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This slide features a red header bar on the left with the text "21ST NATIONAL CONFERENCE" in white. To the right of the header, the date "JUNE 6-7, 2019" and location "METRO TORONTO CONVENTION CENTRE" are listed. The STEP Canada logo is in the top right corner. The main title "STEP CANADA – LITIGATION WITH FOREIGN CONNECTIONS" is centered in large, bold, blue letters. Below the title, a list of speakers is provided: Aileen La Borie, Nicholas Holland, David Lobl, Jonathan Lancaster, and Helen Low, each with their respective firm and location. On the right side, there is a photograph of several international flags flying on tall poles against a blue sky. A dark blue footer bar at the bottom contains the text "STEP Canada 21st National Conference | June 6-7, 2019" on the left and the number "2" on the right.

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THE BLESSING OF MOMENTOUS FIDUCIARY DECISIONS

- *Public Trustee v Cooper* applications as developed in the UK
 - “Momentous decision” – UK
 - trustees know what powers they have, but would like court to confirm that the decision being made is consistent with their fiduciary duties – *Public Trustee v. Cooper*
 - Court must be fully apprised of relevant facts – *Cotton v. Earl of Cardigan*
 - Trustee must demonstrate that exercise of discretion is untainted by any collateral purpose - *Cotton v. Earl of Cardigan*
 - Question whether - Trustee must satisfy the court that the decision was properly taken (higher than “reasonable trustee” standard)- *Tamlin v. Edgar*

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THE BLESSING OF MOMENTOUS FIDUCIARY DECISIONS

- *Public Trustee v Cooper* applications – further developed offshore
 - Adopted and Broadened
 - Jersey Court of Appeal – Trustee not required to prove how they considered the matter - *Kan Lai Kwan Kay v. HSBC International Trustee Ltd.*
 - Codified in :
 - Cayman
 - Bahamas
 - Jersey
 - Guernsey

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THE BLESSING OF MOMENTOUS FIDUCIARY DECISIONS - Cont'd.

- Available in Canada?
 - *Hunter Estate v. Holton*, (1992), 7 O.R. (3d) 372 (Gen. Div.)
 - (Re:) *Toigo Estate*, 2018 BCSC 936
 - BCSC adopted:
 - *Public Trustee v. Cooper (UK)*; and
 - *In the matter of the LKM Discretionary Trust (Guernsey)*

THE BLESSING OF MOMENTOUS FIDUCIARY DECISIONS - Cont'd.

LKM Test:

- The Court outlined the test to be satisfied when a trustee is seeking the Court's approval to a 'momentous' decision:
 1. Does the trustee have the power under the trust instrument and the relevant law to make the 'momentous' decision, in this case to make the distribution?
 2. Has the trustee formed the opinion to do so in good faith and is it desirable and proper to do so?
 3. Is the opinion formed by the trustee one that a reasonable trustee in its position properly instructed could have arrived at?
 4. Is the Court certain that the decision hasn't been vitiated by any actual or potential conflicts of interest?

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THE BLESSING OF MOMENTOUS FIDUCIARY DECISIONS - Cont'd.

- Beddoe Applications
 - Trustee can apply for an order for costs before commencing or defending an action to ensure costs protection - *Re Beddoe*
 - Only granted for certain types of actions – *Alsop Wilkinson v. Neary*
 - Trust Dispute (i.e. subject matter of settlement)
 - Beneficiaries dispute (i.e. questioning the action or inaction of trustee)
 - Third party Dispute (i.e. potential contract or tort liability due to administration of trust)
 - Available in Canada?
 - *Hunter Estate v. Holton*, (1992), 7 O.R. (3d) 372 (Gen. Div.)

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ATTACKS ON TRUSTS

- Fraudulent Transfers, the *Statute of Elizabeth*, and Bankruptcy

<ul style="list-style-type: none"> – United Kingdom – Guernsey – Isle of Man – British Virgin Islands – Bermuda 	<ul style="list-style-type: none"> – Cayman Islands – British Columbia – Alberta – Ontario
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ATTACKS ON TRUSTS – Cont’d

- Ontario
 - *Fraudulent Conveyances Act*
 - Badges of Fraud
 - *Bayerische*

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ATTACKS ON TRUSTS – Cont’d

- Other Attacks on Trusts
 - Sham Trusts
 - Parties give the impression that certain rights and obligations are in place, when in fact they are not.
 - Illusory Trusts
 - Trust deed is an accurate description of the arrangement, but settlor has retained effective control of the trust property (i.e. powers to appoint new trustee & consent power over distributions)
- How to determine whether sham or illusory? - *Mezhprom Bank v. Pugachev*

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ATTACKS ON TRUSTS - Cont'd

- Other Attacks on Trusts
 - Sham Trusts –in Canada
 - Focuses on the intention of the settlor alone (not the shared intention of settlor and trustee).
 - i.e. Is there a true intention to create a trust? – if not then the three certainties are not met and VOID– *Duca Financial Services Credit Union Ltd. V. Bozzo*
 - *Antle v. Canada*
 - List of “red flags” that could indicate sham (and would require explanations from party asserting trust) - *McGoey (Re)*

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ATTACKS ON TRUSTS

- Other Attacks on Trusts
 - TMSF & the Power To Revoke
 - Are Protectors powers fiduciary in nature?
 - TMSF –court ordered that the power to revoke trust “property” be transferred/delegated to receiver?

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DEPENDANTS RELIEF ACTIONS IN MULTIPLE JURISDICTIONS

- Development of the Jurisdiction in the Antipodes
 - New Zealand
 - Australia
- England and Wales
- Canada
 - BC - Wills variation legislation
 - Ontario

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CONFLICT OF LAWS

- Which substantive law governs the Estate, the Trust, the assets or the claim?
- Which court(s) has(ve) jurisdiction?
 - *Jurisdiction simpliciter*
 - Is there a “real and substantial connection” between the chosen forum and the subject matter of the litigation?
 - *Forum conveniens*
 - Is this the most appropriate and convenient forum to try the action?
 - SCC summary of framework for determining jurisdiction – *Goldhar*

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CONFLICT OF LAWS – Cont’d

- Should the court decline jurisdiction?
- Is the court able to grant relief?
- Interaction with foreign courts - particularly with forced heirship

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THANK YOU / QUESTIONS

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