DUTIES AND LIABILITIES OF EXECUTORS, ADMINISTRATORS AND TRUSTEES

As Donovan Waters states in his text *The Law of Trusts in Canada*, there are three fundamental duties which are applicable to all trustees.

"First, no trustee may delegate his office to others; secondly, no trustee may profit personally from his dealings with the trust property, with the beneficiaries, or as a trustee; thirdly, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable man of business administering his own affairs." (1)

To these duties are added those which are specific to the particular trust in question. There are also certain extensions of these basic duties which are well established in their own right. Among such extensions are the "even-hand rule" which requires trustees not to prefer the interests of any one beneficiary or class of beneficiaries over those of any other beneficiary or class of beneficiaries and the duty to account for activities in the administration of the trust.

Let us look first at the duty of care required of a trustee. In Ontario, the Ontario Law Reform Commission published its Report on the Law of Trusts in 1984 and in addition to a great number of recommendations for changes to the present law applicable to trustees, there is a draft of a new Trustee Act. One interesting element of the Report
and draft legislation is the inclusion of a statutory enactment of the duty of care.

As stated in the Report at p. 24 of Volume 1, the common law duty requires that "in conducting the management of the trust, the trustee must exhibit the same diligence and care that an ordinary prudent man of business would exercise in conducting a business that is his own. Whatever he is doing on behalf of the trust and in the discharge of his duties, including the exercise of any ... powers, what is required of him as Dickson J. has stated in Fales, Wohlleben v. Canada Permanent Trust Company [1977] 2 S. C. R. 302, at 318 (1577) 70 D. L. R. (3d) 257, at 270 [1976] 6 W. W. R. 10, at 22 (S. C. C.) is 'vigilance, prudence and sagacity'." Errors of omission as well as of commission will be caught by this test. The standard of care is an objective one and does not look to the skills of the specific trustee as to whether the test has been met but rather to the level of expertise which might be expected of the ordinary prudent man of business. The trustee who is unable to meet this standard and commits a breach of it must look to the provisions of the Trustee Act enabling the Court to excuse a breach of trust where the trustee has acted "honestly and reasonably, and ought fairly to be excused" (2).
While an ordinary, prudent man of business might elect to speculate with some portion of his own funds, it is considered inappropriate for a trustee to do so because he ought not to put the property of others (the beneficiaries) who have not consented at risk. This has led in some instances to extending the formulation of the duty of care to that which an ordinary, prudent man of business would exercise in managing the property of others. It is this version of the rule which the Ontario Law Reform Commission has recommended be adopted as the standard for the ordinary trustee. (3)

There is currently no higher standard of care required of those we would consider to be "professional" trustees. That is the theory, at least. However, by using the provisions available to excuse a breach of trust by one of two or more trustees but not the other or others, the Courts have moved towards a de facto higher standard of care. The classic example of this occurred in Fales, Wohlleben v. Canada Permanent Trust Company where the widow was excused but the Trust Company was not although on my reading of the case it would certainly appear that both the professional and non-professional participated knowingly in events that led to the ultimate loss and it is not at all clear to me that the non-professional trustee
acted any more "reasonably" than the professional trustee or ought to have been excused when the professional trustee was not.

The Ontario Law Reform Commission has recommended that, in addition to meeting the general duty of care, trustees who possess or ought to possess because of their profession, business or calling a higher level of skill will be required by statute to apply it to the trust administration. Accordingly, those who hold themselves out as being more skilled as trustees than the ordinary, prudent man of business and those whom the public is led to believe have such higher skills will be held to a higher standard of care. (4) Professionals, other than trust companies, will be expected to utilize their professional skills, be they legal, accounting or investment, in the conduct of the trust. This may well be appropriate and quite consistent with the development of the common law.

