

# Confusion, Illusion, or Delusion: The Irreducible Core of the Common Law Trust

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## I. INTRODUCTION

It is a great honour for me to have been asked to deliver the Madam Justice Mary Southin Lecture for 2022. More than one of Madam Justice Southin’s judgments hold special meaning for me, but since I have spent the last several years on a project that relates to fiduciary relationships, I am going to mention her 1987 judgment in *Girardet v Crease & Co.*<sup>1</sup> In that judgment she reminded counsel that not every breach of duty by a fiduciary is a breach of a fiduciary duty. This passage has been quoted with approval several times in the Supreme Court of Canada, including by the majority and the dissent in *LAC Minerals Ltd v International Corona Resources Ltd.*, released in 1989.<sup>2</sup> It was also adopted by the late Lord Justice Peter Millett, as he then was, in his influential judgment in 1998 in *Bristol & West Building Society v Mothew.*<sup>3</sup> It has also been cited by the High Court of Australia<sup>4</sup> and other Australian courts, by the Inner House of the Scottish Court of Session,<sup>5</sup> and indeed by the Supreme Court of Samoa.<sup>6</sup>

I would like to adopt and adapt that sentiment to suggest that not every legal relationship that is labelled as a trust deserves to be so called. There is a legend at the McGill law faculty about a professor, long since retired. He was trying to explain, to a first-year class, s. 96 of the *Constitution Act, 1867* which provides that the federal government appoints the judges of the superior courts in the provinces; and he was pointing out that the superior court is given different names in different provinces. In British Columbia it is called the Supreme Court, but next door in Alberta it is called the Court of King’s Bench, and so on. One student could not comprehend this and continued to ask for further and better particulars. Finally the exasperated professor proclaimed: “If the Dean of the Faculty of Law were called Mr. Carrot, that does not mean that he would be a carrot.”

So too: just because a settlor and their lawyer call something a trust, that does not make it so. What does make it so? This requires us to have a theory of trust law, and of what is a trust.

My remarks will have several parts. After this Introduction, I will say a few words about the flexibility of trusts; and then, in Part III, go on to describe something that has been called the “whatever is left” trust, as it is seen in the case law in a testamentary form. Next, I will look at some

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\* Downing Professor of the Laws of England, University of Cambridge. This is a revised, annotated, and expanded version of the Madam Justice Mary Southin Lecture for 2022, given at the Faculty of Law, University of Victoria, 27 June 2022. I am grateful to that Faculty for the honour of the invitation and the pleasure of the visit. I was particularly grateful to Donovan Waters and Mark Gillen for their attendance at the lecture. A condensed version was given as a keynote address at the Third Canadian Law of Obligations Conference at Green College, University of British Columbia, on 23 June 2022, and I thank also the organizers of that event, Samuel Beswick and Marcus Moore, who generously made me the honouree of that event in advance of my departure from Canada to take up my position in Cambridge.

<sup>1</sup> *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.).

<sup>2</sup> *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at 597-8 and 647.

<sup>3</sup> *Bristol & West Building Society v. Mothew*, [1998] Ch. 1 (C.A.), at 16.

<sup>4</sup> *Maguire v. Makaronis* (1997), 188 C.L.R. 449 (H.C.A.), at 491.

<sup>5</sup> *MacRoberts LLP v. McCrindle Group Ltd.*, [2016] CSIH 27, at para. 47.

<sup>6</sup> *Peter Meredith & Co. v. Drake Solicitors Nominee Co.*, [2001] WSSC 32.

similar trusts that have been created *inter vivos*. In Part V, I will explain why I think these trusts, in the forms that I will describe, may not actually work. In Part VI I will look at what solutions may exist to the problems identified in Part V. The brief conclusion follows.

## II. THE FLEXIBILITY OF TRUSTS

Trusts share at least one thing with contracts, which is that they largely aim to give effect to the intentions of their creators. This means that there is a kind of bias in favour of “freedom of trusting”. You can do almost anything you wish with the terms of the trust that you create.

One result of this is that we may see the law of trusts in modular or “building block” terms. We tell a story that the express trust has a settlor, one or more trustees, and one or more beneficiaries; but the first building block of the trust’s flexibility is a person can be in more than one of these roles. The settlor can be a trustee, or a beneficiary, and a trustee can also be a beneficiary, and so on. It is certainly possible for a single person to be in all three roles (although that person must be accompanied by another in at least one of the roles).<sup>7</sup>

We also know from long and valuable experience that trustees, rather than having fixed obligations relating to the benefit of the trust property, may have more or less wide dispositive discretions, giving them a lot of autonomy to decide who receives what from the trust. Conversely, trustees may be under orders, even under the orders of the beneficiary, who may also be the settlor. There is nothing wrong with the “bare trust”: for present purposes, I define this as a trust in which the trustee’s duty in relation to the trust property is to deal with it exactly as instructed by the beneficiary. Where that beneficiary is the settlor, the English may call this a “nomineeship”: the property is “in the name of” the trustee, but in the control, and in the wealth, of the settlor/beneficiary. Such trusts are generally ignored for tax purposes;<sup>8</sup> but in Canada, federal legislation cannot change the provincial law of trusts.

What are the limits of this modularity? It is quite clear that a person can declare themselves to be a trustee for some beneficiary; it may even be possible to do this orally.<sup>9</sup> We have already seen that a trust that puts the beneficiary in control is perfectly possible; and that there is nothing impossible about a trust that gives the trustee very wide dispositive discretions. What if we put all this together, so that a person declares themselves a trustee of a trust of which they are one of the beneficiaries and gives themselves full discretion to take any or all of the property back out of the trust as they see fit? We can call this person STB: Settlor, Trustee, Beneficiary all in one. We must assume, however, that STB is not the *only* beneficiary; it is not possible for a sole trustee to hold property in trust for themselves alone. A British Columbia decision of 2019, styled *Larochelle v Soucie Estate*,<sup>10</sup> held that such an STB trust (with remainder beneficiaries) is possible and was validly created. There are, however, genuine reasons to doubt whether this is correct.

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<sup>7</sup> *Paul v. Constance*, [1977] 1 WLR 527 (C.A.); *Byers v. Foley* (1993), 16 OR (3d) 641 (Gen.Div.).

<sup>8</sup> Generally but not always: *Canada v. Cheema*, 2018 FCA 45. Moreover many bare trusts will soon be required to file income tax returns: *Fall Economic Statement Implementation Act, 2022*, S.C. 2022, c. 19, s. 35.

<sup>9</sup> Traditionally the *Statute of Frauds* stands in the way if the trust property is an interest in land; the many judicially created exceptions (see *Nagel’s Debt Review Inc. v. Mosiuk*, 2019 SKCA 16) probably do not apply to the case of a person who declares themselves a trustee. But the *Statute’s* rules for trusts of interests in land are no longer in force in British Columbia, Manitoba, and New Brunswick: R. Chambers, “Trusts and the Statute of Frauds” (2019) 93 S.C.L.R. (2d) 345, at 346.

<sup>10</sup> *Larochelle v. Soucie Estate*, 2019 BCSC 1329.

In order to assess this, we will look at some different kinds of trusts that have been found to exist before coming to the extreme case of the STB trust.

