



CBA Mid-Winter Conference

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THE CANADIAN
BAR ASSOCIATION



Agenda

- Review of statutory regime.
- Review of *Bethel Estate (Re)*, 2015 NSSC 216.
- Variation of charitable trusts.
 - Specific charitable beneficiaries.
 - Charitable purpose trusts.
- Variation of non-charitable trusts.
- Factors for the Court's consideration.
- Evidence Required.
- Conclusion.



Review of Statutory Regime

- Law Reform Commission Report
 - Started with a request by the NSBS to introduce legislation to abolish the Rule against Perpetuities
 - Consider the merits of a Wait and See reform approach versus abolition
 - Recommendation was abolition



Review of Statutory Regime (Cont'd)

- Along with our recommendation for the abolition of the rule against perpetuities, we recommend the expansion of the courts' power to vary trusts. In particular, we would not require the consent of all adult, capacitated beneficiaries, as the *Variation of Trust Act* now effectively does.

Review of Statutory Regime (Cont'd)

- The requirement for consensus puts too much power in the hands of a recalcitrant beneficiary, with no recourse to have a dispute about a proposed variation of the terms of the trust to account for changing circumstances properly adjudicated. We further recommend certain statutory safeguards to ensure the propriety and effectiveness of any variation.

Amendments to VTA

- Arrangement:
 - a variation, resettlement or revocation of a trust in relation to property or a variation, deletion or termination of, or an addition to the powers of a trustee in relation to the management or administration of the property subject to the trust.



Amendments to VTA (Cont'd)

- Section 3(1): “a person” may apply – no express requirement they have a connection through an interest
- Section 3(2)(a): expanded to include adult, capacitated consenting
- Section 3(3): where not all capable of consenting – test changed from “demonstrating benefit” to showing no “detriment” AND appropriate



Amendments to VTA (Cont'd)

- Section 3(4): where adult and capacity but not full consent
- Section 5: enshrines factors to consider in determining appropriate:
 - Intention of the settlor
 - Position of Trustees
 - Position of Beneficiaries
 - Position of anyone appearing



Review of Bethel Estate (Re), 2015 NSSC 216 Decision

- Harold Bethel was a trust officer of Acadia Trust – Will was prepared in 1967 and he died in 1976
- Left two main beneficiaries – his daughter, Mildred who died in 1979, and his wife, Grace who died in 2013
- 6 charitable gifts: Hospital Auxillary, Acadia University, Pine Hill Divinity, St. Andrew's United Church, Salvation Army and Rotary Club of Truro (for welfare work)



Review of Bethel Estate (Re), 2015 NSSC 216 Decision

- Hospital Auxillary gift was to be paid immediately
- Other five gifts treated differently – five parts held in trust:
 - “From the principal and income of the aforementioned Trust Funds my Trustee shall pay to each of the said organizations the sum of Five Thousand Dollars (\$5,000.00) annually until the said Funds are exhausted.”



Review of Bethel Estate (Re), 2015 NSSC 216 Decision

- In 2005 – preliminary application provided for increased support for Mrs. Bethel as well as increased payout to beneficiaries.
- After Mrs. Bethel's death, charities communicated and decided to apply under the VTA seeking approval of a plan to collapse the trust and payout balance.
- Court approved the arrangement.

Review of Bethel Estate (Re), 2015 NSSC 216 Decision

- Key findings:
 - Not charitable purpose
 - Entitled to principal and interest under will, not a situation where interest only
 - Interests had vested, i.e., nothing left to happen
 - Consistent with intention of testator as discerned by court



Variation of Charitable Trusts - Specific Beneficiaries

- If consent under 3(2) – appropriate according to factors in 3(5)
- If incapacitated beneficiary under 3(3) - not detrimental to that beneficiary and appropriate
- If no consent under 3(4) – not detrimental to non-consenting beneficiary, there is detriment to other beneficiaries if not approved and appropriate

Charitable Purpose Trusts

- Conventional view was that old VTA did not apply to charitable trusts (but no NS case law on topic).
- (See D. Waters, *Law of Trusts in Canada* 4th ed. at 1380, A.J. McClean, “*Variations of Trusts in England and Canada*” (1965) 43 Canadian Bar Review 181 at page 245-246, and *Re Bell*, 112 DLR (3rd) 573.)



