

ESTATE LITIGATION—2009 UPDATE
PAPER 6.1

The Trust and Settlement Variation Act

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THE TRUST AND SETTLEMENT VARIATION ACT

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I. Overview

This paper is intended to provide the reader with an introduction to the history and application of the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463 (the "Act"). The paper also explores the interpretation of s. 2 of the Act, which sets out what a court must consider before approving a proposed arrangement, and illustrates some of the difficulties faced by the court in weighing the financial and non-financial factors and determining in the circumstances what constitutes a sufficient "benefit" to a non-*sui juris* beneficiary or potential beneficiary in order for the court to provide the requisite consent on behalf of such a person.

II. The Purpose of the Act

The purpose of BC's *Trust and Settlement Variation Act*, is to provide the court with the power to consent on the behalf of persons without legal capacity including infants, the unborn and the unascertainable, among others, to a variation of any or all of the trusts, or revocation of the trusts, or enlargement of the powers of the trustees of managing or administering any of the trust property.

III. The History of the Act

Historically, the cardinal principle of trust law was that a court must strictly respect the written intentions of the settlor. As a result, trustees could not vary the terms of a trust or terminate a trust, even at the expense of the beneficiaries in circumstances that were unforeseen by the settlor at the time the trust was created. More significantly, it is probably the case that even if all of the beneficiaries were *sui juris* they could not vary. The common law, however, has gradually veered away from this cardinal principle to broaden the powers of the Court and provide better protection to beneficiaries.

In the seminal trust law case of *Saunders v. Vautier*, [1841] EWHC Ch J82, it was held that notwithstanding the settlor's intentions, if all of the beneficiaries are in agreement and are *sui juris*, the beneficiaries may terminate a trust without the approval of the court. However, the rule in *Saunders v. Vautier* is limited in scope and cannot be invoked where one or more beneficiaries are non-*sui juris* or the class of beneficiaries is not closed. There is also debate as to whether or not the rule allows *sui juris* beneficiaries to vary the terms their trust which may sometimes be a preferable option, rather than terminate the trust altogether.¹ These practical limitations created a need for legislative intervention.

The BC Act is largely based on the English *Variation of Trusts Act*, 1958 (U.K.), 6&7 Eliz. 2, c. 53. The English statute was enacted following the recommendations of the Law Reform Committee in that country to address problems created by an increasing inflexibility in the administration of trusts, and it provided the court with a discretion to approve a proposed arrangement on behalf of beneficiaries who were legally unable to consent, or who were unascertained.² It was in large measure driven by tax considerations to allow variations or revocations of trusts to manoeuvre around new succession taxes.

Until the 1950s, the rule in *Saunders v. Vautier*, coupled with the inherent jurisdiction of the court, allowed the judiciary to finesse the parameters of a trust in order to maintain or maximize its value for a beneficiary. The inherent jurisdiction of the court provided undefined powers to grant suitable redress, but there was no jurisdiction to vary. However, the legal landscape changed in the case of *Chapman v. Chapman*, where the English Appeals Court held that its inherent jurisdiction could not be used to vary or deviate from the terms of the trust unless the case fell into a specified exception. The exceptions in which a court could intervene included its conversion, compromise, salvage and emergency jurisdictions.³

The economic circumstances in post-World War II England revealed the necessity to allow the court conclusively to consent to a trust variation on the behalf of non-*sui juris* beneficiaries outside of the *Chapman* exceptions. In the 1950s, the economic landscape in England was dramatically transformed in terms of financial investment and taxation, but trust law lagged behind in that trustees did not have the power to make appropriate adjustments to the trust investments that would be in the interest of all non-*sui juris* beneficiaries. Trustees only had the statutory power, unless expressly specified by the settlor, to invest the funds of the trust in securities that fell within a "legal list." At the time, the list generally included fixed-interest securities and excluded corporate stocks, which were considered highly speculative investments.⁴

Before the 1950s, there was little incentive for the settlors to grant further investment discretion to the trustees due to consistently low interest rates, minimal inflation, and the historical poor performance of commercial stocks.⁵ Fixed interest securities provided consistent and safe yields. After World War II, however, high inflation rates along with succession taxation caused the value of successive trusts

1 Committee on the Modernization of the *Trustee Act*, "Report on the Variation and Termination of Trusts," BCLI Report No. 25 (October 2003) 23 Est. Tr. & Pensions J. at 158.

2 *Chapman v. Chapman*, [1954] A.C. 429 at 445; Sixth Report, Court's Power to Sanction Variation of Trusts, Cmnd. 310 (1957) ("Sixth Report").

