” is the first of the following persons, proceeding in descending order, who is able and willing to act as a designated person:
- (a) the person nominated by the trust instrument for the purpose of appointing a substitute trustee;
 - (b) except in relation to section 8 (2) (a), the continuing trustees;
 - (c) the *[personal representative as referred to in the enacting jurisdiction]* of the last remaining trustee;
 - (d) the beneficiary, if the trust arises by operation of an enactment.
- (3) If more than one person is nominated by a trust instrument for the purpose of appointing a substitute trustee, the nominated persons may act by majority.
- (4) The nominated persons referred to in subsection (3) are unable to act if a majority of them cannot agree on the appointment of a substitute trustee.
- (5) If there is more than one beneficiary of a trust and the beneficiaries are determined under subsection (2) to be the designated person, the beneficiaries by majority in interest in the trust property may act jointly as the designated person.
- (6) A designated person, other than a person referred to in subsection (2) (b),

- (a) may appoint himself or herself as a substitute trustee, and
- (b) may be appointed as a substitute trustee.

Comment: This section designates those persons who have the authority to appoint substitute or additional trustees. The persons listed in subsection (2) in that order of priority may appoint a substitute or additional trustee. Only one category of persons has the exclusive right to appoint trustees at any given time. If a given category is unable or unwilling to act, the power to appoint passes to the next category.

Subsection (3) provides that if a trust instrument names 2 or more persons to act in appointing new trustees, they may act by majority. Subsection (4) provides that if they are unable to agree, they are deemed incapable of acting. New trustees would then need to be appointed either by a designated person holding appointment authority next in the hierarchy or by the court under section 9.

Appointment of substitute trustee

- 6** (1) A designated person may appoint in writing a substitute trustee in any of the following circumstances:
- (a) subject to subsection (2), a person who was trustee is deceased or a person appointed as trustee dies before taking office;
 - (b) the trustee is a corporation that is dissolved;
 - (c) a person disclaims the office of trustee;
 - (d) a person ceases to hold the office of trustee under section 12.
- (2) A designated person referred to in section 5 (2) (c) and (d) or the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]* may not appoint a substitute trustee under subsection (1) (a) of this section if a person appointed under section 7 accepts the office of trustee.

Comment: This section concerns the non-judicial appointment of substitute trustees. Subsection (1) sets out the circumstances in which the designated person may appoint a substitute trustee to take the place of a trustee who has died, a dissolved corporate trustee, a person who has refused to serve as a trustee, a person who resigns, a person who ceases to be qualified by reason of incapacity, a person convicted of an offence involving dishonesty, a person who is an undischarged bankrupt, a corporate trustee that is in liquidation or a person who is removed as trustee under this Act or by a power under the trust instrument. Subsection (2) prevents the personal representative of the last remaining trustee, the beneficiary under a statutory trust or the Public Guardian and Trustee from appointing a substitute trustee if the trustee is deceased, in the event that a person appointed under section 7 accepts the office of trustee (that is, if a person is appointed in writing by a sole trustee or the last remaining trustee to be a substitute trustee after the trustee's death).

Sole or last remaining trustee may appoint substitute trustee

- 7** Subject to the appointment of a substitute trustee by a person nominated by the trust instrument for that purpose, a sole trustee, or the last remaining trustee, may appoint in writing one or more persons to be a substitute trustee after the sole or last remaining trustee's death.

Comment: This section provides that, subject to the appointment of a substitute trustee by a person so nominated by the trust instrument, a sole trustee, or the last remaining trustee, has the power to appoint successors to assume the office of trustee after the sole or remaining trustee's death.

Temporary absence or incapacity of trustee

- 8** (1) This section applies if a trustee is temporarily unable to participate in the administration of the trust by reason of an absence or incapacity that does not result in the trustee ceasing to hold office under section 12 (b).
- (2) The designated person, in writing, may
- (a) authorize a continuing trustee, or
 - (b) if there is no continuing trustee, appoint a person to act as a substitute trustee,
- for the period that the trustee is absent or incapacitated, to administer all or part of the trust or to exercise the powers or perform the duties authorized by the designated person.
- (3) The administration of the trust, exercise of powers or performance of duties by the continuing trustee or substitute trustee is deemed to be as valid as if the absent or incapacitated trustee were not absent or incapacitated and had participated in the administration of the trust, exercise of powers or performance of duties.

Comment: This section provides that if a trustee is temporarily unable to act, a designated person may either authorize a continuing trustee or appoint a substitute trustee to administer the trust or to exercise the powers or perform the duties of the trustee.

Power of court to appoint trustee

- 9** (1) The court may appoint a substitute or additional trustee if
- (a) the court removes a trustee under section 16, or
 - (b) the court is of the opinion that
 - (i) the appointment of a trustee would otherwise be inexpedient, difficult or impracticable, and
 - (ii) the appointment of a substitute or additional trustee is in the best interests of the objects of the trust.
- (2) In appointing a substitute or additional trustee under subsection (1), the court may do one or more of the following:
- (a) appoint any person, including a court official, as a trustee;
 - (b) designate the person appointed under paragraph (a) as a judicial trustee;
 - (c) order that the judicial trustee is to act as a sole trustee, as a co-trustee or in place of all existing trustees.
- (3) A judicial trustee is an officer of the court.
- (4) The court may give directions to a judicial trustee in regard to the trust or the administration of the trust, with or without an application for directions under section 79 or 80.
- (5) The court may determine or provide for the compensation of a judicial trustee that is to be paid out of the trust property and designate all or part of the trust property as the source for the compensation.

Comment: This section deals with the court's power to appoint substitute or additional trustees. A person appointed as a trustee by the court may either be an ordinary trustee or a judicial trustee. A judicial trustee is an officer of the court and would act subject to the supervision

of the court. A court might appoint a judicial trustee instead of an ordinary trustee if, for example, the existing trustees are unable to agree on important matters in the administration of the trust. The court may provide for the compensation of the judicial trustee, which is appropriately a matter for the court given that the judicial trustee is an officer of the court.

Person not qualified to be appointed trustee

10 A person is not qualified to be appointed as a trustee if any of paragraphs (a) to (d) of section 14 apply to the person.

Comment: This section provides that a person is not qualified to be appointed as a trustee if that person is an incapacitated person, has been convicted of an offence involving dishonesty, is an undischarged bankrupt or is a corporation in liquidation.

Powers and duties of new trustees

11 A substitute or additional trustee appointed in accordance with this Act has the same powers and duties and may in all respects act as if originally appointed as a trustee by the trust instrument.

Comment: This section clarifies that substitute or additional trustees appointed in accordance with this Act are to be treated in the same way as trustees appointed by the trust instrument. This ensures the efficient management of trust property when there is a change of trustees.

Division 2 – Trustee Ceases to Hold Office

Person ceasing to hold office of trustee

12 A person ceases to hold the office of trustee in any of the following circumstances:

- (a) the person resigns the office;
- (b) the person ceases to be qualified to hold the office under section 14;
- (c) the person is removed as a trustee under this Act or under a power conferred by a trust instrument.

Comment: This section provides that a person ceases to be a trustee if the person resigns, is an incapacitated person, is convicted of an offence involving dishonesty, is an undischarged bankrupt, is a corporation in liquidation or is removed under this Act or under the trust instrument.

Resignation by trustee

13 A person may resign the office of trustee by delivering a written resignation

- (a) to the first of the following persons, proceeding in descending order, who exists in relation to the trust:
 - (i) each person nominated by the trust instrument for the purpose of appointing a substitute trustee;
 - (ii) each continuing trustee, or
- (b) if no person exists under paragraph (a), to the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]*.

Comment: This section sets out the procedure to be followed in the event of the resignation of a trustee. This is a mandatory section.

Note: Each jurisdiction should confirm whether its Public Guardian and Trustee is the appropriate party to which paragraph (b) should refer.

Person not qualified to hold office of trustee

- 14** A person ceases to be qualified to hold the office of trustee if any of the following apply to the person:
- (a) the person is an incapacitated person;
 - (b) the person has been convicted of an offence involving dishonest conduct under
 - (i) an enactment, or
 - (ii) a law of Canada or another province of Canada;
 - (c) the person is an undischarged bankrupt;
 - (d) the person is a corporation that is in liquidation.

Comment: This section sets out the characteristics disqualifying a person from being a trustee: legal incapacity, conviction for an offence involving dishonesty, undischarged bankruptcy or a corporation in liquidation.

Removal of unfit trustee

- 15** (1) A person is not fit to hold the office of trustee if
- (a) the person
 - (i) fails to demonstrate the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person,
 - (ii) consistently fails to respond to communications from a beneficiary or another trustee, or
 - (iii) is otherwise unwilling or unable, or unreasonably refuses, to act cooperatively with other trustees, and
 - (b) the person's conduct is detrimental to the efficient or proper administration of the trust.
- (2) Subsection (3) applies if there are 3 or more trustees.
- (3) If the fitness of a trustee to hold office is questioned, a majority of the other trustees may remove the trustee from office by a written resolution setting out the reasons for the removal if the majority determines that the trustee is not fit to hold office.
- (4) A resolution under subsection (3) is effective,
- (a) if the trustee that is the subject of the resolution does not request a meeting under subsection (5), 15 days after a copy of the resolution is delivered to that trustee, or
 - (b) if the trustee that is the subject of the resolution requests a meeting under subsection (5), at the conclusion of the meeting, unless the resolution is rescinded.
- (5) Within the 15-day period after a copy of the resolution is delivered to the trustee that is the subject of the resolution, that trustee, by delivering a written request to another trustee, may request a meeting with the other trustees to respond to the reasons set out in the resolution.

- (6) A meeting requested under subsection (5) must take place as soon as practicable.
- (7) After the trustee responds to the reasons set out in the resolution, the other trustees may rescind the resolution.

Comment: This section sets out the characteristics of a person unfit to be a trustee: a person who is incompetent, nonresponsive or uncooperative, and whose conduct is detrimental to the efficient and proper administration of the trust. If there are 3 or more trustees, a majority may remove a trustee by written resolution setting out the reasons for the removal, and delivering a copy thereof to the trustee that is the subject of the resolution. The resolution becomes effective 15 days after its delivery, unless the trustee requests a meeting. Subsections (5) to (7) set out the “due process” by which the subject trustee may respond to the allegations of unfitness.

Power of court to remove trustee

- 16** (1) The court may remove a person from the office of trustee if
- (a) the person is not fit under section 15 to hold the office of trustee and there are fewer than 3 trustees, or
 - (b) the court is of the opinion that
 - (i) the removal of the person under section 15 or under a power conferred by a trust instrument would be inexpedient, difficult or impracticable, and
 - (ii) the removal of the person is in the best interests of the objects of the trust.
- (2) If the court considers a reduction in the number of trustees to be in the best interests of the objects of a trust, the court may
- (a) reduce the number of trustees, and
 - (b) to give effect to the decision under paragraph (a), remove a person as trustee.
- (3) The court may remove a trustee appointed by the court under section 9.
- (4) Despite any other provision of this Act or a power conferred by a trust instrument, a trustee who is designated as a judicial trustee by the court under section 9 (2) (b) may be removed only under subsection (3) of this section.

Comment: This section permits the court to remove, in the following circumstances, a trustee for the same reasons as in the foregoing section 15: if there are fewer than 3 trustees, or if the court is satisfied that removal under section 15 or under the trust instrument would be impractical and removal would be in the best interests of the beneficiaries or the other objects of the trust. The court may also reduce the number of trustees if the court considers it to be in the best interests of the objects of the trust. Only the court may remove a court appointed trustee, despite any provision of this Act or a trust instrument.

Power of court to reinstate trustee

- 17** (1) A person removed as trustee, except a person removed under section 16 or 78, may make an application to the court for an order under subsection (3) of this section,
- (a) in the case of a person removed as trustee under section 15, within 60 days after the date the resolution becomes effective, or
 - (b) in any other case, within 60 days after the earlier of

- (i) the date of the appointment of a substitute trustee under section 6 (1), and
 - (ii) the date that the removal as trustee comes to the attention of the person removed.
- (2) On an application under subsection (1), the court may make an order under subsection (3) if
- (a) the court is satisfied that the person was removed as trustee based on a mistake of fact or law, and
 - (b) the court considers making the order to be in the best interests of the objects of the trust.
- (3) Subject to subsection (2), the court may
- (a) reinstate the person as trustee on a specified date,
 - (b) declare that the person did not cease to hold the office of trustee during the period following the purported removal, or
 - (c) dismiss the application.
- (4) If the court makes an order under subsection (3), the court may also give directions or make a declaration as to the person's status as trustee or the liability of
- (a) a substitute trustee appointed under section 6 (1),
 - (b) a person who is the subject of the order under subsection (2), or
 - (c) any other person who was a trustee after the person making the application was removed as trustee.

Comment: This section empowers the court to grant relief to a trustee who has been wrongfully removed or thought to have been discharged incorrectly.

Mistaken belief does not invalidate actions of trustee

- 18** (1) If a person is mistakenly believed to have ceased holding the office of trustee under section 12 (b) or (c), the exercise of powers and performance of duties in the administration of the trust by a substitute trustee appointed under section 6 or by any continuing trustees are not invalid only because the belief is based on a mistake of fact or law.
- (2) If a person is mistakenly believed to be holding the office of trustee, the exercise of powers and performance of duties in the administration of the trust by the person as trustee or by the trustees are not invalid only because the belief is based on a mistake of fact or law.

Comment: This section ensures that any actions taken by a substitute trustee or any remaining trustee are valid even if a trustee was removed or is continuing to hold office on a mistaken belief of fact or law. This section operates to protect these trustees and any bona fide third party dealing with the trustees. This is consistent with the policy of the Act to protect innocent third parties in their dealings with trustees.

Liability of former trustee

- 19** Unless the court orders otherwise, if a person ceases to be a trustee, any consequential vesting of trust property in or transfer of trust property to a substitute

trustee does not relieve the former trustee from liability for a breach of trust occurring while that person was a trustee.

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

PART 3 – VESTING

Joint tenants

20 If trust property vests in more than one trustee, the trust property vests in the trustees as joint tenants.

Comment: This section provides that, unless otherwise provided in the trust instrument, if trust property is vested in more than one trustee, it is vested in them as joint tenants, reflecting the preference of the law respecting co-ownership.

Vesting

- 21**
- (1) If a person is appointed as a substitute or additional trustee of a trust, the trust property vests in that person at the time the appointment is effective.
 - (2) If a person ceases to be a trustee of a trust, the trust property ceases to be vested in that person and remains vested in each continuing trustee.
 - (3) If a person who is a sole trustee or the last remaining trustee of a trust ceases to be a trustee and a new trustee has not been appointed or there is otherwise no trustee of a trust, the trust property vests in the court until a new trustee is appointed.
 - (4) A vesting under this section has the same effect as if the property had been actually transferred to the person in whom or the court in which the property is vested.
 - (5) No further declaration or order is required in relation to trust property that vests or ceases to be vested under this section.
 - (6) Without limiting subsections (4) and (5), if an enactment provides that property may be transferred only by registration, by an entry in a record or by other specified means, despite the enactment, a person in whom the property vests under this section is entitled to perfect the transfer of the property in accordance with the enactment insofar as the enactment is applicable.
 - (7) This section applies whether a person ceases to be a trustee, or is appointed as a substitute or additional trustee, in accordance with the terms of the trust or this Act.

Comment: This is a mandatory provision which cannot be excluded by the settlor.

This section provides that when a trustee leaves office, title to the trust property is divested, and if a new trustee is appointed, title to the trust property vests in that new trustee. This section provides that divesting and vesting of title to trust property occur automatically by operation of the Act and that no further declaration or order of the court is required. This is consistent with the efficient management of trust property when there is a change in trustees, and it permits substitute trustees to deal with the trust property immediately upon taking office. This section operates to transfer title to trust property

regardless of whether the trustee has left office as a result of a term of the trust instrument or by operation of law.

Subsection (4) restates the effect of vesting in terms of a transfer to the vested persons of the legal estate in the trust property, or if the legal estate is not the subject of the vesting (as in the case of a trust of an equity of redemption), such other estate or interest as is being vested.

Subsection (6) provides for the perfection of a transfer by registration, entry in a record or other means specified in an enactment.

Vesting of leasehold property does not require consent, or breach or give rise to claim under lease

- 22** If leasehold property vests in a trustee as lessee, the vesting, despite the lease,
- (a) does not require the consent of the lessor,
 - (b) is not a breach of any provision of the lease that prohibits or restricts the disposition of the lessee's interest in the leasehold property, and
 - (c) does not give rise to any forfeiture, right of re-entry or other claim under the lease.

Comment: This section is self-explanatory.

Vesting orders

- 23** (1) If the court considers it to be in the best interests of the objects of a trust, the court may make an order
- (a) vesting all or part of the trust property in, or
 - (b) appointing a person to make or to join in making a transfer of all or part of the trust property to
- a person in a manner and on terms and conditions the court considers appropriate.
- (2) An order under subsection (1) may be made on application by the Attorney General or a person referred to in section 85.

Comment: This section preserves the right of the court to make vesting orders. Such a right would likely be invoked only when vesting by operation of the Act is not available or would be difficult in particular circumstances. The section provides an ultimate means of vesting trust property in the event that all other means of doing so are unavailable. An example would be if all trustees are deceased. This section is a mandatory provision.

PART 4 – POWERS AND DUTIES OF TRUSTEES

Division 1 – General Administrative Powers

Powers of trustee

- 24** (1) Subject to this Act and the trustee's fiduciary obligations, a trustee has the powers and capacity of an individual of full capacity in relation to trust property vested in the trustee as if the property were vested in the trustee absolutely and for the trustee's own use.
- (2) Without limiting subsection (1), a trustee may do one or both of the following:
- (a) sell or lease trust property;

- (b) borrow money for the purpose of carrying out the trust and create a security interest in trust property.
- (3) A trustee may do one or both of the following:
- (a) with the consent of, and for the purpose of providing a residence for, a beneficiary, use the income or capital to which the beneficiary is entitled
 - (i) to purchase or rent living accommodation, or
 - (ii) to construct a residence on land that is part of the trust property or purchased for the construction;
 - (b) with the consent of a beneficiary, appropriate, at fair market value, specific trust property in or towards satisfaction of the share or interest of the beneficiary.

Comment: This section sets out certain administrative powers of trustees, with a view to clarifying and, in some respects, broadening them. The strategy of this section is to define the powers broadly in subsection (1) by assimilating them to those of a vested legal owner of property, subject to the trustee's fiduciary obligations. Subsection (2) elaborates on subsection (1) by listing certain powers that will provide particular comfort to those dealing with the trustee, and subsection (3) lists powers that may not clearly be caught by the general formulation.

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

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

Subsection (3) (a) allows trustees to use trust property to buy, rent or build a house for the use of a beneficiary. Although the power of investment is already an enumerated power under the Act, the common law draws a distinction between the power to invest in land and the power to purchase land for use as a beneficiary's home, as the land for the home would not generate income. This provision reverses the common law position and permits trustees to purchase, rent or build a house for the use of a beneficiary who is entitled under the trust to the money spent for that purpose.

Subsection (3) (b) permits trustees to value and appropriate property to satisfy the interest of a beneficiary. Such property must be assessed at its fair market value.

Power of court to confer further powers on trustees

- 25**
- (1) If, in the administration of a trust, a transfer of trust property that is expedient and in the best interests of the objects of the trust cannot be carried out because the trustee lacks the power, the court may confer the necessary power on the trustee, either generally or in any particular instance and on terms and conditions the court considers appropriate.
 - (2) An order under subsection (1) may be made on application by the Attorney General or a person referred to in section 85.

Comment: This section is included in the Act out of an abundance of caution. The preceding section confers wide powers on trustees in a general fashion and specifies some particular powers on matters in which persons dealing with the trustee may want particular reassurance of the trustee's powers. It is unlikely, therefore, that this section would be frequently used. It would be useful in circumstances in which the trust instrument expressly withholds certain powers from the trustee (thereby trumping the preceding section) but a change of circumstances requires that the trustee have those powers if the best interests of the trust are to be served. Subsection (2) allows an application for a court order under subsection (1) to be made by the Attorney General or any of the persons entitled under the Act to make applications to the court: a beneficiary, a trustee or a secured party who has a security interest in the trust property.