### III. “WHATEVER IS LEFT” TRUSTS: TESTAMENTARY

There is a kind of trust that is sometimes called the “whatever is left” trust. Those who have studied or taught trust law will likely have seen the testamentary version of this. A Canadian example is *Re Walker*,<sup>11</sup> where Mr. Walker by his will left everything to his widow, without words importing a trust, and then said: “... and also should any portion of my estate still remain in the hands of my wife at the time of her decease undisposed of by her such remainder shall be divided as follows ...”,<sup>12</sup> with gifts to others following. Mrs. Walker survived her husband by 19 years, and on her death still held property inherited from him. Her executors wanted to know whether this property was bound by trusts imposed by Mr. Walker’s will. Mr. Justice Middleton, writing for the majority, held that this testator was trying to do two things that were mutually inconsistent: making a gift to his widow, and imposing a trust on her.

When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains in specie at his death or at the death of that person, he is endeavouring to do that which is impossible. His intention is plain but it cannot be given effect to. The Court has then to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention.<sup>13</sup>

The holding was that there was no trust, only a legacy to the wife.

But the same court came to a different view a few decades later, in a case called *Re Shamas*.<sup>14</sup> There, a testator left everything to his widow in a homemade three-line will.<sup>15</sup> As in *Re Walker*, the initial words of gift did not impose a trust, but the will then seemed to impose obligations in relation to the same property, entitling the children to the capital at the time of the widow’s death or remarriage. *Re Walker* was distinguished, and the very short will was held to create a trust, and was also held to grant the widow, who was also the trustee and the life income beneficiary, a wide range of dispositive discretions over the trust property, including powers of which she herself was the object.<sup>16</sup> It was a “whatever is left trust” in the sense that she could use

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<sup>11</sup> *Re Walker* (1925), 56 O.L.R. 517 (C.A.).

<sup>12</sup> At 520-1.

<sup>13</sup> At 522.

<sup>14</sup> *Re Shamas*, [1967] 2 O.R. 275 (C.A.).

<sup>15</sup> The will in its entirety: “This is my last will. I give my Soul to God. I give all I belong to my wife. I want her to pay my debts—raise the family. All will belong to my wife until the last one comes to the age of 21 years old. If my wife marries again she should have her share like the other children if not, she will keep the whole thing and see that every child gets his share when she dies.”

<sup>16</sup> The court interpreted the will as impliedly granting a power in the trustee/widow to carry on the testator’s business, which would otherwise not have been a lawful investment of trust property (but which she had done very successfully, more than tripling the value of the estate); to encroach on the capital for the support and maintenance of herself and the children during the minority of the children; and to encroach on the capital for her own support and maintenance after all the children had reached the age of majority, until the time for distribution of the capital (her own death or

the income and capital as she wished, and the trusts of the capital would apply only to what was left when she died or remarried.

Some cases in other jurisdictions, faced with wills of this kind, have proposed that there is a “floating” or “suspended” trust which only comes into effect upon the death of the legatee.<sup>17</sup> This, however, is impossible to square with basic principles of trust law, such as the beneficiary principle which requires that a trust must always have a beneficiary, and the principle that every existing trust must have ascertainable trust property.<sup>18</sup> In his discussion, James Penner says that any such floating trust analysis is unnecessary, and that: “... the result can perfectly well be achieved on perfectly traditional trust principles.”<sup>19</sup> What he means is that we can take the modular approach: we can see the trustee-legatee as having been given an income interest during their own life, but also an unlimited power to encroach on capital in favour of themselves.<sup>20</sup> Thus, they are free to do as they wish with the trust property, but whatever is left on their death goes to those entitled in remainder. Indeed, *Re Walker* itself mentions this possibility.<sup>21</sup>

But if the property has been held in trust all along, this implies that the person entitled to “whatever is left” was a trust beneficiary all along, albeit with a defeasible interest. And we can ask: what about the normal rights of a beneficiary? These include the right to be told of the trust, to receive accounts and information concerning the trust, and to hold the trustee to account for their stewardship of the trust property.<sup>22</sup> This last consideration includes standing to challenge the trustee’s exercise of fiduciary powers, on the basis that they have not been exercised for a proper purpose.<sup>23</sup> And there are other constraints on fiduciary power-holders that can be enforced by beneficiaries, and probably by objects of the fiduciary powers who are not beneficiaries.<sup>24</sup> The

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her remarriage). The testator had died in 1932 and an application to interpret the will was only brought by two of the children in 1966. Fortunately for the widow, the court interpreted the will as granting her powers to do the things she had been doing for over 30 years; but this was certainly a justifiable interpretation in the circumstances.

<sup>17</sup> These words were used in *Birmingham v. Renfrew* (1937), 57 C.L.R. 666 (H.C.A.), at 675 and 689. This was a case of mutual wills, in which two persons (usually spouses) agree that each shall make substantially the same will and neither shall revoke after the death of the first. These trusts may be of clearly defined assets, but are not uncommonly of “whatever is left” of the inherited property at the death of the survivor. For discussion, see D.W.M. Waters, M. Gillen, and L. Smith, *Waters’ Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021), at 568-82.

<sup>18</sup> *Ottaway v. Norman*, [1972] Ch. 698 (Ch.D.) was a case of a “secret trust”, in which a legatee agrees with the testator that the legacy will be held in trust even though the trust is not mentioned in the will. Brightman J. held that there was such a trust over a house and its contents, giving the legatee/trustee the use of them during her life, but binding her to leave them to the plaintiffs on her own death. The plaintiffs also alleged a secret trust over the money (the residue of the testator’s estate) that had been left to the legatee; they argued that she was bound to leave to them “whatever was left” of it at her death. The judge was willing to assume without deciding that there could be a trust “in suspense” of the money inherited, but he held (at 714) that “the obligation is meaningless and unworkable unless it includes the requirement that she shall keep such money separate and distinct from her own money”. Since there was no evidence to support such an obligation, there was no trust of the money.

<sup>19</sup> J.E. Penner, *The Law of Trusts*, 12th ed. (Oxford: O.U.P., 2022), at 118.

<sup>20</sup> A similar analysis was proposed by G.D. Kennedy, “Gift by Will to W: At Her Death ‘What Remains’ to the Children” (1950) 28 Can. Bar Rev. 839, which was cited in *Re Shamas*.

<sup>21</sup> *Re Walker*, note 11, at 523.

<sup>22</sup> *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224.

<sup>23</sup> *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496 (C.A.); *Grand View Private Trust Co. v. Wong (No. 2)*, [2022] UKPC 47.

<sup>24</sup> See *Re Hay’s Settlement Trusts* [1982] 1 W.L.R. 202 (Ch.D.), interpreting *Re Gulbenkian’s Settlement*, [1970] 1 A.C. 508 (H.L.) and *McPhail v. Doublton*, [1971] A.C. 424 (H.L.) to hold (at 210) that a fiduciary power-holder “must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments.” Unless there is specific authorization, these requirements mean that the fiduciary power-holder may not delegate the power, may not fetter their discretion in

proper purposes doctrine and the other restrictions on fiduciary powers would necessarily mean that the trustee holding fiduciary powers could not simply act as if the trust property were their own.<sup>25</sup>

Penner argues that the solution to this last problem is simple: it is to make the power given to the trustee, which they can exercise in their own favour, a personal or non-fiduciary power. An English case illustrates this approach. In *Re Shuker*,<sup>26</sup> the testator left everything to his wife as executrix and trustee, and granted her all the income during her life, “... with power to convert to her own use from time to time such part or parts as she may think fit of the capital of my said real and personal estate or the investments or sale proceeds thereof.” And he went on to say that whatever was left on her death should pass to certain persons. A few months after the testator’s death, the widow, who was also trustee and executrix and holder of the income interest for life, and the holder and object of the power to encroach, signed a document including these words: “Mrs. Shuker hereby declares that she has converted the whole of the property to her own use.” This, it was held, brought the trust to an end; since she was already vested with the legal interest, her exercise of the power destroyed the defeasible equitable interests held by the other persons named in Mr. Shuker’s will.