3 For further discussion, see D.W.M. Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 1295-1298.

4 Due to the favourable performance of corporate stocks in the late 1950s, Parliament broadened investment restrictions in 1961 through the revised *Trustee Investment Act*, which allowed for 50% of a trust portfolio to be invested in corporate stocks. For further discussion, see Waters, *ibid.* at 947.

5 Waters, *ibid.* at 946.

that were confined to the legal list of investments to plummet.⁶ In other words, trustees that were locked into fixed interest investments could not yield the returns required to keep up with inflation. *Sui juris* beneficiaries could take advantage of the rule in *Saunders v. Vautier*, to terminate the trust and then re-invest the liberated capital funds in commercial stocks, which provided a hedge against inflation. Unfortunately, however, non-*sui juris* beneficiaries and *sui juris* beneficiaries whose trusts provided for vested or contingent interests to non-*sui juris* individuals could not successfully vary their trusts due to the inability of non-*sui juris* beneficiaries to consent, and the narrow jurisdiction of the court.⁷

The English Law Reform Committee reacted to this inequity by proposing the enactment of a statute which would allow the Court to consent on the behalf of beneficiaries otherwise incapable of providing personal consent.⁸ The Committee's position signalled a fundamental policy change in England with respect to trust law, as the proposed statute supported a principle that favoured the protection of the interests of a beneficiary over the cardinal principle, which required strict adherence to the settlor's intentions. In 1958, following the recommendations of the Law Reform Committee, Parliament passed the *Variation of Trusts Act, 1958* (U.K.), 6&7 Eliz. 2, c. 53. The following year, Ontario and New Brunswick adopted similar enactments to the *Variation of Trusts Act*. Nearly a decade thereafter, BC enacted its *Variation of Trusts Act, S.B.C. 1968, c. 57* which generally followed the wording of the English statute and also adopted certain changes made in the Ontario and New Brunswick legislation.

Every common law jurisdiction except Newfoundland now has legislation that provides for the variation of a trust based on the English statute. In Canada, the accepted view seems to be that the variation of trusts legislation is designed to supplement the rule in *Saunders v. Vautier* by providing the Court with the jurisdiction to consent to a variation on behalf of those beneficiaries from whom a consent could not be otherwise obtained.

IV. The Provisions of the Act

The Act is concise, made up of only five sections in total. This paper concentrates on the first two sections, which list the classes of persons on whose behalf a court must provide consent to a proposed arrangement, and which describe the circumstances a court can approve an arrangement on behalf of these categories of beneficiaries. Sections 1 and 2 read as follows:

Court approval of variation

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

- (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,
- (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 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

6 Waters, *ibid.* at 1290. See also A.J. McClean, "Variation of Trusts in England and Canada" (1965) 43 Can.Bar.Rev. 181 at 228.

7 Waters, *ibid.* at 1291.

8 Sixth Report, *supra* note 2.

- (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 powers of the trustees of managing or administering any of the property subject to the trusts.

Benefit to parties interested

2 The court must not approve an arrangement on behalf of a person coming within section 1 (a), (b) or (c) unless the carrying out of it appears to be for the benefit of that person.

Section 3 deals with the requirement to serve notice of an application on the Public Guardian and Trustee, who, under s. 5 is entitled to appear and be heard at the application and entitled to any costs that the court orders.

Section 4 provides that the Supreme Court may exercise its powers under the Act in respect of land, the ownership of which is the subject of a legal life interest.

V. Varying a Trust

In order for the Court to approve of a proposed variation, or “arrangement” on behalf of a class of beneficiaries listed under s. 1, the court must be satisfied that the applicant falls within at least one of the four classes, and that the proposed arrangement appears to be for the “benefit” of the beneficiaries in question.

VI. When is the Consent of the Court Required?

Section 1 of the Act allows the court to approve of any arrangement that varies or revokes the provisions of a trust on the behalf of specified individuals who are otherwise incapable of providing legal consent or from whom consent cannot be obtained for whatever reason.

For the most part, the interpretation of section 1 has been uncontroversial. However, the notion of a “contingency” under s. 1(b) of the Act, and whether the court has the jurisdiction to consent to an arrangement on behalf of a *sui juris* person who has a contingent interest in a trust has received some attention from the court, especially in the context of the variation of pension plans, which are common forms of trusts. When there are unexpected surpluses in a pension plan, plan members (beneficiaries) and employers have attempted to terminate or vary the plan in order to access the surplus funds. Whether the surplus is a contingent or vested interest has received some mixed consideration.

A string of cases, and most recently the decision in *Bentall Corp. v. Canada Trust Co.* (1996), 26 B.C.L.R. (3d) 181 (S.C.) (“*Bentall*”), have held that the interest of the plan members in the surplus of an ongoing plan is contingent. As such, the *Bentall* decision held that a court may employ s. 1(b) of the Act to consent on the behalf of adult contingent beneficiaries, even if the beneficiaries oppose the variation.