Division 2 – Duties

Duty of care

- 26** (1) In the administration of a trust, a trustee must act in good faith and in accordance with the following:
- (a) the terms of the trust;
 - (b) the best interests of the objects of the trust;
 - (c) this Act.
- (2) Subject to section 31, in the performance of a duty or the exercise of a power, whether the duty or power arises by operation of law or the trust instrument, a trustee must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.
- (3) Despite subsection (2) but subject to section 31, if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of care, diligence and skill that is relevant to the administration of the trust and is greater than that which a person of ordinary prudence would exercise in dealing with the property of another person, the trustee must exercise that greater degree of care, diligence and skill in the administration of the trust.

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

Subsection (2) provides that in addition to acting in good faith, a trustee also has, subject to the provision of the Act respecting the standard of care regarding investment of trust property, the duty to exercise care when managing a trust. In managing a trust, a trustee must meet the same standard of care as a person of ordinary prudence. The law assumes that a person of ordinary prudence will be conscientious and diligent when managing the property of others. Subsection (1) sets out an objectively determined standard of care.

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

Conflicts of interest

- 27 (1) A trustee must exercise the powers and perform the duties of the office of trustee solely in the interests of the objects of the trust.
- (2) Without limiting subsection (1), a trustee must not knowingly permit a situation to arise
- (a) in which the trustee's personal interest conflicts in any way with the trustee's exercise of the powers or performance of the duties of the office of trustee, or
 - (b) in which the trustee may derive any personal benefit or a benefit for any other person,
- except so far as the law or the trust instrument expressly permits.
- (3) On application by a trustee who shows that an act or declining to act is in the best interests of the objects of the trust, whether or not the beneficiaries consent, the court may make an order, on terms and conditions the court considers appropriate,
- (a) allowing the trustee to act or decline to act, whether or not the trustee may be in a situation that contravenes subsection (1) or (2), or
 - (b) excusing a trustee from liability for contravening subsection (1) or (2).
- (4) An order under subsection (3) (b) may be made any time after the contravention of subsection (1) or (2).
- (5) A trustee must serve notice of an application under this section as follows:
- (a) to all qualified beneficiaries of the trust, unless otherwise ordered by the court;
 - (b) if a beneficiary of the trust is a minor and has a vested beneficial interest, to the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]* at least 30 days before the date set for the hearing of the application;
 - (c) if the trust is a charitable trust, to the Attorney General at least 30 days before the date set for the hearing of the application.
- (6) On application by the trustee, a qualified beneficiary, the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]* or the Attorney General, the court may vary an order under this section if
- (a) additional information becomes available after the order is made, or
 - (b) the circumstances under which the order was made change.
- (7) Nothing in this section limits the jurisdiction of the court under sections 60, 61 and 81.

Comment: This section provides that a trustee, being a fiduciary, is prohibited from being involved in conflicts of interest and from profiting from office. Subsections (1) and (2) restate this fiduciary duty of a trustee. This section requires trustees, when managing a trust, to act solely in the best interests of the beneficiaries or objects of the trust and to avoid situations in which their interests conflict with the best interests of the beneficiaries or objects of the trust. Unless expressly authorized by the trust instrument, trustees may not use their office to profit personally or to confer benefits on third parties. Trustees who do so will be in breach of this section. Though courts have sometimes permitted otherwise (see Supreme Court of Canada decisions in *Tornroos v. Crocker* and *Peso Silver Mines Ltd v. Cropper*),

trustees as a general rule cannot profit even if the trust could not itself have acquired the benefit or if the trustees intended to benefit the beneficiaries and received an incidental benefit themselves. The only issue is whether a trustee's interest conflicted with his or her trust duty to act, or to be seen to be acting, solely in the best interests of the trust when the profit was made. If so, the trustee must return the profit.

Subsection (2) permits a trustee to profit from trusteeship as long as the trust instrument or the law expressly permits it. A settlor may wish to tolerate certain situations involving a conflict of interest in order to obtain the benefit of the trustee's skills or familiarity with the affairs of the settlor. For example, a common term in a trust instrument is a charging clause permitting the trustee to charge a fee to the trust for professional services. Absent such a clause, a trustee receiving money from the trust (other than the statutory compensation allowed under this Act) would be in breach of subsection (2).

In case law, a trustee may act while in conflict of interest, or profit if the trust instrument is silent, only if all the beneficiaries of the trust have consented before the trustee entered into the conflict, or before any profit was made. If any beneficiary is incapacitated or not yet born, consent would not be obtainable. Subsection (3) addresses this problem by permitting an application to court for an order permitting the trustee to act in a conflict of interest, or to profit personally, as long as doing so would be in the best interests of the objects of the trust. Subsection (4) provides that a court can excuse a trustee from liability at any time after the occurrence of the conflict of interest or personal profit. The court's power under this section does not affect its powers under the provisions of this Act respecting variation and termination of trusts, or to grant relief from liability for breach of trust. Further, the court may endorse the transaction in question even if the beneficiaries do not consent, providing that the court decides that the transaction will benefit the trust and its objects.

Notice requirements are addressed in subsection (5). Subsection (6) permits the court, on application by a trustee, a qualified beneficiary, the Public Guardian and Trustee (or the equivalent official) or the Attorney General, to vary the original order if new information comes to light or if circumstances change.

Duty to report to qualified beneficiary

- 28** (1) For each fiscal period of a trust, the trustee must deliver to the qualified beneficiaries a report in respect of the trust that includes the following:
- (a) for the fiscal period in which the trust is created, a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the time the trust is created;
 - (b) a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the beginning and end of the fiscal period;
 - (c) the basis for the valuations of the assets of the trust, if the trustee considers it practicable;
 - (d) a statement of receipts and their sources for the fiscal period;
 - (e) a statement of disbursements and their recipients for the fiscal period.
- (2) A report under subsection (1) in respect of a fiscal period must be delivered on or before the date that is 60 days after the end of the fiscal period.
- (3) On the written request of a qualified beneficiary, the trustee must allow the beneficiary to inspect the source documents for the statements referred to in subsection (1).
- (4) Subject to section 29 (2), a trustee is not required to disclose information under this section if, in the opinion of the trustee, the disclosure would

- (a) be detrimental to the best interests of any beneficiary or otherwise be prejudicial to the trust property or the administration of the trust,
 - (b) conflict with any duty owed by a trustee as a director of a corporation in which the trust has an ownership interest,
 - (c) reveal the reasons why a trustee did or did not exercise a power conferred by the trust instrument or an enactment,
 - (d) place an unreasonable administrative burden on the trustee, or
 - (e) place the trustee in breach of obligation, properly assumed by the trustee, to maintain confidence.
- (5) A beneficiary may waive, by delivering written notice to the trustee, the right to a report or to specific information in the report that is required to be given under this section.
- (6) A beneficiary may revoke a waiver by delivering written notice to the trustee.

Comment: This section augments the existing common law duty of a trustee to provide accounts within a reasonable time upon a beneficiary's request. Subsection (1) requires a trustee to provide specified financial information in each fiscal period of the trust to each qualified beneficiary. Subsection (2) sets out the required period of time within which the information must be provided.

Subsection (3) provides that, upon a qualified beneficiary's written request, a trustee must allow the beneficiary to inspect the source documents (for example, vouchers and receipts) that underlie the statements referred to in subsection (1).

Subsection (4) limits a qualified beneficiary's right to information. It provides that, subject to the ability of a court, as provided in the next section, to order disclosure of information respecting the terms, administration or property of a trust, a trustee is not required to disclose information if to do so, in the trustee's opinion, would be unreasonable or would conflict with other legal duties the trustee may have.

Subsection (5) permits a beneficiary to relieve a trustee of the obligation to report, but subsection (6) provides that any such waiver may be revoked.

Duty to provide information

- 29** (1) Section 28 does not limit the duty under general trust law of a trustee to provide to a beneficiary, on request, accounts or trust information within a reasonable period of time.
- (2) On application by a qualified beneficiary or a beneficiary who has requested information that has not been provided by the trustee, the court may order, on terms and conditions the court considers appropriate, the disclosure of any information regarding any of the following:
- (a) the terms of the trust;
 - (b) the administration of the trust;
 - (c) the assets and liabilities of the trust.

Comment: Subsection (1) of this section provides that the duty in this Act to report is not in lieu of a duty under the general law of trusts to provide, on request, accounts or trust information to a beneficiary within a reasonable period of time.

Subsection (2) allows the court to order the disclosure of information relating to the terms, administration or property of a trust even if the request falls under subsection (4) of the preceding section.

Division 3 – Investment Powers

Investment of trust property

- 30** (1) A trustee may invest trust property in any form of property in which a prudent investor might invest, including a security issued by a mutual fund as defined in the *[name of statute in jurisdiction regulating securities]*.
- (2) Without limiting section 2 (4), subsection (1) of this section does not authorize a trustee to invest in a manner that is inconsistent with the terms of the trust.
- (3) Without limiting subsection (1), a trustee may invest trust property in a common trust fund managed by a *[trust company or corporation as defined by the jurisdiction]*, whether or not the *[trust company or corporation]* is a co-trustee.

Option 1:

- (4) Except as provided in subsection (3), a corporation that is a trustee must not invest trust money in its own securities.

Option 2:

- (4) A corporation that is a trustee may invest trust money in its own securities.

Comment: This section provides for the power of trustees to invest trust property. Subsection (1) permits a trustee to invest in any type of property or security in which a prudent investor would invest, including mutual funds. Subsection (2) provides that the trust instrument may restrict this power. It may be that a settlor might prefer a more conservative investment strategy.

Without limiting the power of trustees to invest as set out in subsection (1), subsection (3) expressly permits a trustee to invest trust property in a common trust fund managed by a trust company or corporation, as defined by the enacting jurisdiction, without respect to whether that trust company or corporation is a co-trustee.

Subsection (3) provides that a trustee may invest trust property in a common trust fund managed by a trust company, even if the trust company is a co-trustee. This reverses the case law holding that such an investment would amount to an abdication of the trustee's powers to the corporate co-trustee. Subsection (3) would also permit trust property of which the trust company is not a trustee to be invested in that trust company's common trust fund.

Note: Jurisdictions should examine their legislation to determine whether "common trust fund" should be defined.

In order for the common trust funds of nationally active trust companies to be used as investment vehicles by trustees generally, jurisdictions may have to amend legislation respecting the regulation of financial institutions to clarify that a trust company's trust fund need not be restricted to assets held in trust by the trust company.

Subsection (4) is set out in 2 alternative options from which the enacting jurisdiction may choose. Option 1 provides that, except as allowed in subsection (3), a corporate trustee is not permitted to invest trust money in its own securities. Option 2 provides that a corporate trustee may invest trust monies in its own securities. This would enable a corporate trustee's securities to be made available as investment vehicles for trust property.

Standard of care

- 31** (1) In investing trust property, a trustee must exercise the care, diligence and skill that a prudent investor would exercise in making investments.

- (2) Despite subsection (1), if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of care, diligence and skill that is relevant to the investment of trust property and is greater than that which a prudent investor would exercise in making investments, the trustee must exercise that greater degree of care, diligence and skill in investing trust property.

Comment: Subsection (1) of this section provides that the standard of care that a trustee must exercise when investing trust property is the standard of care of a prudent investor.

Subsection (2) provides that, despite the standard set out in subsection (1), trustees who, because of their profession, occupation or business, possess or ought to possess a greater degree of care, diligence and skill respecting investment of trust property than that of a prudent investor will be required to exercise that greater degree of care, diligence and skill when investing trust property.

Trustee not liable if overall investment strategy prudent

- 32** (1) A trustee is not liable for a loss arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property that
- (a) comprises reasonable assessments of risk and return, and
 - (b) would be adopted under comparable circumstances by a prudent investor.
- (2) Despite subsection (1), a trustee is liable for a loss arising from the investment of trust property if
- (a) the trustee is a trustee described in section 31 (2), and
 - (b) the conduct of the trustee that led to the loss did not conform to a plan or strategy for the investment of the trust property that
 - (i) comprised reasonable assessments of risk and return, and
 - (ii) would be adopted under comparable circumstances by a trustee possessing that degree of care, diligence and skill.

Comment: This section and the next section clarify that prudence in the investment of trust property is to be understood in the context of the overall investment strategy. The principle is that prudence is properly understood to have regard to the investment of the trust property generally, as distinct from the separate consideration of any given particular element thereof.

Accordingly, subsection (1) exonerates a trustee from liability for loss to the trust if the overall investment strategy is sound.

Subsection (2) clarifies the liability of trustees who possess or ought to possess a greater degree of care, diligence and skill due to their profession, occupation or business, as set out in subsection (2) of the preceding section. Such trustees are liable for loss to the trust if their conduct did not conform to a plan or strategy that trustees possessing an equivalent degree of care, diligence and skill would adopt under comparable conditions.

Abolition of common law rules – anti-netting rules

- 33** (1) The rule of law that requires the assessment of a trustee's decisions on an investment-by-investment basis is abolished.
- (2) The rule of law for the assessment of damages for breach of trust that prohibits losses from being offset by gains is abolished except in respect of circumstances in which the breach is associated with dishonesty or impropriety by a trustee.

Comment: This section changes the case law rule by which the prudence of a trustee's investment was scrutinized and determined on an investment-by-investment basis. Subsection (1) supports the rule in the preceding section that a trustee's investment strategy is scrutinized on an overall basis in order to determine the prudence of the investments made. Therefore, a trustee will not be liable for breach of trust if the trustee's overall investment strategy is prudent, even if a particular investment viewed in isolation may seem speculative or otherwise imprudent.

In case law, if a breach of trust results in a loss to the trust, the trustee must make up for that loss. If the trust profits from a breach of trust, the profit cannot be taken into account when assessing the trustee's liability. If there is both profit and loss, the loss cannot be set off against the profit. Subsection (2) changes this rule and permits a trustee to set off any losses against any profits resulting from a breach of trust, provided that the breach of trust was an honest one.

Interpretation of trust terms in relation to this Division and section 48

- 34** (1) If the terms of a trust express the powers of the trustee as powers to invest trust property in the investments permitted under a former *Trustee Act*, or a particular provision of a former *Trustee Act*, as it read at any time before its repeal, the terms of the trust are to be interpreted as authorizing the investments permitted under this Division and section 48.
- (2) Despite subsection (1), if an investment is expressly prohibited by the terms of the trust, the terms of the trust are not to be interpreted as authorizing the investment.
- (3) Subsection (1) does not affect a power of the trustee to invest trust property in an investment expressly permitted by the terms of the trust.

Comment: This section sets out transitional provisions respecting the investment of trust property. After this Act comes into force, if a trust instrument authorizes a trustee to invest trust property in investments permitted under a former *Trustee Act*, the trust instrument is to be interpreted as authorizing the investments permitted under this Act, subject to any expressly contrary directions in that trust instrument.

Division 4 – Allocation of Income and Capital

Definition

- 35** In this Division, “**outgoing**” means an expenditure paid or incurred in administering a trust, including, without limitation, an expenditure arising from or made with respect to repairs, maintenance, insurance, taxes, security interests, debts, calls on shares, annuities and losses.

Comment: This section defines “outgoing” as any payment or expenditure made by or on behalf of a trust.

Duty to act impartially and prudently

- 36** Nothing in this Division affects the duty of a trustee
- (a) to act impartially as between different classes of beneficiaries in the administration of a trust, or
- (b) to invest prudently as provided in section 31.

Comment: When there is only one class of beneficiaries sharing the same interests, trustees may administer the trust property with only those beneficiaries in mind. However, if there is

more than one class of beneficiaries, the issue becomes more complicated. For example, one beneficiary may have a life interest in the trust property (usually income) while another beneficiary has an interest in the remainder of the trust property (usually capital). In this context, “income” refers to the periodic revenues gained from use of the trust property while “capital” refers to the growth over time of the value of the trust property.

If there are 2 or more classes of beneficiaries, trustees run the risk of favouring one class over another when administering the trust property. Therefore, trustees must invest carefully to bring similar returns to both the income and capital of the trust property. This is known as the duty of “even hand”. This section provides that nothing in this Division displaces the duty of “even hand”, which exists under general trust law. This Division provides for the possibility of a total return investing regime for trustees, under which even-handed treatment is achieved without having to draw a strict distinction between income and capital accounts for trust property.

Abolition of common law rules of apportionment

- 37** The rules of law known as the first and second branches of the rule in *Howe v. Lord Dartmouth* and the rule in *Re Earl of Chesterfield’s Trusts* are abolished.

Comment: This section abolishes several rules of case law that oblige trustees to convert particular forms of assets to authorized trustee investments and to apportion income from those assets between income and capital beneficiaries. Those rules apply during the period of administration of a deceased person’s estate. The first branch of the rule in *Howe v. Lord Dartmouth* states that if a will contains a residuary gift of personal property, or a future or reversionary property interest for persons in succession, the trustee must convert all wasting, hazardous or speculative assets to authorized trustee investments. The second branch of the rule states that if original assets of the estate, other than authorized investments in the legal list, are to be converted under an express or implied trust for sale, the income from those assets must be apportioned between the income and capital beneficiaries until conversion to the authorized investments actually takes place. The income beneficiary should receive the income that the assets would yield if they had already been converted. The balance, if any, of the actual income from the unauthorized assets is added to the capital.

The rule in *Re Earl of Chesterfield’s Trusts* states that if future or reversionary property is included in a residuary gift under a will, and it is not yielding income before it is sold, the proceeds of sale after it comes into possession must be apportioned between the income and capital beneficiaries. The amount that would be equivalent to the sale proceeds, if invested at the testator’s death at the rate payable on the legal list investments, compounded annually or semi-annually before income tax, is treated as capital and the rest is treated as income.

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

Apportionment of outgoings between income and capital

- 38** (1) This section does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:
- (a) an alter ego trust;
 - (b) a joint spousal or common-law partner trust;
 - (c) a post-1971 spousal or common-law partner trust;
 - (d) a pre-1972 spousal trust.
- (2) A trustee may charge all or part of an outgoing to the income or capital of the trust as the trustee considers is
- (a) just and equitable in the circumstances,

- (b) in accordance with ordinary business practice, and
 - (c) in the best interests of the objects of the trust.
- (3) If the amount of an outgoing charged under subsection (2) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.
- (4) If trust property is subject to depreciation, a trustee may
- (a) deduct from the income earned from the trust property an amount that the trustee considers is
 - (i) just and equitable in the circumstances,
 - (ii) in accordance with ordinary business practice, and
 - (iii) in the best interests of the objects of the trust, and
 - (b) add the amount deducted under paragraph (a) to the capital of the trust.

Comment: Subsection (1) of this section provides that, unless the trust instrument expressly provides otherwise, this section does not apply to the trusts listed. Under the *Income Tax Act* (Canada), those listed trusts are eligible to benefit from rollover provisions for receiving capital property if certain conditions are met. One such requirement is that the settlor, and/or the settlor's spouse or common-law partner, as the case may be, must be entitled to receive the entire income of the trust that arises during the lifetime of that person or during the joint lifetimes, and no one else may receive income or capital of the trust during that period. If this section were to apply, trustees could use their discretionary power to allocate funds between capital and income accounts, thereby decreasing the income that the income beneficiary may receive. This would disqualify the trust from receiving the benefit of the rollover. Subsection (1) preserves the benefit of the rollover provisions under the *Income Tax Act (Canada)* by preventing an unintended application of this section to those trusts. However, this section, or portions of it, will operate if the trust instrument expressly so provides.

Subsection (2) changes the current case law respecting the apportionment of expenses incurred in the administration of trust property between income and capital beneficiaries. The current law is that if the trust instrument is silent on apportionment, the type of expense determines who bears it. Generally, expenses of an income nature are borne by income beneficiaries while expenses of a capital nature are borne by capital beneficiaries. The current rule also depends on other factors, such as for whose benefit the expense is incurred. This creates uncertainty respecting the allocation of expenses between income and capital beneficiaries, as it is often difficult to determine who benefitted from a particular expense. The Act changes the current case law rule by giving trustees the discretion to allocate expenses between income and capital accounts. When exercising their discretion, trustees must act in a just and equitable manner, in accordance with ordinary business practice and in the best interests of the beneficiaries or purposes of the trust, considered as a whole.

Subsection (3) provides that if the amount paid out of the income account or capital account is not equal to the amount of an outgoing charged under subsection (2) to the income or capital of the trust, then a trustee may allocate an amount between the income and capital accounts to recover or reimburse the payment made. This subsection allows trustees to transfer funds between income and capital accounts to make necessary adjustments after paying expenses. Under the current law, trustees would be in breach if they paid for expenses out of income when the expenses were chargeable to capital. The trustees would be personally liable for the expenses and cannot be reimbursed by the beneficiaries at a later date. When managing the trust on a daily basis, there are situations in which it would be sound business practice to make expenditures out of a beneficial interest that might not ultimately bear the cost. The Act recognizes the need for trustees to have this authority in order to exercise their discretion to allocate expenses.

