

STEP Trust Law Q&A

February 16, 2010

Summary of Discussion points

The following notes summarize the discussion on February 16th. They do not provide a definitive statement on the law and should not be considered to be tutorial notes. They are offered as a brief summary of the points discussed for the benefit of those in attendance and for those who sent their regrets.

- Chapter 7 on Variation of Trust suggests that the legislation developed to address tax issues.
 - Clarification: Yes – tax issues were behind many trust variation applications but variations occur for other reasons as well. Students should focus on the role of the court in a variation e.g. what can it consent to and for who?
- Distinguish inherent power of the court and statutory powers:
 - Inherent powers are powers that the courts are acknowledged to have even if there is no legislated authority. As noted in the materials, the power of maintenance of a minor is such a power.
 - Statutory authority is provided in legislation. Often it will codify inherent authority.
- Chapter 11 discusses treatment of income and capital. How are capital gains treated for income tax purposes and trust purposes?
 - Capital gains remain in capital and accrue to the capital beneficiary.
 - Any tax that is payable on this taxable income under the Canadian Income Tax Act, must be paid from capital of the trust.
- If a trustee who is also a beneficiary commits a breach of trust, what is the extent of the liability?
 - This point is difficult to summarize, but generally, analyze the situation based on the first principles in the materials.
 - If a beneficiary consents, instigates, acquiesces, they cannot then make a claim.
 - Remember that the trustees reimburse the trust/make the trust whole.
 - If there are multiple beneficiaries (say at distribution time), the trustee(s) must make the trust whole and then the balance would be distributed. To the extent that the trustee is liable for a sum that would ultimately come back to him or her as a beneficiary, this would likely be addressed in the court order. Students do not need to concern themselves with this level of detail.
- Resulting trusts, presumptions of advancement and transfers from wife to husband
 - As noted, the presumptions are generally gone except for parent to minor children. The Supreme Court of Canada cases on joint accounts confirmed that the presumptions do not apply if the transfer is to an adult child.
 - With respect to your provincial rules, and whether presumptions arise on transfers from husband to wife or wife to husband, please see the legislation cited in the footnote #20 in chapter 16 Part III A 1 at page 278. Where

presumptions have been abolished, resulting trusts arise. If they haven't been abolished by statute, review the legislation to determine if they apply from transfers from wife to husband.

- Links to legislation can be found at: <http://www.canlii.org/en>
- For BC Law see: <http://www.bclaws.ca>
- Constructive trust: explain why carelessness is not sufficient for knowingly assisting in a breach of trust, but it could be sufficient for breach of receipt of property
 - See page 295: If someone assists in a breach, they may be held liable. The courts look for actual knowledge that a breach is occurring. Or, the person must be reckless or wilfully blind. Carelessness is not generally sufficient to meet this latter test. Examples include professionals who assist their clients (or participate in a transaction) where they know or have knowledge that suggests, that the transaction is in breach.
 - Page 297 draws a distinction with carelessness in situations where one receives property that is subject to a trust. In the former, the person who assists may not receive the property.
- Distinguish conceptual and evidential uncertainty (re Three Certainties – Ch 3 p 42)
 - A trust is void if there is conceptual uncertainty, but not evidential uncertainty. Courts try to resolve the latter.
 - Consider that the description of the beneficiaries is so vague that you cannot determine who it is meant to include. Compare it to a description that is clear as to who it is to include, but it is difficult to determine if a particular person belongs to that group or class.
 - One will need to look at the facts and the surrounding circumstances which might help bring certainty to something that appears uncertain. For example: I instruct my trustee to pay the income to my friends for ten years. At the end of ten years, divide it among my nieces and nephews.
 - “friends” is likely to be conceptually uncertain unless they have been defined in the document or some other evidence would help a court define who is included in this class.
 - “nieces and nephews” is a phrase that has conceptual certainty. But, there may be difficulty in determining who is a niece or nephew and/or when the class is to be defined. Courts will seek to provide that definition and in fact, there are rules on how to interpret wills in order to do this.
- BC Students: S. 59 of the BC Law & Equity Act repealed the statute of frauds and replaced it with s. 59(3). See p 62 and supplementary material p 15. Please note: This is a complicated subject. The questions were written by the author and are beyond my expertise. You may wish to read the actual legislation if you wish to pursue it. For exam purposes, this is not examinable content from Chapter 5.
- A student from Alberta has noted that at page 208 of the course text the author wrote the consent of beneficiaries is not required in the sale of trust property. The student has correctly pointed out that there is an exception to this rule in Alberta when there is real property being sold for the purpose of distribution only. This exception would not apply to sales that occur in the ordinary course of a trust administration. Alberta students may wish to refer to s. 10 of Alberta's Devolution of Real Property Act.