In the *Bentall* case, the Court approved the variation of a pension plan despite the opposition of 7 out of a total of 279 plan members who were held to have contingent interests in the surplus funds of the plan. All of the beneficiaries could be identified and they were all of full capacity. The Court maintained that it could approve of the arrangement as long as the vested interests of the opposing beneficiaries were not affected. Mr. Justice Sigurdson stated at 278 that “Canadian courts now have jurisdiction to vary [a] future interest even if all beneficiaries are adult, provided that the future interest is contingent.” The *Bentall* case empowered the Court, at least in the context of pension plans, to approve of a variation despite the opposition of adult contingent beneficiaries.

This line of reasoning has since been overturned by the Court of Appeal in *Buschau v. Rogers Communications Inc.*, 2004 BCCA 80 (“*Buschau*”). In *Buschau*, Newbury J.A. disagreed with the finding in *Bentall* and concluded that the reasoning should not be followed. She held that a court does not have the jurisdiction under the Act to consent on the behalf of capable adults whose agreement to a proposed arrangement cannot be obtained, if they have an existing vested or contingent interests in the trust funds. At para. 96, Madam Justice Newbury explained:

[s]ection 1(b) of that statute permitted, and s. 1(b) of the *Trust and Settlement Variation Act* now permits, the court to consent only on behalf of fully capacitated adults who “may become entitled” to an interest at a future time. Where the person already has an interest, whether vested or contingent, the court may consent on his or her behalf only if he or she is incapable of assenting by reason of infancy or other incapacity, as described in s. 1(a).

Buschau was overturned at the Supreme Court of Canada (2006 SCC 28), which also held that the Act did not apply to pension plans, but the Court of Appeal’s ratio in relation to the court’s jurisdiction to consent under s. 1(b) of the Act appears to have been accepted.

In 2003, in its “Report on the Variation and Termination of Trusts,” the BC Law Institute (“BCLI”) Committee on the Modernization of the Trustee Act proposed that the Legislature should revise the Act to further broaden the jurisdiction of the court to consent to a variation. The BCLI proposed that in certain circumstances, the court should have the discretion to approve a proposed variation despite the dissent of a few beneficiaries, if the majority of a group of beneficiaries representing a substantial majority of the monetary obligations of the trust fund have agreed to the variation, the proposed arrangement is not detrimental to the dissenting beneficiaries, and it would be detrimental to the administration of the trust and the interests of the majority of the beneficiaries not to approve the arrangement.⁹ The BCLI recommendations have not been implemented by the Legislature.

VII. Obtaining Court Approval

Section 2 of the Act precludes the court from approving a variation under ss. 1(a) – (c) unless the variation appears to be for the benefit of the beneficiaries on behalf of whom the court’s consent is being sought. Even if the variation appears advantageous to the beneficiaries, the court retains full discretion under s. 1 to approve or disapprove of the variation; the language specifically states that the court “may” approve of a variation “if it thinks fit.” Note that a benefit is not required for the court’s consent under s. 1(d), but the court may require it.

A frequently debated issue under the Act is whether an arrangement must sustain the basic intention of the settlor in order to be approved by the court. In the oft-cited case of *Re Irving* (1975), 66 D.L.R. (3d) 386 (H.C.J.), Mr. Justice Pennell set out a three step test for approval of an arrangement, the first consideration being whether the arrangement was consistent with the settlor’s intention. However, in BC, the testator’s intention has been found to be a much less important or irrelevant consideration. In *Russ v. British Columbia (Public Trustee)* (1994), 3 E.T.R. (2d) 170, B.C.J. No. 664 (QL) (B.C.C.A.) at 49-51, Finch J.A. (as he then was) disagreed with the reasoning in *Re Irving* and noted that the Act expressly empowers the Court to approve of variations which appear to be contrary to the intentions of the settlor as follows:

The language of s. 1, which authorizes the Court to vary or revoke any trust, is inconsistent with the suggestion that the settlor’s intention is a consideration at all, much less a consideration of first importance. The Act says nothing concerning the settlor’s intention, or of any obligation upon the Court to weigh that intention along with other factors in deciding whether to approve a proposed variation.

⁹ BCLI Report, *supra* note 1 at 165.

In my respectful view, the Court need not consider whether the basic intention of the settlor is preserved. The Court is not charged under the Act with protecting the interests of the settlor. If the proposition put forward by the appellant were correct, the Court would not be able to approve any arrangement that was not such as to keep alive the basic intention of the settlor, in spite of great benefits that might be created for infants and unborn persons.