The duty of care has some very practical implications in the fulfilment of the role of executor. Most of the responsibilities flowing from the duty in this context are very straightforward and capable of determination by the application of common sense. One must protect and preserve the assets. Accordingly, it is necessary to check the status and ensure the adequacy of insurance.
on real property, particularly if it will be vacant for some period of time. Necessary maintenance must be attended to. To the extent possible, assets capable of generating income should be invested in an appropriate manner. Assets should be collected and liabilities discharged if they have been determined to be valid. Care should be exercised in ensuring that there are sufficient assets to discharge liabilities before debts other than funeral expenses and Court fees are paid. If unusual assets are involved consideration should be given to ensuring that the management is something the executor is capable of or to retaining an expert to advise the executor. This is particularly applicable to ongoing business operations but may also apply to investments of a more passive nature, especially if one investment constitutes a significant proportion of the estate. Ultimately, the executor must be in a position to account to the beneficiaries. In these and many other aspects of the estate administration the executor must ensure that his actions are those which a prudent business person would take in managing his own affairs and being mindful of the fact that there is an additional moral obligation arising from the interests of others in the managed property.
Investment Powers and the Duty of Care

One area in which the duty of care required of the trustee must be considered is the investment of the trust property. In provinces such as Nova Scotia and Ontario the existence of a statutory category of qualified investments as set out in the relevant Trustee Act might appear to preclude the necessity of the "prudent man of business" standard of care. Perhaps in administering trusts where this "legal list" is applicable all that is required is to select some securities which qualify and no criticism may be made. In my view, this does not suffice. A prudent man of business would review even such qualified investments and make periodic changes to reflect both external economic events and internal developments with respect to the entities in which the investments have been made.

If the trust document specifically authorizes the unlimited category of investments which seem to prevail in most modern trust documents perhaps it would be difficult for a trustee to defend even a carefully managed portfolio invested only as authorized by the Trustee Act. In highly inflationary times it is arguable that limiting participation in equities to 35% of a trust portfolio is not prudent. On the other hand, such unlimited powers of investment cannot be viewed as a licence to speculate.
The prudent man duty of care, particularly if extended to the management of the property of others, would not countenance speculation. This is a particularly easy trap for the unwary trustee to fall into. If she is trying to follow the provisions of the trust document and sees the language of the broad investment clause the trustee might reasonably assume there are no limits. This is one of the reasons the Ontario Law Reform Commission recommended codification of the overriding duty of care.

In Ontario, the Ontario Law Reform Commission has also recommended the abolition of the present statutory provisions with respect to authorized investments and instead proposes that "subject to the basic duty of care and the terms of the trust instrument, trustees should be able to invest trust money in any kind of property". (5) In this way, the prudent man rule would become the sole criterion for determining if an investment is permitted for trustees or not unless the trust document contains an alternative investment provision. It is interesting that if this recommendation is implemented the existing wills limited to Trustee Act investments may end up with a broader choice than many others where the document has stipulated what appeared to be a broader but not unlimited investment Dower such as the investments authorized for
insurance companies.

Another interesting question in the context of investments and the duty of care is whether diversification of investments is required. In 1980 the Honourable Bertha Wilson (then of the Ontario Court of Appeal) expressed the view that a prudent man rule for investments would require diversification in the absence of a very clear direction to the contrary in the trust document. (6) In this context, one must also consider the case of Re Smith [1971] 1 O. R. 584, 16 D. L. R. (3d); affirmed [1971] 2 O. R. 541, 18 D. L. R. (3d) 405 (C. A.) which, while not holding that there was a duty to diversify, nonetheless resulted in the removal of the trustee who had failed to do so.

The Even Hand Rule

In the administration of a trust, trustees are required to "... act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand." (7) This rule applies in many aspects of trust administration,
but is frequently considered in the context of beneficiaries with successive interests - life tenants and remaindermen. A life tenant entitled to income will usually seek the management of the trust property in a manner which will generate the highest level of income. The remainderman entitled to capital on termination of the prior income interest will look for the maximum capital growth. Between these generally conflicting objectives the trustee must find the balance. This particular problem is not relevant for the executor or administrator of an immediately distributable estate who need not concern himself with whether assets generate income or capital growth so long as they are authorized by will or statute, subject to any relevant considerations of prudence. There are no successive beneficiaries so the capital/income distinction is not of concern to those entitled to the trust property.