Subsection (4) provides that if trust capital is subject to depreciation, trustees may deduct from the income account an amount that is just and equitable, consistent with ordinary business practice and in the best interests of the objects of the trust, and add that amount to the capital account to protect the trust property from loss.

Discretionary allocation trusts of receipts and outgoings

- 39** (1) If a trustee is expressly directed by the trust instrument to hold trust property on discretionary allocation trusts, the trustee may allocate receipts and charge outgoings to the income and capital of the trust as the trustee considers is just and equitable in the circumstances.
- (2) If the amount of an outgoing charged under subsection (1) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.

Comment: This section applies only if the trust instrument expressly employs the words “discretionary allocation trust” and requires the trustee to hold the property on such a trust. Under a discretionary allocation trust, trustees may exercise discretion as to when, where, how much, from which account and to whom benefits are distributed.

A discretionary allocation trust cannot be a trust for the exclusive benefit of the settlor's spouse, an alter ego trust or a joint spousal or common-law partner trust, as those trusts are defined under the *Income Tax Act* (Canada), and does not attract the rollover provisions applicable to those categories of trusts.

Subsection (1) allows trustees to allocate and apportion receipts and outgoings justly and equitably between income and capital accounts under such a trust, and to disregard for that purpose the traditional legal categories respecting income and capital accounts. This power assists trustees in maintaining an even hand between different classes of beneficiaries. It also facilitates efficient investment by relieving the trustees of having to distinguish between different forms of trust property on the basis of the strict legal classifications of income receipts (such as cash dividends) and capital receipts (such as capital gains from the redemption of mutual funds). Subsection (1) effectively displaces the rule of trust law that the characterization of distributions by a corporation to trustee-shareholders necessarily depends on the form of the corporate distribution, insofar as discretionary allocation trusts are concerned.

Subsection (2) provides that if the amount paid out of the income or capital account is not equal to the amount of an outgoing charged under subsection (1) to the income or capital of the trust, then a trustee may allocate an amount between the income and capital accounts to recover or reimburse the payment made.

Total return investment

- 40** (1) In this section:
- “**assets**” means
- (a) trust property that is subject to a total return investment policy, or
 - (b) property that is an endowment or similar gift to a non-profit organization and that is subject to a total return investment policy under subsection (5);
- “**fiscal period**”, in relation to a gift, means
- (a) the period identified in the terms of the gift as the period adopted for accounting purposes,
 - (b) if paragraph (a) does not apply, the period specified by the trustee as the period adopted for accounting purposes, or

(c) if paragraphs (a) and (b) do not apply, the calendar year;

“specified percentage” means

- (a) a percentage specified in the trust instrument or the terms of the gift for the purpose of this section, or
- (b) if no percentage is specified in the trust instrument or the terms of the gift, the percentage specified under subsection (12);

“total return investment policy” means a policy of investing property so as to obtain the optimal return without regard to whether the return is characterized as income or capital;

“trustee” includes the directors of a non-profit organization who have adopted a total return investment policy under subsection (5);

“valuation period” means the valuation period determined under subsection (11).

- (2) This section applies in respect of an endowment or similar gift given before, on or after the date this section comes into force.
- (3) For the purposes of this section, in a trust instrument or the terms of a gift, the following words constitute a reference to a total return investment policy:
 - (a) “on percentage trusts”;
 - (b) “total return”, when used with reference to investments.
- (4) A settlor may direct, in a trust instrument, the trustee to adopt a total return investment policy with respect to all or part of the trust property.
- (5) Subject to subsection (6), the trustee of a charitable trust, with respect to trust property, and the directors of a non-profit organization, with respect to property that is an endowment or similar gift to the organization, may adopt a total return investment policy with respect to that property, whether or not the terms of the trust or gift contain a direction to that effect.
- (6) A total return investment policy may not be adopted under subsection (5) if in the trust instrument the settlor expressly directs the trustees not to adopt a total return investment policy with respect to that trust property.
- (7) If a total return investment policy is adopted, the trustee must determine the net value of the assets at the beginning of each valuation period.
- (8) For the purposes of this section, the net value of the assets is the amount equal to the fair market value of the assets less any liabilities in relation to those assets.
- (9) If a total return investment policy is adopted, the trustee must, in each fiscal period,
 - (a) pay to the persons who would otherwise be the income beneficiaries, or
 - (b) apply to the other objects
 an amount equal to the specified percentage of the net value of the assets at the beginning of the valuation period.
- (10) The trustee must do the following:

- (a) pay or apply an amount under subsection (9) from income earned during the fiscal period from the investment of the assets;
 - (b) if the income referred to in paragraph (a) of this subsection is insufficient to pay or apply the amount required under subsection (9), pay or apply an amount from capital;
 - (c) if the income earned during the fiscal period from the investment of the assets exceeds the amount paid or applied under subsection (9), add the amount of the excess to the assets.
- (11) The valuation period for assets that are invested in accordance with a total return investment policy is determined as follows:
- (a) the first valuation period begins
 - (i) one year after the date of the testator's death, in the case of a testamentary trust or gift made in a will, or
 - (ii) on the date of the settlement or the receipt of the gift;
 - (b) the second and subsequent valuation periods begin immediately after the end of the previous valuation period;
 - (c) a valuation period is the shortest of the following:
 - (i) subject to subsection (12), 3 years;
 - (ii) the period specified in the trust instrument;
 - (iii) the period selected by the trustee.
- (12) The *[regulation-making authority for the jurisdiction]* may, by regulation,
- (a) specify a percentage for the purposes of paragraph (b) of the definition of "specified percentage", or
 - (b) vary the valuation period set out in subsection (11) (c) (i).

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

The extent to which adopting a total return investment policy is attractive will, initially at least, be driven by the terms of the *Income Tax Act* (Canada). Maintaining the distinction between income and capital is a basic feature of that Act, so that if tax is levied on "income", record keeping and accounting for trust property must continue to reflect that distinction. This makes it difficult to adopt a total return investment policy in the context of private family and similar trusts. Achieving the objectives of total return investment while satisfying the requirements of the *Income Tax Act* (Canada) would be possible only by adopting some quite complex accounting measures. It is hoped that by providing a legal framework, as this Act does, for total return investment, taxing authorities may be encouraged to adopt legislation that facilitates the use of this approach in a wide range of trust situations. It will be of value when the terms of the trust do not create distinct income and capital interests, as is typically true of discretionary trusts. Initially, therefore, adoption of a total return investment policy will be most attractive to charitable trusts and non-profit organizations that do not pay income tax. This is reinforced by subsection (5).

The provisions of this Part are based on recommendations of the British Columbia Law Institute's report titled *Total Return Investing by Trustees* (2001).

Subsection (1) defines various terms relating to total return investment.

The term "specified percentage" means either the percentage specified in the trust instrument or terms of a gift or the percentage specified by regulation under subsection (12). Paragraph (a) of the definition makes it clear that the settlor or donor is free to choose as the specified percentage whatever figure is appropriate, having regard to the objects of the trust to be benefitted. For example, if the object is a newly created charitable organization, its needs would be greatest during the "start-up" period and the settlor or donor might choose a relatively high percentage to ensure that these needs are met, even if this might cause the fund to be exhausted earlier than would otherwise have been the case. Similarly, the settlor or donor might select a lower rate if stable funding over a much longer period is the main concern. Paragraph (b) of the definition pertains to circumstances in which the settlor or donor fails to provide for a specified percentage in the trust instrument or terms of the gift. In such circumstances, the percentage will be determined in accordance with subsection (12).

A "total return investment policy" refers to the investing of assets to obtain the optimal rate of return without distinguishing between income and capital receipts.

Subsection (5) provides that trustees of charitable trusts and directors of non-profit organizations are permitted to adopt a total return investment policy even if the terms of the charitable trust or gift to the non-profit organization are silent on the matter.

Subsection (9) requires that, pursuant to adoption of a total return investment policy, trustees must, in each fiscal period, pay to the persons who would otherwise be income beneficiaries or apply to the other purposes associated with the income account the specified percentage of the net value of the trust assets as they were determined at the beginning of the valuation period, as defined.

Subsection (10) requires that payments made under the preceding subsection be from income produced during the fiscal period. If the income is insufficient to pay the amount required under the preceding subsection, then the remaining balance is to be paid from capital. On the other hand, if the income is greater than the required payment, then the excess amount will be added to the capital.

Subsection (11) defines the valuation period for assets invested pursuant to a total return investment policy as the shortest of the period specified in the trust instrument, the period selected by the trustee and 3 years. The first valuation period for assets in a testamentary trust or gift begins one year from the date of the testator's death or otherwise from the date of the trust settlement or the receipt of the gift.

Subsection (12) empowers the appropriate regulation-making authority in the enacting jurisdiction (for example, the Lieutenant Governor in Council) to set by regulation a specified percentage of the net value of the trust assets for the purposes of subsection (9). This specified percentage must be employed to calculate the amount to be paid out to or for the benefit of beneficiaries or other objects of the trust if the trust instrument does not contain a specified percentage.

The specified percentage should be a rate designed to provide a sustainable payout without eroding the value of the trust assets. If there are income and capital beneficiaries, the specified percentage should provide a fair income to the income beneficiaries while preserving the value of the capital. The estimated long-term real rate of return on investment (the nominal interest rate on investment less inflation) provides a theoretically valid benchmark for such a specified percentage, as it represents the rate at which an invested fund would normally be expected to grow after allowing for future inflation. If no more than this percentage is paid out in a given fiscal period of the trust, the value of the trust capital should be preserved. The real rate of return tends to remain relatively stable over long periods of time.

The percentage contemplated under paragraph (b) of the definition of "specified percentage" and subsection (12) is conceptually similar to the discount rate prescribed by

law in some Canadian jurisdictions for calculating the present value of future loss in damages awards. The statutory discount rate in those jurisdictions also reflects an estimated long-term real rate of return on investment and could be employed as the model for the specified percentage under subsection (12). In some Canadian jurisdictions, more than one such discount rate may be prescribed. A discount rate selected in those jurisdictions as a model for the specified percentage under subsection (12) should be one that simply reflects the estimated real rate of interest on investment less inflation, without allowance for other economic factors, such as increased productivity, that relate to specific categories of future loss.

Subsection (12) also allows the appropriate regulation-making authority to vary the valuation period set out in subsection (11) (c) (i).

Application of sections 39 and 40

- 41** (1) Section 92 does not apply to section 39 or 40.
- (2) Sections 39 and 40 do not limit any other power of a trustee to encroach on capital in favour of a beneficiary.

Comment: Subsection (1) of this section provides that the provision in this Act respecting accumulations of income does not affect the operation of sections 39 and 40 respecting discretionary allocation trusts and total return investment. Part 9 of this Act provides for 2 different options with respect to the rule against perpetuities and the law relating to accumulations. Jurisdictions should examine their rules of law to determine which is appropriate to them to ensure that the operation of sections 39 and 40 is not affected.

Subsection (2) provides that a power conferred by a trust instrument on trustees to encroach on capital in favour of a beneficiary is not limited by the above provisions respecting discretionary allocation trusts or total return investment.

Division 5 – Distributive Powers

General Comment: A distributive power is a power to allocate trust property to a beneficiary, such as a power of support, a power of advancement or a power to appoint among beneficiaries who are named or described as a class. There are 2 types of powers of appointment: mere powers, where the donee of the power may appoint, and trust powers, where the donee of the power as a fiduciary has the obligation to appoint property determined at the donee's discretion to each of the power objects. Failure by a trustee to exercise, in the case of a trust power, the obligation to appoint property is a breach of trust.

Interpretation and application

- 42** (1) In this Division, “**spouse**” means *[to be defined by the jurisdiction]*.
- (2) This Division does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:
- an alter ego trust;
 - a joint spousal or common-law partner trust;
 - a post-1971 spousal or common-law partner trust;
 - a pre-1972 spousal trust.
- (3) A direction in a provision of a trust instrument to accumulate income is not in itself evidence of a contrary intention sufficient to have the provision of the trust instrument prevail over a provision in this Division.

Comment: This section addresses issues of application for Division 5. Subsection (1) provides that “spouse” is to be defined according to the law of the enacting jurisdiction. Subsection (2) excludes the application of Division 5 to spousal and alter ego trusts under the *Income Tax Act* (Canada) unless the trust instrument expressly directs the application of Division 5.

Subsection (3) confirms that a mere direction to accumulate income does not in itself indicate an intention that Division 5 is to apply.

Power to pay income to or for benefit of individual

- 43** (1) If property is held by a trustee in trust for an individual, subject to any interest or charge affecting the trust property, the trustee may do any of the following as the trustee considers reasonable in the circumstances:
- (a) if the individual is a minor, pay all or part of the income earned from the property
 - (i) to the parent, guardian or other person having custody or control of the individual, or
 - (ii) towards the individual's past, present or future maintenance, education, benefit or advancement in life;
 - (b) if the individual has reached the age of majority and does not have an income or capital interest vested in interest and in possession, pay to, or for the benefit of, the individual all or part of the income earned from the property;
 - (c) if the individual has a child, spouse or former spouse and the trustee considers the payment to be to the benefit of the individual,
 - (i) pay all or part of the income earned from the property towards the child's past, present or future maintenance, education, benefit or advancement in life, or
 - (ii) pay to, or for the benefit of, the spouse or former spouse all or part of the income earned from the property.
- (2) A trustee may pay the income earned from the trust property under subsection (1)
- (a) whether the interest of the individual in the trust property is vested or contingent,
 - (b) whether or not there is any other fund available for the same purpose, or
 - (c) whether or not there is any person required by law to provide for the individual.

Comment: This section gives trustees the power to apply to beneficiaries the income from trust property for the maintenance and advancement of those beneficiaries. This is generally known as the power of maintenance.

Subsection (1) (a) provides that if the beneficiary is a minor, the trustee may pay the income to the parent, guardian or other person who has custody or control of the beneficiary, or pay the income towards the past, present or future maintenance, education, benefit or advancement in life of the beneficiary. The trustee may determine what is the reasonable amount to distribute without having to consider whether there is any other fund available to the beneficiary or whether any person is legally obligated to support the beneficiary.

Subsection (1) (b) provides that if the beneficiary reaches the age of majority but neither the income nor capital interest has vested in the beneficiary, the trustee may pay income from the trust property to the beneficiary (that is, until the beneficiary either attains a vested interest in the trust or dies, or the interest fails and vests in someone other than the beneficiary). The trustee has the discretion as to how much, if any, income is to be given towards the beneficiary's maintenance and advancement, and to pay the income in that

manner, without having to consider whether there is any other fund available to the beneficiary.

Subsection (1) (c) provides that if the beneficiary has a child, a spouse or a former spouse, the trustee may pay the income to the child, spouse or former spouse if the trustee considers that to do so would be to the benefit of the beneficiary.

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

Power to pay amount from capital for benefit of individual

- 44** (1) If property is held by a trustee in trust for an individual for any interest in capital, subject to this section and to any interest or charge affecting the trust property, the trustee may pay an amount in respect of the individual towards the following from the capital of the trust, as the trustee considers reasonable in the circumstances:
- (a) if the individual is a minor, towards the individual's past, present or future maintenance, education, benefit or advancement in life;
 - (b) if the individual has reached the age of majority, towards the individual's benefit;
 - (c) if the individual has a child or spouse and the trustee considers the payment or application to be to the benefit of the individual,
 - (i) towards the child's past, present or future maintenance, education, benefit or advancement in life, or
 - (ii) towards the spouse's benefit.
- (2) In order to pay an amount under subsection (1), the trustee may
- (a) create a security interest in a capital asset of the trust, or
 - (b) otherwise transfer a capital asset of the trust.
- (3) A trustee may pay an amount under subsection (1) or exercise the power under subsection (2) whether the interest of the individual in the capital
- (a) is vested or contingent, or
 - (b) is in possession or in remainder or reversion.
- (4) A trustee may not pay an amount under subsection (1) in respect of an individual if, as a result of that payment, the total of all amounts paid under that subsection in respect of the individual exceeds the greatest of the following:
- (a) the amount specified under subsection (9);
 - (b) half of the value of the interest of the individual;
 - (c) an amount approved by the court in respect of the individual that is greater than that permitted under paragraphs (a) and (b).
- (5) If the court approves an amount under subsection (4) (c) in respect of an individual and a trustee pays an amount under subsection (1) in respect of the individual, the trustee must promptly give written notice of the following to any other beneficiary who, at the time of the payment of the amount, is entitled to receive income from the capital from which the amount was paid:
- (a) the terms of the order made by the court under subsection (4) (c);

- (b) the amount paid in accordance with the order.
- (6) A trustee may not pay an amount under subsection (1)
 - (a) if the income or accumulated surplus income is available under the terms of the trust for the maintenance, education, benefit or advancement in life of the individual or of the individual's child or spouse, unless the available income or accumulated surplus income is insufficient, or
 - (b) if the payment is detrimental to the pecuniary interest of a person who is entitled to a prior life or other interest, whether the interest is vested or contingent, in the amount to be paid, unless
 - (i) the person is of full capacity and consents in writing to the payment, or
 - (ii) the person is not of full capacity and the court approves the payment, on application by the trustee.
- (7) If an amount is paid under subsection (1) in respect of an individual, the individual's interest in the capital of the trust must be reduced by that amount.
- (8) If the individual referred to in subsection (7) does not have a vested interest in the capital of the trust when the amount is paid or applied under subsection (1), the reduction under subsection (7) is to be made when that interest is vested.
- (9) The *[regulation-making authority for the jurisdiction]* may specify by regulation an amount for the purposes of subsection (4) (a).

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

Subsection (1) allows a trustee to pay capital to a beneficiary with any interest in capital for the purposes set out. It also allows the trustee to exercise the power of advancement in favour of the children or existing spouse of the entitled beneficiary. The trustee must be satisfied that it is reasonable in the circumstances to do so, and that it is to the benefit of the beneficiary. Subsection (2) allows the creation of security interests in capital assets or transfers of capital assets for the purpose of paying an amount from the capital of the trust.

Subsection (3) provides that a trustee may pay an amount to a beneficiary with an interest in capital regardless of whether that beneficiary's interest is vested, contingent, in possession, in remainder or in reversion. Absent the statutory power of advancement provided for in this section, the courts have no jurisdiction to approve a trustee's payment of capital to a beneficiary if the beneficiary does not have an indefeasibly vested interest. If an interest is contingent or vested, but defeasible, any payment of capital may prove to be at the expense of the person entitled to the gift over because the beneficiary ultimately may not be entitled to the interest. A statutory power of advancement is beneficial because when contingent interests and defeasible interests are provided for, most testators and settlors have in mind only what will happen to the gift if the beneficiary were, for instance, to die. The power of advancement in this section may be exercised without the consent of

a beneficiary who is entitled to receive income from the trust capital before the capital beneficiary's interest vests in possession, although such an income beneficiary may be entitled under subsection (5) to receive notice of its exercise. In dispensing with the need for consent of the income beneficiary, subsection (3) departs from the existing law and from trust drafting practice concerning the exercise of the power of advancement.

Subsection (4) limits the amount a trustee may transfer to a beneficiary under the power of advancement. Limiting the amount a trustee may pay out of capital protects remainder interests of the trust in case the capital beneficiary's interest divests or never vests. A trustee may transfer to a beneficiary no more than whichever is the greatest of the following:

- (a) the amount specified by regulation pursuant to the regulation-making authority in subsection (9);
- (b) half the value of the interest of the beneficiary;
- (c) an amount approved by the court that is greater than that permitted under paragraphs (a) and (b).

It is recommended that an amount of \$25 000 is an appropriate initial amount to be specified by regulation.

Subsection (5) provides that if the trustee obtains leave from the court under subsection (4) (c) and transfers an amount under subsection (1), then the trustee must give an income beneficiary who, at the time of the transfer, is entitled to be paid income from the capital written notice of the terms of the court order, and the amount paid in accordance with the order.