Many variations to a trust are at odds with the intention of the settlor. If, as argued by the appellant, the wishes of the settlor may not be thwarted, notwithstanding benefits to the infants and unborn, then the powers afforded by the Act would be meaningless.

Therefore, the interpretation of that provision in BC differs from the interpretation of the similar provision in the Ontario statute, and the statutes in some of the other provinces whose interpretation has been influenced by *Re Irving* (such as Saskatchewan and Manitoba).

To the extent that BC courts have interpreted the Act such that the intention of the settlor need not be considered in approving an arrangement, the Act clearly diverges from the traditional cardinal principle stated above that the court must strictly respect the settlor's intentions. However, the Act is in a sense an extension of the Rule in *Saunders v. Vautier*, giving the court the same ability to consent for non-*sui juris* beneficiaries. The case law reveals a trend towards broadening the discretion of the court to protect the interests of beneficiaries.

It appears that it is also the current view in England that the testator or settlor's intention is of little weight in the consideration of whether to approve an arrangement.¹⁰

The one-step test adopted in BC for a court to consider when determining whether to approve a proposed arrangement, is taken from the third step of the test set out in *Re Irving*, and is commonly known as the "prudent adult" test. Pennell J. put it this way at 394¹¹:

... is the benefit to be obtained on behalf of those for whom the court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?

In *Finnell v. Schumacher Estate* (1990), 37 E.T.R. 170 (Ont. C.A.), Carthy J.A. likened the role of the court under this test to that of "a prudent adviser" to the beneficiaries on whose behalf the court must consent in determining whether the proposed arrangement is a fair bargain from the point of view of those beneficiaries.

This test was adopted by our Court of Appeal in *Sandwell & Co. Ltd. v. Royal Trust Corp. of Canada* (1985), 17 D.L.R. (4th) 337 (B.C.C.A.), and confirmed more recently in *Smith v. Smith Estate*, 2003 BCSC 1606, in which Macaulay J. stated that the sole test to be applied in determining whether an arrangement is for the benefit of those on whose behalf court approval is the prudent adult test as enunciated above.

It must be noted that the "prudent adult test," and determination of a "fair bargain" does not mean that a court takes on the role of a negotiator on behalf of the non-*sui juris* beneficiaries, such as in the commercial sphere, in order to obtain the maximum benefit possible. In *Russ v. British Columbia (Public Trustee)*, the Public Trustee appealed the order approving a variation of the subject trust on several grounds, one of which was that the chambers judge should have applied the "prudent adult" test and should have considered the bargaining position of the non-*sui juris* beneficiaries. The Public Trustee argued that a modest increase in the position of the contingent interests was an insufficient benefit when weighed against their "bargaining position." Because the court could withhold its

10 See e.g., *Goulding v. James*, [1997] 2 All. E.R. 239 (C.A.).

11 *Irving, supra*.

consent on behalf of the infant and contingent interests and effectively block the variation, this was a strong bargaining position, which should have been used to negotiate something substantially more than the benefit under the proposed arrangement. Finch J.A. responded to this argument as follows¹²:

[...] The statutory requirement is that the Court assess any proposal to see whether it is for the benefit of those who cannot consent themselves. It does not require that the Court act as a negotiator in maximizing any benefit that may be made to appear.

Once it is determined that a benefit exists, it is truly a matter of discretion for a judge to decide whether the benefit is sufficient, in that it is something that a prudent adult would accept.

A. What Constitutes a “Benefit”?

The case law interpreting s. 2 and similar sections in other provinces reveals that the word “benefit” is to be liberally interpreted, but not just any benefit will do. There must be a benefit such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept the bargain. Therefore, whether a benefit exists requires a balancing by the court within the circumstances that exist.

Before consenting to a proposed arrangement, the court will review all of the circumstances to determine whether the termination or variation of a trust would, on balance, ultimately benefit for a non-*sui juris* beneficiary. Moreover, the variation must confer the benefits to all beneficiaries, though the overall benefit of the group may outweigh the marginal financial costs to a few (further discussed below). A thorough consideration by the court will review both financial and non-financial benefits. As stated by Justice Walker in *Re Assie Estate*, [1985] S.J. No. 133, 24 E.T.R. 278 (Q.B.):

Benefits are of at least two kinds. There is a direct and present financial benefit.
There is an indirect and future benefit received through others, often speculative in nature and often educational and social in nature. The Court may, of course, consider benefits of any other kind.

Walker J. found that it was the court’s burden to decide if any detriment to the infants or unborn persons in that case was balanced by the benefit to them, and whether a reasonable adult would approve the variation.

