MAKING CORRECTIONS TO TRUSTS: COMPARING VARIATIONS, RECTIFICATIONS AND HASTINGS BASS

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PART I -- INTRODUCTION

The idea of amending a trust deed might, to the uninitiated, conjure an image of a process akin to changing the terms of a contract. The give and take of the bargaining process allows purchasers and vendors the freedom to modify a contract's terms, to walk away from performance, and to sue for a breach. For trust amendments, trustees, settlors, and beneficiaries are usually in agreement that some change to a trust deed is required; therefore, amending a trust deed should be even simpler than changing the terms of a contract.

A trust settlor is usually thought of as making a gift. A trustee accepts obligations, holding the property for the enjoyment of others. [1] After property is vested in a trustee, the settlor and the trustee cannot unilaterally agree to vary its terms? Beneficiaries can amend a trust if they all agree and they all have capacity, but trusts commonly include underage children and unborn children in the class of beneficiaries. Advisors, in reviewing the terms of a trust deed, sometimes discover an error, not in the printed words of the deed, but in the effect of those printed words.[3] Is it correct to even call this an error?

There are two paths to amending a trust: (1) variation, where the spotlight is on the beneficiaries, who have been gifted a right to the use and enjoyment of the trust property,[4] and (2) rectification, where the focus is on determining whether the deed should be re-written to fulfill the settlor's intentions.

Other options including wills variation, disclaimer and resignation have been canvassed

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[1] Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005), [at pages 38 and 62] ("**Waters**")

[2] *Ibid*, at 1288.

[3] Fiona Hunter and Joel Nitikman listed 10 common mistakes in trust deeds as follows: identification of beneficiaries (especially charities); incomplete administrative clauses; failing to provide (or provide adequately) for disabled beneficiaries, Failure to consider s. 75(2) & s 107(4.1) rules; Tainting spouse, alter ego and joint partner trusts; failing to settle property on trustee; missing the corporate attribution rules; Lack of punctuation, paragraph numbering or any structural organization; Providing for resignation, retirement, and replacement of trustees; Duration of the trust. *Common Mistakes in Trust, Estates and Tax Practice and Possible Remedies 2012 Step Conference.*

[4] *Supra note 1* at 69.

elsewhere.[5] This paper is focused on comparing two options: trust variations and trust rectifications. A third option, the so-called rule in *Hastings-Bass,* is also canvassed in light of a recent decision[6] by the United Kingdom Supreme Court (the "UKSC") that clarifies the rule, neuters its application and directs practitioners to rely on the doctrine of mistake, meaning rescission and rectification.

PART II – PRIVATE OPTIONS

When an advisor finds a mistake in a trust, a court application should not be the first option used to correct the problem. Take for example, the following clause in a deceased's will containing a spousal trust that has existed for 20 years.

> During the lifetime of my Spouse, the Trustee shall hold property in a Spousal Trust and pay to or to the benefit of my Spouse all or so much of the income derived from the Spousal Trust as the Trustees in their uncontrolled discretion may determine.

The Canada Revenue Agency (the "**CRA**") stated the following regarding spousal trusts in CRA Views Document 9505015 – *Meaning of "entitled to receive":*

> If, however, *the trustee(s) of a trust may, under the terms of the trust agreement, restrict the payment* to the spouse of any portion of the trust's income it is our view that the spouse is not 'entitled to receive' all the income of the trust within the meaning of paragraph 73(1)(c) of the Act and the trust will not be a spousal trust.[7]

The decision on what corrective steps to take, if any, will require the advisor to look to the history of the trust and the possible results of any corrective measure.

(1) THE EASIEST AND HARDEST OPTION: DO NOTHING

On the facts in the example, the advisor is in a bind. The overriding emotional response might be to quietly return the deed of trust to the filing cabinet and do nothing. After all, no one has noticed the error for nearly 20 years. It is likely the surviving spouse is quite old and will soon pass away. The tainted spousal trust has not been a problem. Do not make it a problem.

Ignoring the problem is a risky strategy for at least three reasons:

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[5]See William Innes and Joel T. Cuperfain, "Variations of Trusts: An Analysis of the Effects of Variations of Trusts Under the Provisions of the Income Tax Act" (1995) 43:1 CAN. Tax J. 16 ("**Innes**"); Maria Elena Hoffstein, "Restructuring the Will and the Testamentary Trust: Methods, Underlying Legal Principles, and Tax Considerations" in "Personal Tax Planning" (2012) 60:3 Can. Tax J. 719 ("Hoffstein").

[6]*Futter and another v. The Commissioners for Her Majesty's Revenue and Customs* and *Pitt and another v. The Commissioners for Her Majesty's Revenue and Customs*, [2013] UKSC 26 ("**Pitt & Futter**").

7Canada Revenue Agency, Meaning of "entitled to recveive" (VIEWS Document 9505015). Emphasis added.

1. The upcoming 21st anniversary of the trust will cause a deemed disposition if the trust is not a qualifying spousal trust. Advisors expose themselves to third party penalties if they participate in filing false tax returns.[8]

2. The advisor would be breaching a fiduciary obligation to the client by not disclosing the possible error and taking the appropriate remedial steps as required by the advisor's professional code of conduct.[9]

3. The CRA will perform some sort of review of the surviving spouse's estate on his or her passing as part of the executor's request for a clearance certificate. It would not be surprising for the CRA to ask to review the spousal trust as part of that process.

Doing nothing is usually not a viable option. The initial panic that follows the discovery of an error is sometimes followed by jumping to costly solutions (like doing nothing) for correcting that error. The first active step that should be taken is to examine the deed for possible solutions in the text.

(2) THE SECOND OPTION: INVOKE THE TRUSTEE'S POWER TO AMEND

Trustees are bound by their fiduciary duties to administer a trust according to its terms.[10] If a trust deed does not specifically empower a trustee to vary the terms of the trust, a trustee cannot implement alterations to the terms of a trust, even if the benefits from a proposed alteration are obvious. The scope of a power to amend depends on the express terms of the deed or on what

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[8] See Canada Revenue Agency, *Third-Party Civil Penalties* (Information Circular IC 01-1), which states as follows:

> If an advisor or tax return preparer finds himself or herself in a situation where he or she discovers that another person had made a false statement for tax purposes (e.g., he or she obtains a new client and finds that previous accountant has made a false statement), the new advisor or tax return preparer would be expected to rectify the situation ***to the extent that the false statement affects the tax return of the current year.*** If the advisor or preparer advises his or her client to make a voluntary disclosure as described in Information Circular (IC) 00-1, Voluntary Disclosure Program, for the prior years, and the client does not follow this advice, the advisor or preparer is not exposed to the third-party civil penalties in respect of prior years. If the current-year return does not reflect the corrections (for example, an incorrect balance of an undepreciated capital cost schedule) because the taxpayer did not agree to it, ***and the advisor or preparer prepared the return knowing of the false statement,*** the advisor or preparer as well as the taxpayer may be subject to penalties. The advisor could be subject to the third-party civil penalties and the person whom the tax return belongs to could be subject to a gross negligence penalty (subsection 163(2) of the Act and section 285 of the ETA). Emphasis added.