Subsection (6) limits the circumstances under which a trustee may exercise the power of advancement under subsection (1). The Act favours income as the primary source of payments for the maintenance, education, benefit and advancement in life of a beneficiary. Subsection (6) (a) requires income to be paid out first. No capital should be paid or applied for these purposes unless the income or accumulated income generated by the trust is insufficient or not available for this purpose under the terms of the trust instrument. Subsection (6) (b) declares that no transfer of capital under subsection (1) may be made if doing so would be prejudicial to the financial interest of another person entitled to a prior life or other interest unless that person is of full capacity and consents or, if the person is not capable of consenting, the court consents on that person's behalf.

Subsection (7) states that individuals receiving payment of capital under subsection (1) shall have their interest in the trust capital reduced by the amount of the payment. This is known as the principle of "hotchpot".

Subsection (8) provides that if the individual receiving the payment of capital referred to in subsection (7) does not have a vested interest in the trust capital at the time of payment, then the reduction in the individual's capital interest will be made when the interest vests.

Subsection (9) provides the statutory authority to make a regulation for the purposes of subsection (4) (a).

Note: Jurisdictions are advised to review their rules of court respecting notice under subsection (5).

Conditions on payment from capital

- 45** (1) If a trustee pays an amount under section 44 (1) or, under the terms of the trust, pays an amount from capital for the benefit of an individual or an individual's child or spouse, the trustee may impose conditions on the person receiving the payment or the benefit of the payment, including, without limitation, conditions relating to the following:
- (a) the repayment of the payment to the trustee;
 - (b) the payment of interest to the trustee;

- (c) the giving of security to the trustee by the person receiving the payment.
- (2) The trustee may do any of the following in relation to a condition imposed under subsection (1):
 - (a) waive all or part of a condition;
 - (b) release a person from an obligation undertaken;
 - (c) release the security given.
- (3) If an amount paid under section 44 (1) is repaid to or recovered by a trustee in accordance with a condition under subsection (1) of this section, the amount repaid or recovered is deemed not to have been paid under section 44.
- (4) When imposing a condition in respect of security under subsection (1), a trustee is not bound by any restrictions on the investment of the trust property.
- (5) A trustee who has acted in accordance with section 26 in paying an amount under section 44 is not liable for a loss arising from the transaction, including a loss arising because a person breaches a condition imposed by the trustee.

Comment: This section provides that a trustee may impose conditions upon individuals receiving payments of trust capital. In case law, if the capital paid out is not applied properly by a beneficiary for the purpose described to the trustee, the trustee can only refuse to make further payments. This section changes the common law and gives the trustee more power to place controls over how trust capital is used.

Subsection (1) provides that if a trustee pays an amount of capital, pursuant to this Act or pursuant to the trust instrument, the trustee may impose conditions, including, without limitation, repayment to the trustee, the payment of interest to the trustee or the giving of security to the trustee, to which the trustee could have recourse if the capital paid out is not expended as intended.

Subsection (2) allows a trustee to waive all or part of a condition, release a person from an obligation or release the security given.

Subsection (3) provides that if the payment of capital is repaid or recovered by a trustee according to a condition, the amount paid is deemed not to have been paid under the power to pay capital and would therefore not be taken into account in determining the maximum amount that a trustee may pay from capital.

Subsection (4) ensures that a trustee is not limited, when imposing a security condition, by restrictions on the investment of the trust property.

Subsection (5) provides that, in paying an amount from capital, a trustee who acts according to the duty of care provided for in this Part is not liable for a loss arising from the transaction, including a loss from a breach of a condition.

Payment or transfer in relation to minor or incapacitated person

- 46** If a minor or an incapacitated person is entitled to trust money or trust securities, a trustee may pay the money to or transfer the securities to
- (a) the guardian of the minor or the committee of the incapacitated person, or
 - (b) the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]* in trust for the minor or the incapacitated person if
 - (i) there is no guardian of the minor or committee of the incapacitated person, or

- (ii) the trustee cannot locate the guardian of the minor or the committee of the incapacitated person after making diligent inquiries.

Comment: This section provides that if a person lacking legal capacity, due either to being a minor or to lacking mental capacity, is entitled to trust money or securities, a trustee may pay or transfer the trust money or securities to the guardian of the minor or committee of the incapacitated person (or equivalent persons as designated in the enacting jurisdiction) or to the Public Guardian and Trustee (or equivalent officer in the enacting jurisdiction), if there is no guardian or committee or if the trustee cannot locate such a person after diligent inquiries.

Note: If a person lacking legal capacity is entitled to trust money or trust securities, each jurisdiction should have regard to its law with respect to the determination of the person to whom payment may properly be made, including the role of the Public Guardian and Trustee, or equivalent officer, in that jurisdiction.

Division 6 – Delegation

Power to appoint agents

- 47** (1) Subject to subsection (3) and section 48 (1), if it is reasonable and prudent, a trustee may appoint a person as agent within or outside the province to exercise any power or perform any duty in the administration of the trust.
- (2) Without limiting subsection (1) but subject to subsection (3), a trustee may appoint a person as agent to do one or more of the following:
- (a) execute documents;
 - (b) transfer or acquire money or other property;
 - (c) give a receipt for any money or other property received by the trustee.
- (3) A trustee may not appoint an agent to do any of the following:
- (a) exercise a discretion to distribute or transfer trust property to, or for the benefit of, a beneficiary of the trust;
 - (b) perform the duties of the trustee under section 48 (2).
- (4) Subsection (3) does not apply to an appointment of an attorney by power of attorney.

Comment: The case law generally prohibits delegation of trustee powers that involve the exercise of discretion. The policy of this Act is that the basis for determining whether a power can be delegated is not whether it is discretionary, but rather whether it is administrative or distributive in nature. Administrative powers relate to the management of the trust property. Distributive powers relate to the determination of whether, and, if so, when and how much, a beneficiary shall receive under the trust, such as powers to maintain a beneficiary out of income until the capital vests in the beneficiary and powers of advancement of capital to particular beneficiaries. Distributive powers also encompass powers of appointment, which may also be granted to trustees, under which they may decide who the receiving beneficiary shall be. Duties of distribution are at the core of trustees' duties and are not delegable unless the terms of the trust instrument so provide. Administrative powers, by contrast, relate to the efficient administration of the trust property. The Act provides for an expanded power on the part of trustees to delegate with respect to administrative powers, especially those relating to investment. This will allow trustees to retain professionals for certain functions, such as engaging expert financial managers to purchase and monitor investments, and this retention of professionals will both assist the trustee and benefit the trust.

Subsection (1) of this section provides that a trustee may delegate administrative powers and duties to an agent when it is reasonable and prudent to do so. It would be reasonable

and prudent to delegate a function if the trustee lacks a particular expertise needed to carry it out, and it is one that the agent performs in the agent's ordinary course of business. A trustee's power to delegate administrative powers is subject to the limits imposed by subsection (3) and to the following section relating to delegation of authority relating to investment.

Subsection (2) provides that the matters that may be delegated include the powers to execute documents, to transfer or acquire money or other property and to give a receipt for money or other property received by the trustee.

Subsection (3) makes it clear that distributive powers are not delegable. A trustee, in delegating authority with respect to the investment of trust property, may not delegate the trustee's own duty to determine the investment objectives for the trust, to exercise prudence in setting the terms and limits of the authority delegated and to acquaint the agent with the investment objectives.

Subsection (4) makes it clear that the limits imposed under subsection (3) do not apply to the appointment of an attorney by power of attorney as is allowed under section 50.

Delegation of authority with respect to investment

- 48** (1) A trustee may delegate to an agent authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice.
- (2) A trustee who delegates authority under subsection (1) must determine the investment objectives for the trust and exercise prudence in
- (a) establishing the terms and limits of the authority delegated, and
 - (b) acquainting the agent with the investment objectives.
- (3) Despite section 49 (4), a trustee is liable for a loss in the value of the trust property caused by an act or omission of an agent to whom authority is delegated under subsection (1) of this section only if the trustee is in breach of subsection (2) of this section and the loss is a consequence of that breach.
- (4) Investment in a mutual fund referred to in section 30 (1), a common trust fund referred to in section 30 (3) or a similar pooled fund is not a delegation of authority with respect to the investment of trust property.

Comment: Subsection (1) of this section permits trustees to engage agents to invest trust property as would a prudent investor, consistent with ordinary business practice.

Subsection (2) provides that a trustee who delegates investment authority is obligated to determine the investment objectives for the trust, to exercise prudence in setting the terms and limits of the authority delegated and to inform the agent of the investment objectives. It is the responsibility of the trustee to determine the objectives. Agents, by contrast, are to exercise administrative powers in order to accomplish the investment objectives of the trustees.

Subsection (3) provides that despite the provision in the following section setting out the circumstances in which a trustee is liable for loss to the trust property arising from selection and supervision of an agent, a trustee is not liable for a loss to the trust caused by an agent's act or omission unless the trustee did not fulfill the obligations under subsection (2) and the loss arises from that failure.

Subsection (4) clarifies that investment in a mutual fund or common trust fund, as permitted under the foregoing provisions of this Act relating to trustee investment powers, or in a similar pooled fund, does not constitute delegation of trustee investment powers.

Agents – appointment, supervision and trustee liability

- 49** (1) This section does not apply in respect of an attorney appointed by power of attorney.
- (2) In appointing an agent, a trustee must
- (a) personally select the agent, and
 - (b) be satisfied of the agent's suitability to exercise the power or perform the duty for which the agent is to be appointed.
- (3) A trustee must exercise reasonable and prudent supervision over an agent appointed by the trustee.
- (4) Subject to subsection (5), a trustee is liable for a loss in the value of the trust property caused by an act or omission of an agent only if the trustee is in breach of subsection (2) or (3) and the loss is a consequence of that breach.
- (5) A trustee is liable for a loss in the value of the trust property caused by the conduct of a financial institution or another person with whom trust property is deposited or left for safekeeping only if the trustee fails to
- (a) exercise prudence in the selection of the financial institution or other person, or
 - (b) exercise reasonable and prudent supervision over the financial institution or other person.
- (6) A trustee may appoint a co-trustee as an agent only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.
- (7) An agent appointed by a trustee may delegate to a person a power or duty of the agent, subject to any restrictions relating to delegation established by the trustee.
- (8) In delegating a power or duty under subsection (7), the agent must
- (a) personally select the delegate, and
 - (b) be satisfied of the delegate's suitability to exercise the power or perform the duty delegated to the delegate.
- (9) An agent must exercise reasonable and prudent supervision over a person to whom a power or duty is delegated under subsection (7).

Comment: Subsection (1) of this section clarifies that this section does not apply with respect to an attorney appointed by a power of attorney.

Subsection (2) sets out a trustee's duty to personally select an agent and be satisfied of the agent's suitability to carry out the powers or duties for which the agent is appointed.

Subsection (3) sets out a trustee's duty to supervise an agent with reasonableness and prudence.

Subsection (4) sets out the scope of the liability of a trustee for loss to trust property caused by an act or omission of an agent: a trustee is liable only if the trustee failed to fulfill the obligations in subsections (2) and (3), and the loss arises from that failure.

Subsection (5) sets out the scope of a trustee's liability for loss to the trust property caused by a financial institution or other person with whom the trust property was deposited or left for safekeeping: a trustee is liable only if the trustee fails to exercise prudence in the choice of the institution or person, or reasonable and prudent supervision thereof.

Subsection (6) preserves the common law rule that a trustee may not delegate distributive power to a co-trustee because co-trustees must act jointly. Such a delegation would be an abdication of trust powers and duties. However, a trustee may delegate to a co-trustee powers that can normally be delegated to an agent. This subsection permits a trustee to delegate to a co-trustee if the delegation would be reasonable and prudent.

Subsection (7) permits an agent to sub-delegate a power or duty of the agent, as long as the sub-delegation complies with any restrictions relating to delegation that the trustee has established. This is a change in the common law, which does not permit sub-delegation by agents without authority to do so from the trustee, and there is considerable doubt as to whether a trustee may so authorize without an express power in the trust instrument. This is to prevent the trustee from losing control over the exercise of the delegated power or discretion. However, sub-delegation is often a practical necessity.

Subsection (8) imposes on an agent a duty when sub-delegating to personally select the delegate and be satisfied as to the delegate's suitability to perform the powers or duties delegated.

Subsection (9) imposes on the sub-delegating agent a cognate duty to exercise reasonable and prudent supervision. The duties in subsections (8) and (9) are consistent with agency principles.

Power to delegate by power of attorney

- 50**
- (1) A trustee may, by power of attorney, appoint an attorney to exercise any powers and perform any duties vested in the trustee, either alone or jointly with another person, for a period not longer than 12 months from the time the power of attorney is to take effect.
 - (2) Subject to subsection (3), a trustee may appoint a co-trustee as attorney only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.
 - (3) If there are only 2 trustees of a trust and the terms of the trust specify that there must be a minimum of 2 trustees, neither trustee may appoint the other trustee as attorney.
 - (4) A trustee who appoints an attorney under subsection (1) is liable for a loss arising from the acts or omissions of the attorney as if those acts or omissions were the acts or omissions of the trustee.
 - (5) Not later than 7 days after a power of attorney is executed under subsection (1), the trustee must deliver written notice in accordance with subsections (6) and (7) that an attorney has been appointed.
 - (6) A notice referred to in subsection (5) must be delivered to the following persons:
 - (a) any other trustee of the trust;
 - (b) a person who has the power under the trust instrument, whether alone or jointly, to appoint a new trustee;
 - (c) if there is no person to whom notice can be delivered under paragraph (a) or (b), the qualified beneficiaries;
 - (d) if there is no person to whom notice can be delivered under paragraphs (a) to (c), the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]*.
 - (7) The notice referred to in subsection (5) must include the following information:

- (a) the identity of the attorney;
 - (b) one or more of the following:
 - (i) the mailing address for the attorney;
 - (ii) the electronic mail address for the attorney;
 - (iii) the fax number for the attorney;
 - (c) a description of the powers and duties delegated to the attorney;
 - (d) the reason for the appointment;
 - (e) the date or event on which the appointment is to take effect;
 - (f) the duration of the appointment.
- (8) The failure by a trustee to comply with subsection (5) does not invalidate, as against a third party dealing with the attorney in good faith, any act done or document executed by the attorney.

Comment: This section changes the law to permit a trustee to delegate temporarily trust powers and duties by means of power of attorney. This permits a trustee to appoint an attorney when the trustee is temporarily unable to act but need not resign, such as when a trustee apprehends temporary physical or mental incapacitation or will be out of the jurisdiction for a significant period of time. This section provides a practical alternative to the resignation and replacement of a trustee in instances in which resignation and replacement would create their own problems or in which the continuing trustees or beneficiaries would prefer that the particular trustee remain in office.

Because full delegation of trustee powers by way of power of attorney can carry significant risk for mismanagement of a trust, this section imposes a number of safeguards. First, the duration of the power of attorney is limited to 12 months. Second, the trustee giving the power of attorney is liable for the acts or omissions of the attorney. Placing the consequences of wrongful or negligent conduct by the attorney upon the donor trustee works to ensure that the trustee selects the attorney carefully. Third, the persons who have an interest in the proper administration of the trust must be notified of the appointment and the nature of the delegation.

Subsection (1) provides that a trustee may, by power of attorney, appoint an attorney to exercise any trustee powers and duties, either alone or jointly with another person, for up to 12 months.

Subsection (2) allows a trustee to appoint a co-trustee as attorney provided that the appointment is reasonable and prudent, and subject to subsection (3).

Subsection (3) specifies that if there are only 2 trustees of a trust, the terms of which require that there be at least 2 trustees, then neither trustee may appoint the other as attorney.

Subsection (4) makes the appointing trustee liable for a loss arising from the attorney's acts or omissions as if they were the trustee's own acts or omissions.

Subsection (5) provides that a trustee has 7 days after execution of a power of attorney to deliver written notice to the persons specified in subsection (6) and containing the information specified in subsection (7).

Subsection (6) lists the categories of persons to whom notice of the appointment must be given:

- (a) any other trustees;
- (b) a person with the power under the trust instrument to appoint a new trustee;
- (c) failing paragraph (a) or (b), the qualified beneficiaries;
- (d) failing paragraph (a), (b) or (c), the Public Guardian and Trustee, or equivalent officer, in the enacting jurisdiction.

Subsection (7) specifies that the notice of the appointment must contain the following information: the identity and address of the attorney, the description of the delegated powers and duties, the reason for the appointment and the starting point and duration of the appointment.

Subsection (8) provides that a trustee's failure to give written notice as required under subsection (5) does not invalidate any acts of the attorney as against a third party dealing with the attorney in good faith. This preserves the rights of third parties dealing in good faith with the attorney.

Note: Each enacting jurisdiction should consider whether its succession law sufficiently distinguishes between, and delineates, the separate roles of personal representative and trustee so as to prevent a personal representative from using this section to delegate his or her powers as personal representative to an impermissible extent.

Division 7 – Miscellaneous

Liability for trust property

- 51** (1) Subject to this Act, a trustee is not liable for a breach of trust committed by a co-trustee unless the trustee participated in the breach of trust by the trustee's own acts or omissions in relation to the trust property.
- (2) Subject to sections 48 (3), 49 (4) and (5) and 50 (4), a trustee is not liable for a loss in relation to trust property by reason only that the trustee signs a receipt with a co-trustee because of a requirement imposed by the trust instrument that trustees act unanimously.

Comment: Subsection (1) of this section clarifies that in order to be liable for a breach of trust by a co-trustee, a trustee must have participated in the breach through his or her own act or omission. Liability for a co-trustee's breach of trust does not arise merely from the status of being a trustee. If a trustee is aware of a co-trustee's breach of trust resulting in loss to the trust property and does nothing to prevent or correct the loss when it would have been possible to do so, the trustee is liable to the beneficiaries for an independent breach of trust by reason of his or her own omissions.

Subsection (2) clarifies that, apart from circumstances contemplated by sections 48 (3), 49 (4) and (5) and 50 (4) in which a trustee could be liable in respect of an act or omission of an agent, a trustee is not liable for a loss to the trust property merely because he or she signs a receipt with a co-trustee due to a requirement of the trust instrument that the trustees act unanimously.

Powers conferred and duties imposed on trustees jointly

- 52** (1) If a power is conferred or a duty is imposed on 2 or more trustees, the power is conferred and the duty is imposed jointly.
- (2) If a power is conferred or a duty is imposed on 2 or more trustees jointly,
- (a) the power may be exercised or the duty may be performed in accordance with section 53 or 54, and
 - (b) the power may be exercised or the duty may be performed by the survivor of them.

Comment: Subsection (1) of this section clarifies that if powers are conferred or duties imposed on 2 or more trustees, they are conferred or imposed jointly.

Subsection (2) provides that when a power or duty is conferred or imposed on trustees jointly,

- (a) they may be exercised or performed by majority, and

- (b) if one or more trustees die, the survivor or survivors may exercise or perform the trustee powers and duties.

Trustees may act by majority

- 53**
- (1) This section does not apply in respect of a trust created by a trust instrument executed before this section comes into force.
 - (2) If there are more than 2 trustees, the trustees may perform their duties and exercise their powers by majority of the trustees holding office.
 - (3) A trustee who disagrees with a decision or act of the majority of trustees may deliver a written statement of disagreement to the other trustees, but, unless the decision or act is unlawful, must join with the majority in doing anything necessary to carry out that decision or act if it cannot be carried out otherwise.
 - (4) A trustee who delivers a written statement in accordance with subsection (3) is not liable for a loss or breach of trust arising from the decision or act even if the trustee joins with the majority in accordance with that subsection in order to carry out that decision or act.

Comment: This section constitutes a significant change in the law by allowing trustees of a private trust to act by majority unless the terms of the trust provide otherwise. This provision is a reversal of the existing default rule that trustees must act with unanimity if the terms of the trust are silent on the matter. This provision brings the default rule with respect to private trusts into accord with the rule governing charitable or public trusts, under which trustees have been authorized since the late eighteenth century to act by majority decision. This provision also brings the default rule with respect to private trusts into accord with actual practice, as it is common for trust instruments expressly to empower trustees to act by majority. This promotes the efficient management of trust property and limits the need for court involvement in the decision making of trustees. The unanimity rule has also been abrogated in several commonwealth jurisdictions, as well as in a majority of states of the United States of America. (See *Restatement (Third) of Trusts* § 39 (2003) and the *Uniform Trust Code* § 703 (a)).

Subsection (1) provides that the existing law continues to apply in respect of trusts created by trust instruments executed before this section comes into force. This preserves the intentions of settlors of existing trusts.