But we will see, in due course, that more recent developments in the law must make us wonder whether Mrs. Shuker ever really held the property on trust. This is because if a “trustee” holds a non-fiduciary power over the trust property by which they can themselves take the benefit of the trust property, there is a serious question whether they can rightly be seen as a trustee who holds that property subject to binding legal obligations, owed to others and relating to the benefit of that property.

#### IV. “WHATEVER IS LEFT” TRUSTS: INTER VIVOS

Before we try to decide whether and how the testamentary “whatever is left” trust could be made to work, let us turn to the *inter vivos* variation. In *Pecore v Pecore*,<sup>27</sup> Mr Justice Rothstein, for the majority of the Supreme Court of Canada, mentioned in *obiter dicta* that it is possible to create an *inter vivos* “whatever is left” trust, at least in the US:

... the American notion of the “Totten trust” (sometimes referred to as the “Bank account trust”) is now recognized as valid in most states in the United States; an individual places money in a bank account with the instruction that upon his or her death, whatever is in that bank account will pass to a named beneficiary ... The Totten trust is so named for the leading case establishing its validity: see *Matter of Totten*, 179 N.Y. 112 (1904). While a Totten trust does not deal with joint accounts as such, it recognizes the practicality of the depositor having control of an account during his or her lifetime but allowing the

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advance, and may not release the power. For detailed analysis, see L. Smith, *The Law of Loyalty* (New York: OUP, 2023), ch. 3.

<sup>25</sup> In *Fox v. Fox Estate*, the trustee did indeed act as if the property were her own. Not only was her exercise of her fiduciary power set aside as invalid; she was removed as a trustee, since the Court was of the view that she did not understand her role or responsibilities.

<sup>26</sup> [1937] 3 All E.R. 25 (Ch.D.).

<sup>27</sup> 2007 SCC 17, [2007] 1 S.C.R. 795.

depositor's named beneficiary of that account to claim the funds remaining in the account upon the death of the depositor without the disposition being treated as testamentary...<sup>28</sup>

There is no doubt that by a combination of case law and statute law, depending on the state, US law does allow this. This occurred in a context in which people were basically encouraged by lawyers, by academics, and eventually by judges to find ways to make dispositions that were testamentary in effect while not having to comply with testamentary formalities or fall into the jurisdiction of the probate courts.<sup>29</sup> Dealing with those courts seems to be a fate often viewed in the US as one worse than the death that has necessarily already occurred.

There are lots of reasons why people would like to make testamentary dispositions without having to comply with the rules for making wills. The traditional view, however, is that if a disposition is testamentary *in effect*, it has to comply with those rules.<sup>30</sup> The traditional view is *not* that you can avoid the rules about wills simply by writing "TRUST" instead of "WILL" at the top of the relevant piece of paper. A trust is different from a will in that a trust gives its beneficiaries—all of them—enforceable legal rights from the moment it is created. A will gives its named beneficiaries *no rights at all* the moment it is created, because it is wholly revocable during the testator's capacitated lifetime and creates no legally protected interest in the beneficiaries until death. The conceptual problem with the Totten trust is that it is a will, and not a trust at all, inasmuch as it does not give the named beneficiary any legally protected interest until the account holder dies with the arrangement intact (and with some balance left in the account). Through a combination of court decisions and statutory intervention, US law has rejected the traditional approach, not only in relation to the Totten trust but much more thoroughly.<sup>31</sup> On the state of the authorities, however, the Totten trust is not effective in Canada.<sup>32</sup>

Now we can return to the British Columbia case that was mentioned earlier, *Larochelle v Soucie Estate*.<sup>33</sup> Here the deceased, Al Soucie, aimed to create an *inter vivos* trust with, it appears, two principal goals. One was to reduce the amount of probate tax payable by his estate, a tax which is calculated on the value of the estate. If assets are put into a valid trust before death, they do not form part of the disposable estate at death, because they were already given away while the settlor

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<sup>28</sup> At para. 52.

<sup>29</sup> J.H. Langbein, "The Nonprobate Revolution and the Future of the Law of Succession" (1984) 97 Harv. L Rev. 1108.

<sup>30</sup> *Cock v. Cooke* (1866), L.R. 1 P.D. 241; *MacInnes v. MacInnes*, [1935] S.C.R. 200.

<sup>31</sup> I have discussed this in L. Smith, "Will-Substitutes and Creditors: Canada and the US" in Alexandra Braun and Anne Röthel, eds., *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Oxford: Hart, 2016) 251, at 255-6 and L. Smith, "Civil and Common Law" in Andrew S Gold, et al., eds., *Oxford Handbook of the New Private Law* (Oxford: OUP, 2020) 228, at 238-9. Langbein, note 29, criticizes the traditional law as based on a "fiction" that unless a present interest is created in the beneficiary, the arrangement is a will and needs the required form. It is not at all clear, however, what he thinks is fictional; the "present interest" test is a *legal test* as to what makes a disposition testamentary. Any such test must necessarily distinguish between dispositions that take effect *inter vivos* and those that take effect on death. Langbein does not say what he thinks makes a disposition testamentary, but his view seems to be that it is entirely up to the testator, not the law, to decide when the rules of testamentary form should apply. It would be surprising if mandatory rules as to the form of wills allowed anyone freely to decide whether or not their arrangements needed to comply with those rules, even if those arrangements were testamentary in effect.

<sup>32</sup> *MacInnes*, note 30; *Carson v. Wilson* (1961), 26 D.L.R. (2d) 307 (Ont. C.A.); *Tubbs v. Tubbs*, [2006] OTC 1074 (Ont. S.C.), at para. 100.

<sup>33</sup> *Larochelle*, note 10.

was alive; and so the probate tax bill is reduced.<sup>34</sup> The other objective also related to reducing the size of his estate. The deceased had a daughter, Shirley Larochelle, from whom he was estranged. British Columbia has the most generous legislation in Canada to permit spouses and children to claim from an estate when they have been left out of a will. But unlike other provinces, it has no anti-avoidance rules; so if you can set things up so that the divisible estate is empty at the time of death, those claimants will have no assets on which to claim, even if their claims are sound.<sup>35</sup>

So Mr. Soucie, with legal advice, transferred all his assets—everything—into a trust, shortly before his unexpected death. The terms of the trust are not fully spelled out in the judgment, but we are told:

The terms of the Trust provide that Al was the settlor and the trustee. During his lifetime, all of the income generated by the Trust would be payable to him and the trustee [Al] also had discretion to allocate capital to Al. No one other than Al was entitled to any of the capital during his lifetime.<sup>36</sup>

This is a situation we earlier described as an STB trust. The settlor, trustee and beneficiary are united in one person: the settlor is also the sole trustee, and is also the only income beneficiary while alive, and also has discretion to allocate capital to ... himself. The trust satisfied the provisions of the *Income Tax Act (ITA)* for what that Act calls an “alter ego trust”;<sup>37</sup> these provisions require that no one other than the settlor (who must be 65 or older) may acquire any of the income or capital before the settlor’s death. By the provisions of the *ITA*, settlement into such a trust is on a “rollover” basis, so that any accrued capital gains are not taxed on the creation of the trust. There must, of course, be some other incentive for creating such a trust, because *not* creating the trust would not trigger taxation on accrued capital gains.