[9] For example, for lawyers see chapter 7.8 "Errors and Omissions" in the *Code of Professional Conduct for British Columbia*.

[10] , *Supranote* 2, at 1288. See also Innes and Geraint Thomas, *Thomas on Powers* 2d ed. (Oxford: Oxford University Press, 2012), Kindle Edition), Chapter 16 ("**Thomas**").

may properly be implied from the terms of the trust.[11]

Thomas on Powers explains "implied powers" as follows:

> A power may be held to exist by implication where that is reasonably necessary for making sense of another part of the instrument or for the carrying out of some express provision or to give business efficacy to the underlying arrangement.[12]

It is fairly clear that the only way to give effect to the "spousal trust" is to ignore or read out the power to withhold income from the spouse. *Thomas on Powers* states as follows:

> The implication of a term is an exercise in the construction of the instrument as a whole: the question is whether the implied provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean: A-G of Belize v Belize Telecom Ltd [2009] UKPC 10; [2009] 1 WLR 1988, [16]-[28]; PNPF Trust Co Ltd v Taylor [2010] EWHC 1573 {Ch), [130]-[133]; [2010) PLR 261.
>
> Nothing can be implied if there is an express provision to the contrary, nor, indeed, if it is not necessary to give business efficacy to the scheme: National Grid Co Plc v Mayes [2001) 1 WLR 864, 873-4, 882; Stevens v Bell [2002] ECA Civ 672; [2002] OPLR 207; [2002] PLR 247; Re Toray Textiles Europe Pension Scheme [2007] EWHC 444 (Ch); [2007] PLR 129.[13]

There is significant risk in taking a filing position that the trustees have an implied power to delete their authority to withhold income, since that power is spelled out in express terms. This strategy might be used, if the trust is reassessed, as part of the litigation strategy in Tax Court. Otherwise, it is much like the "do nothing" approach – a plan of next-to-last resort if nothing else works.

An adjunct to this option is an assumption that the client has been advised of the possible problem and has been advised to seek independent legal advice. That advice would likely be one of the following options:

1. the client has been advised of an error and now has to take action within the limitation period; or
2. the client will not take any action, but the advisor must waive all limitation periods for all foreseeable harm that results.

The viability of this option depends on the independent legal advice given, and vice versa. If

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[11] Thomas, Chapter 16.
[12] *Ibid,* at 3.06
[13] *Ibid,* Chapter 16, at note 35.

the power to amend can only be implied, civil litigation counsel will probably require a waiver of limitation periods from the advisor who made the error. The possibility of a tax reassessment and civil litigation are not extinguished where the power to amend is unclear.

If the CRA reassessed the estate on the grounds that the spousal trust was tainted, it would be prudent to argue that that the trustees' power to withhold income should be ignored in light of the express wish that the trust be treated as a spousal trust. Implicitly, the trustee must have the authority to read out the power to withhold income in order for the trust to function. The counterargument is pretty straightforward - a trustee cannot imply a trust power that contradicts the plain wording of the deed.

Most importantly, this option and the "do nothing" option continue to expose the estate and trust to a reassessment at the 21st anniversary. The possibility of future harm means that other corrective options should be considered.

The common law provides two options for amending a trust deed where that power is not set out in the deed, the first requires the consent of all of the competent beneficiaries, the second relies on the equitable jurisdiction of the Court.

Since the 1950s, most court applications to amend trust deeds have been made under the *Trust and Settlement Variation Act*[14] ("**TSVA**"). The TSVA was enacted as a response to the perceived limitations of the common law.[15] The structure of the TSVA and the judicial reasoning underpinning its application both reference the common law.

(3) AMENDMENTS WITH THE CONSENT OF ALL BENEFICIARIES

As noted above, the terms of a trust must be adhered to. A well-known exception to that rule is available where all the beneficiaries to a trust agree to its dissolution. This exception is known as the rule in *Saunders v. Vautier*.[16]

There is some disagreement as to whether *Saunders v. Vautier* is only authority for the right of beneficiaries to collapse a trust and not to vary it.[17] It is possible to characterize the rule more

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[14] R.S.B.C. 1996, c. 463.

[15] For a Cook's tour through the history of the TSVA, see Helen Low and Claire Wilson, "The Trust and Settlement Variation Act," *Estate Litigation 2009 Update,* CLE British Columbia ("**Low**").

[16] [1841] EWHC Ch 182.

[17] See Hoffstein, *supra* note 5. See also para. 6.1.2 of the *CLE Estate Litigation- 2009 Update on The Trust and Settlement Variation Act,* which states that the *Saunders* rule only allowed consenting of-age beneficiaries to

broadly as allowing capacitated beneficiaries to implement any variation they wish, for whatever reason they wish, including winding up the trust.[18]

Innes and Cuperfain propose a reading of *Saunders v. Vautier* that reconciles the two positions:

> The rule does not permit a variation of trust terms or a reallocation of beneficial interests, as such. As a practical matter, however, the result of the rule is that those individual beneficiaries are the only ones who can object if the trustees depart from the strict terms of the trust. If they are prepared to condone conduct on the part of the trustees that varies from the terms of the trust, this can amount to a de facto variation.[19]

The use of *Saunders v. Vautier* as a variation tool requires the following:

1. The beneficiary or (where there is more than one) all of the beneficiaries are of one mind and are under no disability, the beneficiary or beneficiaries may agree to the termination of the trust;

2. the beneficiary or beneficiaries (current and potential) must all be ascertained and be fully capacitated, and, taken as a whole, they must represent all of the rights of enjoyment in the trust property; and[20]

3. using the analysis from Innes and Cuperfain, either

   the trustees accede to a direction from all of the beneficiaries, or

   all of the beneficiaries accede to an amendment put forward by the trustees.

Invoking *Saunders v. Vautier* is preferable for any trust that does not want to publicise its affairs in a court application and if the variation will correct the error without causing new problems.

(4) SUMMARY

Varying a trust deed by applying the powers given to the trustees or by internal agreement among all the beneficiaries are actions that can take place behind closed doors. The main concern is ensuring that the authority to amend the deed is available. However, there is no formal process that must be followed in making the amendment.

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terminate a trust without the approval of the court, not vary it. .

[18] See Innes, *supra* note 5, at 20.

[19] *Ibid.*

[20] *Supra* note 2, at 1195-1201.