The rule in *Howe v. Dartmouth* (1802) 7 Ves. Jr. 137, 32 E. R. 56 (Ch.) is the equitable rule requiring, where successive interests are established under a will, the conversion of residuary personality of a non-productive, wasting or unauthorized nature and the investment of the proceeds in authorized investments. Whenever there is a duty to convert either expressly in accordance with a trust document or implied by virtue of the *Howe v. Dartmouth*
rule the trustee ought to determine what income a life tenant would have been entitled to if conversion had taken place and allow this amount as a charge against the proceeds of the actual conversion to be paid to the life tenant. If there is an express power of postponement there is a duty to convert from the date of the testator's death but no time within which the conversion should be effected. If there is no express power to postpone, then conversion should be carried out in the executor's year. The operation of these rules concerning conversion and/or apportionment will assist the trustee in maintaining an even hand between successive beneficiaries in circumstances where it might otherwise be difficult to do so. For a thorough consideration of these rules see Waters, The Law of Trusts in Canada (2nd edition) 1984 at pp. 791-819.

Conflicts of Interest and Duty

"The most fundamental duty a trustee owes to the beneficiaries is the duty of loyalty. This duty ... is imposed because the trust relationship is a fiduciary relationship of the highest order and demands of a trustee that he administer the trust solely in the interest of the beneficiaries. It is this duty which underlies all of his other duties and powers." (8)
A trustee must ensure that his own personal interests do not conflict with his duties as a trustee. However honourable his intentions may be, if the result of a situation where a conflict exists is profit to himself he will be required to account for it.

The duty of loyalty leads to a prohibition against a trustee purchasing assets of the trust unless such purchase is authorized by the trust document or by the Court. The Courts will usually decline to approve such purchases unless they are satisfied that several conditions have been met. As stated by Henry J. in Re Hourigan (1983) 14 E. T. R. 90 at 93, "the rule is quite clear in equity that he is not entitled to [purchase the trust property] except in cases of urgency, willingness to pay at least as much if not more than would be paid by a purchaser at arm's length or, alternatively, that a proper consent of all cestuis que trust is obtained". See also Re Estate of Ronald R. Mitchell (1970) 1 N. S. R. (2d) 922 (N. S. C. A.).

The January 20, 1986, Nova Scotia Court of Appeal decision in Price Waterhouse Ltd. v. MacCulloch which reversed the lower Court's decision reported at 69 N. S. R. (2d) 167, 20 E. T. R. 189 highlights the results to the trustee of this situation. The widow who was one of the executors,
although apparently not a very active one, purchased two pieces of real estate from the estate. She was concurrently negotiating to resell the properties and did so for a substantial profit. The estate subsequently became bankrupt and the trustee in bankruptcy obtained a declaration that the executrix held the proceeds of sale in trust for the trustee in bankruptcy and she was required to account for such proceeds.

While the result of this case seems entirely justified because there appear to be clear elements of bad faith on the part of the executrix, the result might well have been the same had she purchased the property without Court approval intending to occupy it, and received an unexpected unsolicited offer shortly after for a substantial profit.

The consequences of engaging in activities where there is a conflict between the personal interest and duty of a trustee can be very onerous. In Island Realty Investments Ltd. v. Douglas et al, 19 E. T. R. 56, a corporation held property as trustee which was switched for property owned personally by a principal of the corporation. Loss occurred and the corporation and the principals were held liable to the full extent of the loss, notwithstanding the Judge's
conclusion that loss would probably have occurred even if the original property had continued to be held. Stewart L. J. S. C. stated at p. 63, "There was no intention to prejudice the plaintiff or other investors. Nevertheless the switch of security must be held to be a breach of trust ... " and at p. 64, "I regard it as highly probable that a similar result would have occurred had there been no breach of trust." He went on to quote Galt J. in Br. North Amer. Elevator Co. v. Bank of Br. North Amer. (1914) 6 W. W. R. 1444 at 1477, "It is not open to a trustee, or to one acting knowingly in conjunction with him, where there has been a breach of trust and loss has followed, either to tender evidence that if he had strictly followed the directions of the trust an equal or greater loss would have taken place."

