WILLS AND TRUSTS

*Gordon Bale**

I. ESTATE TAX

The changes of the past year which will have the greatest impact on wills and trusts were those announced by Mr. Benson, Minister of Finance, in his budget speech on October 22, 1968 in relation to estate tax and gift tax. The changes were not as sweeping as those recommended by the Royal Commission on Taxation. However, in this area no reform could be as fundamental as that recommended by the Royal Commission in that it advocated the abolition of these taxes and the inclusion of gifts and successions in the tax base of the transferee rather than taxing the transferor.[1] In regard to deaths occurring after midnight October 22, 1968, the minister proposed that all amounts left outright by one spouse to the other should be exempt from estate tax and that if a spouse leaves an entire life interest in a trust to the surviving spouse, the assets in the trust will be excluded from property passing on the death of the first spouse but will be included in the estate of the surviving spouse. Mr. Benson said: "With this reform, we will recognize the contribution made by wives to the accumulation and conservation of the wealth of the family. It will eliminate a deeply felt grievance."[2]

This important reform has had an impact on the rest of the act in that the minister attempted to maintain the same total revenue while permitting tax free transfer between spouses. The rate schedule which formerly started at ten percent now starts at fifteen percent. The maximum rate of tax, now fifty percent as opposed to fifty-four percent is now attained when the aggregate taxable value exceeds 300,000 dollars rather than two million dollars as before.[3] Thus the estate tax payable when property passes from one generation to the next has been substantially increased to compensate for tax free transfers between spouses.

As the bill amending the Estate Tax Act[4] was not introduced until after the House reconvened in January, the only guides available were the budget resolutions and statements made by the Minister of Finance. The budget resolutions provided an exemption for property passing "absolutely and indefeasibly to the spouse." Concern was expressed that the exemption would

---

*B.A., 1956, Royal Military College; M.A., 1958, McGill University; LL.B., 1962, Queen's University; LL.M., 1964, University of London. Professor of Law, Faculty of Law, Queen's University.

[1] 3 REPORT OF THE ROYAL COMM'N OF TAXATION 465-519 (1966).

[2] 2 H.C. DEB. 1685 (1968).

[3] H.C., WAYS AND MEANS BUDGET RESOLUTIONS at 208-11 (1968).

[4] Can. Stat. 1958 c. 29.

be lost in wills which, to avoid a double passing, stipulate that property is only to go to the spouse provided he or she survives the testator by thirty, sixty, or ninety days. The minister has given assurances that the exemption will not be lost provided the property vests absolutely and indefeasibly in the spouse within 120 days. However, if the will sets up a trust which provides that the income is to be paid to the wife until her remarriage or if the trustee is given discretion to encroach upon capital for the benefit of children, the exemption will be lost.[5] There will thus be many wills which have to be redrafted if the tax free transfer to the surviving spouse is to be obtained.

Formerly under the Estate Tax Act, the amounts deductible were dependent solely on certain persons surviving the testator. There was a deduction of 60,000 dollars in the case of a deceased male person survived by a spouse plus 10,000 dollars for each minor child. These deductions were available whether the testator gave any property to the wife or children. Under the proposed amendments to the act the deduction of 10,000 dollars for each child of any age will only be available if at least 10,000 dollars passes to each child. Similarly, the additional deduction for children under twenty-six years of age of 1,000 dollars per year that the child is under twenty-six, with an income limitation, and the additional deduction which cannot exceed 30,000 dollars for an infirm child is dependent upon the child receiving property equal to at least the total amount of this exemption.

The proposed changes in the gift tax which are also to be made retroactive to October 23, 1968 are very important. An outright gift to a spouse or a gift on trust such that only the spouse can receive the income or any benefit during the life of the spouse is exempt from tax. It should, however, be noted that the minister has not proposed any change in section 21 of the Income Tax Act[6] so that the income of the transferred property will still be deemed to be the income of the transferor. Gifts to the other individuals but not to a corporation will be exempt up to 2,000 dollars per annum for each recipient. Gifts to a trust will not qualify for the 2,000 dollar exemption unless the trust has only one beneficiary who is a living person. Other gifts will be aggregated and taxed according to a new rate schedule which starts at twelve percent and rises to seventy-five percent as opposed to the former rate schedule which ranged from eleven percent to twenty-eight percent.[7] However, unlike the present gift tax provisions the aggregation is to be cumulative from one year to the next. Therefore, although a person might give the same amount of taxable gifts each year, his cumulative gift sum would increase each year and he would pay tax at a higher marginal rate. The rate of seventy-five percent in cases where the individual's gift sum is in excess of 200,000 dollars, appears to be high in comparison with the fifty percent maximum rate of tax under the Estate Tax Act. However, as the minister states: "This 75 percent means in effect a

[5] The Globe and Mail (Toronto), Dec. 31, 1968, at B-5, col. 3.
[6] CAN. REV. STAT. c. 148 (1952).
[7] *Supra* note 3, at 201-03

tax rate of three-sevenths or about 43 percent, on the total of the gift and the tax on it, the basis on which we normally think of income and estate taxes."[8]

A very significant feature is that the new cumulative gift tax system will be fully integrated with the estate tax. Property passing on death will include the cumulative gift sum at the time of death plus the amount of gift tax levied in respect of that cumulative gift sum. Full credit against the estate tax payable is then to be given for the gift tax paid. As a result, the gift tax is tantamount to a prepayment of estate tax. Gift programs solely as a tax planning technique will be greatly curtailed. It will be advantageous to utilize the exemption of gifts to the extent that such value does not exceed 2,000 dollars per individual as these amounts will not be included in the cumulative gift sum. Therefore a father or grandfather, with many issue that he wishes to benefit, will still be able to transfer a considerable amount annually free of gift and estate tax, provided the donee lives for three years. Whether a person with a spouse will be able to double his gift program by transferring assets to his wife tax free, who will then make 2,000 dollar gifts to the same individuals remains in doubt until the legislation is introduced.[9]

Large gifts to one individual will no longer have any estate tax advantages, unless the property transferred is likely to appreciate in value before the donor's death. More emphasis will undoubtedly be placed on asset freezing techniques where future appreciation in the value of assets accrue to children through the sale of assets to a holding company in return for fixed return securities and the sale of common shares to the children.

The new legislation will mean decisions will have to be made about the extent to which a husband should take advantage of the tax free transfer to his wife rather than transferring some assets to his children on his own death. The longer the life expectancy of the wife and the higher the rate of return which may be earned by the assets, the more significant is the advantage of tax postponement. However, because of the progressive nature of the estate tax, there is a definite advantage to having half the estate pass to the children on the husband's death and half the estate pass to the children on the wife's death. The advantage of splitting the estate is reinforced by being able to take advantage of the exemption for each child twice, once on the hus-

---

[8] *Supra* note 2, at 1686. A gift tax rate of one hundred percent is comparable to an estate tax rate of fifty percent because of the different tax base. A gift tax is only levied on the amount of the gift while estate tax is levied on the total amount of property passing. If a person had two million dollars and if the gift tax rate were one hundred percent and the estate tax rate were fifty percent, an inter vivos gift of one million dollars would attract a gift tax of one million dollars while if the entire estate were given by will, it would mean that two million dollars would be the property passing and one million dollars would be the estate tax payable. In each case the beneficiary receives one million dollars of the two million dollars.