Charitable Purpose Trusts (Cont'd)

- New VTA contains concept of “arrangement” (section 2(a)) which is broad.
- New VTA allows “a person” to apply to the Court for an order confirming an arrangement (subsection 3(1)).
- New VTA speaks of “beneficiaries” of the trust with vested or contingent interests.



Charitable Purpose Trusts (Cont'd)

- Note: other provinces (i.e. Alberta, Saskatchewan and Manitoba) have specific statutory provisions confirming that their variation of trusts legislation applies to charitable purposes/institutions.
- What about the trust that has no easily ascertainable beneficiary but rather a broad charitable purpose?
- Common law recognizes several types of charitable trusts, not all of which have easily ascertainable beneficiaries (i.e. relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community)



Charitable Purpose Trusts (Cont'd)

- See paras. 27-39 of *Bethel* decision - broader issue not decided there.
- Can the new VTA be used to vary a wholly charitable purpose trust with no specifically named beneficiaries unlike as in *Bethel*?
- Stay tuned ...



Charitable Purpose Trusts (Cont'd)

Cy-pres Doctrine

- Applies when a charitable gift or bequest has become impossible or impracticable.
- Cy-pres – “as near as” possible.
- Requires expression of general charitable intent by settlor/testator.
- Also applies to the misnaming of charitable beneficiaries.
- See Waters *Law of Trusts in Canada* 4th ed. at page 819.

Charitable Purpose Trusts (Cont'd)

- Impracticality or impossibility can take various shapes:
 - Description of purpose too narrow/evolution of technology/procedures.
 - Geographic scope of class of beneficiaries too narrow.
 - Investment outcomes not as expected.
 - Facts changes.
 - Others.



Charitable Purpose Trusts (Cont'd)

- Common issue is failure to meet 3.5% disbursement quota for charitable trusts under *Income Tax Act* if no power to encroach on capital.
- See in particular *Fenton Estate*, 2014 BCSC 39 and *Aged Men's and Women's Homes v. Loyal True Blue and Orange Home*, [2003] 63 OR (3d) 777 (“Re Stillman”).



Charitable Purpose Trusts (Cont'd)

- Is there inherent jurisdiction broader than cy-pres to vary a charitable trust (i.e. to implement a “total return” investing approach)?
- See in particular *Killam Estate (Re)*, 1999 CanLII 9404 and discussion by Cullity, J. of same in *Re Stillman*.
- The inherent jurisdiction to alter the administration or “machinery” of charitable trusts can be extensive if changes are in the best interests of the beneficiaries and for the better administration of the trust.

Charitable Purpose Trusts (Cont'd)

- But, as Cullity, J. says, that is “a leap of some magnitude”.
- Note: Attorney General of Nova Scotia has a *parens patriae* role to oversee charitable trusts within the province, and should receive notice of application to vary charitable trusts.
- AG generally takes no position (but see *Killam* where AG appeared).

Variation of Non-Charitable Trusts

- Many reasons new VTA may be used to vary non-charitable trusts.
- Recent tax changes to testamentary and “life-interest” trusts discussed in sessions this morning prime reasons.
- Consider also US tax consequences for US resident beneficiaries, addition of corporate beneficiaries to family trusts and similar tax related issues.
- Other reasons could include:
 - Protection of minor/young adult beneficiaries (see *Re S(N)*, 2007 NSSC 288).