It is interesting to ask why, as a matter of tax policy, Parliament would have created this rollover device. Apparently the answers are these.<sup>38</sup> Although Canadians do not seem to regard the probate system with the same horror as their neighbours in the US, this trust helps one to avoid it. On the death of settlor/trustee, the trust interests that were created *inter vivos* will continue, and this means, typically, that the persons chosen by the settlor will become entitled to the capital, under the terms of the trust and not via a will. Thus, for these assets at least, the process of probate—which is criticized as slow, and public—is avoided. We should remember, though, that probate is public for good reason; the probate of a will is not a bilateral lawsuit but an *in rem*

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<sup>34</sup> More precisely, assets held by a sole trustee like Mr. Soucie *do* pass to the trustee’s executor on the trustee’s death, but are subject to the pre-existing trust, so presumably upon a purposive interpretation of the estate tax legislation they are omitted from the valuation. Of course, where the trustee is someone other than the settlor, or where there are multiple trustees (holding as joint tenants), this problem does not even arise.

<sup>35</sup> Unfortunately for Shirley Larochelle and those similarly situated, the B.C. courts have held that persons in her position cannot invoke the fraudulent conveyances legislation that protects creditors from self-improvement by debtors: *Mawdsley v. Meshen*, 2012 BCCA 91, 348 D.L.R. (4th) 307, at para. 12. For an overview of Canadian law on dependants’ relief legislation, see A. Popovici and L. Smith, “Freedom of Testation and Family Claims in Canada” in Kenneth GC Reid, Marius de Waal, and Reinhard Zimmermann, eds., *Comparative Succession Law vol. III: Mandatory Family Protection* (Oxford: OUP, 2020) 507.

<sup>36</sup> *Larochelle*, note 10, at para. 88; see also para. 174.

<sup>37</sup> The definition is in *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 248(1) “alter ego trust” but this “definition” is literally incomprehensible without extensive further reading in s. 104(4).

<sup>38</sup> This summary is based on M.R. Gillen and F. Woodman, *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery, 2021), at 20-21, 658-9, 661-2.

proceeding in which any interested party may participate to ensure that what is promulgated as a will meets the law's requirements.<sup>39</sup> One may ask why the federal Parliament should facilitate, through its tax law, the bypassing of provincial proceedings. In particular, one may wonder why the federal Parliament should facilitate, by federal income taxation law, the reduction of payment of provincial probate tax, which is payable in most but not all jurisdictions.<sup>40</sup> It is observed also that the *alter ego* trust may allow a settlor to avoid the operation of dependants' relief legislation, as illustrated by *Larochelle v Soucie Estate*.<sup>41</sup> One can at least hope that this effect was not one that was intended by Parliament. Finally, and perhaps with a little more credibility as a legislative goal, it is said that an *alter ego* trust may allow better asset management in the situation of a settlor whose capacity is degenerating. But this, of course, only seems to make sense where someone other than the settlor is the trustee.

This brings us to something that the *ITA* does *not* say: it does not say that the settlor must be the only trustee, or a trustee at all. Its definition turns on access to income and capital, not on who holds the property, the powers of investment, or any powers to encroach on capital. If, as I suspect, it is very common to create STB trusts like Mr. Soucie did, this is not because the *ITA* requires it. It is because it leaves the settlor in full control of the assets, just as he or she was before the trust was set up. And this raises some serious questions of trust law.

In our case, the scheme succeeded. When Mr. Soucie died, he was a wealthy man, but there was almost nothing in his estate; it amounted to \$4,000, less than his liabilities.<sup>42</sup> His daughter Shirley Larochelle, who was left nothing by Mr. Soucie, brought the proceeding seeking to make a claim against his estate under the wills variation legislation. But the result was that Ms. Larochelle had no assets against which to make her claim. Probate tax would have been nil as the value of the estate was less than zero. What happened to all the property in the trust? Under the terms of the trust, it went to the named capital beneficiaries in remainder, namely Mr. Soucie's children who were not estranged. But they did not take under a will; they took, it was held, pursuant to a trust interest that arose when their father created the trust, while he was still alive.

## V. WHAT IS WRONG WITH THIS PICTURE?

What could be wrong with this picture? If Mr. Soucie had literally given all his property away while alive, let's say to the Red Cross, then of course his estate would be empty, it would pay no probate tax, his estranged daughter would find no assets to claim against. But of course, on that hypothesis, his non-estranged children would get nothing. It looks to me like Mr. Soucie performed a kind of magic trick. He wanted to get the benefits of giving it all away, but bear none of the burdens of giving it all away. If he had given it all away, he would not be able to enjoy it,

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<sup>39</sup> A.H. Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" (2017) 46 *Advocates' Q.* 316.

<sup>40</sup> In the words of one book (A.H. Oosterhoff et al., *Oosterhoff on Wills*, 9th ed. (Toronto: Carswell, 2021), at 204): "It seems somewhat bizarre to have the federal government not only condone, but promote tax avoidance at the provincial level."

<sup>41</sup> *Larochelle*, note 10.

<sup>42</sup> It is also to be hoped that Parliament did not intend to incentivize hiding assets from creditors. The general law of fraudulent conveyances would of course be available to creditors after the creation of a trust like Mr. Soucie's (though not, at least in B.C., to relatives who were not adequately provided for: see note 35). Indeed, if Mr. Soucie had gone bankrupt, it is arguable that the whole "trust" fund would have been available to his creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), s. 67(1)(d): that provision states that the property of a bankrupt divisible among their creditors includes "such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit." The estate of a deceased person can be made bankrupt (BIA, s. 44(1)).

and he would not be able to control what happened to it on his death. But according to the decision, he had it all ways. While alive, he could do whatever he wanted with all the trust property. He could spend any or all of it on whatever he wanted. If he wanted to change his mind about where it went on his death, he could just remove it from the trust he had created. His trust brought about the same *effects* as if he had instead written a will; but if he had done that, there would have been probate tax to pay, and the claims of his estranged daughter to be met. According to the Supreme Court of British Columbia, it was not a will even though it behaved exactly like one. To me, this seems incorrect.

So how do we analyze this practice, which I suspect is not uncommon in British Columbia and elsewhere in Canada? Let's apply some basic trust law. The whole plan only works if Mr. Soucie's non-estranged children are trust beneficiaries from the moment of trust creation, while Mr. Soucie was still alive. Why? Because if they only get an interest when he dies, the instrument would be a will and the whole plan would fall apart. If an instrument creates interests that only take effect on death, it is a will regardless of the title on the document. The strategy would fall apart not just because the document was not in the form of a will, but because all his wealth would have gone into his estate, leaving it taxable and subject to the statutory claims of his estranged daughter. So the strategy works only if it creates beneficial interests in *all* the trust beneficiaries at the moment that the trust is created, while Mr. Soucie was still alive. But what does that mean? Beneficiaries have rights. Trustees are accountable to beneficiaries; that is part of the essence of the trust. According to the 2018 decision of the Supreme Court of Canada in *Valard Construction Ltd. v. Bird Construction Co.*,<sup>43</sup> beneficiaries have the right to be told about the trust. According to basic trust law doctrine going back for centuries, beneficiaries have the right to see the trust accounts and supporting documentation, and to hold the trustee accountable for how they deal with trust property.<sup>44</sup>

Were Mr. Soucie's non-estranged children told of the trust and their rights under it? Were they sent periodic accounts of the trust property and how it was invested? Or were they more likely treated like the beneficiaries of a will, who have no right to information or anything else, because the will can be freely changed the next day? Were they given information each time the trust property was diminished by the exercise of Mr. Soucie's power of encroachment in favour of himself? Not in this case, because he died just a few days after the trust was set up. But was it ever intended that he would act as though he was dealing with property that was not his own, as every trustee must act? A fiduciary power cannot be exercised selfishly; it can only be properly exercised in the pursuit of the purposes for which it was conferred.<sup>45</sup> Was Mr. Soucie told that once he created the trust, the property was no longer entirely his, and that he was accountable to others as to his dealings with it? And that he might be removed as the trustee if he did not act accordingly?<sup>46</sup> It seems very doubtful; the judgment seems to make it clear that Mr. Soucie was told that he could carry on just as before, as if the money was his to do with as he wished. The trust, after all, was his *...alter ego*.