[9] Even if the legislation does not specifically cover this point, the double exemption might not be realized in that the wife might simply be considered the agent for the husband in such a blatant example as that given. Such a problem may in the future be eliminated by the adoption of a tax unit which includes both husband and wife.

band's death and once on the wife's death. Therefore, in the case of large estates, wills should be reconsidered by weighing the advantages of tax postponement achieved by leaving all the estate to the wife or leaving all the income of a testamentary trust to the wife as compared with the advantage of estate splitting.

II. LEGISLATION

In Alberta, there was an amendment to The Wills Act, 1960.[10] Section 33 was modified so that in a will made on or after June 1, 1968, the surviving spouse of a person who stands in an anti-lapse relationship to the testator will no longer be entitled to receive a preferential share of 20,000 dollars.[11] There was also a minor amendment to The Trustee Act.[12]

In British Columbia, the most significant legislative development was the enactment of the Variation of Trusts Act.[13] This is the same statute as was enacted in Ontario in 1959[14] and which has been adopted by the Commissioners on Uniformity of Legislation in Canada.[15] British Columbia also passed the Human Tissue Act[16] and repealed the Cornea Transplant Act.[17] The Human Tissue Act is essentially similar to that of Ontario. Under this act the deceased does not have the right to dispose of his body for therapeutic or research purposes, however, if he dies in hospital, the administrative head of the hospital may authorize the use of the body if the person so requested. In the case of a person who dies in a place other than the hospital, his spouse or nearest relative must authorize the use of the body even though the person has so requested. There were also some minor amendments to several statutes.[18]

Manitoba enacted The Presumption of Death Act[19] and The Human Tissue Act.[20] The Human Tissue Act is the Uniform Act proposed by the Commissioners on the Uniformity of Legislation in Canada.[21] It pro-

---

[10] Alta. Stat. 1960 c. 118.

[11] Alta. Stat. 1968 c. 104.

[12] Alta. Stat. 1968 c. 99.

[13] B.C. Stat. 1968 c. 57.

[14] Ont. Stat. 1959 c. 104.

[15] [1961] PROCEEDINGS OF THE CONF. OF COMM'RS ON UNIFORMITY OF LEGISLATION IN CANADA at 24, 142.

[16] B.C. Stat. 1968 c. 19. For a full discussion of related problems, see Castel, *Some Legal Aspects of Human Organ Transplantation in Canada*, 46 CAN. B. REV. 345 (1968).

[17] B.C. Stat. 1961 c. 12.

[18] There were minor amendments to the Administration Act by B.C. Stat. 1968 c. 3; to the Patients' Estates Act by B.C. Stat. 1968 c. 36, and to the Official Guardian Act and the Public Trustee Act by the Statute Law Amendment Act, B.C. Stat. 1968 c. 53, §§ 15, 19.

[19] Man. Stat. 1968 c. 48.

[20] Man. Stat. 1968 c. 31.

[21] [1965] PROCEEDINGS OF THE CONF. OF THE COMM'RS ON THE UNIFORMITY OF LEGISLATION IN CANADA at 30, 104. It has also been adopted by Alberta, Alta. Stat. 1967 c. 37; by Newfoundland, Nfld. Stat. 1966-67 No. 78 and the North West Territories, N.W.T. Ord. 1966 c. 9.

vides that the direction of a person of eighteen years or more as to the use of his body for therapeutic or research purposes is full authority for obtaining possession of his body no matter where he dies. There were also amendments to The Devolution of Estates Act, [22] The Surrogate Courts Act [23] and The Trustee Act. [24]

In New Brunswick, there was only a minor amendment to The Probate Courts Act. [25] In Newfoundland, there were no legislative changes in regard to wills and trusts. In Nova Scotia, a minor amendment was made to The Probate Act [26] and a provision was added to The Trustee Act, [27] providing a special procedure applicable to moneys obtained through a public appeal for funds for victims of a disaster. In Ontario, there was only a very minor amendment to The Perpetuities Act, 1966. [28]

The most significant amendment in regard to intestate succession occurred in Prince Edward Island. The widow's preferential share was increased from 8,000 to 50,000 dollars. [29] There was also enacted an Official Trustee Act [30] giving authority to the Official Trustee to assume some duties which had formerly been exercised by the Attorney General under such acts as The Provincial Administrator of Estates Act. [31]

Saskatchewan enacted The Human Tissue Act [32] and repealed The Corneal Transplant Act. [33] The act is basically similar to that of Ontario. The Council of the Yukon Territories has passed The Perpetuities Ordinance [34] which is identical to The Perpetuities Act, 1966, of Ontario. [35] The basic reform is the adoption of the "wait and see" principle and the abandoning of the old possibilities rule.

III. SUCCESSION

1. *Intestacy*

The most interesting case reported during the past year in regard to intestacy was *Re Charlton.* [36] A husband who was tried for non-capital murder was convicted of the manslaughter of his wife after a plea of guilty. The question was whether the husband in a subsequent civil proceeding in-

[22] Man. Stat. 1968 c. 17.
[23] Man. Stat. 1968 c. 14.
[24] Man. Stat. 1968 c. 70.
[25] N.B. Stat. 1968 c. 48.
[26] N.S. Stat. 1968 c. 47.
[27] N.S. Stat. 1968 c. 61.
[28] Ont. Stat. 1968 c. 94.
[29] An Act to Amend The Probate Act, P.E.I. Stat. 1968 c. 44, § 3.
[30] P.E.I. Stat. 1968 c. 38.
[31] P.E.I. REV. STAT. c. 125 (1951).
[32] Sask. Stat. 1968 c. 32.
[33] SASK. REV. STAT. c. 259 (1965).
[34] Y.T. Ord. 1968 c. 2.
[35] Ont. Stat. 1966 c. 113. For an excellent section by section commentary, see R. GOSSE, ONTARIO PERPETUITIES LEGISLATION (1967).
[36] [1968] 2 Ont. 96, 68 D.L.R.2d 217 (High Ct.).

volving his wife's estate could argue that he was not criminally responsible for his wife's death in order to share in her intestacy. Counsel for the husband considered that the defence of non-insane automatism stood an excellent chance of success but, after two days of trial, he decided that a plea of guilty to manslaughter should be made. This was done after the trial judge made it known to counsel that he would direct the jury that if they believed the husband had killed his wife in a state of emotional shock, their verdict should be "not guilty by reason of insanity." Counsel decided that as his client was obviously of sound mind, he should not let him run the risk of spending the rest of his life in a mental institution and therefore recommended the plea of guilty to manslaughter. The certificate of conviction could not be tendered in evidence but proof of the plea of guilty was made by the letter of counsel for the husband at the criminal trial. Mr. Justice King held that "nothing in any of the reasons given as to why he so pleaded detracts in any way from the above finding. Under these circumstances the rule of public policy that no one can profit by his own wrongful act should be applied." [37]