Brock v. Cole et al (1983) 13 E. T. R. 235 (Ont. C. A.) and the recent decision (under appeal) in International Corona Resources Ltd. v. Lac Minerals Ltd. are two cases in which the Court held the defendants liable to the full extent of their gain and did not base their determination of damages on the extent of the loss which the plaintiffs could prove. In the latter case Holland J. cites with approval the quote from Re Dawson; Union Fidelity Trustee Co. Ltd. (1966) 84 W. N. (Pt. 1) (N. S. W.) 399 at pp.

"The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.

"The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries, is of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract ... Moreover, the distinction between common-law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account; the effect of such increase would, at common law, be excluded from the computation of damages but in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of..."
restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before."

Another remedy which may be pursued where a trustee has a serious conflict of interest is the removal of the trustee. For example, see Orenstein v. Feldman et al. (1978) 2 E. T. R. 133.

If a testator or settlor knowingly appoints a trustee who will inevitably find himself in a conflict of interest position he would be well advised to provide in the trust document a mechanism for managing the conflict. Perhaps the trustee must disclose the interest and refrain from participating in the decision concerning the conflict situation or perhaps he should be authorized to participate and to profit notwithstanding the duty to the trust. Factors such as the relationship of the trustee to the testator/settlor and any business relationship prior to undertaking the trusteeship will be relevant to the determination of how the conflict should be handled.

Delegation by Trustees of Duties and Powers

Delegatus non potest delegare. A trustee appointed to administer assets beneficially owned by others
is expected to carry out his responsibilities for doing so personally. However, since the decision in *Speight v. Gaunt* (1883) 22 Ch. D. 727, aff'd 9 App. Cos. 1 (H. L.), it has been clear that in certain circumstances it is quite proper to engage agents to assist the trustee with some tasks. The most obvious agents to whom specific functions may be delegated are solicitors, bankers and brokers and indeed some provincial Trustee Acts make reference to these agents.

To determine the circumstances in which delegation may occur one must return to the basic duty of care. Would an ordinary, prudent man of business employ an agent to carry out the particular task for his own account? If so, it is probably appropriate for a trustee to do so. A qualification arises where the exercise of discretionary powers is concerned. Whereas the businessman may choose to put funds in the hands of a friend to disburse to the businessman's children in such circumstances as the friend considers appropriate, the trustee may not make such an arrangement for another to make the decisions as to what income or capital will be advanced to the trust beneficiaries. The judgment of the trustee on this sort of question is presumably one of the reasons he was selected as a trustee and must therefore be exercised by the trustee.
personally.

In selecting agents the prudent businessman would ensure that the agent has the necessary skill and ability to perform the required tasks. Moreover, the agent would be expected to report on activities in order for the businessman to judge the performance of the agent. So for the trustee the employment of agents must be done carefully as to selection and with a reasonable level of supervision of the activities of the agent.

A particularly problematic area for trustees with respect to employing agents has been in the field of investment. It is quite arguable that investment decisions are the very type of discretionary decisions that the testator/settlor contemplated the trustee making personally, albeit with some advice from a broker. This is also an area where there is significant risk of loss whether investments are managed personally or handed over to agents to manage. May a trustee decide that the prudent businessman would employ an investment counsellor to manage the investments, carefully choose such a counsellor and attentively review the results achieved by the counsellor as reported from time to time? Or is this type of delegation prohibited for trustees?
Obviously, these questions only become relevant if there is delegation and loss occurs which puts the trustee at risk of personal liability to make good the loss. However, if trust law is to keep pace with the times it must be recognized that few ordinary, prudent men of business today would manage a significant portfolio of investments on their own. That may have been appropriate when a few bonds and a very few stocks were the only portfolio investments obtainable and inflation was virtually unheard of. In present times it would seem to me that failure to obtain very competent investment advice could be argued to be a breach of the duty of care owed by a trustee. But the trustee must be very cautious in this area and where investment counsellors are making the actual decisions and giving the instructions for purchases and sales of securities it is incumbent on the trustee to monitor the progress very carefully and frequently. Moreover, the trustee should set the investment policy and establish clear parameters within which the counsellor may operate, keeping in mind the duty of care and the requirement to maintain an even hand among the income and capital beneficiaries.