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<sup>43</sup> Note 22.

<sup>44</sup> For example *Sandford v. Porter* (1889), 16 O.A.R. 565 (Ont. C.A.); *Campbell v. Hogg*, [1930] 3 D.L.R. 673 (P.C.).

<sup>45</sup> See *Fox v. Fox Estate* and *Grand View Private Trust Co. v. Wong (No. 2)*, both cited in note 23.

<sup>46</sup> As noted in note 25, *Fox v. Fox Estate* illustrates that it is a ground for the court to remove a trustee from office—even one who is a beneficiary—that the trustee/beneficiary ignored the interests of the other beneficiaries and acted as if the trust property was their own.

Perhaps we can imagine that the correct interpretation of the trust instrument was that Mr. Soucie held a *non-fiduciary* power of encroachment on the capital, of which he himself was the only object? This is the drafting suggestion of James Penner, as we have seen, and was adopted by the testator in *Re Shuker*.<sup>47</sup> This would free up STB's like Mr. Soucie to use the power however they wished, for their own benefit. But then a new question arises. If the trust was interpreted in that way, would the other so-called "beneficiaries" (his non-estranged children) have had any legally protected rights at all when the trust was created? This is where we bump into the essence of the trust, sometimes called its "irreducible core". "If the beneficiaries have no rights enforceable against the trustees there are no trusts."<sup>48</sup> And if there were no trusts, again, the whole scheme should have failed.

For a clue as to what has gone wrong here, I would like to turn to the 2020 decision of the Judicial Committee of the Privy Council in *Webb v. Webb*.<sup>49</sup> This was an appeal from the Cook Islands involving New Zealand parties and New Zealand trusts. The trusts were quite like Mr. Soucie's trust: they were STB trusts, in which STB could, under the terms of the trust, do whatever he wanted with trust property. Two very formally declared and created trusts were held to be invalid:

The Court of Appeal considered, correctly in my opinion, that the powers reserved to Mr. Webb under the trust deeds may be analysed in two different ways. One is to consider whether those powers were so extensive that Mr. Webb can be said never to have disposed of any of the property purportedly settled on or acquired by the trusts. In this connection one might also ask whether the trusts lacked the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. The other is to ask whether the powers reserved to Mr. Webb were so extensive that in equity he can be regarded as having had rights which were tantamount to ownership. The Court of Appeal recorded, at para. 55, the parties' agreement that in this case it can make no difference to the outcome which of these two analytical routes is taken. I will therefore confine myself to the substantive question whether Mr. Webb's powers under each of the trust deeds were such that, in equity and in all of the circumstances of this case, he can be regarded as having had rights in the trust assets which were indistinguishable from ownership. In my view he plainly can. Mr. Webb had the power at any time to secure the benefit of all of the trust property to himself and to do so regardless of the interests of the other beneficiaries. In my opinion, for the reasons set out at para. 87 above, the Court of Appeal was plainly entitled to find as it did that the trust deeds failed to record an effective alienation by Mr. Webb of any of the trust property. The bundle of rights which he retained is indistinguishable from ownership.<sup>50</sup>

Now full control of the trust property by the beneficiary does not necessarily undermine a common law trust; as we have seen, the bare trust is well known. A bare trust might not be apt to accomplish some intended purposes; for example, the beneficiary of a bare trust would find that his creditors, including a former spouse, would have access to the beneficiary's rights for the satisfaction of their claims. But it is a valid trust, because there is trust property held by a trustee for the benefit of the beneficiary. Moreover, if we think about a self-declared trust, where the

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<sup>47</sup> Text above at notes 23-26.

<sup>48</sup> *Armitage v. Nurse*, [1998] Ch. 241 (C.A.), at 253.

<sup>49</sup> 2020 UKPC 22 (P.C.).

<sup>50</sup> At para. 89.

settlor is also the sole trustee, as in *Soucie Estate* and *Webb v. Webb*, such a trust in one sense never involves an alienation; it must involve the *creation* of a new Equitable interest in another, while the settlor-trustee continues to hold the same rights, now holding them in trust.

So if the advice of the Privy Council was in the form of a student's assignment, and I was commenting upon it, I would say that it could be made a little more precise. The particular problem they were addressing arises out of the STB configuration. By purporting to declare a trust, Mr. Webb purported to put himself under legally binding obligations relating to the benefit of the relevant rights. But he did not, because of the wide powers that he held *in his own favour*, powers that could not sensibly be understood as fiduciary powers because the clear intention was that he could use them without regard to the interests of anyone but himself. Before declaring the trust, he could do whatever he wanted with the relevant property; and lo and behold, after declaring the trust, he could do ... whatever he wanted with the relevant property.<sup>51</sup>

In my view, this is the correct analysis of Mr. Soucie's attempt to create a trust. What he did, despite the care and formality with which it was done, did not create a trust because it did not give anyone else any rights to the property that he continued to hold. Reflecting on this reminds me of learning, back in the 1980's, about the certainty of intention that is essential to the creation of an express trust. We were taught that a settlor did not need to use the word "trust" to show the intention to create a trust; all they needed was ... the intention to create a trust. But what was that intention? That was a puzzle. It must be possible to articulate some *legal outcome* that they needed to intend to bring about.

Conversely, we were told that if the person did use the word "trust", as in the case of professionally drafted trust documents, then certainty of intention was obviously present. It has taken me a long time to realize that this is not actually true. The same puzzle applies here too. *Even if* the settlor uses the word "trust", it must logically be true that we still have to look for the same intention as in the case where that word is not used. The creation of a trust is not the casting of a magic spell.<sup>52</sup>

So what is that elusive intention? The core of certainty of intention must be something like this: an intention that the relevant rights (the trust property) *not* be at the free disposal of the trustee (who, remember, may be the same person as the settlor). The reason it must be something like that relates to what a common law trust *is*: it is a relationship in which the trustee cannot enjoy the benefit of the trust property, but rather has an obligation towards others regarding the

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<sup>51</sup> Something similar can be seen in the earlier decision in *Clayton v. Clayton*, [2016] NZSC 29. In this case, because of the matrimonial property law legislation, the validity or otherwise of the trust was not essential to the decision; similarly, see *Grosse v. Grosse*, 2015 SKCA 68, application for leave dismissed 2016 CanLII 7608 (S.C.C.). In *Clayton* the Supreme Court of New Zealand expressed disapproval of the term "illusory trust", on the view that an illusory trust is no trust at all. This is correct, but in my view the term is still useful as it speaks to a case in which the documentation creates the illusion of a trust even though the legal analysis shows that there is no trust. In the same way we sometimes talk of a "void contract"; it is no contract at all, but this conclusion exists along with facts that may show that there was an attempt to create a contract, an attempt which ultimately failed.

<sup>52</sup> For the same reason, there is no reason in law to play games with ingots of precious metal or otherwise to preserve the "settlement property". I understand that imperatives of this kind may arise from a concern about the ability to prove the valid creation of the trust; but it remains true that the validity of a trust never depends on the continued holding in trust of the property originally settled. I am not aware of the use of such talismans in other common law jurisdictions.

benefit of that property.<sup>53</sup> Even if the trustee is a beneficiary, they cannot *fully* enjoy the benefit of the trust property, precisely because they must honour the obligations they owe to the other beneficiaries. Those obligations *are* the trust. This definitional core shows us why a common law trust needs a beneficiary (unless it is charitable), and why a common law trust needs trust property. But it also shows us what is the real intention that must be found for an express trust to arise.