2. *Formalities*

In *Re Tachibana*, [38] the Manitoba Court of Appeal had to determine whether a holograph document, clearly of testamentary character, which was signed at the beginning and in the middle but not at the end was a formally valid will. Mr. Justice Freedman said: "A holograph will very properly stands on a different footing from that of an ordinary will and should not be subject to the formalities required of the latter." [39] He construed sections 6(1) and 7 of the Manitoba Wills Act [40] which provide that no will is to be valid unless it is signed at the end as not applying to holograph wills: "[I]t is my view that the statutory provision relating to holograph wills [section 6(2)] stands by itself, unaffected by the requirements which the statute prescribes for ordinary wills." [41] A new wills act has been enacted in Manitoba but, Professor Battersby has stated "that the same decision would be reached under the new Wills Act." [42]

The Ontario Law Reform Commission has recommended the adoption, with some modifications, of the Uniform Wills Act including the provision for the making of holograph wills. [43] If this is enacted the holograph form

[37] *Id.* at 102, 68 D.L.R.2d at 223. However, on appeal Jessup, J.A., ordered a new trial on the issue of whether the husband was criminally responsible for his wife's death. He held that if the result of a criminal trial is not conclusive, in a subsequent civil proceeding arising from the same facts he could see no basis in principle and no authority that an admission or confession in the criminal trial is conclusive in subsequent civil proceedings.

[38] 63 W.W.R. (n.s.) 99, 66 D.L.R.2d 567 (Man. 1968).

[39] *Id.* at 103, 66 D.L.R.2d at 571.

[40] MAN. REV. STAT. c. 293 (1954) which has now been replaced by The Wills Act, Man. Stat. 1964 c. 57.

[41] *Supra* note 39, at 105, 66 D.L.R.2d at 572.

[42] Battersby, *Wills and Trust*, 3 MAN. L.J. 131, at 132 (1968).

[43] DEP'T OF ATTORNEY GENERAL, REPORT OF THE ONTARIO LAW REFORM COMM'N ON THE PROPOSED ADOPTION IN ONTARIO OF THE UNIFORM WILLS ACT 28 (1968).

will be acceptable in all Canadian jurisdictions other than British Columbia, Nova Scotia and Prince Edward Island. However section 7 of the proposed act specifically provides that the requirement of a signature at the end should apply to holograph wills. This would mean that if the wills act as proposed by the Ontario Law Reform Commission were enacted, an Ontario court would not be able to reach the laudatory result of upholding the testator's intention as was done in *Re Tachibana.*

3. *Joint Wills*

Joint wills continue to cause difficulty. In *Re Gillespie,* [44] a husband and wife made a joint will which provided that "all property . . . of which we may be possessed . . . at the date of decease of either of us shall be held by the survivor during his or her life with full power of sale and that upon the decease of the survivor, that the said estate shall be the property of . . . ." [45] certain named persons. The wife predeceased her husband and subsequently the husband made a new will which was substantially different than the joint will. It was argued that the doctrine of *Dufour v. Perira,* [46] which imposes a trust upon the executors of the survivor who made a new will for the benefit of the beneficiaries under the joint will could not be invoked unless there was either a clause in the joint will providing that it should not be revoked, or a separate agreement providing for nonrevocation. However, Mr. Justice Stark stated that the agreement not to revoke may be implied from the joint will itself and should be in this case. One factor upon which he relied was the use of the phrase "Know all men by these presents" which he considered more appropriate to a contract than a will. Stark held that the determination of the property bound by the trust was a matter of construction and that "[t]he intention of the parties seems clear that the joint will is to only dispose of those assets in existence before the death of the first spouse." [47] This case illustrates the need, if litigation is to be avoided, for a joint or mutual will to state explicitly whether or not there is an agreement not to revoke the will or whether or not a trust is to be imposed on the survivor. If there is an agreement not to revoke, it also illustrates the need to define explicitly the property which is to be the subject of the trust. [48]

4. *Ademption*

An excellent example of the technicalities of the doctrine of ademption is presented by *Re Britt.* [49] The testatrix gave a legacy of "all monies owing" on a mortgage. After executing the will, the mortgage fell into default and

[44] [1968] 2 Ont. 369, 69 D.L.R.2d 368 (High Ct.).

[45] *Id.* at 371, 69 D.L.R.2d at 370.

[46] 1 Dick. 419, 21 Eng. Rep. 332 (Ch. 1779).

[47] *Supra* note 45, at 376, 69 D.L.R.2d at 375.

[48] Another case concerning a joint will was *Re* Stanley, 69 D.L.R.2d 431 (B.C. Sup. Ct. 1968). The issue was whether a joint will which did not dispose of any property until the death of the survivor could be admitted to probate on the death of the first to die. The will was admitted to probate.

[49] [1968] 2 Ont. 12, 68 D.L.R.2d 26.

the testatrix instituted a foreclosure action, including a claim for possession and on the covenant for payment. There was no redemption and a final order of foreclosure was made. The testatrix was still seised of the property at the date of her death. Mr. Justice Laskin stated that if she had sold the property after the foreclosure, the bequest would have been adeemed and, if she had bequeathed the mortgage as such instead of the monies owing, final foreclosure in itself would have resulted in ademption. However, as the testatrix had given all the monies owing on the mortgage, Laskin stated:

> [I]t follows that because the mortgagee still retained the property at her death, the mortgage debt, although translated into a judgment on the covenant, remained enforceable by execution; in other words, it remained alive as a judgment debt. The question then becomes whether a bequest of a debt owing to a testator is adeemed where at his death it has become a money judgment.
>
> I would answer this question in the negative, recognizing at the same time that we are dealing here with a specific bequest. I am prepared to accept the rule, going back to *Ashburner v. MacGuire* . . . that the intention of the testatrix is not a saving factor. But not every change affecting a specific legacy results in ademption. Where the change is in name or in form only but the specific thing given is substantially the same, it would be an over-refinement to find ademption: . . . . [I]t remains alive because the property by which it was secured is still in the creditor's hands and can be reconveyed if necessary. The fact that the executor has no intention of realizing on the personal judgment has no bearing on the issue of ademption.[50]

5. *Interpretation*

A considerable number of cases dealing with the construction of wills have been reported during the last year.[51] One of the more interesting

[50] *Id.* at 15, 68 D.L.R.2d at 29. Two other cases dealing with ademption are *Re* McLean, 69 D.L.R.2d 46 (N.B. Sup. Ct. 1968) and *Re* Sutherland, 67 D.L.R.2d 68 (Alta. Sup. Ct. 1968). These cases provide support for the argument that § 20 of the Uniform Wills Act dealing with ademption should be enacted in those provinces which do not already have it. The Ontario Law Reform Comm'n has so proposed in its report, *supra* note 43, at 35-36.