PART III-- COURT APPLICATIONS

(1) THE INHERENT JURISDICTION OF THE COURT TO VARY TRUSTS

The TSVA makes it unlikely that an applicant would apply to a superior court and request a trust variation on the authority of the court's inherent jurisdiction. In a rectification application, the opposite is true - the inherent jurisdiction of the court is the key to the process. In British Columbia the inherent jurisdiction to provide equitable relief can be traced in different ways. The following may be helpful if the court asks counsel to provide the basis for asking the court to invoke its inherent jurisdiction.

Subsection 3(1) of the *Supreme Court Act*[21] provides that as a court of inherent jurisdiction, the Supreme Court of British Columbia ("**BCSC**") has all of the powers that were vested in the Chief Justice and the other justices of the court on March 29, 1870. In S. *(L.) v. British Columbia (Ministry of Children & Family Development)*,[22] Southin, J.A. described this inherent power as including "the various forms of equitable relief".[23] Section 4 of the *Law and Equity Act*,[24] gives a court of *law or equity* the power to grant *equitable relief* to a Petitioner who is so entitled.

The inherent jurisdiction of the court to vary a trust is based on the principle of aiding the preservation of the settlor's property in the trust and supporting the trustee's administration of its terms. Waters provides that this jurisdiction does not go so far as to allow the court to re-write the trust deed.[25] In the seminal case *Tornroos v, Crocker ("**Tornroos**")*,[26] the Supreme Court of Canada ("**SCC**") limited the circumstances in which it was appropriate for a court to intervene to vary a trust. At the risk of oversimplifying the case, the trustees in *Tornroos* requested that the SCC authorise them to make investments that were not available under the trust deed. Kellock J. found that, as a rule, the court does not have the power to endorse actions of trustees that are not authorized by the terms of the trust.[27] However, the court possessed an inherent jurisdiction to vary the terms of a trust in situations of emergency, or salvage jurisdiction:

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[21] R.S.B.C. 1996, c. 443.
[22] 2004 BCCA 244,27 B.C.L.R. (4th) 62.
[23] *Ibid*, at para. 45.
[24] R.S.B.C. 1996, c. 253.
[25] *supra* note 2, at 1362-1363.
[26] [1957] SCR 151.
[27] *Ibid*, at para. 14.

> [W]here the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to.[28]

The SCC adopted the reasoning of the House of Lords in *Chapman v. Chapman,*[29] which limited the courts' authority to vary trusts to situations where it is essential that trustees act. Waters advises that the courts have been conservative in using their inherent jurisdiction to vary trusts unless some sort of disaster would ensue without the their intervention.[30]

Court applications, either under the TSVA or invoking the inherent jurisdiction of the court, proceed on the assumption that the court has the authority to amend the deed. The main concern of the applicants is making the application in a manner that will convince the court to use its authority in the manner requested. It is unlikely that an application relying *solely* on the court's inherent jurisdiction to vary a deed would be made except in the most dire situations.

(2) THE TSVA

Where the trustees are not given dxpress power to amend a trust and the beneficiaries cannot avail themselves of the use of *Saunders v. Vautier,* an application for variation is usually made under the TSVA.

The TSVA is a model of economical drafting, containing only 5 sections. The heart of the TSVA is set out in sections 1 and 2.

> 1. If property is held on trusts arising before or after this Act came into force under a will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of
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> > a. any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,
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> > b. any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the

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[28] *Ibid,* at para. 14.
[29] (1954] A.C. 429, [1954]1 All E.R. 798.
[30] Waters, *supra* note 2, at 1350

happening of a future event a person of a specified description or a member of a specified class of persons,

c. any person unborn, or

d. any person in respect of an interest of the person that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined,

any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the bowers of the trustees of managing or administering any of the property subject to the trusts.

2. The court must not approve an arrangement on behalf of a person coming within section l(a), (b) or (c) unless the carrying out of it appears to be for the benefit of that person.

Sections 3 and 5 give the Public Trustee standing (to be heard and for costs) in applications if any of the beneficiaries listed in section 1 lack the capacity to consent to the variation. Section 4 provides that the court with the authority to make orders in respect of land that is the subject of a life interest.

(a) Who is Authorised to Bring an Application?

Section 1 of the TSVA provides that the BCSC may, if it thinks fit, by order approve on behalf of….*any arrangement proposed any person.* Presumably, the category of applicants is very broad. Realistically, the application will be brought by a competent adult beneficiary or a trustee.

(b) When is the Use of the TSVA Required?

The interpretation of even the most spartan statute can still lead to confusion. Subsection I(a) of the TSVA uses the terminology "vested or contingent" and specifically refers to individuals who are not capable of providing consent. Subsection l(b) uses a descriptive phrase that reads like a definition of a "contingent interest"[31] and appears to allow the court to render decisions on

[31] A contingent interest is dependent on &n event that might not occur. For example, an interest arising when a beneficiary reaches a certain age.

behalf of capacitated adults. That is not the case.

In *Buschau v. Rogers Communications Inc*[32] the British Columbia Court of Appeal ("**BCCA**") determined that subsection 1(b) applies to a class of persons with something less than a contingent interest. Newbury J.A. made it clear that the BC courts will only assert their power on behalf of beneficiaries who lack capacity.

This initial finding is important in light of the second ruling: that the consent of all competent beneficiaries must be obtained to make a variation.[33] This ruling overturned *Bentall Corp. v. Canada Trust Co.*[34] In *Bentall,* a group of 7 contingent beneficiaries opposed the variation of a pension plan that was favored by 272 beneficiaries. The *Bentall* court found that it could consent to the variation despite the opposition, so long as the variation did not harm the contingent beneficiaries.

A TSVA application is not available to ask the court to overrule minority beneficiaries who disagree with the application. The statute has been interpreted narrowly. Section 2 of the TSVA requires the court to only approve variations that are for the benefit of the incapacitated beneficiaries.

(c) How to Prove a Benefit

Since the court is given broad discretion under the TSVA, it is prudent to convince the Public Trustee of the merits of the application and address any concerns that are raised by the Public Trustee. It is also not uncommon to use financial specialists to compare the positive aspects of variation with the status quo. Several other papers summarizing the TSVA provide a plethora of case summaries that demonstrate that applicants cannot rely on a template or formula to ensure

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[32] 2004 BCCA 80, overturned on other grounds (2006 SCC 28).

[33] *Ibid*, at paras. 102 and 103. In its "Report on the Variation and Termination of Trusts, October 2003," at 8, the BC Law Institute called for an amendment of the TSVA to allow the court to vary a trust even where some beneficiaries do not consent:

> We accordingly recommend that the *Trust and Settlement Variation Act* should be revised to state expressly that the courts have the power to approve a proposal to vary a trust even if an adult beneficiary, whether vested or contingent, withholds consent to the proposed arrangement. This power should be exercised only where a substantial majority of beneficiaries in number and interest agree, there would be no detriment to the person who withheld consent, and a failure to approve the arrangement would be detrimental to the administration of the trust and interests of other beneficiaries.