Variation of Non-Charitable Trusts (Cont'd)

- Investment performance of trust.
- Development of addictions/disabilities/spendthrift behavior – changes to beneficiary's circumstances from date of settlement.
- Extended length from date of settlement given abolishment of rule against perpetuities.
- Performance of the trustee? (or Trustee Act?)
- Others.
- New VTA allows variation of *inter vivos* and testamentary trusts equally.

Variation of Non-Charitable Trusts (Cont'd)

- Consider various scenarios:
 1. All beneficiaries are of full age and consent – Court determines it is appropriate to do so (subsection 3(2)).
 - Query – is Court approval now required when the rule in *Saunders v. Vautier* would otherwise apply? (See *Buschau v. Rogers Communications Inc.*, [2006] 1 SCR 973 for a description of the rule.)

Variation of Non-Charitable Trusts (Cont'd)

2. Where one or more beneficiaries are incapable of consenting – must not be “detrimental to the interests of any of the beneficiaries incapable of giving consent” (subsection 3(3)).
3. Where one or more beneficiaries refuse to consent – must be “not detrimental to the pecuniary interest of any person who has withheld consent” and “would be detrimental to the administration of the trust or to the interests of the other beneficiaries to not approve the arrangement” (subsection 3(4)).

Variation of Non-Charitable Trusts (Cont'd)

- Must consider intention of the settlor if objectively discernible, positions of the trustees, positions of the beneficiaries and the position of any other person appearing (subsection 3(5)) –more later.



Variation of Non-Charitable Trusts (Cont'd)

- Not much consideration of “not detrimental to” test.
- Much more caselaw on “benefit”.
- “Survey of the cases shows that the expression ‘for the benefit of the person’ has been interpreted with flexibility of meaning ... the Court ‘is entitled and bound to consider not merely financial benefit but benefit of any other kind’” (*Re Irving* (1975) 11 OR (2d) 443 at para. 19.)

Variation of Non-Charitable Trusts (Cont'd)

- A benefit arising from a proposal may be financial, social, moral or enhancement of family well-being (see *May v. May*, [1995] 1 WWR 70).
- Is tax a legitimate ground to consider for a variation?
 - “Statutes permitting courts to vary trusts came about principally because of taxation and the perils to trusts as a result of tax legislation not contemplated at the time the trust was created.” (*Forsythe Estate, Re*, 2001 NSSC 37 at para. 17).



Variation of Non-Charitable Trusts (Cont'd)

- See also Waters *Law of Trusts in Canada*, 4th ed. at page 1360, 1362 and 1406, *Re Westons Settlements*, 1968 3 ALL ER 338 and *Fishleigh-Eaton v. Eaton-Kent*, 2013 ONSC 7985.
- Note: Consider the tax issue of whether a variation is in fact a “resettlement” of the trust in that it does not maintain the substratum of the trust and instead effects a “fundamental change”.

Factors for the Court's Consideration

- Section 3(5) Factors:
 - No priority among factors
 - “Objectively discern” settlors intention; significant direction on evidence required
 - Position of “any person appearing”; anticipates that there may be other people impacted



Evidence Required

- Trust documents
- Financial information (current and historical)
- Evidence from settlor (if available and admissible) or objective evidence of intent
- Evidence from trustee of operation of trust and assessment of requested changes in broad context of detriment/benefit
- Evidence from beneficiary of assessment of requested changes in broad context of detriment/benefit
- Evidence from any other person attending (CRA, Public Trustee, creditor ?)

Conclusion

- New VTA more flexible than old VTA.
- Lowered test from “benefit” to “not detrimental”.
- Allows Court to force a variation on a recalcitrant beneficiary.
- Does it alter the rule in *Saunders v. Vautier*?
- Requirement to consider intention of settlor and positions of trustees, beneficiaries and others.



Conclusion (Cont'd)

- Cy-pres and inherent jurisdiction of the Court still available for charitable trusts.
- Tax changes will always be a consideration.



Questions

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