B. Financial Benefits

Demonstrating that there will be a tangible financial benefit to the non-*sui generis* beneficiary appears to be the surest way to convince the court to approve a proposed arrangement. If the variation of a trust would explicitly enhance its ultimate monetary value for all beneficiaries on whose behalf the court’s consent is sought, the court will have little difficulty in approving the application. However, the case law reveals the difficulties in deciding what should be considered a sufficient “financial benefit.” Many applications concern the avoidance of taxation, which in practice can provide a significant direct or indirect financial benefit.

In *Re Riddalls*, [1983] S.J. No. 374, 24 Sask.R. 16 (Q.B.), Riddalls bequeathed his entire estate to his trustees and his widow in trust until she attained the age of 65 years, or until her death, whichever occurred first. Upon that event, the farmland was to be divided into two sections. One section of farmland was to be transferred to Riddalls’ adult son, Trevor, one-half section to his adult daughter, Audrey, and one-half section to the widow, or if she was dead, then to Trevor. Under the will, Riddalls’ infant and unborn grandchildren received contingent interests in the farmlands, taking only if Trevor and/or Audrey pre-deceased the widow. Due to a potential capital gains tax liability of the

12 *Russ v. British Columbia (Public Trustee)*, *supra* at para. 67 (QL).

estate for about \$250,000, the three adult beneficiaries sought to wind up the trust in a way that would avoid the tax payment. Otherwise, the estate would have to sell a substantial portion of the farmlands currently being farmed as one unit in order to make the payment. The court approved the variation of the trust, despite the fact that the contingent interests were extinguished, finding that a prudent adult would have approved of the proposal. The widow was then 61 years old and the trust would be completed in four years. It was unlikely that Trevor or Audrey would die within that four years, and thus it was unlikely that the contingent interests would ever vest. The ability to avoid capital gains tax and retain the farmland was a distinct benefit to the present beneficiaries, and the grandchildren were bound to be better off as a result of the benefit to their parents.

Re Assie Estate concerned a similar issue to *Re Riddalls*, but this time, the Court found on the facts that a prudent adult would not approve of the proposed arrangement. In *Re Assie Estate*, the widow and adult children applied to wind up a testamentary trust to avoid the tax consequences. Again, the widow was given a life interest in the estate, with the remainder to be divided among the children at the widow's death. Provision had been made in the trust for a gift over to the testator's grandchildren if a child predeceased the widow. Mr. Justice Walker distinguished *Re Riddalls*, saying that he could not find much benefit in the proposal to the contingent interests, as they would be terminated by the variation. The more favourable tax treatment that would result from the variation may not trickle down to benefit the contingent beneficiaries. Whereas the *Re Riddalls* trust had only four years to run, here the trust had 11 years, increasing the possibility that a contingent beneficiary would take. *Re Riddalls* involved two children whose death might change contingent interests into vested interests, while here there were seven children. The tax savings here was smaller and more speculative than in *Re Riddalls*. In addition, in *Re Riddalls*, the tax savings needed to be dealt with immediately whereas here, the main problem could be deferred for seven years. Finally, in *Re Riddalls*, a real psychological, emotional and family benefit would result from the lifting of a financial burden from a family member, whereas here there was no such problem or result.

In summary, the Saskatchewan case law above indicates that the avoidance of tax liability may be found to be a sufficient benefit for a court to approve a proposed arrangement that will extinguish contingent interests if: the likelihood is small that a contingent interest will become a vested interest, the tax savings are significant and reasonably certain; there is an immediacy to the tax problem; and there is a real financial or non-financial benefit to all vested beneficiaries that will trickle down to the beneficiaries whose interests are to be terminated. These factors are borne out by the Manitoba case of *Hasick v. Henderson Estate*, [1991] M.J. No. 623 (Q.B.), in which the testatrix left a life interest in the residue of her estate to her daughter, Nancy, with the remainder divided between Nancy's children (or Nancy's grandchildren, if her children pre-deceased her). Nancy had two adult sons in their 30s, both of whom were unmarried and did not intend to have children. Nancy wished to wind up the estate by terminating the trust for a variety of reasons, including the avoidance of capital gains tax liability, estimated to be about one-half of the value of the estate if the trust was not wound up by the end of the year. Schwartz J. was asked to consent on behalf of the unborn contingent beneficiaries. Schwartz J. held that there was a financial benefit to the proposal for the contingent beneficiaries to the extent that, if one-half of the capital of the estate was paid out in taxes, the contingent interest would be significantly adversely affected. The judge was satisfied that by winding up the trust and putting approximately \$100,000 more into the hands of Nancy (mother and grandmother of the beneficiaries) was of more interest to the potential beneficiaries than to deprive her of the \$100,000. It may be inferred that Schwartz J. thought that the contingent beneficiaries could experience an indirect benefit of the funds through Nancy, which was more desirable than being "disbenefited" entirely of one-half of the estate.