[51] In addition to the few cases subsequently discussed, the following cases were concerned with the construction of wills: *Re* Linklater, 66 D.L.R.2d 30 (B.C. 1967) (issue means descendants in all degrees); *Re* Winn, 66 D.L.R.2d 182 (Sask. Q.B. 1967) (class gift—when membership is determined); *Re* Owens, 66 D.L.R.2d 328 (Ont. High Ct. 1967) (accumulation of surplus income from residue—after 21 years, the released income goes on an intestacy); *Re* Hollis, 66 D.L.R.2d 369 (Sask. Q.B. 1968) "to hold under her, her heirs, executors, and administrators absolutely and forever"—not a substitutionary gift consequently there was a lapse); *Re* Simon, 66 D.L.R.2d 423 (N.S. Sup. Ct. 1967) (gift of residue on trust for "education, support and maintenance," gives an implied power to trustees to encroach on capital); *Re* Johnston, 66 D.L.R.2d 689 (Ont. High Ct. 1968) (misdescription of charities—application of cy-près doctrine); *Re* McKenzie, 67 D.L.R.2d 105 (Ont. High Ct. 1968) (remaining forty percent construed as a residuary bequest—no intestacy as a result of the death of beneficiaries receiving percentage shares); *Re* Johnston, 67 D.L.R.2d 396 (Ont. High Ct. 1968) (life estate to wife, remainder to brothers and sisters alive at wife's death—brothers and sisters predeceased wife—intestacy—wife shares in the intestacy); *Re* Ellis, 67 D.L.R.2d 403 (Ont. 1968) (direction to pay all estate taxes and succession duties means burden falls on residue); *Re* Parsons, 67 D.L.R.2d 685 (Ont. 1968) (residue on trust to pay to the wife for her maintenance and support "out of the in-

cases was *Re Dunsmuir.*[52] The testatrix had died in 1937 and had left a share of residue on trust for her daughter-in-law, her children and then to her grandchildren. A child of the daughter-in-law died in 1965 leaving two children who were illegitimate by birth. One child was born in 1948 and subsequently adopted in Ontario after she married a man who was not the father of the child.

In regard to the adopted child, the crux of the matter was whether the British Columbia Adoption Act, section 10,[53] was to be given retrospective operation in construing "children" in a will of a testatrix who died prior to its enactment. Mr. Justice Aikins considered that section 10(6) ("This section does not apply to the will of a testator dying before . . . the seventeenth day of April, 1920,") indicated that the legislature understood that section 10 would require a court to give it retrospective effect. The other child was illegitimate and had not been adopted. If the will had been made after March 31, 1960, there would have been no problem because of the enactment of section 31 of the act[54] which provides that: "In the construction of a will except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother." However, the will was made in 1937 and the testatrix died in 1937. Aikins held that the existing rule of construction under the law of England on November 19, 1858 was received into British Columbia. This rule of construction was laid down in the later case of *Hill v. Crook*[55] which

come and such of the corpus as is necessary"—intestacy as to part not needed); *Re* Kirkpatrick, 68 D.L.R.2d 476 (B.C. Sup. Ct. 1968) (annuity of 275 dollars per month to widow with power in trustee to increase it by twenty-five dollars "per month from time to time"—trustee may increase monthly payment to amounts in excess of 300 dollars); *Re* Budnyk, 68 D.L.R.2d 534 (Alta. 1968) (estate tax is borne by residuary legatee—devise of house "together with all the furniture and equipment of any kind therein" does not include car found in garage); Reishiska v. Cody, 62 W.W.R. (n.s.) 581 (Sask. 1967) (testatrix's will stated "bequests are to become effective on date of arrival in Canada" within fifteen years of her death—extrinsic evidence that it was the testatrix's intention that beneficiary become permanently resident was inadmissible as will was clear); *Re* Holosko's Will, 63 W.W.R. (n.s.) 125 (Alta. Sup. Ct. in Chambers 1968) (bequest to sisters who were dead at the making of will, testator referred to cousins as "sestras"—extrinsic evidence indicated latent ambiguity and was admissible); *Re* Peters Will, 63 W.W.R. (n.s.) 180 (Man. Q.B. 1967) ("[all my real and personal property] in equal shares" creates a tenancy in common); *Re* Steinberg Will, 63 W.W.R. (n.s.) 649 (Man. Q.B. 1968) (gift of income without limitation and no gift of corpus —annuitants entitled to a proportionate part of estate immediately); *Re* Thompson Estate, 65 W.W.R. (n.s.) 702 (B.C. Sup. Ct. in Chambers 1968) (when should membership in a class be determined). There were also two cases dealing with commorientes: *Re* Cane, 66 D.L.R.2d 741 (Man. Q.B. 1968) and *Re* MacLauchlan, 65 W.W.R. (n.s.) 56 (B.C. Sup. Ct. 1968)

[52] 67 D.L.R.2d 227 (B.C. Sup. Ct. 1968).

[53] B.C. REV. STAT. c. 4, § 10(6) (1960) which reads: "This section [§ 10] does not apply to the will of a testator dying before . . . the seventeenth day of April, 1920." Another case concerned with the succession rights of an adopted child was *Re* May Estate, 65 W.W.R. (n.s.) 679 (Sask. Surr. Ct. 1968). It was held that a child adopted by agreement prior to the enactment of adoption legislation is entitled to a grant of letters of administration as next of kin of the son of the adopting parents.

[54] B.C. Stat. 1960 c. 62.

[55] L.R. 6 H.L. 265 (1873).

held that children in a will prima facie means legitimate children. However, it was held that public policy and social conditions had altered so substantially by the nineteen-thirties that such a rule of construction was no longer appropriate in ascertaining what a testator intended. Aikins held that "the rule of restrictive construction enunciated in *Hill v. Crook* is not to be applied in this Province to wills made after the legislation in respect to illegitimate children passed in the nineteen-twenties." [56] *Re Dunsmuir* is an excellent example of the common law being remoulded to meet more effectively changed social conditions.

The construction of the will in *Re Burgess* [57] seems rather unusual. The will contained the following bequest: "To the two children (boy and girl) of William Cowan of Lake Johnston, Saskatchewan, One Thousand dollars each." [58] Cowan had six children at the time the will was made in 1965 and at the time of the testatrix's death. However, Mr. Justice Macdonald considered the following extrinsic evidence: "When Miss Burgess moved away from Saskatchewan in February, 1914, two children had been born to William Cowan; Gladys Belle then eight years of age, and William Henry at that time six years of age. It is reasonable to assume that the testatrix knew these cousins. But it is a question whether she had knowledge of the births of William Cowan's four other children . . . ." [59] It would seem that the latent ambiguity of the will should have been clarified by this extrinsic evidence and that the eldest daughter and the eldest son were the persons whom the testatrix wished to benefit. It was held that each of the six children of Cowan were entitled to a bequest of 1,000 dollars with the result that the residue which was to be divided equally among three chartities was reduced by an additional 4,000 dollars. A question which this case suggests is whether wills are construed differently when charities are the residuary beneficiaries.