[34] (1996)BCLR(3d) 181 (S.C.).

success.[35]

In TSV A applications the court is not examining evidence to ensure a certain standard of proof is met or that the benefit reaches a certain quantum. The preamble to section 1 of the TSVA gives the court discretion to approve a variation. Section 2 of the TSVA requires that the proposed variation *"appears to be for the benefit"* of the incapacitated beneficiaries.

Anyone who has ever reviewed the case law applying subsection 15(1) of the *Income Tax Act* ("**ITA**") will know that the term "benefit" has a broad meaning. Realistically, just as in the ITA, the issue before the court usually relates to a financial benefit. British Columbia courts have advised that their role is to act as a "prudent advisor" for the beneficiaries without capacity.[36]

The wording of section 2 of the TSVA recognizes that a judge is not expected to predict the future; as well, the court is not required to demand that a proposed variation maximize the benefit for the incapacitated beneficiaries at the expense of the beneficiaries who have capacity.[37] However, the variation should not be made at the expense of individual members of a class of beneficiaries, even if it benefits the group as a whole. [38]

In *Russ v. British Columbia (Public Trustee),* the BCCA reinforced the notion that an application under the TSVA is not adversarial in nature. As noted, the Court emphasized that once it had been determined that a benefit existed, it was left to the discretion of the court to decide whether the benefit was sufficient.[39] Also, it is not necessary for the applicant to show that the proposed variation is consistent with the intentions of the trust settlor.[40] This view of the TSVA replicates the rule in *Saunders v. Vautier.*

The criteria for approval is nicely described in *Burleton v. Royal Trust Corp. of Canada.*[41] The Court stated that the proposed arrangement must be shown to be for the benefit of the

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[35] See for example, Bernadette R. Dietrich, "Trusts, Trustees, Trusteeships – All You Need to Know and More," ***2006*** *Ontario Bar Association, Continuing Legal Education*. Also see Low, *supra* note 15.

[36] See *Sandwell & Co. Ltd. v. Royal Trust Corp of Canada* (1985), 17 D.L.R. (4th) 337 (BCCA); and *Smith v. Smith Estate*, 2003 BCSC 1606

[37] [*Ibid*- should put the case name since there are 2 in the previous note], at para. 67.

[38] *Finnell v. Schumacher Estate* (1990), 74 O.R. (2d) 583, 38 O.A.C. 258 (C.A.).

[39] *Russ v. British Columbia (Public Trustee)* (1994), 3 E.T.R. (2d) 170, B.C.J. No.664 (QL) (C.A.).

[40] *Ibid.* Other provincial legislation has been interpreted as requiring the applicant to show the variation is consistent with the settlor's intent.

[41] (2003), 34 C.P.C. (5th) 182 (Ont. S.C.J.).

incapacitated beneficiaries, and the arrangement overall must be one that the court thinks it ought to approve. This latter point is a restatement of section 2 of the TSVA and reflects the position of the court as a prudent advisor.

In summary:

1. There is no particular standard of proof that an applicant must meet.
2. The application is not meant to be an adversarial process.
3. The applicants must show a benefit to a class of beneficiaries. The benefit must not harm some of the members oft at class in order to benefit others.
4. The benefit must not result in harm to another class of beneficiaries.
5. The court is not required to maximize the benefit for the class at the expense of other beneficiaries.
6. The court has broad discretion to determine whether benefit is sufficient.

(3) THE LIMITATIONS OF TRUST VARIATIONS

(a) Prospective Result

Trust variations are generally understood to have prospective effect. Both *Thomas*[42] and *Waters* identify the prospective nature of the remedy. However, both also recognise that there is no apparent limitation on the judicial authority to make a variation retrospective. Waters states as follows:

> The court may approve an arrangement 'varying or revoking' trust or trusts in question. It is sometimes not realized how considerable is the scope of this power. It means that revocation on any terms is possible and that variation of any degree is also possible.... 'Varying' the trust may take any form, although it is often said that it cannot amount to a revocation and a resettling on terms which bear no comparison with the revoked trust. [43]

There is little Canadian case law on the issue. In *University of Alberta v R ("**U of A**")*,[44] the trustees applied for a trust variation under the Alberta *Trustee Act* and asked for the variation order to apply retrospectively, pursuant to Rule 322 of the *Alberta Rules of Court*.[45] The Court

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Thomas, *supra* note 10, at para. 16.1.

[42] See Thomas, *supra* note 10, at para. 16.41

[43] See Waters, *supra* note 2, at 1389-90.

[44] *University of Alberta v. R*, 11 Alta LR (2d) 26, 1979 Carswell Alta 52 (WL) (Q.B.).

[45] *Trustee Act*, R.S.A. 1970, c. 373, s. 37 [re-en. 1973, c.13, s. 12(2); am. 1974, c. 14, s.7(3); 1978, c. 51, s. 29].

denied the request stating: "It does not appear to me that the Act is intended to permit retrospective variation. It is cast in prospective terms to deal with proposed arrangements and variations."[46]

The CRA recognizes this constraint. For example, the CRA takes the position that a variation cannot retrospectively create a qualifying spousal trust. A variation is an agreement between the beneficiaries and not a proper testamentary instrument. Pursuant to subsection 70(6) of the ITA, the original terms of the taxpayer's will apply.[47]

This does not mean that the CRA opposes all efforts to give a variation retrospective effect. For example, subsection 248(23.1) of the ITA provides that matrimonial property transferred to a surviving spouse under a court order is deemed to be transferred as a consequence of death, allowing for a rollover.

It is probably safest to say that the CRA views variations as generally having prospective effect, but in some circumstances, the CRA will recognise a testamentary variation as having retrospective effect, particularly if the variation is (1) made via a court order and (2) made within 36 months of the date of death.[48]

(b) Tax Effects

A TSVA application is aimed at showing that the change to the trust will benefit a particular class of beneficiaries. It is not uncommon for the applicants to retain experts who will provide concrete evidence of the benefits in support of the application. The energy poured into proving a benefit, often to avoid a negative tax result, can sometimes blind advisors to the obvious: providing a benefit could be viewed as a transfer of a property. A material variation to a trust could be viewed as a resettlement. The tax implications of variations have been discussed extensively elsewhere.[49] To date the CRA has not aggressively pursued reassessments resulting from variations. A sample of the CRA commentaries is illuminating for two reasons. First, the CRA is well aware of the potential tax implications of a variation, but has acted with restraint.

Alberta Rules of Court, R. 322.