In *Russ v. British Columbia (Public Trustee)*, an arrangement that proposed to change a contingent interest into a vested interest was seen to confer a benefit. The trust in issue was established by deed which disposed of the settlor's shares in a company in trust for the settlor's three children during their lifetime and then to the settlor's grandchildren alive at the time. If any grandchild predeceased their parent, then the grandchild's portion would be divided among his or her issue then alive. At the time

of the application to vary, only one child (Russ) was still alive. Russ and her five children brought the application to obtain greater control of the trust assets and obtain an interim distribution. The potential beneficiaries of the Russ share were: her children, her grandchildren born and unborn and the children and grandchildren of Russ's deceased siblings. The majority of Russ's grandchildren were minors. The arrangement provided that the interests of the unborn, infant and unascertained contingent beneficiaries would be secured by the establishment of a separate trust, under which the issue of Russ's children alive at the date of Russ's death would receive an equal share *per stirpes* of the trust fund whether or not their parent predeceased Russ. The court approved the variation, stating that to convert a 4.48% chance that the contingent beneficiaries might one day inherit an interest into cash equally of 5% of the present value of the trust was benefit. The approval was upheld on appeal, where the court emphasized that once it is determined that a benefit exists, it is truly a matter of discretion for a judge to decide whether the benefit is sufficient.

Courts have also approved of an arrangement on behalf of unascertained beneficiaries upon an insurance policy being put in place to provide for those beneficiaries, thus providing a tangible financial benefit. This is more likely to work if the chance of an unborn beneficiary acquiring a vested interest is remote. In *Westminster and Sullivan v. The Royal Trust Company*, [1972] N.S.J. No. 193, 32 D.L.R. (3d) 631 (N.S.S.C.-T.D.), the settlor's daughter, and son, who had a life estate in the capital fund with the capital passing to their children, if any, at their death. The daughter was 57 years old and the son was 60, and neither had any children. The son and daughter consented to an arrangement that would transfer the trust property to them. Under the arrangement, two risk insurance policies would be issued to the trustee to provide the trustee, on the birth of a child of the son or daughter, with a sum of money equal to the present value of the trust plus 10%. The Court held that there was a benefit to the unborn children as they would acquire a vested interest in the proceeds of the insurance policy, which was more than they would have gotten on the death of the parent. However, see *Farrington v. Rogers* (1980), 6 E.T.R. 156, B.C.J. No. 315 (S.C.), in which Chief Justice McEachern dismissed the petition for a variation, finding that the unborn children did not ultimately benefit, and there was a clear detriment. Although the proposal did not include an insurance policy to cover the risk of contingent interests born after the arrangement, McEachern C.J.S.C. expressed that he would not have approved the arrangement even with insurance in place to cover such interests. He stated that the Court should not, except in exceptional circumstances, approve variations which are dependent on commercial arrangements that may be in place for 30 or more years, which are expensive, and which could accidentally fail for unforeseen reasons.

On the issue of a potential savings of trustee or trust management fees, in *Samoil v. Samoil*, [1999] A.J. No. 1184 (Q.B.), the Court held that while a proposed arrangement allowing a beneficiary to manage her own trust funds would likely bring a savings of fees and increased returns, it could find no example in the case law of an application which extinguished contingent interests succeeding on the grounds that the applicant wished to avoid trustee fees, which were reasonable, and a normal, expected part of the trust.

Paramount in the consideration of balancing benefit and detriment is the possibility of an interest of an unborn person actually vesting. Where the likelihood is small, then the term 'benefit' can be given a very liberal interpretation. The court will assess the overall factual context of each proposed arrangement. For instance, a financial arrangement which provides immediate access to the capital of the trust will not necessarily be, on balance, "beneficial." The court may consider the beneficiary too immature or too much of a spendthrift to properly handle a large sum of money. In *Re Towler's Settlement Trusts*,¹³ the Court held that in approving an arrangement that would defer a beneficiary's right to capital for a period after she turned 21 would give her time in which it was hoped she would gain maturity and responsibility with her adult independence, which could also be viewed as a non-financial benefit.

13 [1963] 3 All E.R. 759.