The presumption against intestacy was unsuccessfully invoked in *Re McEwen.* [60] A testator directed that the residue of his estate was to be held on trust to pay a monthly sum to his wife for life and a specific sum to his daughter for life. He then provided that "[i]f my said adopted daughter . . . shall have died leaving lawful issue then upon the death of my said wife . . . the residue . . . equally between the issue of my said adopted daughter. . . . Provided that if my said adopted daughter shall have died without leaving lawful issue then upon the death of my said wife . . . ." [61] the residue was to go to two named charities. The testator's wife survived the testator but predeceased the daughter. Mr. Justice Tysoe held that the will only provided for a disposition of the testator's estate if the daughter died first and then the wife. This appears to be an unduly strict construction. It seems

---

[56] *Supra* note 52, at 248.
[57] 64 W.W.R. (n.s.) 44, 67 D.L.R.2d 526 (B.C. Sup. Ct. in Chambers 1968).
[58] *Id.* at 45, 67 D.L.R.2d at 527.
[59] *Id.* at 55, 67 D.L.R.2d at 534.
[60] 66 D.L.R.2d 87 (B.C. 1967).
[61] *Id.* at 88.

probable that the only reason that the testator included the words "then upon the death of my said wife" was to make it clear that in the unlikely eventuality of the widow surviving the daughter, the residue was not to be distributed until the widow died because the widow's income of 150 dollars per month was being provided out of that residue. Perhaps, the presumption against intestacy should not have been given such short shrift.

In *Re Malott*, [62] a testator made a will which gave shares amounting to eighty-five percent of his estate to seven persons, specifically devised certain real property to a brother and gave the remainder to children of named persons. One issue was whether the percentage shares should be calculated including or excluding the specifically devised real property. On appeal it was held, reversing the trial decision, that the real estate is not deductible from the value of the estate in calculating the percentage shares but that debts other than estate tax were deductible. As to the net income of the estate, it was held that the net income on the specific devise was to go to the devisee but that all other income was to be credited to the residuary legatees except that legatees who were given a percentage share were entitled to income at the rate of five percent per annum from one year after the testator's death until their legacy was paid.

The Ontario Court of Appeal in *Re Down* [63] had to construe a devise which read in part: "When my said son . . . arrives at the age of thirty years, providing he stays on the farm. . . ." [64] The staying on the farm was construed not as a precatory direction but as a condition subsequent which was void for uncertainty with the result that the son on attaining thirty years of age was to have an indefeasible vested interest. [65]

6. *Dependants' Relief Legislation*

Some Alberta testators have shown that they know the weakness in dependants' relief legislation and have thereby illustrated the need for reform if this legislation is to provide effective protection for dependants. For instance, in *Dower v. Public Trustee*, [66] a testator made gifts of approximately one million dollars shortly before he died and left no estate out of which an order for maintenance of the widow could be made. The wife in *Re Collier* [67] has now turned the table. Several years before her death, the wife transferred 100,000 dollars to a trust in which she reserved a life interest with remainder to her children and died with a very small estate. The husband applied for an order under Alberta's Family Relief Act [68] and argued that the trust formed part of the estate. The husband was relying on the wide definition of a will which includes "any will, codicil or other

[62] [1968] 1 Ont. 577, 67 D.L.R.2d 187.

[63] [1968] 2 Ont. 16, 68 D.L.R. 2d 30.

[64] *Id.* at 18, 68 D.L.R.2d at 32.

[65] The same result was reached in *Re* Messinger, 70 D.L.R.2d 716 (B.C. Sup. Ct. 1968) in which the devise was "to my wife while she resides in the home."

[66] 38 W.W.R. (n.s.) 129, 35 D.L.R.2d 29 (Alta. Sup. Ct. 1962).

[67] 65 D.L.R.2d 223 (Alta. Sup. Ct. 1967).

[68] ALTA. REV. STAT. c. 109 (1955).

instrument or act by which a testator so disposes of . . . property . . . that the property will pass on his death to some other person." [69] However, the court held that the property did not pass on her death as the gift to the children was made on the execution of the trust and the transfer of the funds to the trust company. A much more interesting problem would have arisen if the wife had reserved a power of revocation.

In *Re Pfrimmer*,[70] an application was made under the Manitoba Testators Family Maintenance Act [71] by a son age forty-six who, as a result of multiple sclerosis, had become totally disabled physically and was being maintained by the province. Mr. Justice Deniset held that a testator "does not fail in his moral duty if he considers that one of the 'relevant circumstances' regarding his dependants' means is help from the State." [72] It is submitted that it has long been recognized that dependants' relief legislation is intended not only to protect the personal interest of dependants but also to protect a public interest in attempting to prevent a testator's dependants from becoming a burden on the state. It is for this reason that it has been consistently held that a person cannot contract out of this legislation. [73] Therefore, there appears to be little justification for distinguishing between mental infirmity, where, as was held in *Re Cousins*, [74] there is a duty for the testator to provide for a dependant even though he is being maintained by the state, and physical infirmity.

In *Re Smigelski Estate*, [75] an intestate died leaving a widow and four children and an estate of approximately 30,000 dollars which consisted mainly of a farm. Under the Alberta Family Relief Act [76] it is not a condition precedent to jurisdiction that a person die testate. The widow made an application for the transfer of the farm and this was granted subject to a charge in favour of one daughter for 2,500 dollars. The order was annulled on appeal. Mr. Justice Johnson acknowledged that in an estate of this size, it is obvious the whole of the estate will probably be needed for adequate maintenance but he annulled the order because the widow intended to convey the farm to her son. Johnson said: "The Family Relief Act cannot be used to rearrange the succession to an estate, or to prefer one beneficiary over another." [77]

In considering some of the British Columbia decisions under The Testator's Family Maintenance Act, [78] it would appear that this act is being

---

[69] *Id.* § 2(i).

[70] 69 D.L.R.2d 71 (Man. Q.B. 1968).

[71] MAN. REV. STAT. c. 264 (1954).

[72] *Supra* note 70, at 76.

[73] Laskin, *The Protection of Interests by Statute and the Problem of "Contracting Out,"* 16 CAN. B. REV. 669 (1938), and Bale, *Limitation on Testamentary Disposition in Canada*, 42 CAN. B. REV. 367, at 391-93 (1964).

[74] 59 Man. 372, 5 W.W.R. (n.s.) 289 (K.B. 1952).

[75] 64 W.W.R. (n.s.) 456 (Alta. 1968).

[76] ALTA. REV. STAT. c. 109, § 4(1) (1955).