[46] *U of A*, *supra* note 44, at para. 18.

[47] See Canada Revenue Agency, *Tainted spousal trust – variation* (VIEWS Docurnent 9731797).

[48] See Canada Revenue Agency, *Testamentary Spouse Trusts* (Interpretation Bulletin IT 305R4), which sets out CRA positions on untainting spousal trusts.

[49] See Timothy G. Youdan, "Income Tax Consequences of Trust Variation, Revocable Trusts and Powers of Appointment" (2004-2005) 24 Est Tr & Pensions J 141 **("Youdan");** Innes, *supra* note 5; and Hoffstein, *supra* note 5.

Second, advisors are requesting advance tax rulings to obtain comfort from the CRA. The assumption must be that the CRA will continue to act with restraint.

CRA VIEWS Document (Ruling) 2000-0022483 – *21 Year Rule*

> This document discusses tax issues relating to a complete reorganization of a trust in order to mitigate tax consequences of the 21 year deemed disposition rule. As minor and unborn children were involved, the value of the contingent capital interests were determined and set aside in a separate trust:
>
> Issue 1) is section 107(2) available on distribution out of original trust?
>
> Issue 2) will the variation cause a disposition or resettlement?
>
> POSITION: 1) 107(2) is available. 2) No resettlement or disposition due to variation.
>
> REASONS: 1) Consistent with prior positions taken – see file 990557. 2) Consistent with previous positions taken – acceleration of interest does not cause resettlement.[50]

CRA VIEWS Document 9209655- *Variation of trusts*

> [A] variance of a trust may have the consequence of causing the trust to be resettled if the variance is of significant magnitude to cause a fundamental change in the tem1s of the trust. If this occurs there would be an actual disposition of the trust's property from the 'old' trust to the 'resettled' trust. ...However, a variation of a trust affecting only administrative or investment powers, for example, would generally not create a taxable event.[51]

CRA VIEWS Document 2000-0059795- *Testamentary Trust Variation*

> Although there is a question whether an agreement to vary the terms of a trust operates as a variation of an existing trust or as a creation of a new trust ce1iain common law reasoning suggests that a va1iation by an agreement among beneficiaries may result in the creation of a new trust. Accordingly, upon the variation of a trust, it is a question of law whether the distribution of prope1iy can be said to be made under the terms of the testator's will or another trust, for the purposes of the meaning of 'testamentary trust'.

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[50] Canada Revenue Agency, *21 Year Rule* (VIEWS Document 2000-0222483).
[51] Canada Revenue Agency, *Variation of trusts* (VIEWS Document 9209655).

Generally, no tax consequences will ensue for a taxpayer who executes a valid disclaimer, release or surrender within the meaning of subsection 248(9) of the Act. Otherwise, a taxable disposition might result where the disclaimer, release or surrender does not fall within the definition of these terms in subsection 248(9) of the Act. In this regard, we would refer you to Interpretation Bulletin IT-385R2 which discusses disclaimers, releases and shnenders and the tax consequences that result thereof in respect of a disposition of an income interest in a trust.[52]

CRA VIEWS Document (Ruling) 2001-0111303 – Beneficiary added to a discretionary trust

Issue 1) Whether the addition of a beneficiary to a discretionary trust, as permitted under the terms of the trust, results in a resettlement of the trust property.

Issue 2) Whether the addition of a beneficiary to a discretionary trust results in a disposition of any part of the existing beneficiaries' interest in that trust.

Issue 3) If the answer is yes, determination of the fair market value of that interest.

POSITION

1) There is no resettlement.

2) Yes, it would result in partial disposition of the interest of each of the existing beneficiaries.

3) While not free from doubt, the value of each beneficiary's interest at a particular point in time would approximate a proportionate share of the FMV of trust property at that time.[53]

CRA VIEWS Document 9216525 – Disposition of capital interest

Although under common or statutory law in Canada beneficiaries may be able to vary a testator's will, certain common law reasoning suggests that a variation by an agreement among beneficiaries may create a new trust. Accordingly, upon the variation of a trust, it may be a question of law whether the distribution of property can be said to be made under the terms of a testator's will or another trust, for the purposes of the meaning of

[52] Canada Revenue Agency, *Testamentary trust variation* (VIEWS Document 2000-0059795).
[53] Canada Revenue Agency, *Beneficiary added to discretionary trust* (VIEWS Document 2001-0111303).

'testamentary trust', 'personal trust' and paragraph 248(8)(a) of the Act.[54]

CRA VIEWS Document 9731797 – Tainted spousal trust – variation

> [A] trust must qualify as a spouse trust under the original terms of the will and any changes to those terms by means of a variation obtained under variation of trusts legislation will not bring the trust within the wording of subsection 70(6).
>
> [A] variation obtained under variation of trust legislation may not be used to purify a tainted spouse trust so that the trust would be subject to the rollover provisions of subsection 70(6) and (6.1). Similarly…an agreement or undertaking by the trustees may not be used to purify a tainted spousal trust.[55]

CRA VIEWS Document (Ruling) 9624583 – Variation of trust to allow income streaming

> [W]here the variation does not change the trust materially, and in particular does not change the beneficiaries or their entitlements, the variation will not constitute a resettlement of the trust; there will therefore be no disposition by the trust of its property and no disposition of income or capital interests by any beneficiary.[56]

CRA VIEWS Document 2005-0124151R3 – Trust variation – redemption right

> "[T]he variation of a trust to provide for redemption rights" would not result in "a disposition by the existing unit holders of their units" or "a disposition by the trust of its assets or in a resettlement of the trust". However, such a variation would result in "the trust qualifying as a 'unit trust' under paragraph 108(2)(a) of the Act immediately," "the trust qualifying as a 'mutual fund trust' within the meaning of subsection 132(6) of the Act," and "the trust continuing to qualify as a 'registered investment' under paragraph 204.4(2)(c) of the Act so that the units of the trust will not constitute 'foreign property' within the meaning of subsection 206(1) of the Act. 57

(c) Conclusions from CRA Statements

The mischief the CRA has identified in trust variations are: (1) resettlements and (2) property

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[54] Canada Revenue Agency, *Disposition of capital interest* (VIEWS Document 9216525).
[55] CRA VIEWS Document 9731797, *supra* note 47.
[56] Hoffstein, *supra* note 5, at 14.
[57] Canada Revenue Agency, *Trust variation – redemption rights* (VIEWS Document 2005-0124151 R3).

dispositions. The CRA positions are not without doubt.[58] They almost all hinge on the assumption that a beneficial interest in a discretionary trust has a certain quantifiable value. In trust law the valuation of an interest in a discretionary trust is understood as nil, since the entitlement of a beneficiary does not vest until the exercise of discretion by the trustee.[59] If the "trust law" position holds true, the "dispositions" that concern the CRA have no value. Nonetheless, the possible tax consequences and the limited prospective scope of trust variations will lead practitioners to consider other options.