Subsection (2) provides that if there is more than one trustee, the trustees may act by majority of the trustees holding office. A settlor could still override this provision by expressly requiring that the trustees act unanimously.

Subsection (3) allows dissenting trustees to provide a written statement of their disagreement to the other trustees, but, as long as the act or decision in question is not unlawful, the dissenting trustees must still join with the majority to do anything needed to carry out a decision or act if it cannot otherwise be carried out.

Subsection (4) ensures that a trustee who delivers a written statement under subsection (3) is protected from liability for breach of trust arising from the act or decision respecting which the trustee dissented.

Trustee abstentions

- 54**
- (1) This section does not apply in respect of a trust created by a trust instrument executed before this section comes into force.
 - (2) If a trustee abstains from participating in a decision or act of the trustees because there is a conflict or potential conflict between the trustee's personal interest and the powers and duties of the office of trustee, or for another good reason, the trustee is deemed not to be holding office for the purpose only of

determining whether a decision is made or act is done by a majority of trustees holding office or unanimously by the trustees holding office.

Comment: The purpose of this section is to clarify the effect of abstentions of trustees for determining when a decision of trustees is unanimous or by majority.

Subsection (1) provides that this section applies only to trusts created after this section comes into force.

Subsection (2) provides that a trustee who abstains from a decision or act, due to a conflict of interest or other good reason, is deemed not to be holding office for the purpose of ascertaining whether a given decision is being made or act is being done by a majority of trustees holding office or unanimously by the trustees holding office.

Allocation of insurance proceeds

- 55**
- (1) This section applies only to proceeds under a contract of insurance that are payable after this section comes into force.
 - (2) A trustee must allocate insurance proceeds to the capital of the trust if
 - (a) the trustee entered into a contract of insurance against loss of, or damage to, any trust property,
 - (b) the trustee paid the premiums owing under the contract, and
 - (c) insurance proceeds under the contract are paid to the trustee.
 - (3) If a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, whether or not the beneficiary is required by the trust instrument or by a third party to obtain the insurance, and insurance proceeds under the contract are paid to the beneficiary,
 - (a) the beneficiary must pay the insurance proceeds to the trustee,
 - (b) the trustee must allocate the insurance proceeds to the capital of the trust, and
 - (c) the trustee must reimburse the beneficiary for expenses incurred by the beneficiary in entering into the contract of insurance, in the amount the trustee considers in his or her opinion to reflect the interests of the other beneficiaries in the trust property.
 - (4) A trustee may apply all or part of the insurance proceeds received by the trustee under subsection (1) or (2) to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.
 - (5) Nothing in this section affects the rights of a secured party, lessor, lessee or other person
 - (a) to receive insurance proceeds, or
 - (b) to require that the insurance proceeds be applied to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.

Comment: Subsection (1) of this section provides that this section, which effects changes to the law, applies only to insurance proceeds payable after the coming into force of this section.

Subsection (2) requires a trustee to allocate insurance proceeds to the capital of the trust if the trustee insured the trust property, the trustee paid the premiums and the proceeds are paid to the trustee. The proceeds are treated as capital of the trust to be invested by the trustee to earn income.

Subsection (3) addresses instances in which a beneficiary, such as a life tenant, insures trust property and the proceeds are paid to the beneficiary. In such instances, this subsection requires the beneficiary to pay the proceeds to the trustee, who must allocate the proceeds to the capital of the trust. The trustee must reimburse the beneficiary for expenses, such as premiums, incurred by the beneficiary in the amount the trustee considers takes account of the interests of other beneficiaries in the trust property. This is a change to the law: at common law, the benefit of the insurance goes to the beneficiary who entered into the insurance contract.

Subsection (4) permits a trustee to use all or part of the insurance proceeds to restore trust property that has been lost or damaged.

Subsection (5) provides that this section does not affect the rights of a secured party, lessor, lessee or other person to receive insurance proceeds or to require that those proceeds be applied to the rebuilding, reinstating, replacing or major repair of trust property that has been lost or damaged. In some circumstances, a lender or landlord, for example, may require that insurance be obtained to secure certain obligations, and will require that the proceeds be payable to the lender or landlord, as the case may be, in priority over other interests, or have the right to require that the proceeds be used to restore the property that was lost or damaged. These legitimate commercial arrangements are protected under this subsection.

No notice from other trust

56 A trustee does not, in the absence of fraud, have notice of an instrument, matter, fact or thing in relation to a trust merely because the trustee has notice of the instrument, matter, fact or thing in his or her capacity as trustee of another trust.

Comment: This section provides that a trustee acting for more than one trust cannot be regarded as having notice of anything relating to a trust merely because the trustee acquired notice thereof in his or her capacity as trustee of a different trust. That is, notice relating to the particular trust in question would be required. What will constitute notice to the trustee in a particular instance will depend on the circumstances. Fraud would negate this provision.

PART 5 – VARIATION AND TERMINATION OF TRUSTS

Definition

57 In this Part, “**arrangement**” means

- (a) a variation, resettlement or termination of a trust, or
- (b) a variation or deletion of, or an addition to, the powers of a trustee in relation to the management or administration of a trust.

Comment: In this section, the term “arrangement” is defined broadly to include a resettlement or termination of a trust, as well as a modification of the beneficial interests of beneficiaries. It also includes a modification of the powers of a trustee.

Application of this Part

58 This Part applies whether the interest in the trust property of the object of the trust is vested or contingent or arises by operation of law.

Comment: This section indicates the broad scope of interests to which the provisions of this Part apply.

Arrangement effective on unanimous consent

59 An arrangement takes effect without court approval if

- (a) all of the objects of a trust are beneficiaries that are of full capacity, and

(b) all of the beneficiaries of the trust consent to the arrangement.

Comment: This section provides that an arrangement of a trust, as defined in this Part, may be effected by unanimous consent of the beneficiaries without the need for court approval, as long as all the beneficiaries are of full legal capacity. This section is a significant reform of the law. Under the current law, known as the rule in *Saunders v. Vautier*, the legally competent beneficiaries of a trust can terminate, but not vary, the trust.

Arrangement effective with court approval

- 60** (1) This section applies in relation to a trust if one or more of the following are applicable to the trust:
- (a) a beneficiary of the trust is not of full capacity or does not consent to an arrangement;
 - (b) a beneficiary of the trust is a charitable organization that is legally incapable in its own right of consenting to an arrangement;
 - (c) an object of the trust is a charitable purpose or a non-charitable purpose described under section 74 (3).
- (2) An arrangement in relation to a trust referred to in subsection (1) takes effect if
- (a) one of the following applies in respect of each beneficiary of the trust, other than a beneficiary described in subsection (1) (b):
 - (i) the beneficiary who is of full capacity consents to the arrangement;
 - (ii) the court approves the arrangement under subsection (3) or (5), and
 - (b) the court approves the arrangement under subsection (7), if subsection (1) (b) or (c) is applicable to the trust.
- (3) On application by a beneficiary or trustee and subject to subsection (4), the court may approve an arrangement on behalf of any of the following persons for the purposes of subsection (2) (a) (ii):
- (a) a person who is not capable of consenting because the person is a minor or is otherwise not of full capacity;
 - (b) an unborn person;
 - (c) a person, whether ascertained or not, who has a vested or contingent interest and whose existence or whereabouts cannot be established despite reasonable measures having been taken to discover that information;
 - (d) a person in respect of an interest of the person that may arise by reason of the person being in a class of persons that may benefit from a power of appointment that may or must be exercised by the trustees or any other donee of the power.
- (4) The court may not approve an arrangement under subsection (3)
- (a) on behalf of a person referred to in subsection (3) (a), (b) or (c) unless the court is satisfied that the arrangement appears to be for the benefit of the person, or
 - (b) on behalf of a person referred to in subsection (3) (d) unless the court is satisfied that the arrangement will not be detrimental to the interests of the person.

- (5) On application by a beneficiary or trustee and subject to subsection (6), the court may approve an arrangement for the purposes of subsection (2) (a) (ii) on behalf of a person who has the capacity to consent to the arrangement but refuses to consent to the arrangement.
- (6) The court may not approve an arrangement on behalf of a person under subsection (5) unless the court is satisfied that
 - (a) the arrangement will not be detrimental to the pecuniary interest of the person,
 - (b) a substantial majority of the beneficiaries, representing a substantial majority of the beneficial interests in the trust property as determined by the monetary value of those interests, have
 - (i) consented to the arrangement, or
 - (ii) had the court approve the arrangement on their behalf under subsection (3), and
 - (c) not approving the arrangement will be detrimental to the administration of the trust and the interests of other beneficiaries.
- (7) On application by any person, the court may approve an arrangement for the purposes of subsection (2) (b)
 - (a) on behalf of a charitable organization that is legally incapable of consenting in its own right, or
 - (b) for a charitable purpose or a non-charitable purpose described under section 74 (3).

Comment: This section addresses the circumstances under which the court may approve an arrangement.

Subsection (1) indicates that this section applies to trusts that have one or more of the following: a beneficiary who is not of full legal capacity or does not consent to an arrangement, a beneficiary who is a charitable organization that does not have legal capacity to consent to an arrangement or objects of a trust that include a charitable purpose.

Subsection (2) provides that an arrangement relating to such a trust will take effect if, with respect to each beneficiary (other than a charitable organization that is not legally capable of consenting to an arrangement), the beneficiary of full legal capacity consents and the court approves the arrangement under subsections (3) and (5). If a beneficiary is a charitable organization that does not have the legal capacity to consent, or if the objects of a trust include a charitable purpose, an arrangement will take effect if the court approves the arrangement upon application by a person under subsection (7).

Subsection (3) sets out the following persons on whose behalf the court, upon application by a beneficiary or trustee and subject to the required conditions set out in subsection (4), may approve an arrangement:

- (a) a person who cannot consent because the person is a minor or otherwise not of full legal capacity;
- (b) an unborn person;
- (c) a person, known or unknown, having either a vested or contingent interest and whose existence or whereabouts cannot be established despite reasonable efforts;
- (d) a person who may have an interest as a result of being a member of a class of persons that may benefit from a trust power that a trustee must exercise or from a power of appointment that a donee of a power of appointment may exercise.

Subsection (4) sets out the criteria that are to guide the court in granting or withholding its approval. It stipulates that the court may not approve an arrangement on behalf of persons referred to in subsection (3) (a), (b) or (c) unless satisfied that the arrangement appears to be of benefit to that person, and the court may not approve an arrangement on behalf of a person referred to in subsection (3) (d) unless satisfied that the arrangement will not be detrimental to the interests of that person.

Subsections (5) and (6) constitute a departure from the current law in permitting the court to approve an arrangement on behalf of a legally competent adult who opposes the arrangement. The authority of the court to do so is provided for in subsection (5). The circumstances in which the court may do so are set out in subsection (6), and will not be easily met. This power is likely to be used only when the beneficial interests are widely distributed, and a small number of intransigent beneficiaries hold out against change. The restructuring of a pension trust is an example of when this power might be invoked.

Subsection (5) provides that a court, upon application by a beneficiary or trustee and subject to the required conditions in subsection (6), may also approve an arrangement on behalf of a person who has the legal capacity to consent but refuses to do so.

Subsection (6) sets out the criteria that are to guide the court in granting or withholding its approval. It stipulates that the court may not approve an arrangement under subsection (5) unless satisfied that

- (a) the arrangement will not be detrimental to the person's pecuniary interests,
- (b) a substantial majority of the beneficiaries, who constitute a substantial majority of the beneficial interests in the trust property, have either consented or have had the court approve on their behalf under subsection (3), and
- (c) not to approve the arrangement would be detrimental to the administration of the trust and to the interests of other beneficiaries.

Subsection (7) sets out the authority of the court to approve an arrangement for the purposes of subsection (2) (b) on behalf of a charitable organization incapable of consenting, or for a charitable purpose or a non-charitable purpose as defined in the Act.

Notice to *[Public Guardian and Trustee as referred to in the enacting jurisdiction]* and Attorney General

- 61** (1) If a person applies to the court for an order under section 60 (3) approving an arrangement
- (a) in respect of a person referred to in section 60 (3) (a) or (b), or
 - (b) in respect of a person referred to in section 60 (3) (c) or (d) who is a minor or an incapacitated person, unless the person is an incapacitated person to whom section 99 applies,
- the person making the application must serve notice of the application on the *[Public Guardian and Trustee as referred to in the enacting jurisdiction]* at least 30 days before the date set for the hearing of the application.
- (2) If a person applies to the court for an order under section 60 (7) approving an arrangement, the person must serve notice of the application on the Attorney General at least 30 days before the date set for the hearing of the application.
- (3) The *[Public Guardian and Trustee as referred to in the enacting jurisdiction]* is entitled to appear and be heard on an application referred to in subsection (1) and is entitled to the costs the court orders.
- (4) The Attorney General is entitled to appear and be heard on an application referred to in subsection (2).

Comment: This section provides that notice must be given to the Public Guardian and Trustee, or equivalent officer as designated in the enacting jurisdiction, if a court order is sought to approve an arrangement on behalf of a person lacking in legal capacity, unless the person is represented by a representative appointed under the enactment in the enacting jurisdiction that provides for appointment of a person to manage the affairs of a person lacking mental capacity. Such a representative may be designated by different jurisdictions under different terms, such as committee, guardian, custodian, curator or some other term. If consent on behalf of a charity is sought, the Attorney General must be notified. The Public Guardian and Trustee or the Attorney General, as the case may be, is entitled to be heard on the application in question.

PART 6 – TRUSTEE COMPENSATION AND ACCOUNTS

Definitions

62 In this Part:

“**trust**” includes the estate of a deceased person;

“**trustee**” includes

- (a) an executor or administrator of the estate of a deceased person, whether or not the property included in the estate is subject to a trust,
- (b) *[a committee of a patient appointed under the statute of the jurisdiction providing for appointment of committee], and*
- (c) *[a testamentary guardian as referred to in the jurisdiction].*

Comment: This section defines “trustee” for the purposes of this Part to include additional persons who are in a position similar to trustees, as they are defined in this Act, so that the same principles respecting compensation apply to those additional persons.

Note: Jurisdictions should consider the need to include some or all of this section if they do not have legislation dealing with the subject matter of these definitions.

Application of this Part

63 This Part applies in respect of the estate of a person who dies before, on or after the date this Part comes into force.

Comment: This section clarifies that this Part applies to estates of persons who die before, on or after the coming into force of this Part.

Compensation of trustee

- 64**
- (1) A person is entitled to fair and reasonable compensation to be paid out of the trust property for services rendered as trustee of the trust.
 - (2) As part of the compensation to which a trustee is entitled under subsection (1), a trustee who
 - (a) has professional skills, and
 - (b) has rendered services to the trust, apart from those generally associated with the office of trustee, that required the exercise of those professional skills
 is entitled to charge fees at reasonable rates for those services that are reasonably necessary for the purpose of carrying out the trust.
 - (3) The trustees of a trust are not presumed to be entitled to equal compensation under subsection (1).

- (4) On application by a trustee during the administration of the trust or on the passing of accounts, the court may determine the amount of compensation to which the trustee is entitled under subsection (1).
- (5) In determining a trustee's compensation, the court may consider the following:
- (a) the gross value of the trust property at the time compensation is claimed;
 - (b) any change in the gross value of the trust property since compensation was last claimed or the trust was created and the portion of that change attributable to decisions of the trustee;
 - (c) the amount of revenue received and expenditures incurred in administering the trust;
 - (d) the complexity of the work involved in administering the trust, including whether or not any difficult or unusual questions were raised;
 - (e) any unusual difficulties or situations encountered in administering the trust;
 - (f) whether or not the trustee had to instruct on litigation relating to the trust;
 - (g) whether or not the trustee was required to manage a business, be the director of a corporation or perform other additional roles in administering the trust;
 - (h) the amount of skill, labour, responsibility, technological support and specialized knowledge required in administering the trust;
 - (i) the number and complexity of tasks relating to the administration of the trust that were delegated to others;
 - (j) the time expended in administering the trust;
 - (k) the number of trustees.
- (6) A trustee may make an application under subsection (4) even if the trust instrument provides for the determination of the amount of compensation.
- (7) Subsection (4) does not authorize the variation of a contract, with respect to compensation between a settlor and a trustee, that is not part of the trust instrument, whether or not the contract is incorporated by reference in the trust instrument.

Comment: This section provides for the right of a trustee to be compensated and the basis on which compensation is to be calculated.

Subsection (1) provides that a trustee is entitled to compensation that is fair and reasonable and that the compensation is to be paid out of the trust property.

Subsection (2) provides that a trustee who possesses professional skills, and who renders such professional services to the trust, is entitled to charge reasonable fees as compensation for those services if they are reasonably necessary in carrying out the trust.

Subsection (3) clarifies that it is not to be presumed that the entitlement of trustees to fair and reasonable compensation means that all trustees are to be compensated equally.

Subsection (4) provides that the court may, on application by a trustee, determine the compensation to which the trustee is entitled.

Subsection (5) sets out the factors that the court may consider in determining compensation.

Subsection (6) allows a trustee to apply to the court to determine compensation even if the trust instrument provides for determination of the amount of compensation. This allows the court to provide relief if a trust instrument sets a trustee's compensation at an unreasonably low level.

Subsection (7) provides that the right of a trustee to apply to the court for relief under subsection (6) does not extend to allowing variation of a separate contract respecting compensation into which a trustee and a settlor have entered.

Interim compensation of trustees

- 65**
- (1) During the administration of the trust and without prior authorization of the court, if there is at least one beneficiary who is of full capacity and who has a vested beneficial interest in the trust property, a trustee may take payment out of the trust property in an amount that, in the trustee's opinion, is fair and reasonable compensation for services rendered as trustee of the trust during the period to which the payment relates.
 - (2) A trustee who takes a payment under subsection (1) must promptly deliver to the qualified beneficiaries a notice stating
 - (a) the amount of the payment,
 - (b) a description of the services rendered, and
 - (c) that, within a specified period of not less than 60 days from the date of the notice, a qualified beneficiary may make an application to the court under subsection (3) if the qualified beneficiary objects to the payment.
 - (3) On application, within the period specified in the notice in accordance with subsection (2) (c), by a qualified beneficiary who objects to the payment taken by a trustee under subsection (1), the court may determine the amount of compensation, if any, that the trustee may be paid under subsection (1).
 - (4) After a trustee is served with a notice of an application made under subsection (3), the trustee may not take any further payment under subsection (1) until the court has disposed of the application.

Comment: This section addresses the circumstance in which a trustee may wish to claim his or her fees with respect to trustee services already rendered, without having to obtain prior court authorization. This practice of interim compensation is also referred to as "pre-taking". This section regularizes this practice and sets out the procedures to be followed.

Subsection (1) provides that a trustee may take payment out of the trust property in an amount the trustee considers to be fair and reasonable for services rendered during the applicable time period, without prior court authorization, if there is at least one beneficiary who is of full capacity and who has a vested beneficial interest.

Subsection (2) requires a trustee who takes interim compensation under subsection (1) to promptly deliver a notice to all "qualified beneficiaries" (that is, those beneficiaries who are defined as having vested interests and who have advised the trustees that they wish to be qualified beneficiaries). The notice must indicate the amount of the interim compensation, the services rendered and that a qualified beneficiary may, within a specified time period of not less than 60 days from the date of the notice, apply to the court to determine what compensation a trustee may be paid, if the qualified beneficiary objects to the interim compensation taken by the trustee.

Subsection (3) provides for the ability of a qualified beneficiary, within the time period specified in the notice under subsection (2), to apply to the court to determine what compensation a trustee may be paid.

Subsection (4) prevents a trustee, after the trustee is served with notice of a qualified beneficiary's application under subsection (3), from taking any further payment until the court disposes of the matter.

Reimbursement of expenses

- 66** During the administration of the trust and without prior authorization of the court, a trustee may reimburse himself or herself out of the trust property for expenses incurred by the trustee in the administration of the trust.

Comment: This section allows trustees, without prior court authorization, to reimburse themselves out of the trust property for expenses they have incurred in the administration of the trust.

Passing of accounts

- 67** (1) On application by a qualified beneficiary or a trustee, the court may order that the trustee's accounts be passed on a single occasion or at intervals set by the court.
- (2) The qualified beneficiary or trustee making an application under subsection (1) must serve notice of the application on each of the other qualified beneficiaries.
- (3) If a qualified beneficiary referred to in subsection (2) is a minor or an incapacitated person and the guardian or committee of the qualified beneficiary is not present at the passing of accounts, the court may determine, at the passing of accounts or at a subsequent hearing, that the qualified beneficiary is to be or is deemed to have been represented by another person who, at the passing of accounts,
- (a) is of full capacity,
 - (b) has a substantially similar interest in the trust property, and
 - (c) is not in a conflict of interest with the qualified beneficiary in relation to any aspect of the accounts.