[77] *Supra* note 75, at 458.

[78] B.C. REV. STAT. c. 378 (1960).

applied not simply to provide proper maintenance but to provide dependants with a fair share in the estate. A striking example is *Re Parks Estate.*[79] A testator left his entire estate of about 53,000 dollars to his daughter to hold on trust to maintain his house for his seventy-seven year old widow and at her discretion to use the estate for the needs of the widow with remainder to the daughter. The widow who was barely capable of caring for herself and unaccustomed to handling money and both adult sons petitioned for an award for proper maintenance. In spite of the fact that there did not appear to be any evidence that the daughter would not properly maintain the widow, Chief Justice Wilson stated that: "The widow is the only person in this litigation who qualifies as a dependant and a person in need, and her requirements are paramount."[80] He awarded the wife 5,000 dollars and a life interest in the rest of the estate and if need were shown, the corpus might be encroached upon for her support. The sons were found to have an adequate standard of living but he said: "The action of their father in selecting the daughter as the sole recipient of his paternal bounty does not seem to me to be entirely fair or reasonable. . . . But in an estate of this size. . . . I should have more justification for interfering with a disposition than the fact that I would not myself have made it."[81] He finds this justification in *Re Woods Estate*[82] and orders that on the death of the mother each son is to receive one-fifth of the remainder with the daughter taking three-fifths. If what is desired is that dependants should receive a fair share in an estate, perhaps a more logical solution would be to provide by statute for legitime or a forced share which must be given to every dependant instead of stretching the dependant's relief legislation to cover such situations.

IV. TRUSTS

1. *Creation of a Trust*

In *O'Dell v. Hastie,*[83] a father sold his farm to his youngest daughter but title was never transferred although the full purchase price was paid. On the death of the father more than twenty years after the sale, the purchaser brought an action against the executors asking for a vesting order and an accounting or, in the alternative, a return of the purchase price. Mr. Justice MacDonald held that a vendor who has been paid the purchase price becomes a trustee and therefore the executors of the vendor could not rely on section 36(1) of The Limitation of Actions Act.[84] The section provides that no purchaser of land may bring an action on the agreement after ten years since section 43(2) of the act means that "where the trust property is in

[79] 64 W.W.R. (n.s.) 586 (B.C. Sup. Ct. 1968). Another case decided under the same act was *Re* Stark Estate, 62 W.W.R. (n.s.) 170 (B.C. Sup. Ct. 1967).

[80] 64 W.W.R. (n.s.) 586.

[81] *Id.* at 595.

[82] 54 W.W.R. (n.s.) 606 (B.C. 1965).

[83] 67 D.L.R.2d 366 (Sask. Q.B. 1968).

[84] SASK. REV. STAT. c. 84 (1965).

the possession of the trustee then an action to recover it is not barred by the Act."[85] The plaintiff was not, however, granted an accounting but judgment for a return of the purchase price because of laches.

In *Cuthbert v. Cuthbert*,[86] a husband appealed to the Ontario Court of Appeal from a declaration that he held the matrimonial home in trust as to a half interest for his wife. Prior to the marriage of the parties, it was agreed that the man should take title to land in his name but it was to be joint property and they would erect a matrimonial home on the land. The wife did much physical work in erecting the house and contributed some money towards its construction. The mortgage was substantially reduced out of a joint bank account into which each contributed their salary. As a result of the agreement and the part performance of the agreement, the appeal was dismissed.

In *Sanderson v. Halstead*,[87] there was an invalid assignment of a beneficiary's interest in a life insurance policy. Mr. Justice Parker following *Milroy v. Lord*,[88] held that equity will not assist a volunteer to complete an imperfect gift and that no trust had arisen in that if a transfer is intended to take effect by one mode such as a gift and it fails, the court will not hold the intended transfer to operate as a declaration of trust.

An agreement which formed the basis of the dispute in *Industrial Incomes Ltd. v. Maralta Oil Co.*[89] raised several interesting questions. Was there a trust? If so who were the beneficiaries and could the settlor revoke? A debtor who had an interest in an oil well entered into an agreement to save this interest from being lost in a mechanics' lien proceedings by the drilling contractor. The debtor assigned its interest in the oil well to a third party who agreed to pay the drilling company's account. The agreement stated that the assignee was to reimburse itself for the amount paid to the drilling company out of the proceeds from the well. When such payment was completed, it was to distribute 52,000 dollars among the creditors of Maralta. This money would be obtained from sale of oil. Finally, the assignee was to retain the balance. In a prior action, a creditor who was not paid sued the assignee of the interest in the oil well. It was held that the relationship of trustee and cestui que trust could not be inferred as between the assignee and the creditors in that creditors had no notice of the assignment.[90] Subsequently, the debtor brought an action against the assignee, and the Supreme Court of Canada agreed with the appeal court that the intention to create a trust should be inferred from the fact that the moneys were to be kept in a separate bank account until the creditors' claims had been paid. The Supreme Court quoted with approval the order of the Court of Appeal that:

---

[85] *Supra* note 83, at 370.
[86] [1968] 2 Ont. 502, 69 D.L.R.2d 637.
[87] [1968] 1 Ont. 567, 67 D.L.R.2d 567 (High Ct.).
[88] 4 De G.F. & J. 264, 45 Eng. Rep. 1185 (C.A. 1862).
[89] [1968] Sup. Ct. 822, 69 D.L.R.2d 348.
[90] Seller v. Industrial Incomes Ltd., 41 D.L.R.2d 329 (Alta. Sup. Ct. 1968).

> Once the amount owing to creditors as at May 1, 1953, is ascertained, then from such amount or $52,000, whichever is the lesser, the respondent may deduct the aggregate of amounts paid by it to the creditors either in payment of such claims or in purchase of such claims. The appellant will be entitled to the balance. Where the respondent has purchased a claim at less than the actual amount owing, it may only claim credit for the amount actually paid and not the original amount owing, for a trustee may not benefit by buying up debts. [91]

Maralta's cross-appeal for a return of the interest in the oil well was, of course, dismissed as the trust was only for the payment of the Maralta's creditors and its interest in the oil well had been assigned under the contract for good consideration.