In some less controversial areas of delegation the main point which executors and trustees should
keep in mind is that if they delegate to others some of their administrative functions such as preparation of accounts in a simple estate or handling the day-to-day banking transactions they must be prepared to give up some of the compensation they would otherwise receive in order to pay the agents for these services. The trust estate should only be expected to bear the additional costs of agents where clearly it was necessary to acquire the expertise of the agent in question. It would be my submission that for preparation of all but the simplest of tax returns experts should be obtained at the expense of the estate and further that the charges of investment counsellors should be paid in addition to the executor's/trustee's compensation if the executor/ trustee is, as I have suggested, establishing the investment policy and monitoring the results carefully and frequently.

One other point which is important in the context of delegation is the frequently occurring situation where trustees delegate most of their responsibilities to one of their number. The same principles concerning the appointment and supervision of agents should apply as if the trustee were not a trustee. The trustees who wish to delegate should establish policy and supervise as well as being satisfied that the trustee to whom they intend to delegate has the necessary skills. Although
the delegating trustees may hope to be excused from liability should loss occur, they should not count on it. See MacDonald v. Hauer [1973] 3 W. W. R. 484, varied on appeal, (1977) 72 D. L. R. (3d) 110 and also Re Hall et al and Hall (April 27, 1983) B. C. S. C. 20 A. C. W. S.
FOOTNOTES


(2) Trustee Act, R. S. N. S. 1967, Chapter 317, Section 62; Trustee Act, R. S. O. 1980, c. 512, Section 35

(3) Report on the Law of Trusts (1984), Recommendation No. 1 at Page 79 of Volume 1 as follows:
1. The revised Trustee Act should set out expressly the general duty of care governing the exercise of power and discharge of duty by trustees. Accordingly, the revised Trustee Act should provide that, in the discharge of their duties and the exercise of their powers, whether the duty or power is created by law or the trust instrument, trustees shall exercise that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

(4) Ibid., Recommendation No. 3 at Page 79 of Volume 1 as follows:
3. "Professional" trustees, that is, trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, should employ that particular level of knowledge or skill in the administration of the trust, in addition to the general duty of care applicable to all trustees as provided in Recommendation 1.

(5) Ibid., Recommendation No. 2 at Page 304 of Volume 1

(6) Wilson, Trustees' Investment Powers, Law Society of
(7) Waters, *op. cit.*, Note 1, at p. 787

Appendix of Cases

Re Berry (1981), 10 E.T.R. 152 (Ont. H.C.): In this case, part of the estate remained undistributed. Action pending against personal representatives for large amount of damages in respect of wrongs alleged to have been committed by the deceased. The pending action was one of substance and if successful, would possibly have the result that insufficient assets would be left in the estate to pay all bequests. The issue was whether the personal representative could, pending final disposition of the action, pay money out of the estate pursuant to the terms of the will. Held: in these circumstances, the Public Trustee could not pay out the corpus or income of the estate pursuant to the provisions of the will without attracting liability for doing so in the event of a deficiency unless directed to do so by the Court after full disclosure. The Court, moreover, did not make any such direction.

Re McCarthy (1981), 10 E.T.R. 261 (P.E.I.S.C.): By her will, the testatrix appointed her executrix and gave the residue of her estate "in equal shares to and among my sisters" with a substitutionary provision in favour of children of any deceased sister. Included in the residue of the testatrix's estate were 62 items of jewellery. The executrix obtained an appraisal of each item of jewellery and also made enquiries as to the methods of selling the jewellery. She then exercised her discretion and decided to make an in specie distribution of the jewellery. The P.E.I. Supreme Court held that the executrix had acted properly in making an in specie distribution of the jewellery. The test was whether a reasonable and honest person might have come to the same conclusion, and that test was satisfied: she had acted in good faith and in the circumstances she had acted prudently and providently.