- Substitute Trustees - Section 14(5)(c) of the Alberta Trustee Act begins with the words, “When a new trustee is appointed”. If you have 3 trustees and one dies, can you carry on with the 2 surviving trustees? Section 5(c) indicates that where there are more than 2 trustees originally appointed it is not necessary to fill up the original number of trustees. However, does section 5(c) still apply when you are not actually appointing any new trustees but simply carrying on with the surviving 2 trustees?

Response: Based on a plain language reading, I would expect that the better interpretation is that if there were more than 2 trustees originally appointed, if one dies or is incapable or resigns, they do not need to be replaced unless the deed sets out that there must always be a certain number of trustees. To answer this question more specifically, one would need to do research into how the courts have interpreted the provision. Many provinces have provisions that seem to leave gaps in the various scenarios that might have to be dealt with. This level of detail is beyond the scope of the course.

- Duty to account – On page 44 of the Supplementary materials, it indicates there is no duty to provide details regarding the capital paid to Alicia and that it may breach her privacy rights to do so. Does this mean that the trustees would only indicate an amount that was paid to Alicia but not the reasons for the payment? Or does it mean that the amount paid to Alicia cannot be disclosed?

Response: The fact of the payment – amount and who – is part of the accounting. Generally, the comment was made to reinforce the point that care is required before offering details and/or reasons unless the law requires it. E.g. when the accounts are being questioned or an allegation of a breach of trust occurs.

I have not tried to look up case law on this point. For purposes of the course, the key points are:

- Understanding the nature of the duty to account, and
- Recognizing who is entitled to an accounting, and what it should entail.

Generally, trustees should exercise judgment in how much to include in the initial accounting – e.g. what to volunteer and what should only be provided if and when asked. Recent cases such as Rosewood in the UK illustrate the challenges that a trustee must face. Students in this course are not expected to be able to determine these finer points as it involves case law that I don’t believe was included.

- Duty to sell – The discussion on page 46 of the Supplementary Materials regarding the duty to sell the cottage makes no mention of the rule in Howe. Rather, it seems to be based on the Trustee’s duty to sell under the investment rules in the Trustee Act although no explicit reference to the Act is made. Similarly, there is no mention made of the rule in Howe on page 67 of the Supplementary Materials under item 4. Are we to answer questions regarding the duty to sell under the Trustee Act only? When does the Rule in Howe arise now given the provisions of section 3 of the Alberta Trustee Act? If the duty to sell now arises because of section 3, do the apportionment provisions of the Rule in Howe still apply? Finally, the Fales case discussed on pages 172 to 174 of the course materials seems to analyze the failure to sell securities in a timely manner as a breach of the duty of care. Please advise as to how to address this duty to sell.

Response: I cannot address this without the materials in front of me. Some general comments which may help follow. If not, please advise and I will try to follow up.

- a) Generally, one has to consider 3 sources of authority: the document, the legislation and the common law. The rule in *Howe v Dartmouth* applies to very specific situations. Legislation and/or the trust document may override it.
 - b) I do not recall that any trustee legislation sets out a duty to sell. My initial response is that I think the rules are being confused. I would begin by going back to first principles:
 - a. A trustee has a duty to be prudent and a duty to be impartial.
 - b. Prudence requires that trustees dispose of investments that do not fit within the investment policy/restrictions in the deed etc.
 - c. Impartiality means that investments that favour one group of beneficiaries over another are not appropriate, although this must now be assessed in the context of the overall investment policy and the prudent investor rules under the Trustee Act.
 - d. When it is determined that an investment should not be retained, the trustee should not speculate on when is the best time to sell. (*Fales*). They should sell at the first opportune time. This is subject to directions or specific instructions in the trust and the prudent investor rule provisions that recognize that “special assets” must be considered when setting the investment policy.
 - e. If the facts bring the situation under the rule of *Howe v Dartmouth* then apportionment should follow unless the deed authorizes the trustee to do otherwise which is often the case.
- All students are reminded that the examinable content is summarized here: <http://www.step.ca/joining/student/diplomaroute/studentresources.asp> and is discussed further at the beginning of each chapter of supplementary materials, also found under student resources.