2. *Duty of Trustee in Regard to Investment*

In *Re Meakes*, [92] a trustee in Ontario, on the advice of her solicitor, invested a comparatively small trust fund in a first mortgage on a residential property in Quebec. Section 26 of The Trustee Act provides that a trustee may invest in "first mortgages, charges or hypothecs upon real estate in Canada, . . . but only if the investment is in other respects reasonable and proper." [93] Surrogate Court Judge MacRae said:

> It is quite apparent that what happened here was that [the solicitor] in recommending the advancement of the $10,000 in December, 1961, was doing it to assist Mr. Sills and the Citizens Construction Co. Ltd. out of a tight spot when they could not get any money from any source. It was a highly speculative investment at the most and not one that should be considered at all when such a trust was for the benefit of three infant children. The fact that the mortgage was in another Province indicates to me that no responsible trustee would consider this as a safe investment under all the circumstances. Such a small trust fund as this was, in my opinion, required to be invested for security, liquidity and income. Even the investment of such an amount in any mortgage in Ontario might not be appropriate. [94]

The trustee could not be exonerated merely because she sought the advice of her solicitor and the judge quoted Lord Justice Lindley who in *Re Whiteley*, [95] said: "They [the trustees] may and must seek advice on matters they do not themselves understand; but in acting on advice given them they must act with that prudence which I have already endeavoured to describe." [96] It was also held that, as the trustee had not acted reasonably, she was not entitled to be relieved from the breach of duty under section 35 of The Trustee Act. In order to determine the amount which the trustee was required to reimburse the trust fund, the trustee was given credit for the amount received on the mortgage less expenses and she was charged with

---

[91] *Supra* note 89, at 827, 69 D.L.R.2d at 351.

[92] 70 D.L.R.2d 258 (Ont. York County Surr. Ct. 1968).

[93] ONT. REV. STAT. c. 408 (1960).

[94] *Supra* note 92, at 264. An interesting query in regard to the reporting of this case is why protective anonymity was accorded to the solicitor who advised the trustee to purchase the mortgage.

[95] 33 Ch. D. 347 (1886).

[96] *Supra* note 92, at 266.

the amount of the mortgage, 10,000 dollars, together with simple interest at five percent. It was further ordered that when this sum was paid, the trustee would be entitled to assign the mortgage to herself in her personal capacity.

3. *Charitable Trusts* [97]

The issue in *Re Wedge* [98] was whether there was a valid charitable trust. The testator gave his estate on trust "to some needy displaced family of European origin (commonly known as D.P.s') who wishes to make a new start in life in Canada and engage in farming. The said gift shall be made within six months from the date of my death and the choice of families so made shall be in the sole discretion of the said Sisters of Saint Ann." [99] As the class of potential beneficiaries was not ascertainable, the trust would fail for uncertainty unless it was for a charitable purpose. Mr. Justice McFarlane said that "finding the word 'needy' in the clause I feel no doubt that this case falls within Lord MacNaughten's first division—trusts for the relief of poverty." [100] The next issue was whether a trust for the relief of poverty like other charitable trusts requires an element of public benefit. The judge noted that Mr. Justice Wells in *Re Massey Trust* [101] held that a trust for the relief of poverty is an exception from the general rule which requires public benefit. McFarlane said: "For myself, with respect, I find it difficult to state a logical reason for the exception." [102] He then stated that it must be remembered that the law of charity has not been built up logically but empirically. He found that it was not necessary to determine this issue in that, although the trustee was required to select a single family, the trust did not lose the element of public benefit. He stated that "my opinion is that where the class from which the selection of the object is to be made meets the tests to which I have referred for the requirement of public benefit, it cannot be said logically or on authority that there is an additional test, namely, that there must be more than one object to be selected." [103] For there to be public benefit the possible beneficiaries must not be negligible although the actual beneficiary may be restricted to one family and presumably to one person.

4. *Acquisition by Trustee of Property Alleged to be Trust Property*

In *Pine Pass Oil & Gas Ltd. v. Pacific Petroleums Ltd.*, [104] the plaintiff held oil exploration permits which it transferred to the defendant for a seven

---

[97] Two other cases dealing with charitable trusts were *Re* Etter, 65 D.L.R.2d 398 (Sask Q.B. 1967) and *Re* Jacques Estate, 65 W.W.R. (n.s.) 136 (B.C. Sup. Ct. 1967). An important article relating to charitable trusts is Sheridan, *Cy-Près in the Sixties: Judicial Activity*, 6 ALTA. L. REV. 16 (1968).

[98] 67 D.L.R.2d 433 (B.C. 1968).

[99] *Id.* at 447.

[100] *Id.* at 448.

[101] 21 D.L.R.2d 477 (Ont. High Ct. 1959).

[102] *Supra* note 98, at 449.

[103] *Id.* at 450.

[104] 70 D.L.R.2d 196 (B.C. Sup. Ct. 1968).

and one-half percent interest in the net oil or gas revenues. The agreement read: "Pacific shall hold the said Permits in trust for Pine as to an undivided seven and one-half (7-½) percent net carried interest . . . of the proceeds of the sale of that part of the production of oil and/or gas recovered from so much of the said lands as shall at any time hereafter be comprised within any . . . lease or license issued pursuant to the provisions of the Permits . . . ." [105] Pacific discovered commercial quantities of oil in the permit area. Pursuant to British Columbia's Petroleum and Natural Gas Act, [106] Pacific applied for a lease to develop the discovery area and, as required by statute, it surrendered back to the Crown part of the permit area called "corridor acreage." The Crown then sold this acreage by public auction to the highest bidder which turned out to be Pacific. Pacific brought in further producing wells to the "corridor acreage" and the plaintiff claimed a seven and one half percent interest in the net revenue from the corridor wells.

It was held that the income from the corridor wells was realized from property outside the scope of the trust. The leases acquired in regard to the "corridor acreage" were not issued pursuant to the provisions of the permits which were held on trust but through direct purchase from the Crown. Mr. Justice Ruttan refused to find a constructive trust even though the defendant in purchasing the "corridor acreage" had utilized knowledge acquired in developing the trust property. Ruttan said:

> I agree this case is unique in that a person acting in a fiduciary capacity in the proper conduct of the development of the property defined within the contract acquired information useful both for developing the property inside the permit and the property lying outside but immediately adjacent thereto and which, in fact, was part of the permit area when the information was acquired. Nonetheless, in the contemplation of both parties that corridor acreage was to go outside of the permit area just as soon as the lease was selected, and would no longer be part of and governed by the terms of the contract. [107]

This case does not appear to set the fiduciary duty owed by the trustee in regard to information obtained in developing the trust property at a very high plane. However, it is significant that in the final agreement between the parties the clause which appeared in the first draft whereby the trustee was to allow the plaintiff to have access to geological data was struck out.

5. *Variation of Trusts*

The applicability of the Ontario Variation of Trusts Act [108] was con-

---

[105] *Id.* at 202.

[106] B.C. Stat. 1947 c. 70.

[107] *Supra* note 104, at 216.