Re Lotzkar; Montreal Trust Company of Canada v. James et al. (1985), 19 E.T.R. 135 (B.C.S.C.): The petitioner trust company, executor of the estate of the deceased applied to the Court for power to lease a parcel of land forming part of the estate, a power not given to it by the terms of the will. The petition was refused. The respondents sought an order...
refusing the petitioner its costs and asking that the respondents' costs be paid by the petitioner, not from the estate but from its own resources. The Court refused the application mainly because the postponement of distribution for the 15-year period of the lease represented a drastic departure from the testator's intention. Held: the petitioner was not entitled to any costs of the application for these proceedings; the respondents were entitled to their costs payable by the trustee, but not from the estate. It is important that an executor or a trustee not be deterred from seeking the advice and direction of the Court in a matter where there is room for serious doubt or difference of opinion. However, that did not apply in the present case: the proposal was improvident for the beneficiaries, and the application was unnecessary and ill-advised. (See also Re Lotzkar; Montreal Trust Company of Canada v. James (1984), 17 E.T.R. 201 (B.C.S.C.), where the Court refused to invoke its emergency jurisdiction to vary the powers of the trustees for the reason that the powers sought were too radical to be permitted).

Re Cocomile; Mintz v. Adamo et al. (1985), 21 E.T.R. 113 (Ont. H.C.). Executor applied to court for advice and directions as to whether he could settle claim against estate where there were numerous creditors and a possibility the estate would be insolvent. Held: Refers to test of care, skill and prudence of prudent man of discretion and intelligence acting in own affairs and requirement of vigilance, prudence and sagacity. Settlement would meet this Test.

Re Brander (1986), 43 Alta. L.R. 2d) 38 (Alts Surr. Ct.). The executor failed to realize on house which was major asset of estate in falling real estate market between 1981 and 1984. Sold in 1984 at substantial loss from date of death value. Held: Executor not negligent in decision not to sell due to poor market conditions but liable for lost rent plus interest because had not rented for three year period and only awarded nominal executor's compensation.
Re Proniuk (1984), 18 E.T.R. 31 (Alts. Surr.Ct.): In the administration of an estate, the executors had failed to invest certain estate funds. Held: the executors were liable to pay to the estate an amount in respect of interest lost to the estate by reason of their lack of care and diligence and consequent non-investment of estate funds. The funds of the estate being under the control of the estate solicitors in their trust account, the Court was of the opinion that it was their duty to maintain sufficient diligence to invest those funds pending distribution.

Re Canada Permanent Trust Company and McGregor (1980), 30 O.R. (2d) 146 (sub. nom. Re McGregor; Canada Permanent Trust Company v. McGregor) 7 E.T.R. 137, 115 D.L.R. (3d) 697 (C.A.): The equitable rules that require executors to convert unproductive assets and apportion the proceeds between capital and income and the underlying equitable doctrine of maintaining an even hand between a life tenant and remainder man will yield to a contrary intention expressed by the testator in his will.

Re Poche; Poche v. Pihera (1983), 16 E.T.R. 68, 50 A.R. 264 (sub. nom. Poche v. Poche), 6 D.L.R. (4d) 40 (sub. nom. Re Poche), add’l reasons at (1984), 6 D.L.R. (4d) 40 at 56 (S.C.): The stock portfolio of the estate consisted primarily of oil and gas stocks with very low dividend rate. The life tenant was not receiving reasonable income from the estate because the executrix refused to sell any stocks. The life tenant claimed damages from the executrix under the Administration of Estates Act of Alberta. Held: Claim allowed. Failure of the executrix to convert stocks into income producing assets constituted a breach of the duty to maintain an even hand between the life tenant and the remainder man. The Court found that the provisions in the will allowing the executrix to postpone conversion and to retain assets was subservient to the duty of maintaining an even hand.

Re Driscoll (1983), 40 O.R. (2d) 744, 15 E.T.R. 34 (H.C.): In this case, the youngest son and his wife constituted two of the three
executors and trustees appointed under father's will. The youngest son had a vested interest in half of the residue under the will and would inherit the entire residue if the trust property was not sold during the oldest son's lifetime. The oldest son was given a power to demand sale of the trust property. The trustees had a duty to keep an even hand between the beneficiaries: because the youngest son had a conflict of interest as trustee, he was entitled to request either court supervision of sale or appointment of disinterested trustees.

Re Liberal Petroleums Trust (1985), 39 Alta.L.R. (2d) 357 (Q.B.): Where the Act and the trust deed were silent as to what class of beneficiary should bear the tax burden, the trustee was required to deduct tax from the total income of the trust and distribute the remaining net income equally between resident and non-resident beneficiaries.