C. Non-Financial or Other Benefits

As the term “benefit” is to be interpreted liberally, a court may consider benefits other than those that involve money. However, it remains unclear to what extent a non-financial benefit may satisfy the prudent adult test, especially when there will also be a financial detriment. Courts also have appeared to have difficulty quantifying non-financial benefits, especially when weighed against a financial loss to a non-*sui generis* beneficiary. The court may find that a clear non-financial benefit offsets a small financial cost and approve an arrangement. However, as to weight, non-financial factors will usually take a back seat to financial factors, and the court is hesitant to find that a non-financial benefit adequately makes up for any monetary loss.¹⁴ The court must balance all of the benefits and detriments of the proposed arrangement to properly ascertain whether the variation of a trust is ultimately beneficial.

Family dissension will be a significant non-financial factor for the consideration of the court. In *Re Zekelman*, [1971] 3 O.R. 156, 19 D.L.R. (3d) 652, the settlor initially set up a trust for his first and (at the time) only son. He later had other children and successfully applied to vary the initial trust in order to include the later children as beneficiaries, to avoid resentment between the siblings. The Court was asked to consent on behalf of the eldest son who was still legally an infant. Though the variation had the effect of diluting the interest of the first son, the variation also included an accelerated vesting age. The benefits of an accelerated vesting age and minimization of family dissension were held to sufficiently offset the financial costs to the first son. Osler J. held that a first blush, it appeared that the variation would be a detriment to the first son; however he held that ample authority exists for the proposition that the word “benefit” is to be interpreted liberally and not to be confined to a financial benefit.

In *Re Tweedie* [1975] B.C.J. No. 1162, 64 D.L.R. (3d) 569 (S.C.), non-financial benefits in the proposed variation were found to outweigh any potential financial loss to contingent beneficiaries. The applicant sought to vary and revoke a trust set out in the will of her mother, in which she had a life interest, as she wished to use the capital to pay off a loan she had taken to build a home. The trust was to be divided equally and *per stirpes* among the testatrix’s issue alive at the death of the applicant. The applicant had one sister and they each had one child. All four were adults. Based on the circumstances, the Court found it was much more probable that the trust would eventually be payable to one of four consenting adults, rather than an infant or unborn person and that it was highly unlikely that either of the latter two classes would receive any benefit. In addition, the amount involved was not large. Therefore, the judge approved the variation on the basis that the evidence showed a real psychological, emotional and family benefit of lifting a financial burden from a family member. Given that the most probable heirs had consented, and the judge considered that he was being asked to approve on behalf of classes who would realistically lose nothing.

However, the benefit of the avoidance of family dissension, or psychological and emotional benefits, will not always outweigh a clear financial detriment of one or more beneficiaries. In *Re Harris Estate*, [1974] B.C.J. No. 366, 47 D.L.R. (3d) 142 (S.C.), an application was brought by a widow on behalf of her infant children for a variation of a trust made up of the proceeds of life insurance policies on the children’s father. As it stood, the funds were held in trust 5/8 for the benefit of the eldest son, and 1/8 for each of the other three children. The Public Guardian and Trustee opposed the application on behalf of the eldest son on the grounds that there would be no benefit to him. The Court agreed with the PGT and held that although the eldest son may benefit from relief of potential emotional, psychological and other upsets and strains arising from the realization of the unequal division, and the possible burden of looking after other family members, these intangible benefits to the son and the group as a whole did not outweigh the real financial disadvantages to the son alone. Nor would there be any benefit to the son’s unborn children who may acquire interest at some point.

14 But see *Re Weston’s Settlements*, [1969] 1 Ch. 223 (C.A.), discussed *infra* at page 13.

In *Farrington v. Rogers* (1980), 6 E.T.R. 156, B.C.J. No. 315 (S.C.), a testator left a trust for the benefit of his daughter Isobel, her children, and her unborn grandchildren of her son, Ronald. The youngest of Isobel's children was left a larger trust fund than his older siblings so all of the *sui juris* beneficiaries, including the youngest son, agreed to consent to a variation to equalize the distribution of the trust. The problem was that the will included Ronald's unborn children as beneficiaries. The Public Guardian and Trustee argued and McEachern C.J.S.C. agreed that his unborn children did not ultimately benefit from the proposed variation, and there was a clear detriment. As such, the petition was dismissed. *Farrington* was followed by *Kunater v. Royal Trust Corp. Of Canada*, [1980] B.C.J. No. 1892, 23 B.C.L.R. 238 (S.C.), in which the facts were similar, but the situation presented an even stronger case against varying the trust as the interests of the unascertained class were not as remote (being future widows and children of the sons), and as the sons could marry at any time and have issue.