Of course, I know that settlor can also be a trustee, and a trustee can also be a beneficiary; and I know that a trustee can have discretionary authority to advance trust property out of the trust. But cases like *Webb* and *Soucie Estate* show the limits of this modular approach. By trying to add all of these building blocks together, we have caused the building to fall down. When the so-called trustee has a discretionary authority that can be exercised *in their own* favour, without limit and without the fiduciary constraints that include the proper purposes doctrine, it is impossible to see the power as a fiduciary power. It is the opposite of that. And it means that any fiduciary or other obligation to the other beneficiaries is entirely illusory. An obligation that you can freely choose whether or not to perform is not an obligation as we use that term in the law. If under our contract I am obliged to repair the roof on your house, but pursuant to another clause I can decide whether or not I wish to repair your roof, then I am not really obliged at all.<sup>54</sup>

In *Soucie Estate*, counsel for Shirley Larochelle argued that Mr. Soucie did not have the intention to create a trust, and Donegan J. rejected this argument and found that certainty of intention was proved.<sup>55</sup> She held that the primary evidence of this was the use of the language of “trust” in the documentation. She held that this was supported by the evidence that Mr. Soucie took professional advice, discussed the matter with his non-estranged children, and signed various documents referring to the trust. With respect, and freely admitting that in the 1980’s I would have agreed that this was determinative, I no longer think this is right. Donegan J. was correct that there was lots of evidence that Mr. Soucie wanted to bring about some of the *effects* of creating a trust; namely, avoiding probate tax and defeating any wills variation claim. But if the intention to create a self-declared trust is an intention to put oneself under legally binding and legally enforceable obligations of accountability and decision-making to the (other) beneficiaries of the trust, then it is not clear that Mr. Soucie had that intention.

Take this hypothetical example. In a time of war, a law is made that everyone of a certain age is liable to conscription. There is an exemption, however, for those who are employed in certain industries, such as the manufacture of munitions. Now imagine that a wealthy person—let’s call him Mr. Rich—goes to the munitions factory, operated by MF Ltd., and explains that he would

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<sup>53</sup> See the definition in *Valard Construction Ltd.*, note 22, para. 16. It is unfortunate that immediately afterwards (para. 17), the majority referred to the trust as involving a division of legal and equitable title between trustee and beneficiary. This simplistic description should not be used even in introductory textbooks, as it is both inaccurate and misleading. It is basic trust law that *Equitable* rights or interests can themselves be held in trust by the one who holds them; this makes it impossible to say, as a general proposition, that it is definitionally true that a trustee holds legal title. More profoundly, of course, ‘equitable title’ is often a wholly inappropriate term, as in widely discretionary trusts or charitable trusts.

<sup>54</sup> In a concurring minority judgment in *Politzer v. Metropolitan Homes Ltd.*, [1976] 1 S.C.R. 363, Laskin C.J.C. said (at 366): “I see no binding contract supported by consideration in an agreement under which the purchaser may choose to perform or not, without liability if he decides not to.” There is no consideration because such a purchaser is under no genuine obligation. In *Suisse Atlantique Société d’Armement Maritime SA v. NV Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361 (H.L.), Lord Wilberforce said (at 432) that to stipulate a contractual obligation that need not be performed “... would be to reduce the contract to a mere declaration of intent.”

<sup>55</sup> At paras. 265-284.

like to be employed there. Mr. Rich clarifies that he does not want to do any work there, or to be under any obligation to work; he just wants to be employed, and he is willing to hand over a sizeable sum of money to reach this goal. Surely we would say that this person is confused. He clearly wants to attract a legal consequence of being employed at the factory; but he does not want to *be employed*, because “being employed” has a meaning in law, including being under an obligation to do work as directed. Nothing would be changed if he and MF Ltd. signed a document that specified that Mr. Rich was an employee with no obligation to work. It would not matter if the document was entitled “employment contract”, because it would not be what an employment contract is, and he would not be an employee.<sup>56</sup>

It is important to underline, moreover, that this conclusion does *not* depend on finding that Mr. Rich or MF Ltd. or both engaged in dishonesty, deceit, or sham. It would not matter if their document accurately recorded the terms of the agreement. The problem is that their agreement, on its terms, is not a contract of employment, and they are not free to make it one, because the meaning of an employment contract comes from the law. And intending to enjoy the consequences of an employment contract is not the same as intending to create an employment contract, as that relationship is defined by law.

In the same way, being a trustee has a meaning in law, and what it does *not* mean is that you can do exactly as you wish with the property that you purport to hold in trust. That is the opposite of what it means, and the fact that you sign documents that call the arrangement a “trust” does not change anything. Earlier, we saw that the testamentary “whatever is left” trust may fail, as in *Re Walker*,<sup>57</sup> because the testator has tried to do something and its opposite: to make an outright gift, and then to impose obligations on the donee. This is impossible; but it is equally impossible in the other direction: Mr. Soucie purported to impose obligations on himself, while remaining free to do exactly as he wished.

## VI. A SALVAGE OPERATION?

Do my arguments mean that despite the *ITA*, a person cannot create an *alter ego* trust? No. They mean that such a trust must comply with the nature of a common law trust.

When a person holds a non-fiduciary power, they can do with it largely as they wish, including releasing or renouncing it.<sup>58</sup> But if the power holder is also the object, or an object, of the non-fiduciary power, then the power holder can obviously use the power to benefit themselves and in this sense, it is an asset that they hold. Thus if a settlor holds a non-fiduciary power of revocation over the trust, his creditors may be able to “seize” that power and in this way have access to the assets held in trust.<sup>59</sup> Where the settlor held a non-fiduciary power to remove and replace the trustees, it was similarly held that his creditors could have access to the assets held in

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<sup>56</sup> An important decision on the difference between intention to create a certain kind of trust, and intention to bring about the consequences of that trust, is *Antle v. Canada*, 2009 TCC 465, [47]-[49], *aff'd* 2010 FCA 280 (F.C.A.), application for leave to appeal dismissed [2010] S.C.C.A. No. 462 (S.C.C.).

<sup>57</sup> Note 11.

<sup>58</sup> They cannot commit “fraud on a power”; this vague term basically means that they must act in good faith; see *Vatcher v. Paull*, [1915] A.C. 372 (P.C.).

<sup>59</sup> *Tasarruf Mevduati Sigorta Fonu v. Merrill Lynch Bank and Trust Company (Cayman) Ltd.*, [2011] UKPC 17, [2012] 1 W.L.R. 1721; see also *BIA*, s. 67(1)(d), discussed above, note 42.

trust, because the power gave him full control, for his own benefit, of the trust assets.<sup>60</sup> And where the person who holds the non-fiduciary power of which they are also an object purports also to be a trustee, as we have seen, there is probably no trust at all, because that person effectively holds the property for their own benefit.<sup>61</sup>

Because of the restrictions on the use of a fiduciary power, such a power is *not* an asset held by the holder. How do we tell whether a power is or is not fiduciary? The legal test is not particularly complex, even though its application may be difficult. One case put it this way:

The task of determining the scope and nature of a power conferred in the deed is one of construction of the deed, taking into account all relevant circumstances (which do not include the subjective intentions of the settlor). A relevant consideration is whether the donee of the power also has other roles such as trustee, discretionary beneficiary and/or settlor. Also relevant will be the actual powers conferred and their effect both individually and together. The task of construction is to consider objectively what the purpose is for which the power has been conferred. Putting it another way, the question is: for whose benefit, as a matter of construction of the trust deed, has the power been given?<sup>62</sup>

In a trust of the kind that Mr. Soucie created, where he was settlor and trustee and beneficiary and holder of an unlimited power to encroach on the capital and also the sole object of that power, it seems to me that it would be very unlikely that a court, interpreting and construing the trust deed as a whole, could conclude that the power was held in a fiduciary capacity. Since (in order to comply with the *ITA*) the settlor/trustee/beneficiary is the only one who can benefit from the power of encroachment, the proper purposes for which the power could be used, if it were fiduciary, would be to benefit the object of the power, who is the very person who holds it. This seems to destroy even the possibility that the power is fiduciary, which in turn, as we have seen, destroys the trust.