(4) COURT APPLICATIONS WITH RETROSPECTIVE EFFECT

(a) The So-Called Rule in *Hastings-Bass*

The rule in *Hastings-Bass* has been described as follows:

> Where a trustee acts under a discretion given to him by the terms of the trust, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account.[60]

The rule is concerned with trustees who make decisions without giving proper consideration to relevant matters which they ought to have taken into account, *implying* a breach of trust.

On May 9, 2013 the UKSC issued two decisions[61] *(Pitt & Futter)* that clarified the limited ability of trustees to rely on their own breaches of fiduciary duty to reverse the unfortunate consequences of their decisions.

In the first two sentences of *Pitt & Futter,* Lord Walker states, "These appeals raise important and difficult issues in the field of equity and trust law. Both appeals raise issues about the so-called rule in *Hastings-Bass."* [62]

Any time the adjective "so-called" precedes a noun, the noun is to be treated as masquerading as something it is not.[63] Lord Walker explains the discomfort of the UKSC as follows:

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[58] See Innes, *supra* note 5; Hoffstein, *supra* note 5; and Youdan, *supra* note 49. Each of the cited articles critiques the CRA statements.
[59] *Gartside v. IRC,* (1968] 1 All ER 121 (H.L.).
[60] *Sieffv Fox,* [2005] EWHC 1312 (Ch),at para. 49.
[61] *Pitt & Futter, supra* note 6.
[62] *Ibid,* at para. 1.
[63] The court says the rule is more aptly called "the rule in *Mettoy,"* from the decision of Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587. The adjective applies regardless.

> It is a striking feature of the development of the *Hastings-Bass* rule that it has led to trustees asserting and relying on their own failings, or those of their advisers, in seeking the assistance of the court... [I]in general it would be inappropriate for trustees to take the initiative in commencing proceedings of this nature. They should not regard them as uncontroversial proceedings in which they can confidently expect to recover their costs out of the trust fund.[64]

In *Futter* the trustees distributed an initial trust settlement to Mr. Futter and subsequently distributed a second settlement to his three children. This second distribution triggered the application of taxable capital gains legislation and a tax liability for Mr. Futter and his children. The trustees of the two settlements applied to have the distributions declared void on the basis of the rule in *Hastings-Bass.* One of the trustees making the application was a tax specialist who had acted as an advisor to the trust.[65]

In *Pitt* the initial trust assets were a financial settlement from a traffic accident that caused a serious head injury to Mr. Pitt. The 1994 settlement was made on the advice of specialist advisors. The settlement could have been structured so that there would be no inheritance tax. The advisors neglected to provide that advice. In 2007, Mr. Pitt died. His executors/trustees applied to have the trust set aside. The trial court allowed the application on the basis of the rule in *Hastings-Bass,* but ruled that the application would not have succeeded under the law of mistake.

The UKSC in *Pitt & Futter* confirmed that the rule in *Hastings-Bass* will apply in limited circumstances. The UKSC was uncomfortable with the idea that trustees would rely on their own errors as a grounds for appealing to the court of assistance.[66] It was also difficult to accept that trustees had breached their fiduciary duties when they had obtained advice from specialists and acted on that advice. The negative result does not create a breach.

The rule *Hastings Bass* has not taken hold as a first tier option for correcting trusts in Canada. The decisions in *Pitt & Futter* will probably ensure the status quo. The UKSC clearly says the following:

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[64] *Pitt & Futter, supra* note 6, at para. 69.
[65] *Ibid,* at para. 47.
[66] *Ibid,* at para. 69.

1. If trustees act in a way that is outside the scope of their discretionary power then that act is void even if they have relied on professional advice.[67]

2. If trustees breach their duties in exercising a discretionary power then such exercise might be voidable but there are no 'hard and fast' rules as to what information trustees should take into account when exercising some such power. Fiscal results may be a relevant consideration.[68]

3. There will be no breach of trust if the trustees acted upon appropriate professional advice, even if the advice was incorrect.

The UKSC also discusses the issue of whether trustee decisions can be considered void or voidable. Void and voidable have a temporal connotation in that a void transaction has no effect, while a voidable transaction is valid until the affected party makes a claim. In this way void and voidable also limit who can make the complaint. A voidable trustee decision can only be treated as such at the election of the beneficiary.[69] The UKSC stated in *Pitt & Futter* that if an instrument is voidable, it is at the instance of the beneficiary who is adversely affected just as a voidable contract will only be upheld at the election of the wronged party).

(5) THE REAL VALUE OF *PITT AND FUTTER:* MISTAKE

(a) Comments on Rescission

While narrowing the scope of the rule in *Hastings-Bass*, the UKSC did not render trusts unchangeable. The UKSC favours court applications relying on the doctrine of mistake to correct trust errors. After denying the appeal under *Hastings Bass,* the UKSC granted relief in *Pitt,* allowing the rescission of the trust on the grounds of mistake.[70]

The Crown made two reasonably compelling arguments against allowing rescission on the basis of mistake:

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[67] *Ibid,* at para. 80.
[68] *Ibid,* at para. 80.
[69] *Black's Law Dictionary, sub verbis "void contract"* and *"voidable contract":* A void contract "never had any legal existence or effect," and "either party thereto may ignore it at his pleasure." On the other hand, a voidable contract "is void as to the wrongdoer but not void as to wronged party, unless he elects to so treat it."
[70] It should be noted that the UKSC did not rule that there had not been a mistake in *Futter*. Counsel in *Futter* had not argued mistake at the initial hearing and the appeal courts did not allow them to raise the argument at appeal (at para. 135). However, the Court does comment that even if mistake had been properly pled, the Court might have had difficulty granting relief for distasteful artificial tax avoidance transactions.

1. Tax should be paid on some transaction of a specified type, whether or not the taxpayer is aware of the tax liability. Mistake of law is not a defence.

2. The funds available to the trust were nominal if the deed was to be rescinded. Equity does not act in vain. A court should not make an order where it has no practical effect.