Comment: This section concerns the passing of accounts, which is the process whereby a trustee, either voluntarily or as required by law, renders a true and just account of trust administration to the court. Passing of accounts occurs from time to time because trustees have a duty to keep ongoing records of their activities with respect to the trust property.

Subsection (1) provides for the authority of the court, on application by either a qualified beneficiary or a trustee, to order the passing of a trustee's accounts either at a single time or at intervals set by the court.

Subsection (2) requires the person making the application to serve notice on all qualified beneficiaries. Qualified beneficiaries are entitled to be notified of and to appear at a passing of accounts.

Subsection (3) addresses the circumstance in which a qualified beneficiary is a minor or is incapacitated, and his or her committee or guardian is not present at the passing of accounts. In such a case, the court may determine, either at the passing of accounts or at a subsequent hearing, that the qualified beneficiary is to be represented, or deemed to be so represented, by another fully capacitated person who has a substantially similar interest in the trust property and who is not in a position of being in a conflict of interest with the qualified beneficiary with respect to the accounts. At present, trustees sometimes have to arrange for separate legal representation for an incapacitated beneficiary at a passing of accounts. This is expensive and unnecessary if fully capacitated beneficiaries of the same class are present who can speak for the interests of that class. Subsection (3) makes it unnecessary to arrange for separate representation of a minor or otherwise incapacitated beneficiary if the committee or guardian is not in attendance. If the committee or guardian

is in attendance, the committee or guardian will be the exclusive representative of the incapacitated beneficiary.

Repayment by trustee

68 If a trustee's compensation as finally determined by the court is less than the total of the payments taken by the trustee without court authorization during the administration of the trust, the trustee must restore the difference to the trust property.

Comment: This section provides that if a trustee's compensation, as determined by the court, turns out to be less than the total payments taken by the trustee without court authorization, then the trustee must restore the difference to the trust property.

Application of Part to judicial trustee

69 The provisions in an order under section 9 (5) concerning compensation of a judicial trustee prevail over any contrary provision of this Part.

Comment: This section ensures that matters relating to compensation of a judicial trustee set out in a court order under the provision of this Act pertaining to the power of the court to appoint trustees and to provide for their compensation prevail over any contrary provision of this Part of the Act. Judicial trustees are officers of the court, and therefore it is appropriate that their compensation should be a matter of discretion of the court.

PART 7 – CHARITABLE GIFTS, CHARITABLE TRUSTS AND NON-CHARITABLE PURPOSE TRUSTS

Power of court to vary charitable gifts and charitable trusts

- 70**
- (1) This section applies in respect of a gift given before, on or after the date this section comes into force.
 - (2) On application by the trustee of a charitable trust or by the personal representative of a donor of a charitable gift, the court may vary the terms of the trust or gift in accordance with subsection (3) if the court is of the opinion that
 - (a) an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust or gift, or
 - (b) a variation of the trust or gift would facilitate the carrying out of the intention of the settlor or donor.
 - (3) In varying the terms of the trust or gift under subsection (2), the court may do one or more of the following:
 - (a) vary, delete or add to the terms of the trust or gift;
 - (b) vary, delete or add to the powers of a trustee in relation to the management or administration of the trust;
 - (c) vary, delete or add to the powers of the donee in relation to the management or administration of the gift;
 - (d) if the court makes a finding under subsection (2) (a), vary or add to the terms of the trust or gift to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust or gift.
 - (4) For the purposes of a variation under subsection (2), it is irrelevant whether the charitable intent of the settlor or donor was general or specific, except that if the

terms of the trust or gift expressly provide for a gift over or a reversion in the event of the lapse or other failure of a charitable purpose, the gift over or reversion, if otherwise valid, may take effect.

Comment: At common law, when a charitable trust, that is, 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. This section restates the power of the court to make a *cy-près* order, but with 2 important changes to the law.

First, it is a precondition to the application of the *cy-près* doctrine that the donor had a “general charitable intent”. It can be very difficult to establish such a subjective intent, and this section abrogates that requirement.

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

Surplus arising from public appeal

- 71** (1) This section applies if, as a result of an appeal to the public for support, property is held in trust by a trustee.
- (2) If an identifiable donor to an appeal referred to in subsection (1) indicates in writing at the time the donor makes a donation that the unexpended portion of the donation is to be refunded if the trustee is unable to fully expend the trust property for the purpose for which the appeal is made, before the trustee makes an application under section 70 or 75, the trustee must refund to the donor
- (a) the unexpended portion of the donation, or
 - (b) if the unexpended portion of the donation cannot be readily determined, an amount equal to that proportion of the donation that the unexpended portion of all the donations to the trust resulting from the appeal bears to the total donations to the trust resulting from the appeal.

Comment: This section addresses the problem that arises when money is collected through a public appeal for a non-charitable purpose. The difficulty arises if the purpose of the public appeal does not meet the legal definition of charity, and the purpose is therefore non-charitable as a matter of law, and the public appeal has been constituted without any provision for the distribution of a surplus. Under current law, in such a circumstance, nothing can be done with the surplus except to let it accumulate interest indefinitely, or else pay it into court.

This section contemplates that the trustee may apply to the court for an order that the surplus be applied to a charitable purpose or to a non-charitable purpose. This section also provides for the return of surplus funds to a donor if the donor has indicated in writing at the time of making the donation that the unexpended portion is to be refunded if the trustee is unable fully to expend the trust money for the appeal’s purpose. If the donation has been commingled with other money raised through the appeal and the identity of the unexpended portion of the donation has thus been lost, which would likely be the case, then the trustee must refund to the donor an amount equal to the proportion of that donation that the unexpended portion of all the donations bears to the total donations.

Note: A complete legislative regime to address the problem of a surplus arising from a public appeal for a non-charitable purpose is provided for in the *Uniform Informal Public Appeals Act*. Jurisdictions that do not enact that Act should enact this section.

Power to order sale of property – charitable trust

- 72** (1) If the court finds that a specific property held in trust for a charitable purpose can no longer be used advantageously for the charitable purpose or should for any other reason be sold, the court may authorize the sale of the property and give directions concerning the conduct of the sale and the application of the proceeds from the sale.
- (2) An order under subsection (1) may be made on application by any of the following:
- (a) the Attorney General;
 - (b) the trustee;
 - (c) a person appearing to the court to have a sufficient interest in the matter.

Comment: Occasionally, changing circumstances can result in land that is held in trust for a charitable purpose that is no longer useful for that charitable purpose. An example might be if land is conveyed to a trustee to hold it in trust for use as a public park, but subsequent environmental degradation renders the land unsuitable for public use. If the court finds that the land is no longer useful, or finds that for some other reason it should be sold, then the court may authorize its sale and give directions for the conduct of the sale and the application of the proceeds of the sale. This section would permit the trustee to apply to the court for the sale of the land and the court might order that the proceeds be used to purchase another piece of land that might be more suitable. Subsection (2) provides that a court application may be made by the Attorney General of the enacting jurisdiction, the trustee or a person whom the court considers to have a sufficient interest in the matter.

Notice to Attorney General

- 73** If an application is made for an order under section 70, 71 or 72 by a person other than the Attorney General, the order may not be made unless the person has served notice of the application on the Attorney General at least 30 days before the date set for the hearing of the application.

Comment: This section provides that if an application is made to the court for an order under any of the 3 preceding sections by anyone other than the Attorney General of the enacting jurisdiction, then the order may not be made unless the person making the application has served the Attorney General with notice thereof at least 30 days before the date set for the hearing of the application. The Attorney General is the guardian of the public interest in all matters relating to charities and it is therefore appropriate that notice be given to the Attorney General of any court application that may affect the charity in question.

Non-charitable purpose trust

- 74** (1) In this section, “**non-charitable purpose trust**” means a trust created under subsection (2) or a trust constituted under section 75 (3) (b), (d) or (f).
- (2) Subject to this section, a person may create a trust that
- (a) does not create an equitable interest in any person, and
 - (b) is for a non-charitable purpose described in subsection (3).
- (3) For the purposes of subsection (2) (b), a non-charitable purpose is a non-charitable purpose that is recognized by law as capable of being a valid object of a trust or is
- (a) sufficiently certain to allow the trust to be carried out,
 - (b) not contrary to public policy, and

- (c) in relation to one or more of the following:
 - (i) *[purposes for which a society may be incorporated under the jurisdiction's legislation respecting societies]*;
 - (ii) the performance of a function of government in Canada;
 - (iii) a matter specified under subsection (12).
- (4) A non-charitable purpose trust may exist indefinitely.
- (5) Subject to subsection (8), if the court is of the opinion that an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of a non-charitable purpose trust, the court may
 - (a) vary or add to the terms of the trust to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, or
 - (b) if the court is unable to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.
- (6) Subject to subsection (8), if the court is of the opinion that a change in circumstances since the creation of the non-charitable purpose trust has resulted in a purpose of the trust being obsolete or no longer expedient, the court may vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.
- (7) In exercising the power under subsection (6), the court may consider the views of the settlor or the trustee concerning the obsolescence or expedience of the purpose of the trust and the proposed variation.
- (8) Subsections (5) and (6) do not apply if
 - (a) the trust instrument contains a valid direction concerning the ultimate disposition of the trust property, or
 - (b) the intention of the settlor concerning the ultimate disposition of the trust property can be inferred from the trust instrument and is valid.
- (9) Despite subsections (5) and (6), if the court cannot determine a substitute purpose for a non-charitable purpose trust, the court may order that the trust property be returned to the settlor or to the settlor's personal representative.
- (10) The court may make an order that it considers appropriate
 - (a) to enforce a non-charitable purpose trust, or
 - (b) to enlarge or otherwise vary the powers of the trustee of a non-charitable purpose trust.
- (11) An application for an order under this section may be made by any of the following:
 - (a) the Attorney General;
 - (b) a person appointed specifically by the settlor in the trust instrument to enforce the trust;
 - (c) the settlor;
 - (d) the personal representative of the settlor;

- (e) the trustee;
 - (f) a person appearing to the court to have a sufficient interest in the matter.
- (12) The [regulation-making authority for the jurisdiction] may make regulations specifying matters in respect of which a non-charitable purpose trust may be created under subsection (2).

Comment: This section validates the creation of trusts for certain non-charitable public purposes. It broadens the narrow range of gifts for such purposes that, under current law, may take effect as trusts per se. This section is based on recommendations in the Law Reform Commission of British Columbia's *Report on Non-Charitable Purpose Trusts* (1992).

Subsection (1) defines "non-charitable purpose trust" as a trust created under subsection (2) or constituted under the provisions in this Part allowing the court to make orders in relation to a trust whose objects consist of both a charitable purpose and a non-charitable purpose.

Subsection (2) provides authority for a person to create a trust that is for any of the non-charitable purposes set out in subsection (3) and that does not create an equitable interest in any person.

Subsection (3) defines a non-charitable purpose as one that the law presently recognizes as being a valid object of a trust (maintenance of a grave or tomb, erection of a monument over a burial place and provision of food and shelter for specific animals) or that is sufficiently certain to allow the trust to be carried out, is not contrary to public policy and relates to one or more purposes that a jurisdiction may provide.

Note: The *Uniform Trustee Act* sets out a square-bracketed suggested provision in which such purposes are those for which a non-profit society may be incorporated under the enacting jurisdiction's statute respecting societies. These purposes also include the performance of a function of government in Canada. Subsection (12) also provides that jurisdictions may make regulations specifying matters for which a non-charitable purpose trust may be created.

Subsection (4) provides that a non-charitable purpose trust may exist indefinitely, unless the trust instrument stipulates otherwise.

Subsections (5) to (9) provide for the ability of the court to deal with circumstances in which the purpose of a trust has failed. They allow the court to approve a substitute purpose, which may also be non-charitable, or order another disposition of the trust property.

Subsections (10) and (11) address a major ground for the traditional hostility that the law has had to non-charitable purpose trusts: because the beneficiaries are the members of the public at large, or a significant segment of it, there is no obvious person who can enforce the trust against the trustee should it become necessary to do so. Subsection (10) provides that the court may make an order it considers appropriate to enforce a non-charitable purpose trust or to enlarge or vary the powers of a trustee of a non-charitable purpose trust, and subsection (11) lists the persons who may apply for an order under this section. They include the Attorney General, given the public purpose of such trusts, and any person whom the court considers to have a sufficient interest in the matter.

Subsection (12) provides, as described above in the note relating to subsection (3), for the power to make regulations specifying matters for which a non-charitable purpose trust may be created.

Imperfect trust provisions – charitable and non-charitable purposes

- 75**
- (1) A trust is not void by reason only that the objects of the trust consist of a charitable purpose and a non-charitable purpose.
 - (2) A trustee may make an application to the court for an order under this section in relation to a trust described in subsection (1).

- (3) On an application under subsection (2), the court may make one or more of the following orders:
- (a) an order that a charitable purpose constitutes the object of a separate charitable trust, if the court determines that it is practicable to separate the charitable purpose from a non-charitable purpose;
 - (b) an order that a non-charitable purpose constitutes the object of a separate non-charitable purpose trust, if the court determines that
 - (i) the non-charitable purpose is described under section 74 (3), and
 - (ii) it is practicable to separate the non-charitable purpose from the other objects of the original trust;
 - (c) an order that the terms of the disposition of property relating to a non-charitable purpose must be construed as provided in section 76, if the court determines that
 - (i) the non-charitable purpose is not described under section 74 (3), and
 - (ii) it is practicable to separate the non-charitable purpose from a charitable purpose;
 - (d) an order that a charitable purpose and a non-charitable purpose constitute the objects of a separate non-charitable purpose trust, if
 - (i) the court determines that
 - (A) the non-charitable purpose is described under section 74 (3), and
 - (B) it is not practicable to separate the charitable purpose from the non-charitable purpose, and
 - (ii) the court makes an order under paragraph (a), (b) or (c) of this subsection separating other objects of the original trust;
 - (e) an order that the terms of the disposition of property relating to a charitable purpose and a non-charitable purpose must be construed as provided in section 76, if
 - (i) the court determines that
 - (A) the non-charitable purpose is not described under section 74 (3), and
 - (B) it is not practicable to separate the charitable purpose from the non-charitable purpose, and
 - (ii) the court makes an order under paragraph (a), (b) or (c) of this subsection separating other objects of the original trust;
 - (f) an order that the trust takes effect as a non-charitable purpose trust, if the court determines that
 - (i) the non-charitable purpose is described under section 74 (3), and
 - (ii) it is not practicable to separate any objects of the trust;
 - (g) an order that the terms of the disposition of property purporting to create a trust must be construed as provided in section 76, if the court determines that
 - (i) the non-charitable purpose is not described under section 74 (3), and

- (ii) it is not practicable to separate any objects of the trust.
- (4) If the court makes an order under subsection (3) (a) to (e), subject to any terms in the trust instrument regarding apportionment of the trust property or the manner in which a power of apportionment may be exercised, the trustee must divide the trust property as the trustee considers reasonable in the circumstances between any new trusts and powers of appointment.
- (5) Despite subsection (3) (d) to (g), if the objects of a trust consist of a charitable purpose linked conjunctively or disjunctively with a purpose that is not described specifically but is referred to only by an indefinite qualifying term, such as “benevolent”, “worthy” or “philanthropic”, the trust takes effect as a charitable trust.
- (6) The trustee must apply all of the property of the trust described in subsection (5) as if only the charitable purpose had been set out in the trust instrument.

Comment: It sometimes occurs that a trust is created for purposes that are both charitable and non-charitable. In the absence of curative legislation, such a trust will fail in whole or in part.

This kind of problem can arise due to confusion with respect to language. A settlor or testator may use terms such as “benevolent” or “philanthropic”, thinking they imply a charitable purpose, when, as a matter of law, they do not and simply taint the trust. This section addresses this problem of a trust containing an unintentional non-charitable purpose by providing that such a trust operates solely for the benefit of the charitable purpose.

There can also be trusts created that contain both a charitable purpose and an obviously non-charitable purpose. This section addresses this problem by providing that if it is possible to separate the charitable purpose and the non-charitable purpose, then they will operate as 2 separate trusts, one a charitable purpose trust and the other a non-charitable purpose trust. A trustee would have the discretion to divide the trust assets between the 2 trusts. This section also provides that if it is not possible to separate the charitable and non-charitable purposes, the trust is valid and takes effect as a non-charitable purpose trust.

This section is based on recommendations in the Law Reform Commission of British Columbia's *Report on Non-Charitable Purpose Trusts* (1992).

Subsection (1) provides that a trust is not void simply because it contains both charitable and non-charitable purposes.

Subsection (2) allows a trustee to apply for a court order under this section with respect to such a trust.

Subsection (3) sets out the various orders that a court may make with respect to such a trust:

- (a) an order that a charitable purpose in a trust becomes the object of a separate charitable purpose trust if it is practicable to separate the charitable purpose from a non-charitable purpose;
- (b) an order that a non-charitable purpose in a trust becomes the object of a separate non-charitable purpose trust if
 - (i) the non-charitable purpose is one that is recognized under the section of this Part that provides for non-charitable purpose trusts, and
 - (ii) it is practicable to separate the non-charitable purpose from the other objects of the original trust;
- (c) an order that the terms of a disposition of property relating to a non-charitable purpose must be construed as a power to appoint the income or the capital as provided in the subsequent section in this Part that provides for such dispositions if

- (i) the non-charitable purpose is not one that is recognized in the section of this Part that provides for non-charitable purpose trusts, and
 - (ii) it is practicable to separate that purported non-charitable purpose from a charitable purpose;
- (d) an order that a charitable purpose and a non-charitable purpose become the objects of a separate, non-charitable purpose trust if
 - (i) the non-charitable purpose is one that is recognized under the section of this Part that provides for non-charitable trusts,
 - (ii) it is not practicable to separate the charitable and non-charitable purposes, and
 - (iii) the court makes an order separating other objects of the original trust;
- (e) an order that the terms of a disposition of property relating to both a non-charitable purpose and a charitable purpose must be construed as a power to appoint the income or the capital as provided in the subsequent section of this Part that provides for such dispositions if
 - (i) the non-charitable purpose is not one recognized in the section of this Part that provides for non-charitable purpose trusts,
 - (ii) it is not practicable to separate the charitable and non-charitable purposes, and
 - (iii) the court makes an order separating other objects of the original trust;
- (f) an order that a trust takes effect as a non-charitable purpose trust if
 - (i) the non-charitable purpose is one that is recognized under the section of this Part that provides for non-charitable trusts, and
 - (ii) it is not practicable to separate any objects of the trust;
- (g) an order that the terms of a disposition of property purporting to create a trust must be construed as a power to appoint the income or the capital as provided in the subsequent section of this Part that provides for such dispositions if
 - (i) the non-charitable purpose is not one that is recognized under the section of this Part that provides for non-charitable trusts, and
 - (ii) it is not practicable to separate any objects of the trust.

Subsection (4) provides that if an order is made under subsection (3) (a) to (e), the trustee must divide the trust property between any new trusts and powers of appointment as the trustee considers reasonable in the circumstances. This requirement is subject to any terms in the trust instrument dealing with apportionment of the trust property or the way in which a power of apportionment may be exercised.

Subsection (5) provides that despite subsection (3) (d) to (g), if a trust contains a charitable purpose linked with a purpose that is referred to only by such terms as "benevolent", "worthy" or "philanthropic", the trust will take effect as a charitable trust.

Subsection (6) requires the trustee of a trust described in subsection (5) to apply all the trust property as if only the charitable purpose had been set out in the trust instrument.

Disposition purporting to create non-charitable purpose trust construed as power to appoint

- 76** (1) This section applies in respect of a disposition described in subsection (2) and made before, on or after the date this section comes into force.

Alternative subsection (1):

- (1) This section applies in respect of a disposition described in subsection (2) and made on or after the date this section comes into force.
- (2) If the terms of a disposition of property purport to create a trust that

- (a) does not create an equitable interest in any person, and
- (b) is for a specific non-charitable purpose, other than a non-charitable purpose described under section 74 (3),

the terms of the disposition must be construed, subject to this section, as constituting a power to appoint the income or the capital, as the case may be, for a period not exceeding 21 years.