Re Hopkins (1982), 13 E.T.R. 30 (Ont.C.A.): Where there is a duty to retain with a power to convert, there is an obligation to act in an even handed manner in carrying out the duty. In this case, the ultimate entitlement to property in the estate potentially depended on the manner of exercise by trustees of discretionary powers with respect to sale or retention of the assets of the estate.

Re Davis (1983), 14 E.T.R. 83 (Ont.C.A.): The trustee was given a wide discretionary power over distribution of capital and income. Hostility developed between the beneficiaries and the trustee; the cause of the hostility was no more the fault of the trustee than the beneficiaries. However, where hostility and conflict prevent the objective exercise of a discretionary power, replacement of the trustee is appropriate.

Re Billes (1983), 14 E.T.R. 247 (Ont. H.C.): In this case, the trustees had a power to convert and a power to retain assets. The trustees were unable to agree whether to retain or to sell certain shares. Held: the will conferred on the trustees an absolute power to convert
assets as well as an absolute power to retain them. They were required to exercise one of these powers and to be unanimous in whichever course was chosen. The trustees were not in unanimous agreement and deadlock existed. The Court, accordingly, had jurisdiction and, indeed, a duty to intervene and break the deadlock. In all the circumstances of the case, the appropriate course of action was a sale of the shares, and the Court, accordingly, ordered that the trustees sell those shares when the opportunity for an advantageous and beneficial sale for them arose, and the trustees were further ordered to actively seek such an opportunity.

Lavoie v. Lavoie, Lavoie v. Trust General et al. (1981), 11 E.T.R. 61 (Que.Sup.Ct., Dist. of Montreal): Will directing executors to pay beneficiary his quarter share in estate in annual instalments, with remaining capital to be transferred at time of last payment. Clause 7 of the testator's will allowed the executors to advance any part of the capital to the beneficiary in "urgent need". Under the will, the executors were to be the sole judges of any alleged state of "urgent need". Held: the Court could not declare that the petitioner was in a state of "urgent need", but it would declare that the executors could validly act on the request made to them by the petitioner.

Jones v. Public Trustee et al. (1982), 12 E.T.R. 83 (B.C.S.C.): The administratrix distributing the property of the estate sought directions from the Court as to the efforts to be made in her search for the next-of-kin of the deceased. Held: the search for the next-of-kin was a matter which the administratrix must herself pursue; it was not appropriate to give directions as to the efforts that should be made by her.

Hinton v. Canada Permanent Trust Company (1979), 5 E.T.R. 117 (Ont. H.C.): The principle that a court could only interfere with the trustees' exercise of discretion where failure to do so would be manifestly prejudicial to the interest of the beneficiaries was
inapplicable where the failure to interfere would have the effect of frustrating the clear intention of the testatrix.

Re Price (1979), 5 E.T.R. 194 (Ont. H.C.): In a case of a deadlock between trustees with respect to the exercise of their discretion, judicial intervention was justified where a failure to intervene would be manifestly prejudicial to the interest of the beneficiaries.

Garland v. Clarke (1982), 41 N. and P.E.I.R. 75, 119 A.P.R.R. 75 (Nfld. Dist. Ct.): where the defendant had used the plaintiff's trust funds for the purpose of enhancing the value of his own real estate, it was held that his attempt to derive benefit from his fiduciary position disqualified him from immunity under the Trustee Act.

Canada Permanent Trust Company v. Stairs et al. (1969), 2 N.S.R. 1965-69 134 (ICS. S.C.): where the trustee voted shares of the trust in favour of a resolution for the trustee's personal benefit, it was held that the trustee was not permitted to improve his position at the expense of the beneficiaries. Thus, the court granted an injunction restraining the trustee from acting on the resolution.

Re Hall et al. and Hall (April 27, 1983), B.C. S.C., 20 A.C.W.S.: the trustee signed on behalf of all parties the necessary resolutions and caused the amalgamation of certain companies to another company. As a result of such merger, he would appear to have gained certain shareholdings at the expense of the estate and the other shareholders. The share structure benefited the trustee to the detriment of the estate, which received a smaller amount of dividends. Held: a clear conflict of interest and a duty was shown, and the trustee was removed as trustee of the estate.