Thus the easiest way to set up an *alter ego* trust, even if the trust includes a power of encroachment over the entire capital of which the settlor/beneficiary is the only object, is to choose someone else to be the trustee. In this case, if the power of encroachment is held by that trustee, then it will be obvious that the power is held in a fiduciary capacity. This of course will take away certain features of the arrangement that Mr. Soucie created, which were most likely presented to him as advantages of it. First, an independent trustee may insist on being paid for the exacting job of being a trustee for others. This, however, is not necessarily the case; what if the trustee were the capital beneficiary who stands to take any capital remaining on the death of the settlor? In this configuration, any use of the power of encroachment by its trustee/holder, in favour of Mr. Soucie, would actually impoverish the trustee/power-holder in their capacity as remainder beneficiary; thus, it would be much easier to argue that the power was fiduciary.<sup>63</sup> But this will not get rid of the second reason that having someone else as the trustee would be less advantageous: the settlor will not be in total control of the trust property. But of course that is what, I have argued, is fatal to the attempt to set up a trust of the kind that Mr. Soucie did.

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<sup>60</sup> *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev*, [2017] EWHC 2426 (Ch).

<sup>61</sup> *Webb v. Webb*, note 49.

<sup>62</sup> *Pugachev*, note 60, at para. [203].

<sup>63</sup> This configuration would, however, create a baked-in conflict of interest in relation to the use of the power, which might not be wise.

What if Mr. Soucie were (as in the actual case) the trustee, but (unlike in the actual case) someone else (such as a sibling, or one or more of his non-estranged children, the capital beneficiaries) were *also* a trustee? Multiple trustees must, by default, act unanimously to exercise their powers.<sup>64</sup> Some practitioners may think that a recent decision of the Supreme Court of Canada suggests that this solution could address any possible argument that the trust was invalid on the basis that the trustee lacked any genuine obligations towards others. In *S.A. v. Metro Vancouver Housing Corp.*,<sup>65</sup> the settlor of a trust, S.A., was also the object of a very wide power of encroachment on the capital.<sup>66</sup> The principal issue was whether S.A.'s interest in the trust was an asset in her hands which needed to be declared in her application for subsidized housing. The trustees were S.A. and her sister. Obviously if S.A. had been the only trustee, we would be in a situation very similar to *Webb v. Webb*, where the result was that there was no trust at all.<sup>67</sup> Although no one was arguing that the trust was not valid, the majority placed a great deal of weight on the fact that there was a second trustee. The majority said, through Côté J.:

I would pause at this point to note that S.A.'s status as co-trustee is irrelevant to the determination of the nature of her interest in the Trust. In this capacity, she is required to reach decisions unanimously with her co-trustee, and must exercise her discretion independently, in accordance with the terms of the Trust and in compliance with her fiduciary obligations. ... These limitations effectively prevent S.A. from unilaterally ordering payments out of the Trust to herself as she may please. Therefore, S.A. has no greater access to the Trust's assets than does any person with an interest in a *Henson* trust who is not simultaneously a trustee thereof. For this reason, I would not attach any significance to S.A.'s status as a co-trustee.

There is a maxim of Equity that "Equity looks at substance, not form". If the validity of this trust had been called into question, I would suggest that the relevance of the second trustee would have needed a great deal more attention than this. Côté J. referred to S.A.'s fiduciary obligations, but not to whom those obligations were owed. They were not simply owed to herself, since no one can owe obligations to themselves. The fiduciary duties of trustees are owed to beneficiaries, not objects of powers as such;<sup>68</sup> and the whole foundation of the decision was that S.A. was only the object of a discretionary power and not a beneficiary in the trust law sense. And yet, the Supreme Court of Canada did not even stop to notice who *were* the beneficiaries of the trust, or whether they had

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<sup>64</sup> This rule can be varied by the trust deed, but of course if the deed stated that Mr. Soucie could exercise the power of appointment on his own, we would be back to where we started.

<sup>65</sup> *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99.

<sup>66</sup> I describe S.A. as the settlor but the trust arose in a curious way (see para. 13 and the Appendix). S.A. inherited one-third of the residuary estate of her father but did not want to be the full owner of that wealth as it would have disentitled her from subsidized housing. The court, under the same B.C. wills variation legislation that Mr. Soucie successfully avoided, accepted the application of S.A. to vary the will so that it created a discretionary trust with the terms that were proposed by S.A. This is not how trusts usually arise and it is not how wills variation applications usually unfold; presumably the application was unopposed. Although the court's order in a sense determined the terms of the trust, all the money that went into it was, before it existed, S.A.'s, and this is what makes a person a "settlor" in the common law of trusts.

<sup>67</sup> *Webb v. Webb*, note 49.

<sup>68</sup> On this important and often-ignored distinction, see L. Smith, "Massively Discretionary Trusts" (2017) 70 C.L.P. 17, at 21-24, and *Grand View Private Trust Co. v. Wong (No. 2)*, note 23, at paras. 29 and 33.

been notified of the trust as required by the Court's own 2018 decision in *Valard Construction Ltd.*<sup>69</sup> It seems highly unlikely that they had been.

What might the Court have considered if it had studied this question more closely? In English law, those who are the objects of a discretionary power have often, on the breakdown of their marriage, tried to keep the trust assets out of matrimonial property calculations by saying, as S.A. did, that they have no *right* to trust property but only a hope of receiving some of it. English courts have paid more attention to the established facts than the abstract possibilities: if the evidence shows that it is "likely" that the person will receive funds from the trust when they request them, then the trust fund is a relevant resource.<sup>70</sup> A recent decision in B.C. took a similar view, holding that

... as the question is one of substance and not form, sufficient certainty that the trust assets will be transferred to the purported owner can fulfill this criterion [of being "owned"]. The enquiry, in other words, does not end with the analysis of discretionary words in the trust deed, but rather requires consideration of the possibility events will unfold as if the trust were fixed.<sup>71</sup>

If that test had been applied in S.A., it seems likely that the decision would have been different.<sup>72</sup>

So what might be analysis had Mr. Soucie had a compliant co-trustee? The issue in S.A.—whether the STB should be seen as the economic owner of the trust assets—did not arise in the *Soucie* litigation. But the passage quoted above from Côté J.'s judgment in S.A. suggests that the presence of a second trustee estops the Court from questioning the independence of that person. As we have seen, this is doubtful; and in a different kind of dispute, different considerations might arise. A trustee who exercises their discretions as directed by the settlor acts improperly.<sup>73</sup> Their decisions are liable to be set aside and they are liable to be removed as trustee.<sup>74</sup> To insulate such an arrangement from challenge, therefore, it would be essential that the co-trustee not be a puppet of the settlor. They would have to be advised of their fiduciary obligations to the beneficiaries—all of the beneficiaries, including those who will obtain such capital as remains on the death of the settlor. While this might ensure the validity of the arrangement as a common law trust, it would obviously make it less attractive to a settlor, who inevitably would lose full control of the assets during the remainder of their life.