The UKSC addresses the first argument as begging the question. If the transaction is set aside, it is deemed not have occurred. There will be no tax result.[71] On the second point the UKSC reasons that granting the order would not be acting in vain because the tax has a significant impact on parties who have received a distribution from the estate.[72]

The UKSC spends several paragraphs unraveling earlier decisions that had de1ermined that rescission could be denied where the mistake was not about the "effect" of the mistake, but only about its "consequences."[73] Its ratio on the doctrine of mistake is as follows:

> I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will norm ally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.[74]

In granting the rescission (setting aside) of the trust in *Pitt* the UKSC made the following comments:[75]

1. Rescission on the ground of mistake requires a causative mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.

2. Consequences (including tax consequences) are relevant to the gravity of a mistake.[76]

3. Ignorance, inadvertence, and misprediction are not mistakes. However, they can lead to false beliefs or assumptions which the law will recognise as mistakes.[77]

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[71] Ibid at para l 30.
[72] lbid at para 141 .
[73] Admittedly, the author sometimes inadvertently get those words reversed. The UKSC recognizes the difficulty in distinguishing an "effect" from a "consequence".
[74] Ibid at 122.
[75] The author assumes a similar analytical framework could often be applied to rectifications. Both equitable remedies are meant to correct material errors that have resulted in unintended consequences.
[76] Ibid at 122.

4. Mere ignorance, even if causative, is insufficient. However, the distinctions may not be clear on the facts of a particular case.[78]

5. The gravity of the mistake must be assessed by a close examination of the facts. The injustice of leaving a mistaken disposition uncorrected must be evaluated based on the facts of the particular case.[79]

6. The court must make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected, and form a judgment about the justice of the case.[80]

7. Mistake is an equitable doctrine. In its broadest sense, equity is fairness. The UKSC's guidance to examine the gravity of an error is only an examination of the consequences-something that is at the heart of a variation application.

(b) Mistake and Rectification

Serendipity is a good term to describe the UKSC's guidance to the British legal community at the same time that the doctrine of mistake is coming to be thought of as an appropriate option for correcting trust errors in Canada. The UKSC in *Pitt* does not draw any distinction between the prerequisites for rescission and rectification, suggesting that they are subject to the same standards.[81]

Rectification is an equitable remedy that authorizes the court to change written documents to reflect the intent of the parties or the settlors. The general principle with regard to rectification is clearly stated in *Snell's Equity*.[82]

> If by mistake a written instrument does not accord with the true agreement between the parties, equity has power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in which that transaction has been expressed in writing. Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts.

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[77] Ibid at 104.
[78] Ibid at 108 & 109
[79] Ibid at 126.
[80] Ibid at 128.
[81] Ibid at 140.
[82] 30th ed. p. 693

The principle from *Snell's Equity* was adopted in *Re Slocock.*[83] The court was concerned with an application for rectification of a deed designed to reduce or avoid payment of tax on the death of a party. Due to a solicitor's error, the deed described the property incorrectly. Graham J. said the following:

> The true principles governing these matters I conceive to be as follows. (1) The court has a discretion to rectify where it is satisfied that the document does not carry out the intention of the parties. This is the basic principle. (2) Parties are entitled to enter into any transaction which is legal, and, in particular, are entitled to arrange their affairs to avoid payment of tax if they legitimately can. The Finance Acts 1969 and 1975 tell them explicitly how they can do so in the case of estate duty and capital transfer tax. (3) If a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected. The Crown is in no privileged position qua such a document. It would not be a correct exercise of the discretion in such circumstances to refuse rectification merely because the Crown would thereby be deprived of an accidental and unexpected windfall. (4) As counsel for the trustees submitted, neither *Whiteside v. Whiteside* [[1949 2 All E.R. 913]] nor any other case contains anything which compels the court to the conclusion that rectification of a document should be refused where the sole purpose of seeking it is to enable the parties to obtain a legitimate fiscal advantage which it was their common intention to obtain at the time of the execution of the document.[84]

Slocock and *Snell' s Equity* were applied in a tax context in Canada in *Canada (Attorney General) v. Juliar.*[85]

The Juliars were assessed taxes on the restructuring of a family business involving transfer of corporate shares. They had thought the tax was deferred pursuant to the rollover provisions of the *ITA,* but the transaction was mistakenly structured such that a particular rollover provision did not apply. The Juliars challenged the assessment and brought a successful application for rectification of the agreement.

Juliar was first applied in British Columbia in *Snow White Productions Inc. v. PMP Entertainment Inc.).*[86] Burnyeat J. allowed rectification of a number of deficiencies in the agreement. The Court stated that "it was always the common intention of the parties to obtain the legitimate fiscal advantage of the benefits under the *Income Tax Act* (Canada) and

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[83] Re Slocock's Will Trusts [1979] I All E.R. 358 at page 361.
[84] Ibid at at p. 363.
[85] (2000), 50 O.R. (3d) 728 (C.A.) ("***Juliar***") at para 33.
[86] (2004), 46 B.L.R. (3d) 283 (S.C.) ("***Snow White***").

the *Income Tax Act* (British Columbia) which accrue to an 'eligible production corporation' in a position to receive an 'accredited film or video production certificate'."[87] As such, it was appropriate to grant rectification such that that intention could be realized.

(i) Intent and Mistake

In rectification applications evidence of thwarted intentions must be proved. This is a significant departure from applications under the TSVA where the court is not concerned with the intent of the settlor, focusing instead on whether a proposed variation provides sufficient benefits to justify altering the deed of trust.

Rectification must be able to show that the deed does not conform with the intent of the settlor. This certainly presents some practical problems. On occasion settlors know little more than they handed a $100 bill to a lawyer, then watched, agog, as the lawyer stapled the bill to the deed and then placed the deed into a filing cabinet.

(ii) Standard of Proof

There is authority that "convincing" is the standard of proof required for a successful rectification application.[88] Not surprisingly, the CRA takes a conservative position on the standard of proof required. In 2010, the CRA published a statement acknowledging the authority to restate documents to reflect intent as stated in *Juliar*. However, the CRA states that such a variance will only be considered if the evidence of an error is unequivocal.[89]

The SCC has ruled that the standard of proof required in all civil matters is proof on a balance of probabilities.[90] In *Juliar*, the Ontario Court of Appeal found that results[91] can prove intent (as opposed to only historical evidence).[92]

> [T]he true agreement between the parties here was the acquisition of the half interest in the Gold's tobacco business by transfer of shares...in a manner that would not attract

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[87] Ibid at para. 24.

[88] Wasauksing First ation v. Wasauksing Land Inc. [2004]0.J. No.810,184 O.A.C.,84 at para 81.

[89] CRA views, 2010-0381961 E5 Sale of shares of a small business corporation.

[90] C (R) v. McDougall (2008) S.C.C. at para. 40 of the decision Rothstein J. states the following:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences.

[91] In another context ***res ipsa loquitur*** or an inference that is drawn from an outcome, without direct evidence.

[92] This may become a lynch pin in applications where the applicant is relying on results to prove intent.