- (3) Despite subsection (2), the terms of a disposition described in that subsection must not be construed as constituting a power to appoint if the terms of the disposition provide for an illegal purpose or a purpose contrary to public policy.
- (4) Despite subsection (2), if the disposition is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that, by voiding the disposition, the result would be closer to the intention of the person disposing of the property than the period of validity provided by this section.
- (5) An order under subsection (4) may be made on application by a person referred to in section 74 (11).
- (6) If the disposition described in subsection (2) provides for the expenditure of all or a specified portion of the income or capital within an annual period or another recurring period that is less than 21 years and that income or capital is not fully expended within the period that is less than 21 years, the person who would have been entitled to the property that is subject to the power to appoint, if the power to appoint had terminated at the expiration of that period, is entitled to that unexpended income or capital.
- (7) If the income or capital that is subject to a power to appoint under subsection (2) is not fully expended within a period of 21 years, the person who would have been entitled to the property that is subject to the power to appoint, if the power to appoint had terminated at the expiration of the 21-year period, is entitled to that unexpended income or capital.
- (8) Nothing in this section applies to any discretionary power to transfer a beneficial interest in property to any person as a gift.

Comment: Non-charitable trusts for public purposes have been validated in the provision of this Part that provides for such trusts. However, it is also necessary to provide for other dispositions of property that purport to create non-charitable purpose trusts that do not meet the requirements of that provision.

There are 2 alternative provisions with respect to subsection (1). The first alternative subsection (1) is for those jurisdictions that have enacted a provision similar to section 20 of the *Uniform Perpetuities Act*. The second alternative subsection (1) is for those jurisdictions that have not enacted such a provision.

The first alternative subsection (1) provides that this section applies to dispositions of property described in subsection (2) made before, on or after this section comes into force.

The second alternative subsection (1) provides that this section applies to dispositions of property described in subsection (2) made on or after this section comes into force.

Subsection (2) describes those dispositions of property to which this section pertains: those that purport to create non-charitable purpose trusts, the terms of which do not create an equitable interest in any person and are for a specific non-charitable purpose, other than one described in section 74 that provides for non-charitable purpose trusts.

Subsection (2) provides that those dispositions of property are to be construed, subject to this section, as powers to appoint the income or capital, as the case may be, for a period of time not exceeding 21 years.

Subsection (3) limits the application of subsection (2) to dispositions whose terms do not provide for illegal purposes or purposes contrary to public policy.

Subsection (4) provides that, despite the 21-year period provided for in subsection (2), if the property disposition is expressed to be of perpetual duration, the court may void the disposition if it determines that to do so would be closer to the intention of the person making the disposition.

Subsection (5) specifies that an order under subsection (4) may be made on the application of the same persons who may make an application for an order respecting non-charitable purpose trusts.

Subsection (6) provides that if a property disposition under this section has provided for the expenditure of all or a specified part of the income or capital within an annual or other recurring period less than 21 years, but it is not all expended within that period, then the person who would have been entitled to the property if the power to appoint had terminated at the end of that time period is entitled to the unexpended income or capital.

Subsection (7) provides that if the income or capital of a power to appoint under subsection (2) is not fully expended within 21 years, then the person who would have been entitled to the property if the power to appoint had terminated at the end of 21 years is entitled to the unexpended income or capital.

Subsection (8) clarifies that this section does not apply to any discretionary power to make a gift of a beneficial property interest.

Trust property held for charitable purposes not to be seized

- 77** (1) Property held in trust for a specific charitable purpose by a trustee or charitable corporation, as opposed to property held for the general purposes of the trust or corporation, is exempt from execution, seizure or attachment to satisfy a judgment against that trustee or corporation except to the extent that the judgment is based on a liability incurred by the trustee or corporation in relation to that specific charitable purpose.
- (2) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter because it makes no specific reference to that matter.

Comment: The purpose of this section is to restate the law respecting the non-exigibility of property held by a trustee or charitable corporation for a specific purpose. It is designed to address the decision of the Ontario Court of Appeal with respect to the liquidation of assets of the Christian Brothers of Ireland in Canada (CBIC) to satisfy claims arising out of occurrences in Newfoundland. In that case, the court held that 2 schools in Vancouver held by the CBIC on separate purpose trusts and unconnected to the events in Newfoundland were assets that might be liquidated to satisfy the Newfoundland claims.

This section is based on the recommendation of the British Columbia Law Institute's report titled *Creditor Access to the Assets of a Purpose Trust* (2003). Subsequent to the preparation of the Institute's report titled *A Modern Trustee Act for British Columbia*, the Legislature of British Columbia enacted the *Charitable Purposes Preservation Act*, which has the same principal objectives as this section.

Subsection (1) provides that if a judgment has been obtained against a trustee or charitable corporation, property held by the trustee or charitable corporation on trust for a specific purpose (as distinct from property held generally for the purposes of the trustee or charitable corporation) is exempt from civil enforcement process, such as attachment,

execution or seizure. The exception to this is if liability on which the judgment is based is related to the specific purpose.

Subsection (2) provides that this section is of retroactive effect.

PART 8 – ADDITIONAL POWERS OF THE COURT

Non-performance by trustee

- 78** If, on application by a beneficiary, the court is satisfied that a trustee has refused or failed to
- (a) perform a duty imposed on the trustee, or
 - (b) consider in good faith the exercise of a power conferred on the trustee,
- the court may
- (c) order the trustee to
 - (i) perform the duty, or
 - (ii) consider in good faith the exercise of the power and satisfy the court that the trustee has given due consideration to the exercise of the power, or
 - (d) remove the trustee.

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

Trustee may apply to court for directions

- 79** (1) A trustee may apply to the court for directions on any matter or question of fact, law or discretion arising in respect of a trust.
- (2) Without limiting subsection (1), if trustees are deadlocked on any matter arising in respect of a trust, one or more of the trustees may apply to the court for directions respecting the resolution of the matter.
- (3) The duty of a trustee who follows the directions given under subsection (1) or (2) or section 9 (4) is discharged with respect to the subject matter of the directions, unless the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

Comment: This section provides for the ability of a trustee to apply to the court for directions. A trustee (including a judicially appointed trustee) who follows the court's directions is relieved of liability as long as the trustee is not fraudulent or dishonest in obtaining the directions.

Trustee may apply to court for order respecting distribution of trust property

- 80** (1) On application by a trustee, the court may authorize the trustee to distribute trust property among the persons entitled to receive the trust property, with the trustee having regard only to
- (a) the persons whom the trustee has been able to locate after making diligent efforts, or

- (b) the claims or interests that the trustee has been able to determine after making diligent efforts.
- (2) In making an order under subsection (1), the court may give directions respecting the procedure to be followed by the trustee in relation to a distribution of the trust property, including, without limitation, directions concerning the notice that must be given to persons who may have an interest in the distribution of the trust property.
- (3) An order under subsection (1) or section 9 (4) does not prejudice the right of any creditor or claimant to follow the trust property into the hands of a person who receives it.

Comment: Subsection (1) of this section allows a trustee to obtain authorization from the court to distribute trust property among creditors or beneficiaries of whom the trustee is then aware, having made diligent efforts to locate such persons, and to distribute trust property to satisfy the claims and interests that the trustee has been able to ascertain, after having made diligent efforts to do so.

Subsection (2) provides that the court may give directions respecting procedure and notice.

Subsection (3) provides that trust property that is distributed pursuant to an order under this section (or an order respecting a judicially appointed trustee) remains subject to proper claims to such trust property by creditors and beneficiaries whose whereabouts or claims were not ascertained at the time of the distribution.

Trustee may be relieved of liability for breach of trust

- 81** (1) In this section, “**exemption clause**” means a provision of a trust instrument that excludes or restricts the liability of a trustee, including, without limitation, a provision that purports to do one or more of the following:
- (a) make the enforcement of the liability of the trustee subject to restrictive or onerous conditions;
 - (b) permit a trustee to act despite a conflict between the trustee’s personal interest and the powers and duties of the office of trustee;
 - (c) exclude or restrict any right or remedy in respect of the liability of a trustee, or prejudice any person who pursues such right or remedy;
 - (d) exclude or restrict rules of evidence;
 - (e) negate a duty that, in the absence of the provision, would otherwise be imposed on the trustee.
- (2) The court may relieve a trustee or former trustee either wholly or partly from personal liability if the court is satisfied that
- (a) the trustee or former trustee is or may be personally liable for a breach of trust, and
 - (b) the trustee or former trustee
 - (i) has acted honestly and reasonably, and
 - (ii) ought fairly to be excused for the breach of trust.
- (3) Subject to subsection (4), an exemption clause in a trust instrument is effective to relieve, according to its terms, a trustee of liability for a breach of trust.
- (4) If the court is of the opinion that the conduct of a trustee

- (a) constitutes a breach of trust, and
- (b) has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be relieved by an exemption clause from liability for the breach of trust,

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

Comment: This section addresses the grounds on which a trustee may be relieved from liability. The general provision respecting the ability of a court to do so is set out in subsection (2). The other subsections address the issue of liability if a trust instrument contains what is known alternatively as an “exculpation” or “exemption” clause. Such a clause, referred to in this Act as an “exemption clause”, is a provision in a trust instrument that purports to excuse the trustee from liability for conduct that may constitute a breach of trust. The purpose of this section is to clarify the role and effect of exemption clauses and to achieve an appropriate balance between the legal policy of protecting beneficiaries and the right of a settlor to include in trust instruments provisions aimed at protecting trustees from liability. The scheme of this section is to declare exemption clauses to be effective according to their terms but to provide that, upon application by a beneficiary, the court may, in certain circumstances, grant relief from the exemption clause.

Subsection (1) defines “exemption clause” to include a number of types of trust instrument provisions that operate indirectly to excuse a trustee from liability.

Subsection (2) provides for the ability of the court to relieve a trustee or former trustee from liability if satisfied that the trustee or former trustee has acted honestly and reasonably, and ought in fairness to be so relieved. This relief may be granted even if there is no exemption clause in the trust instrument.

Subsection (3) provides that an exemption clause will take effect as written, unless the court declares otherwise under subsection (4).

Subsection (4) provides that the court may declare that an exemption clause is ineffective with respect to the breach of trust at issue and that the liability of the trustee be as if there were no exemption clause in the trust instrument. The grounds on which the court may do so is if the court is of the opinion that the trustee’s conduct would constitute a breach of trust and has been so egregious that fairness to the beneficiary requires that the trustee not be relieved from liability by an exemption clause.

Contribution and indemnity

- 82** (1) In this section, “**breach of trust**” includes any act or omission that gives rise to the liability of a trustee to the beneficiaries of the trust, regardless of whether the act or omission
- (a) is intentional,
 - (b) is negligent, or
 - (c) would give rise to a right for contribution or indemnity apart from this Act.
- (2) This section applies only with respect to a breach of trust
- (a) that is the subject of a legal proceeding commenced after this Act comes into force, or
 - (b) if no legal proceeding has been commenced for breach of trust, for which a claim for contribution or indemnity is made after this Act comes into force.

- (3) Except as provided in this section, a trustee is not obligated to contribute to or indemnify a co-trustee in relation to a breach of trust.
- (4) If a trustee commits a breach of trust, the court, having regard to the responsibility of each trustee for the loss to the trust, may determine the amount the court considers appropriate
 - (a) for which each trustee is liable in order to make good the loss to the trust, or
 - (b) that a trustee must contribute to another trustee.
- (5) The court may
 - (a) exempt a trustee from liability to make a contribution to another trustee, or
 - (b) order that any contribution due to, or to be recovered from, a trustee amounts to a complete indemnity.
- (6) The powers conferred on the court by this section may be exercised even if the trustee claiming contribution or indemnity or the trustee against whom the claim is made, or both of them, have acted fraudulently in breach of trust.
- (7) If a trustee in breach of trust is insolvent, the court may apportion liability for making good the loss to the trust and any other losses as is appropriate among the solvent co-trustees.
- (8) If the beneficiaries have settled with a trustee who is in breach of trust and who subsequently seeks contribution from a co-trustee, the court, in making any contribution order and without limiting subsections (4) and (5), may consider whether the settlement was reasonable.

Comment: This section addresses the contribution and indemnity of trustees for breach of trust. With respect to the matter of contribution, at common law, when there is a breach of trust, each liable trustee must contribute an equal share. However, if a trustee is in breach of trust because of fraud, that trustee would be responsible for the entire loss incurred by the trust. With respect to the matter of indemnification of trustees, there are 3 situations at common law in which trustees have a right to be indemnified. A trustee must indemnify co-trustees if that trustee has fraudulently appropriated trust property or if that trustee is a solicitor who has given incorrect legal advice to co-trustees. If a trustee is also a beneficiary, that trustee must indemnify co-trustees to the extent of that trustee's beneficial interest. For other situations, the common law is unclear as to whether trustees can be indemnified. Under this Act, the court has the discretion to excuse trustees for breach of trust. Under the foregoing section, the court may relieve a trustee who is in breach of trust from personal liability, either wholly or partly, provided that the trustee acted honestly and reasonably and ought fairly to be excused from liability for the breach. As an extension of those court powers in the foregoing section, this section permits the court, if there are co-trustees, to adjust the obligations to contribute that would arise ordinarily among trustees.

Subsection (1) defines "breach of trust" for the purposes of this section.

Subsection (2) provides that this section, which changes the law, applies only to a proceeding for breach of trust or to a claim for contribution or indemnity that is made after the coming into force of this Act.

Subsection (3) provides that it is only as provided in this section, rather than as previously pursuant to common law, that a trustee is obligated to make contribution to, or to indemnify, a co-trustee in relation to a breach of trust.

Subsections (4) and (5) give the court wide discretion to determine the proportions in which co-trustees are liable as between themselves for making good the loss to the trust and the

amount of contribution that may be recovered by a trustee from a co-trustee if there has been a breach of trust.

Subsection (4) provides that if a trustee has committed a breach of trust, the court may determine the amount it considers appropriate for each trustee to be liable to make good the loss to the trust, or that a trustee must contribute to another trustee. In doing so, the court must have regard to the extent of the responsibility of each trustee in breach for the loss that has been caused.

Subsection (5) provides that the court may exempt a trustee from liability to make a contribution or may order that any such contribution due to or to be recovered from a co-trustee amounts to a complete indemnity.

Subsections (6) to (8) provide more detailed guidance in relation to particular issues.

Subsection (6) provides that the court may exercise its powers even if the trustee claiming contribution or indemnity, or the trustee against whom the claim is made, or both, have acted fraudulently.

Subsection (7) provides that if a trustee in breach is insolvent, the court may apportion responsibility for making good the losses among the solvent trustees.

Subsection (8) provides that the court may consider the reasonableness of a settlement reached between the beneficiaries and a trustee in breach, if that trustee then seeks contribution from a co-trustee.

Beneficiaries instigating breaches of trust

- 83**
- (1) If a trustee commits a breach of trust, and the breach was at the instigation or request or with the consent of some but not all of the beneficiaries, the court may order the beneficiaries who instigated, requested or consented to the breach to contribute to or indemnify the trustee or persons claiming through the trustee.
 - (2) If the court makes an order under subsection (1), the court may order that all or part of the interest of the beneficiaries in the trust is to be used to satisfy the obligation to contribute to or indemnify the trustee or persons claiming through the trustee.

Comment: This section provides that if all the beneficiaries of a trust are legally competent adults, they can all authorize a trustee's actions. However, as provided in subsection (1), if a trustee commits a breach of trust at the instigation, request or consent of only one or some, but not all, of the beneficiaries, the breach cannot be excused by the authorization of those beneficiaries, and the court may order those beneficiaries who so authorized the trustee to contribute to or indemnify the trustee or those claiming through the trustee.

Subsection (2) provides that if the court makes an order under subsection (1), the court may also order that all or part of the interest of those beneficiaries in the trust be made available to satisfy the obligation of contribution or indemnity.

Payment into court

- 84**
- (1) A trustee may pay into or deposit in court trust money or trust securities.
 - (2) If a trustee is not available to receive payment or transfer of trust money or trust securities and give a receipt for the trust money or trust securities, the court may order, on application by a person in possession or control of the trust money or trust securities, that the trust money or trust securities be paid into or deposited in court.
 - (3) A receipt given by a *[proper officer of the court in the jurisdiction]* for any money or securities paid into or deposited in court under subsection (1) or (2)

relieves the trustee or other person paying or depositing the money or securities from any further obligation relating to the money or securities.

- (4) The court may make orders it considers necessary or appropriate regarding the trust money or trust securities paid into or deposited in court under subsection (1) or (2) and for the administration of the trust to which the money or securities are subject.

Comment: This section provides for trust money or trust securities to be paid into or deposited in court when circumstances so warrant.

Subsection (1) provides for a means by which a trustee may be relieved of the trust through payment of trust money or trust securities into court. It may be used in circumstances in which the use of the resignation provision is not available or appropriate.

Subsection (2) provides that if a trustee is not available to give a receipt to a person in possession or control of trust money or securities, then on application of that person, the court may order that the money or securities be paid into or deposited in court.

Subsection (3) provides that a trustee or anyone so paying or depositing trust money or securities into court is discharged from further responsibility for the money or securities upon obtaining a receipt from the court.

Subsection (4) allows the court to make any orders it deems necessary or appropriate to deal with trust money or securities paid into or deposited in court, and to deal with the administration of the trust in question.

Note: If a person lacking legal capacity is entitled to trust money or trust securities, each jurisdiction should have regard to its law with respect to the determination of the person to whom payment may properly be made, including the role of the Public Guardian and Trustee, or equivalent officer, in that jurisdiction.

Who may apply to court for order

85 Subject to this Act, an order of the court under this Act in respect of a trust may be made on application by any of the following persons:

- (a) a beneficiary;
- (b) a trustee;
- (c) a secured party who has a security interest in the trust property.

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

Costs paid by party or out of trust property

- 86** (1) The court may order costs of a proceeding under this Act, in the amounts or proportions the court may order, to be paid
- (a) by or to a party to the proceeding, or
 - (b) out of the trust property.
- (2) The court may order costs of a transfer of or other transaction respecting trust property, in the amounts or proportions the court may order, to be paid out of the trust property.
- (3) For the purposes of subsection (1) (b) or (2), the court may designate all or part of the trust property as the source for the payment.

Comment: Subsection (1) of this section provides that the court may order costs of a proceeding under this Act, including amounts and proportions, to be paid by or to a party to the proceeding, or out of the trust property. Ordinarily, costs are paid by the party who is unsuccessful in the proceeding. However, in proceedings under this Act, there may be no one opposed to the application, or a party may question the application solely for the purpose of ensuring that the terms of the trust are taken into account in the proceedings. In such cases, it may be appropriate for the court to award costs from the trust property, indemnifying the parties to the proceedings.

Note: Jurisdictions should consider whether some or all of this section is necessary or whether it is addressed under its court rules.

Subsection (2) goes beyond the matter of costs of legal proceedings and empowers the court to order costs of a transaction respecting trust property to be paid out of the trust property.

Subsection (3) provides that in ordering costs under this section, the court may order the costs to be drawn from all or part of the trust property.

PART 9 – PERPETUITIES AND ACCUMULATIONS

General Comment: As resolved by the Uniform Law Conference of Canada, this Act provides for the abolition of the rule against perpetuities and the law relating to accumulations.

The sections of this Part are divided into 2 groups: Option 1 and Option 2. The sections comprising Option 1 pertain to those jurisdictions that have not enacted any reforms with respect to these rules. The sections comprising Option 2 pertain to those jurisdictions that have enacted reforms with respect to these rules.

Depending on the law in a particular jurisdiction, other variations are possible. For example, some jurisdictions may have re-enacted the UK *Accumulations Act, 1800* as a provincial or territorial statute.

Option 1 for Jurisdictions that have not reformed the rule against perpetuities and the law relating to accumulations

Definition

87 In this Part, “**rule against perpetuities**” means

- (a) the rule of law known as the modern rule against perpetuities, including the operation of the rule with regard to remoteness of vesting and perpetual duration and with regard to testamentary executory interests in personalty, and
- (b) the rule of law known as the rule in *Whitby v. Mitchell*, prohibiting the disposition, after a life interest to an unborn person, of an interest in property to the unborn child or to any other issue of an unborn person.

Comment: This section defines the “rule against perpetuities” to mean the rule known as the modern rule against perpetuities and the rule in *Whitby v. Mitchell*. The rule in *Whitby v. Mitchell* is the rule of law that forbids the disposing, after a life interest to an unborn person, of an interest in property to the unborn child or to any other issue of an unborn person.