[108] ONT. REV. STAT. c. 413 (1960). In provinces in which a Variation of Trusts Act has not been enacted, *Re* Spurrell, 65 D.L.R.2d 64 (Nfld. Sup. Ct. 1967) is of significance. Justice Puddester stated: "[T]here is no statute in Newfoundland authorizing the trustee to expend from income or capital where the instrument in question fails to give that power, but I am satified that this Court, in addition to any statutory power, has inherent jurisdiction to authorize expenditures from both income and capital in cases in which it thinks it right and proper so to do." *Id.* at 70.

sidered in *Re Davies.*[109] The will provided that residue was to be divided equally among four children. Only one of the four children had attained the age of twenty-one years. An application was made by the one adult child for the approval of the court of an arrangement on behalf of the three minor residuary legatees. The arrangement provided that instead of the money belonging to the infant residuary legatees being paid into the Supreme Court pursuant to section 36(4) of the Trustee Act,[110] it was to be held by a trust company with enlarged powers of investment. The will, however, created no powers or trusts; it was simply a distributive will. Mr. Justice Grant said: "The Court cannot create a trust where none existed before. Its powers are limited to variation or revocation of trusts already existing or enlarging the powers of the trustees of managment or administering any of the property which has theretofore been subject to trusts."[111]

6. *Termination of a Trust by a Beneficiary*

The issue of whether a beneficiary could terminate a trust was raised in *Whonnock Lumber Co. v. G. & F. Logging Co.*[112] The plaintiff obtained a judgment that declared that the defendant as a result of a contract held certain timber sale contracts with the provincial Government as trustee for the plaintiff. The defendant later refused to execute assignments of the contracts to the plaintiff. The interesting aspect of the case was whether the plaintiff could invoke the principle in *Saunders v. Vautier*,[113] that a beneficiary solely and absolutely entitled to the trust property can require the trustee to convey the property to him. Mr. Justice Robertson quoted from the decision of Mr. Justice Clauson in *Re Sandeman's Will Trusts*[114] that such a beneficiary is prima facie entitled to a transfer unless there is some good ground to the contrary. He found "this good ground to the contrary" in that the defendant had a right to do the logging. Robertson said: "It is obvious that the position of the defendant vis-à-vis the Department, and perhaps in other respects, might be better under this arrangement than if Whonnock were the legal owner of the timber sale contract and the defendant were the grantee of a right from Whonnock to do the logging; the defendant does not hold the contract only for and on behalf of Whonnock but holds it also as a party with an interest in the state of the title."[115] Mr. Justice Nemetz, although he decided the case on the different basis, was inclined to agree with the chamber judge that the defendant was not a "bare trustee." Mr. Justice Norris, in his dissent, considered that the defendant was a "bare trustee" and that the plaintiff was entitled to have the trust property transferred to him.

---

[109] 66 D.L.R.2d 412 (Ont. High Ct. 1967).
[110] ONT. REV. STAT. c. 408 (1960).
[111] *Supra* note 109, at 414.
[112] 69 D.L.R.2d 561 (B.C. 1968).
[113] 4 Beav. 115, 49 Eng. Rep. 282 (Ch. 1841).
[114] [1937] 1 All E.R. 368 (Ch.)
[115] *Supra* note 112, at 576.

7. Constructive Trust—Measure of Damages for Wrongful Detention of Shares

In *Crighton v. Roman*,[116] the plaintiff sued for damages for wrongful detention of mining shares. This particular issue arose out of the same set of facts which the Supreme Court of Canada considered in an earlier case also called *Crighton v. Roman*.[117] In that case the Supreme Court, reversing a trial and Ontario Court of Appeal decision, held that a constructive trust arose out of a joint venture in regard to mining claims and ordered Roman to deliver certain mining shares and to account for the dividends received. In a new action, Crighton sued for damages for wrongful detention in that the shares had fallen in price. The claim was for the difference between the highest price at which the shares traded between the date on which the trial judgment was rendered and the price at which the shares were sold shortly after they were received by Crighton pursuant to the Supreme Court of Canada decision. This was the measure of damage adopted in *Toronto General Trusts Corp. v. Roman*[118] in which Mr. Justice Schroeder said: "[B]y reason of the fiduciary relationship . . . and since every presumption is to be made against him as a wrongdoer that loss is to be estimated on the assumption that the shares would have been sold by the plaintiff as a prudent owner at the best price obtainable."[119] Mr. Justice Stewart dismissed the action and distinguished the case from *Toronto General Trusts Corp. v. Roman* on the basis that in that case the defendant had lost at all three levels and was throughout in wrongful detention of the shares whereas in this case Roman "owed no duty to deliver the shares to Crighton or account to him for them, protected as he was by the judgment of Judson, J., and the Ontario Court of Appeal, both valid and binding until their reversal by the Supreme Court of Canada."[120] On appeal, Mr. Justice Laskin considered that the trial judge had failed to give full effect to the Supreme Court decision and that it had force as of the date of the judgment at trial and he accordingly awarded the damages claimed.

The measure of damages does seem to be extremely generous in that it assumes rather unrealistically that every investor can and does sell his shares at the peak price of its market fluctuation. As the measure of damages is so generous, there is perhaps something to be said for permitting the defendant to invoke the relieving provision of section 35 of the Ontario Trustee Act.[121] However, Laskin stated: "I do not see in these facts, nor in the fact that Crighton succeeded only in an ultimate appeal, any ground to excuse Roman for the consequences flowing from his continuing hold upon shares that belonged beneficially to Crighton."[122]

---

[116] 67 D.L.R.2d 669 (Ont. 1968).
[117] [1960] Sup. Ct. 858, 25 D.L.R.2d 609.
[118] 37 D.L.R.2d 16 (Ont. 1962).
[119] *Id.* at 19.
[120] [1968] 1 Ont. 138, at 142 (High Ct.).
[121] ONT. REV. STAT. c. 408 (1960).
[122] *Supra* note 116, at 674

V. CONCLUSION

The proposed amendments to estate and gift taxes announced by the Minister of Finance in his budget address on October 22, 1968 overshadow all other developments in relation to wills and trusts. As a consequence of these changes, it will be necessary for many wills to be redrafted in order to take advantage of the tax free transfer between spouses in regard to federal taxation. The problem of providing liquidity to pay taxes which arise on death will have to be reviewed. Gift programmes will have to be reconsidered. Such changes will be complicated because British Columbia, Ontario and Quebec impose succession duty and it will be further complicated in that substantial revision of the Ontario Succession Duty Act [123] has been proposed. The governments of provinces which levy succession duty will encounter strong pressure to provide tax free transfer between spouses. In Ontario, a committee of the legislature has recommended that the surviving spouse be allowed an exemption of 90,000 dollars. [124] The Smith Report recommended that Ontario introduce a gift tax [125] but the committee of the legislature has recommended that "the Legislature not implement this recommendation until the Province has made every effort to negotiate an agreement with the Federal government to eliminate duplication in the administration and collection of succession duties and gift taxes." [126] Tax planning during the coming year will thus be enshrouded in a considerable amount of uncertainty which will place a premium on flexibility.

---

[123] ONT. REV. STAT. c. 386 (1960).

[124] TAXATION IN ONTARIO, A PROGRAM FOR REFORM, THE REPORT OF THE SELECT COMM. OF THE LEGISLATURE ON THE REPORT OF THE ONTARIO COMMITTEE ON TAXATION at 205 (1968).

[125] 3 REPORT THE ONTARIO COMMITTEE ON TAXATION at 204-07 (1967).

[126] *Supra* note 124, at 220-21.