The facts in *Farrington* were later distinguished in *Re Kovish Estate*, [1985] B.C.J. No. 1206, 18 E.T.R. 133 (S.C.-Ch.), a trust was set up for the testatrix's surviving daughter with a provision for a gift over to the daughter's children or grandchildren. The daughter wished to forgo her share so that her own children would take immediately and have capital available to re-invest in a family business, which the granddaughters would manage together. Madam Justice Proudfoot was satisfied that the circumstances were different than those existing in *Farrington*. If the family business was successful and if the granddaughters received a benefit, then the unborn class was certain to benefit. There was no evidence to indicate any unusual risk in the business venture.

Smith v. Smith Estate is a recent decision that held that it was not quantifiable, but no doubt would be beneficial to all infant residual beneficiaries to know that reasonable arrangements were being made for their grandmother (the wife of a beneficiary with a life interest in a trust). The life interest beneficiary wished to vary the trust to give his wife a contingent life interest, in effect adding a beneficiary. The Court held that it had the jurisdiction under the Act to add a beneficiary. However, the Court also found in the proposed arrangement a reasonable prospect of a financial benefit to the infant beneficiaries, with relatively little risk of disadvantage.

The approval on behalf of issue, of an arrangement to pay out trust capital to the parent based on the benefit to the issue that comes with the parent being able to better provide financially for this issue found in *Westminster Sullivan v. The Royal Trust Company*, wherein, the judge noted that it was a benefit to the unborn beneficiaries that the parents, having acquired in their lifetime the capital of a substantial trust fund, would be better able to carry out their parental responsibilities and make adequate provision for any children. On the other hand, see the *Kunater* case, where Justice Ruttan rejected the above argument made by two sons of the settlor. The sons argued that by having the trust funds paid out to them, they would be more readily able to use the funds for the benefit of themselves and their children. Ruttan J. held that the suggested "benefit" was no more than an obligation that existed on any parent, by common and statute law. To discharge those parental obligations by using the trust funds vested in the issue, could hardly be said to be a benefit to the issue.

Another non-financial consideration is that young beneficiaries should be adequately mature and educated before they are granted enough income to effectively retire for the rest of their lives.¹⁵ Accordingly, the opportunity for a child to be educated and properly socialized will resonate strongly with the court. On the extreme end of valuing non-financial benefits over and above financial benefits, in *Re Weston's Settlements*, [1969] 1 Ch. 223 at 234 (Eng. C.A.), the petitioner proposed a variation of a trust to avoid a significant payment of British capital gains tax, which would have a child who grew up in Britain move to an island tax haven. Lord Denning held that, despite the tax advantages provided by the variation, the educational and social disadvantages that the child would face by moving away from Britain were too significant. The Court found that the arguably dubious non-financial benefit of infant beneficiaries to "grow stronger with firm roots," in England outweighed clear and significant financial benefits of varying the trust. The petition was dismissed.

15 *Re Holt's Settlement*, [1970] 2 All E.R. 554 (Ch.D.).

Re Goldstein Insurance Trust, [1988] M.J. No. 588, 56 Man.R. (2d) 73 (Q.B.) possibly reflects the express language in the Manitoba *Trustee Act* that a benefit includes an arrangement which “would enhance the financial social, moral or family well-being of that person” on whose behalf the court is asked to consent.¹⁶ The uncle and adoptee parent of two orphaned children applied to vary the terms of an insurance trust created by the children's natural parents in their will. The uncle had two young children of his own, and his family was of modest means. Thus, difficulties were brought into the new family unit due to the trust proceeds being paid to the two adopted children and creating a set of “have” and “have not” children within the same family. The Court approved the arrangement that would vary the terms of the trust to provide for the maintenance and support of all four children. It was found that the benefits that would accrue to the present beneficiaries of the trust were more than sufficient to satisfy the statutory requirement that the arrangement be of a justifiable character.

VIII. Conclusion

The *Trust and Settlement Variation Act* empowers the court to consent to the revocation or variation of trusts on behalf of legally incapacitated or unascertained beneficiaries, and to enlarging the powers of trustees, of managing or administering any trust property. It is without a doubt that the legislation has dramatically broadened the jurisdiction of the court held previously under the common law to act in the best interests of beneficiaries. According to the 2003 BCLI Report, the legislation should be amended to increase the jurisdiction still further.

In order to approve of an application under the Act, the court must be convinced that the variation provides a benefit to the person for whom it is asked to consent. A benefit may be financial or non-financial and the court will make its determination on the facts of the case. Certain non-financial benefits will be considered seriously in the eyes of the judiciary. A variation may be approved despite the financial cost to a beneficiary if the variation can provide harmony within the beneficiary's family, education, and proper socialization, among other things.

IX. References

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- D.W.M. Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005)
- Sixth Report, Court's Power to Sanction Variation of Trusts, Cmnd. 310 (1957)

¹⁶ *Trustee Act*, C.C.S.M. c. T160, s. 59(8).