Rule against perpetuities

88 The rule against perpetuities is abolished.

Comment: This section abolishes the rule against perpetuities, as it is defined in the preceding section.

Accumulations Act repealed

89 The *Accumulations Act, 1800* (U.K.), 39 & 40 Geo.III, c. 98, is repealed insofar as it is part of the law of [name of province or territory].

Comment: This section repeals the UK *Accumulations Act, 1800* to the extent that it is part of the law of the enacting jurisdiction.

Application of this Part

- 90** (1) Subject to subsection (2), this Part applies in relation to
- (a) all interests in property created before, on or after the date this Part comes into force, and
 - (b) all trusts created before, on or after the date this Part comes into force.
- (2) The law as it was before the date this Part comes into force continues to apply to an act or step respecting property if
- (a) the act had been done or the step had been taken before the coming into force of this Part in reliance on the application of the rule of law against perpetuities or the *Accumulations Act, 1800*,
 - (b) the act or step is
 - (i) done or taken in reliance on the application of the rule of law against perpetuities or the *Accumulations Act, 1800*, and
 - (ii) part of a series of acts or steps respecting property, and an act or step that is part of the series had been done or taken before the coming into force of this Part in reliance on the application of the rule of law against perpetuities or the *Accumulations Act, 1800*, or
 - (c) a court of competent jurisdiction has held that an interest or purported interest in property is void for breach of the rule of law against perpetuities or the *Accumulations Act, 1800*.

Comment: This section clarifies the legal effect of the abolition of the rule against perpetuities and the repeal of the law relating to accumulations on property interests and trusts.

Subsection (1) provides that the provisions of this Part apply to all interests in property and all trusts created before, as well as on and after, the date those provisions come into force. This is, however, subject to subsection (2).

Subsection (2) provides that the law as it was prior to the coming into force of this Part will nevertheless continue to apply to an act done or step taken respecting property in the following circumstances:

- (a) if an act or step was done or taken before the coming into force of this Part and in reliance on the rule against perpetuities or the UK *Accumulations Act, 1800*;
- (b) if an act or step done or taken is in reliance on that rule or Act and is part of a series of acts or steps, one of which was done or taken before this Part comes into force and was done or taken in reliance on that rule or Act;
- (c) if a court of competent jurisdiction has held that an interest or purported interest in property is void for breach of the rule against perpetuities or the UK *Accumulations Act, 1800*.

***Option 2 for Jurisdictions that have reformed
the rule against perpetuities and
the law relating to accumulations***

Rule against perpetuities

- 91** (1) The rule of law known as the modern rule against perpetuities, as modified by the *[the name of the jurisdiction's legislation relating to perpetuities]*, is abolished.
- (2) The rule of law known as the rule in *Whitby v. Mitchell*, prohibiting the disposition, after a life interest to an unborn person, of an interest in property to the unborn child or to any other issue of an unborn person, is abolished.
- (3) Subject to subsection (4), subsection (1) applies in relation to
- (a) all interests in property created before, on or after the date this section comes into force, and
 - (b) all trusts created before, on or after the date this section comes into force.
- (4) Despite subsection (1) and section *[section in this Act providing for the repeal of the jurisdiction's legislation relating to perpetuities]*, the *[the name of the jurisdiction's legislation relating to perpetuities]*, as it read before the coming into force of this section, continues to apply to an act or step respecting property if
- (a) the act had been done or the step had been taken before the coming into force of this section in reliance on the application of that Act,
 - (b) the act or step is
 - (i) done or taken in reliance on the application of that Act, and
 - (ii) part of a series of acts or steps respecting property, and an act or step that is part of the series had been done or taken before the coming into force of this section in reliance on the application of that Act, or
 - (c) a court of competent jurisdiction has held that an interest or purported interest in property is void for breach of the rule against perpetuities as modified by that Act.

Note: This section operates in conjunction with the repeal of an enacting jurisdiction's legislation respecting perpetuities.

Comment: Subsection (1) of this section provides that the rule of law that is known as the modern rule against perpetuities, as modified by the enacting jurisdiction's legislation respecting perpetuities, is abolished.

Subsection (2) abolishes the rule in *Whitby v. Mitchell*. That is the rule of law that forbids the disposing, after a life interest to an unborn person, of an interest in property to the unborn child or to any other issue of an unborn person.

Subsection (3) provides that the abolition of the rule in subsection (1) applies to all interests in property and trusts created before, as well as on or after, the date this section comes into force. This is, however, subject to subsection (4).

Subsection (4) provides that despite the abolition of the rule in subsection (1) and despite the repeal of the jurisdiction's legislation respecting perpetuities, that legislation, as it read

before the coming into force of this section, will continue to apply to an act done or step taken respecting property in the following circumstances:

- (a) if an act or step was done or taken before this section came into force and was done or taken in reliance on that legislation applying;
- (b) if an act or step is done or taken in reliance on the legislation applying and is part of a series of acts or steps, one of which was done or taken before the coming into force of this section and in reliance on the legislation applying;
- (c) if a court of competent jurisdiction has held that an interest or purported interest in property is void for breach of the rule against perpetuities as modified by the enacting jurisdiction's legislation respecting perpetuities.

Accumulations of income

- 92**
- (1) In this section, “**disposition**” includes the conferring of a power of appointment and any provision by which an interest in property or a right, power or authority over property is disposed of, created or conferred.
 - (2) If property is settled or disposed of in such a manner that all or part of the income earned from the property may or must be accumulated, the power or direction to accumulate that income is valid if the disposition of the accumulated income is or may be valid, but not otherwise.
 - (3) Nothing in this section affects
 - (a) the rights of any person or persons to terminate an accumulation that is for the benefit of the person or persons, or
 - (b) any jurisdiction or power of the court under an Act to direct payments from accumulations.
 - (4) Subject to subsections (5) and (6), this section applies to instruments taking effect before, on or after *[date specific to each jurisdiction]*.
 - (5) Nothing in this section renders invalid any accumulation validly empowered by a disposition taking effect before *[date specific to each jurisdiction]*.
 - (6) Nothing in this section divests or otherwise affects any interest that had become vested as a result of the expiration before *[date specific to each jurisdiction]* of a period of accumulation previously permitted or in force.

Comment: Subsection (1) of this section defines “disposition”, broadly, for the purposes of this section to include the conferring of a power of appointment and any legislation by which a property interest or a right, power or authority over property is disposed of, created or conferred.

Subsection (2) provides that if a settlement or disposition of property is such that all or part of the income from the property may or must be accumulated, then the power or direction to do so is valid as long as the disposition of the accumulated income is or may be valid.

Subsection (3) ensures that this section does not affect a person's right to terminate an accumulation that is for that person's benefit nor does it affect the authority of the court to direct payments from accumulations under any statute.

Subsection (4) provides that this section applies before, as well as on or after, a date specified by the enacting jurisdiction. This is, however, subject to subsections (5) and (6).

Subsection (5) clarifies that this section does not invalidate an accumulation that was validly empowered by a disposition taking effect before a given date specified by the enacting jurisdiction.

Subsection (6) clarifies that this section does not divest or otherwise affect an interest that has become vested as a result of a period of accumulation that had been previously permitted or in force, expiring before a date specified by the enacting jurisdiction.

PART 10 – GENERAL

Ability of person to have child

- 93**
- (1) If, in the administration of a trust, a question arises that turns on the ability of a person to have a child at some future time, it must be presumed that
 - (a) a male is able to have a child at the age of 14 years or over, but not under that age, and
 - (b) a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years.
 - (2) Despite subsection (1), in the case of a living person, it may be presumed that the person is or will be unable to have a child at the time in question if
 - (a) that person provides information or a reason supporting why that person is or will be unable to have a child at that time,
 - (b) there is a decision of the court that that person is or will be unable to have a child at that time, or
 - (c) there is an opinion of a *[medical practitioner, physician or doctor as referred to in the jurisdiction]*, or an individual entitled to practise medicine under the laws of another jurisdiction, that that person is or will be unable to have a child at that time.
 - (3) Subject to subsection (4), if, in the administration of a trust, a question is decided by treating a person as able or unable to have a child at a particular time, then the person must be so treated for the purpose of any related question that may arise in the administration of the trust, even if the evidence on which the finding of ability or inability to have a child at the particular time is proved by subsequent events to have been erroneous.
 - (4) If, in the administration of a trust, a question is decided by treating a person as unable to have a child at a particular time and that person subsequently has a child at that time, the court may make an order that it considers appropriate to protect the right that the child would have had in the trust property as if
 - (a) that question had not been decided, and
 - (b) that child would, apart from the decision, have been entitled to a right in the trust property.
 - (5) For the purposes of this section, the possibility that a person may at any time have a child by adoption may not be considered in deciding a question that turns on the ability of a person to have a child at some particular time, but if a person does subsequently have a child by adoption, subsection (4) applies in relation to that child.
 - (6) Subject to subsection (7), a trustee is not liable for a loss arising from a payment of trust money or a transfer of trust property further to a decision to treat a

person as unable to have a child at a particular time if, before the trustee has notice that the person subsequently had a child at the particular time, the trustee

- (a) relies on a decision of the court that that person is or will be unable to have a child at that time, or
- (b) relies on an opinion of a *[medical practitioner, physician or doctor as referred to in the jurisdiction]*, or an individual entitled to practise medicine under the laws of another jurisdiction, that that person is or will be unable to have a child at that time.

(7) Subsection (6) does not apply if the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining the decision or opinion.

Comment: Subsections (1) to (5) of this section set out certain presumptions to be applied in determining the ability of a person to have a child at some future or particular time. This exercise can be necessary in the administration of a trust in the process of identifying beneficiaries. These presumptions accord with those found in perpetuities legislation. Subsection (2) provides that, in the case of a living person, the presumption that the person is or will be unable to have a child at the time in question may be based on information from that person, a court decision to that effect or a medical opinion to that effect.

Subsection (6) protects a trustee from liability for a loss that may arise from paying trust money or transferring trust property pursuant to a decision to regard a person as unable to have a child at a particular time as long as, before having notice that the person subsequently did have a child at that time, the trustee relied on a court decision or a medical opinion as to the person's inability to have a child at that time. This is, however, subject to subsection (7).

Subsection (7) provides that the protection of the trustee from liability set out in subsection (6) does not apply if the trustee has been guilty of fraud, wilful concealment or misrepresentation in obtaining the court decision or medical opinion.

Entitlement to income arising from contingent interest in trust property

94 A beneficiary entitled to a contingent interest in trust property is entitled to the income earned from that interest in the trust property before that interest vests in the beneficiary, subject to any other person's interest in that income.

Comment: This section alters the case law to provide that a beneficiary who is entitled to a contingent interest in trust property is also entitled to the income generated by that property prior to the vesting of the interest in the beneficiary. This entitlement is subject to any other person's interest in that income. Also, a contrary intention in the trust instrument would prevail over this provision. Under the current case law, most contingent interests do not carry such intermediate income, and income earned prior to vesting generally forms part of the trust capital and does not become intermediate income for the contingent income beneficiary. (This section is not intended to alter the rule that a legacy to an adult beneficiary does not attract interest until the end of the "executor's year", that is, one year from the date of the testator's death, or the date of the grant of administration in an intestacy.)

Assumptions if notice of trust

95 (1) Subsection (2) applies to a person who receives notice of the existence of a trust by reason only of the production or registration of a document evidencing

- (a) an appointment of a trustee,
- (b) a trustee ceasing to hold office, or

- (c) a vesting of property in a trustee.
- (2) A person to whom this subsection applies may assume without inquiry that
 - (a) a former trustee possessed the powers the former trustee exercised or purported to exercise over the trust property, and
 - (b) a current trustee has the powers the current trustee has exercised or purports to exercise over the trust property.

Comment: This section provides that if a person learns of the existence of a trust only on the basis of a document being produced or registered that shows the appointment of a trustee, a trustee's ceasing to hold office or vesting of property in a trustee, then that person, without having to look behind that document, may assume that a former trustee possessed the powers he or she exercised or purported to exercise or that a current trustee so possesses those powers. The purpose of this section is to ensure that a third party dealing with trustees should be able to assume that the trustees are properly exercising the authority they purport to have and should not be prejudiced by an improper exercise of trustee powers in the absence of circumstances or information that would raise doubts in the mind of a reasonable person as to the sufficiency of a trustee's authority or the propriety of a transaction with a trustee.

Purchaser takes property subject to trust if notice of defect

- 96** (1) In this section, “**purchaser**” means
- (a) a purchaser for value,
 - (b) a secured party, or
 - (c) any other person who for value has received an interest in or a claim on trust property.
- (2) A purchaser of trust property takes the trust property subject to the terms of the trust if the purchaser, at the time of the purchase, has received notice that
- (a) a former trustee did not possess, or a current trustee does not possess, a power purported to be exercised with respect to the trust property, or
 - (b) a former trustee or current trustee has acted in breach of trust with respect to the trust property.

Comment: This section provides that a purchaser of trust property, as defined in this section, takes the trust property subject to the terms of the trust if, at the time of the purchase, the purchaser received notice that a former or current trustee did not possess a power purported to be exercised with respect to the trust property or that the former or current trustee was in breach of trust with respect to the trust property. This section defines “purchaser” broadly to mean a purchaser for value, a secured party or any other person who for value has received an interest in or claim on trust property. This section expresses the principle that it is equitable that the title of a third party who is aware when purchasing trust property that it is being transferred in breach of trust should remain encumbered by the interest of the beneficiary. Notice may be actual or constructive. No change from the current case law is intended.

Note: Jurisdictions should have regard to their statute law relating to the transfer of title in land.

Person not liable if compliant with Act or order

- 97** Subject to this Act, a person who complies with this Act or an order made under this Act is not liable for a loss arising from anything done or permitted to be done under this Act, unless it was done or permitted to be done in bad faith.

Comment: This section clarifies that, subject to provisions of this Act, a person who complies with this Act or an order made pursuant to the Act, will not be liable for a loss arising from anything they have done or permitted to be done under the Act in good faith.

Receipt relieves person from further obligation

98 A receipt given by a trustee for any money or other property received by the trustee relieves the person paying or otherwise transferring the money or other property from any further obligation relating to the money or other property.

Comment: This section provides that a receipt issued by a trustee for money or property received by the trustee is conclusive evidence that the person transferring the money or property has done so and is discharged from any further obligation relating to the money or property. The person would have no duty to oversee whether the money or property is used properly and would not be liable for any misuse of the money or property by the trustee.

Representation by committee

99 (1) If a beneficiary is an incapacitated person for whom a *[committee, guardian, custodian, curator or other term used by the enacting jurisdiction]* has been appointed under the *[enactment of enacting jurisdiction]*, the *[committee, guardian, custodian, curator or other term used by the enacting jurisdiction]* is the representative of that beneficiary for the purposes of this Act.

- (2) Without limiting subsection (1),
- (a) any action required or permitted to be taken by the beneficiary,
 - (b) any notice or report required or permitted to be given to the beneficiary, and
 - (c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if taken by, given to or given by the *[committee, guardian, custodian, curator or other term used by the enacting jurisdiction]* on behalf of the beneficiary.

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

Comment: Subsection (1) of this section provides that if a beneficiary is an incapacitated person for whom a protective officer has been appointed under the applicable statute of the enacting jurisdiction, then that officer is that beneficiary's representative for the purposes of this Act.

Subsection (2) specifies the following 3 particular instances of representation as valid:

- (a) an action required or permitted to be taken by the beneficiary,
 - (b) a notice or report required or permitted to be given to the beneficiary and
 - (c) a consent or agreement required or permitted to be given by the beneficiary.
- These do not limit or detract from the general authority provided for under subsection (1).

Subsection (3) confirms that any notice or report under this Act required or permitted to be given to a minor beneficiary is to be given to the guardian of the estate of the minor beneficiary.

Agent of beneficiary

100 For the purposes of this Act,

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

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

Comment: This section clarifies that beneficiaries may act through agents for the purposes of the Act. Therefore, a trustee may properly deal with an agent of a beneficiary.

Notice – qualified beneficiary

- 101** (1) For the purposes of the definition of “qualified beneficiary”, a beneficiary of a trust may deliver written notice to a trustee of the trust advising the trustee that the beneficiary wants to be a qualified beneficiary.
- (2) A beneficiary may withdraw notice under subsection (1) by delivering written notice of the withdrawal to a trustee of the trust.

Comment: This section specifies the process by which a contingent beneficiary wishing to become a qualified beneficiary as defined in the Act may do so: by delivering a written notice to a trustee of the trust so advising. Such notice may be withdrawn by delivering a written notice of withdrawal. Qualified beneficiaries are entitled to receive all notices and reports.

Delivery of documents

- 102** *[For each enacting jurisdiction to enact]*

Comment: Each enacting jurisdiction may enact a provision it considers appropriate.

PART 11 – TRANSITIONAL PROVISIONS, REPEALS AND CONSEQUENTIAL AMENDMENTS

Transition

- 103** (1) In this section:
- “**effective date**” means the date this Act comes into force;
- “**specified sections**” means the following sections:
- (a) section 6 *[appointment of substitute trustee]*;
 - (b) section 30 *[investment of trust property]*;
 - (c) section 31 *[standard of care]*;
 - (d) section 32 *[trustee not liable if overall investment strategy prudent]*;
 - (e) section 33 *[abolition of common law rules – anti-netting rules]*;
 - (f) section 38 *[apportionment of outgoings between income and capital]*;
 - (g) section 39 *[discretionary allocation trusts of receipts and outgoings]*;
 - (h) section 42 *[interpretation and application – distributive powers]*;
 - (i) section 43 *[power to pay income to or for benefit of individual]*;
 - (j) section 44 *[power to pay amount from capital for benefit of individual]*;
 - (k) section 45 *[conditions on payment from capital]*;
 - (l) section 47 *[power to appoint agents]*;

- (m) section 48 [*delegation of authority with respect to investment*];
 - (n) section 50 [*power to delegate by power of attorney*];
 - (o) section 52 [*powers conferred and duties imposed on trustees jointly*];
 - (p) section 94 [*entitlement to income arising from contingent interest in trust property*].
- (2) Subject to subsection (3), an act or a thing done by a trustee before the effective date that would have been validly done if the specified sections, as they read on the effective date, were in force on the date the act or thing was done is deemed to have been validly done to the extent that the act or thing would have been valid had this section been in force on the date the act or thing was done.
 - (3) Subsection (2) does not apply if the act or thing is the subject matter of a proceeding that was commenced before the effective date.
 - (4) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter because it makes no specific reference to that matter.

Comment: It is to be noted that, in addition to this section, it is provided in Part 1 that, subject to certain specific provisions of the Act listed therein, the Act applies to trusts created before, as well as on or after, the coming into force of that section. Certain provisions in the Act contain their own specific rules respecting their application or non-application to trusts or to events occurring before the Act comes into force.

Subsection (1) lists 2 definitions: “effective date” means the date the Act comes into force and “specified sections” refers to the list of sections set out that are referred to in subsection (2).

Subsection (2) provides for the retroactive validation of certain actions of trustees before the coming into force of this Act. It gives retroactive effect to an action or thing done by a trustee, with respect to the specified sections listed in subsection (1), before this Act comes into force that would have been legally valid if the specified sections had been in force at the time the action or thing was done. That is, an action or thing done is deemed to have been validly done to the extent that it would have been valid had this section been in force.

Subsection (3) provides, however, for the exception to the rule of retroactivity regarding actions or things done by trustees in relation to those specified sections: there is no retroactive effect given to an action or thing done under the specified sections if the action or thing was the subject matter of a legal proceeding that was begun before this Act comes into force. This preserves the position of anyone who has questioned the actions of trustees in a proceeding commenced before the Act comes into force.

Subsection (4) affirms the plenary scope and nature of the retroactivity of this section and clarifies that this section is not to be considered as lacking retroactive effect with respect to any matter merely because it does not specifically refer to that matter.

Note: The definitions and provisions of this section may need to be modified if different provisions are brought into force on different dates.

Repeals and Consequential Amendments

104 [*as required by the jurisdiction*]

Comment: Repeals of and consequential amendments to other legislation would be as required by the enacting jurisdiction.

Commencement

105 [*in accordance with the practices of the jurisdiction*]

Comment: The manner by which the Act is brought into force will be in accordance with the legislative practices of the enacting jurisdiction.