> immediate liability for income tax"). This was so even though the true agreement was admittedly ascertained "more on an inference than on clear, direct, and admissible evidence.[93]

The balance of probabilities standard is cited in two recent trust rectification decisions, *McPeake v. Canada* (Attorney General),[94] and *Kanji v. Canada (Attorney General).*[95] The two decisions highlight the practical problems associated with meeting even a civil standard of proof in a rectification. The Kanji trust and the McPeake trust raise the same problem: a *trust contributor* was also named as a trust beneficiary.[96]

In *McPeake*, the BC Supreme Court applied the Ontario Court of Appeal's reasoning in *Juliar* that intention, even if not recorded at the point of formation of an impugned transaction may be inferred from the evidence.[97] In *McPeake*, the petitioners filed affidavits from the settlor, the three trustees, and two tax practitioners. The tax practitioners were not the original advisors to the settlor or the McPeake family.

The evidence of the affiants was that the creation of the trust was supposed to multiply access to the capital gains exemption from Mr. McPeake alone to all of his family.[98] No contrary evidence of intent as presented. Indeed, a 1999 sale of shares by the trust to Microsoft Corporation was followed by tax filings by the trust and the beneficiaries where the beneficiaries claimed the capital gains exemption. In summary, in *McPeake*, the court was able to infer the intent through the results as represented by the tax filings and the uncontradicted evidence of the petitioner's affiants.

Importantly, the court stated that the equities favoured a rectification. Without rectification, Mr. McPeake would suffer the tax liabilities of the ownership of all of the trust property without having any of the benefits of that ownership.[99] This express reference to the prevention of

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[91] At para. 25.
[92] 2012 BCSC 132.
[95] 2013 Carswell ONT 1160 (OSC).
[96] The significant difference between the trusts is that Mr. Kanji gifted the property to the trust while Mr. McPeake sold shares to the trust. The Federal Court of Appeal decision in HMQ v. Sommerer 2012 FCA 207 rejecetd the CRA's view that all types of contributions triggered the application of subsection 75(2) of the ITA.
[97] at para 35.
[98] at para 41.
[99] at para 45.

inequitable results endorses *Juliar*[100] and is further confirmed in *Pitt.*[101]

In *Kanji,* the court acknowledges the civil standard of proof, but also recognizes that references to a standard of "convincing evidence" may be a reflection of uneasiness with contradicting evidence of intent as displayed by the documents.[102] Ultimately the Court denied the application.

In *Kanji,* various factors militated against the chances for success.

1. The applicant was the sole affiant.
2. The applicant was cross-examined on his affidavit. The cross examination indicated he was not certain of his purposes in creating the trust.
3. No expert evidence was supplied.
4. The court was not able to draw an inference from the applicant's actions over the life of the trust that would show the trust was drafted incorrectly.
5. The court expresses discomfort with the delay in making the application. The applicant had been aware of the problem for several years before taking steps to correct it.
6. The applicant's legal counsel advised the court the evidence of the former advisors (who were being sued) would not be supportive or helpful to the applicant's position.[103]
7. The court ruled that an adverse inference could be drawn directly from the evidence presented by counsel that the former advisors would only provide evidence that would be adverse to the application.

(6) RESULTS AND INTENT

In comparing *Kanji* with *McPeake* and *Juliar* it is apparent that the historical documented evidence of intent is lacking in all three cases. Certainly, the paucity of affidavit evidence in *Kanji* and the possible negative evidence of the former advisor was not helpful. The striking departure for *Kanji* may reflect the UKSC's comments that it is reasonable for the court to take into account the harmful result arising from the purported error. In *McPeake* and in *Juliar,* the

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[100] Supra note 85. The Ontario Court of Appeal adopts the reasoning in Slocock's Will Trust, that it would be inequitable to deny a rectification just because it would deny the Crown and unexpected windfall (at paras 33 and 34)

[101] *Pitt,* note 6.

[102] Supra note 95 at para 1 7.

[103] Ibid at para 34.

courts determined that it would have been unconscionable or unjust to leave the mistakes uncorrected. That determination helped form the judgment in each of the cases.

In *McPeake* and *Juliar*, the original tax filings showed an obvious misunderstanding of the facts. In both cases, tax filings were made on the understanding that tax would be minimized. Instead, the exact opposite result occurred. Also, in both cases, the efficient tax result was not a remote possibility and could occur with proper corrective measures.

In Kanji, the error was still on the horizon when it was first discovered. Corrective steps were not taken after its discovery. Unlike *McPeake* and *Juliar*, where the errors were quite obvious from the tax filings, the court in *Kanji* could not point to any "smoking gun" that would show that the Kanji family trust was created incorrectly.

PART IV -- SUMMARY OF OPTIONS

The advantage of a variation application under the TSVA is that a negative future event will be more apparent than evidence of historical intent. The application is focused on showing the sufficiency of the benefit and the lack of harm to other beneficiaries. The application is not an adversarial process and there is no bar against re-filing an application to correct deficiencies in an earlier application. A variation may only have prospective effects. However, that limitation also allows the applicant to take the position that the CRA does not have standing to be heard or even notified of an application.

The obvious advantage of a trust rectification over a variation application is the retrospective effect of a successful alteration to the trust deed. Since the deed is deemed to be corrected from its outset, concerns regarding resettlement or "dispositions of property" are not apparent. However, one must still be aware that a rectification may have a tax result. For example, what should the tax result be where a beneficiary is removed as of the inception of the trust, but that beneficiary has received property from the trust?

Rectifications and the application of the doctrine of mistake can import a results-based analysis (the result of not allowing the rectification would be unconscionable). A rectification application is therefore, not devoid of the kind of analysis that might be undertaken in a trust variation application.

The enhanced benefits of requesting an application of the court's equitable jurisdiction using the

doctrine of mistake must be balanced against a higher standard of proof that is required to obtain a rectification and the fact that the application can be an adversarial process.

A serious limitation to any rectification or rescission application is the need for advisors to admit there has been some kind of fundamental misunderstanding of the documents or the facts. It is unlikely that advisors will start flinging themselves on their swords in mistake applications (which is what seemed to occur in *Hastings-Bass* applications). Advisors are less likely to provide affidavit evidence of their errors out of fear of voiding their liability insurance. It is completely plausible that a rectification application could be denied on the grounds of a lack of evidence and in the subsequent civil claim sufficient evidence of negligent drafting could lead to a successful claim against the advisor.

It may well be that professional insurers will have to look more closely at files where an advisor's error, if admitted would ensure a successful rectification or rescission application. The application could result in a complete or substantial mitigation of damages.

As always, waiting on the sidelines for the right case to take forward to get a favourable precedent is the CRA. Certainly, the decision in *Kanji* shows that rectification applications require sufficient positive evidence for the court to conclude on a "balance of probabilities" that the settlor's intention is not borne out in the trust deed. Whether the application is for a rectification, rescission or variation, the Crown should not be opposing the application merely because the Minister of National Revenue would be deprived of taxes. To paraphrase Graham J. in *Re Slocock*, accidental errors should not lead to unexpected windfalls for the Crown.

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