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<sup>69</sup> Note 22. The beneficiaries were referred to as "third parties" in S.A. at para. 38; but they were the ones to whom the trustees were legally responsible, and who were entitled to the property to the extent that the dispositive power was not exercised.

<sup>70</sup> This approach has been adopted also in Hong Kong: see *Cheng Wai Tao v. Poon Ka Man Jason*, [2016] HKCFA 23, at paras. 25-32, with references to the English cases.

<sup>71</sup> *H.S.S. v. S.H.D.*, 2018 BCCA 199, at para. 86, application for leave to appeal dismissed 2019 CanLII 7962 (S.C.C.).

<sup>72</sup> One commentator notes that "...in oral argument during the Supreme Court appeal, S.A.'s counsel told the court that the trust had distributed income to her to help pay for the housing" during the dispute, and that "...S.A.'s trust sprung [sic] into action immediately and paid the balance of her rent while the appeal was ongoing": J. Nitkman, "Henson Trusts: A Sham in Sheep's Clothing?" (2019) 38 E.T.P.J. 205, at 209, 214.

<sup>73</sup> *Turner v. Turner*, [1984] Ch. 100 (Ch.D.).

<sup>74</sup> If the trustee agrees in advance to act in this way, moreover, with this arrangement not being visible in the trust deed, the trust is likely to be a sham, making it simply a bare resulting trust for the settlor: *Antle v. R.*, 2010 FCA 280, application for leave to appeal dismissed 2011 CanLII 26840, 2011 CanLII 26841 (S.C.C.), reconsideration refused 2012 CanLII 4143, 2012 CanLII 4145 (S.C.C.). If it were a bare trust, the benefit of the assets would fall into the estate, making them taxable and subject to wills variation claims.

Let us consider a final possibility. We have seen that the most serious defect in Mr. Soucie's trust was that although he was the trustee, he did not owe *substantive* obligations to anyone else, and since these are the defining characteristic of the common law trust, thus according to *Webb v. Webb*<sup>75</sup> he did not create a trust at all. We have seen also that Mr. Soucie could have avoided this problem by using a separate trustee who was the *only* trustee and held the power of encroachment in a fiduciary capacity; but that then, Mr. Soucie would not have controlled the exercise of that power. Consider this possibility: Mr. Soucie uses a separate trustee, whether a fee-charging professional or a friendly family member (call that person T), but the trust deed grants the power of encroachment (whose object is Mr. Soucie) to Mr. Soucie himself. Now if *this* power were clearly stipulated to be non-fiduciary in nature, it would not impugn the existence of the trust, because T would clearly hold the trust property subject to the duties of a trustee in relation to the benefit of the property. And by giving the power of encroachment to Mr. Soucie in a non-fiduciary capacity, one would ensure that Mr. Soucie had unfettered access to the assets during his life.

In my view, this arrangement could be effective, at least so long as it was correctly administered. It is clear that revocable trusts are trusts; this variation would effectively be a trust that could be revoked in dribs and drabs, and so it would be valid in principle. But the question of correct administration would be crucial for it to withstand challenge, for example as a disguised bare trust. Differently from the arrangement in the actual case, in this variation Mr. Soucie would not be the legal title-holder to the assets; he would have to go to the trouble of informing the trustee that he was exercising his power of encroachment, and the trustee would have to transfer the relevant assets to Mr. Soucie.<sup>76</sup> The assets in the trust would, it seems, remain potentially available to the settlor's creditors, before and possibly after death.<sup>77</sup> The trustee T, of course, would owe fiduciary duties both to Mr. Soucie and to whomever was named as the capital beneficiary on the death of Mr. Soucie. Because of this, T would be required to notify the capital beneficiaries of the existence of the trust, as well as any exercises by Mr. Soucie of the power of encroachment. T would also presumptively be required to invest the trust property in a way that held an even hand among the beneficiaries, although this duty could be varied by the trust terms. And, like all express trustees, T would have to keep trust accounts, and be ready to produce them to the beneficiaries.

All of this would undermine the convenience of the transaction as compared with what happened in the actual case, but it seems that it would be necessary to ensure the validity of the trust. If these steps were not taken by the trustee T, the conclusions could include that T was liable in breach of trust to restore any improper disbursements to the trust fund, or (if T's conduct was understood to have been part of an implicit arrangement with the settlor) that the arrangement was a sham that was never intended to give any present rights to the other beneficiaries; this would lead to a resulting trust so that the benefit of all the trust property would fall into the settlor's estate.

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<sup>75</sup> Note 49.

<sup>76</sup> A trust deed can stipulate a required form (such as a deed) for the exercise of a power, but it need not. However, the trustee, who is responsible towards all the beneficiaries for stewardship of the trust assets, would be entitled to insist on some preservable evidence (such as a signed letter) from the settlor that the power was being exercised. This would be essential for the trustee in order to substantiate the entries in their trust accounts.

<sup>77</sup> See *BIA*, s. 67(1)(d), discussed above, note 42. Although the non-fiduciary power of encroachment would come to an end on the death of its holder and object, if that person had been made bankrupt while alive, then it seems arguable that s. 67(1)(d) would operate to include the trust fund in the bankrupt estate even after the death of the bankrupt.

## VII. CONCLUSION

The common law has a long tradition of muddling along without concepts, often without definitions, and even without a commitment to conceptualism. One example is that the law of restitution was for many shrouded in the obscure language of quasi-contract. I will close with an illustration of this from another judgment of Madam Justice Mary Southin, this time as Justice of Appeal. In 2002, when I was teaching the law of restitution, I became aware of her judgment in *434438 B.C. Ltd. v. R.S. & D. Contracting Ltd.*<sup>78</sup> Her Ladyship there referred to the 1963 decision in *Estok v Heguy*<sup>79</sup> which is fairly well-known as an early Canadian restitution case. She observed, however, no doubt from personal memory, that when the case was summarized in the Vancouver Bar Association's journal *The Advocate*, the summary included the phrase, not "unjust enrichment" but "unjust in Richmond". This sent me to search the law library for this gem;<sup>80</sup> and every time since then that I have taught the law of restitution in Canada, I have begun by telling the students that the law of unjust enrichment is a recent arrival to the common law. An image of that page from *The Advocate* is the best illustration of this.

In my view, both scholarship and judicial reasoning are moving steadily away from any historical distrust of conceptualism. Of course, we should move with caution: there is wisdom in the common law's tradition of casuistic reasoning, comparing one case to another and indeed, paying attention to intuitions of justice that may arise from thinking in concrete terms. But just like freedom of contract, freedom to mould the terms of one's trust has limits which derive from the nature of the trust institution itself. You cannot make something a trust just by calling it that.

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<sup>78</sup> *434438 B.C. Ltd. v. R.S. & D. Contracting Ltd.*, 2002 BCCA 650 at para. 35.

<sup>79</sup> *Estok v. Heguy* (1963), 40 DLR (2d) 88 (B.C.S.C.).

<sup>80</sup> It may be found at (1963) 21 *Advocate* 179, where the case summary begins: "CONTRACT – Sale of land – Doctrine of unjust in Richmond." This was in the days when full law reports did not appear for many months, so brief summaries of important cases that could be published more quickly were very important for practitioners. My guess is that the now-disappeared practice of dictation was implicated here, Richmond being a city in British Columbia directly adjacent to Vancouver.