NON-CHARITABLE PURPOSE TRUSTS IN COMMON LAW CANADA

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1. A Purpose Trust Whether the Object is Charitable or Non-Charitable

Imagine a lawyer asked by an intending testator to draft a trust to further a purpose that does not fall within the confining definition of charity. And there is quite a variety in the number of things that the will-maker may wish to do. For example, it may be to assist an amateur drama group whose members change from time to time, to maintain his or her showcase house garden until the property title is transferred into the devisee's name, to finance the renovation of a 'tired' clubhouse building, or to preserve a privately owned vintage automobile and its original fittings. Heritage houses in private hands, wallpapered and sometimes furnished in period, can attract the same devotion. The writer recalls a testator who, as a book lover, rued the passing of small secondhand bookshops in his community and wished to create a trust to make loans on a discretionary basis to assist small local booksellers. Another wished to fund research among local enthusiasts in the cultivation of bonsai trees, a lifelong interest of the testator. And then there was the testator who wanted his trustees to maintain his golf clubs in top class condition, and to make them available at discretion for use by promising young players who could not afford the very best clubs. More frequently the trust is to finance the retention and care in present and future family hands of an art, photograph, *objets d'art*, stamp or coin collection. The contents of a wine cellar may be similarly treasured. The intended trust property, to be maintained in correct temperature and humidity settings, may be a large family bible, of considerable antiquity, with brass fittings, brought long ago from a New England state or 'the old country'. As for dispositions to take effect during the client's lifetime, the

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instruction may be to prepare an *inter vivos* trust to provide with a given fund for the upkeep of a community meeting facility, or the furtherance of a street project (*e.g.*, early parental death and a young family in need), with which in either case the client has been keenly involved.

None of these trust objects is a charitable purpose, though in fact these types of purpose can be either of a near-charitable (not-for-profit) public character or be purely personal in the object that is to be furthered.

If the desired trust object is not charitable, or otherwise approved by case law, it may be possible instead, though often cumbersome, to attach conditions to gifts.[1] On occasion the formation of a corporation to carry out the *inter vivos* transferor's purpose is not unrealistic. But as a mode of discharging the intended purpose, especially in a will, it is the simplicity, low cost, and prolongation of the gift on the terms of a trust that particularly attract the client.

Research by the lawyer usually reveals that today's intended trust object is not within the list of nineteenth century 'anomalous' valid non-charitable trusts, and, legislation in Canada and Canadian case law being of little assistance beyond this point,[2] English materials are examined. Is there yet a way of drafting a trust with the object desired that will be upheld in a Canadian court? Though sometimes doubted because they are 'out of line', English cases like *Drummond (Re)*[3] suggest that for some purposes there are possibilities.

There is unanimous acceptance that the object of any valid trust for the benefit of persons or the furtherance of purposes must be lawful and in conformity with public policy. The object must be certain in terms of who is to benefit (and to what extent), or the purpose that is to be furthered, though court assistance is available if the uncertain purpose is nevertheless within the confines of 'charity'. It is also

1. It is possible also to have a gift to charity A of an interest which is defeasible or determinable on a non-charitable purpose no longer being discharged by A, with a gift over to charity B. Of course, this assumes that charity A has the power to carry out such a purpose, and so to satisfy the condition. But testators are not often attracted by these 'trips around the houses', as one testator put it to the present writer. As to powers, see, *post*, para. 2(c).
2. Analysis of this subject from a Canadian perspective can be found in D.W.M. Waters, M.R. Gillen, L.D. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005), see c. 14, Part II Purpose Trusts and Charity.
3. [1914] 2 Ch. 90, [1914-15] All E.R. Rep. 223. This was a gift by way of trust for an unincorporated school alumni association. The court noted that there was no perpetuity problem, and that the association committee was empowered to expend the capital of the gift when and as it pleased. Trust held valid.

necessary that the court be able to determine whether the trust is being properly carried out,[4] and that no perpetuity violation exists.

Assuming each of these basic requirements is met, the issue under consideration here is the law's attitude towards the content of the particular purpose the testator or settlor intends shall be furthered if that purpose is for the public but does not fall within the particular jurisdiction's understanding of "charity", or it is private in nature.

2. The Approach in England

(1) The traditional view

If a glance is taken at *Underhill and Hayton*,[5] a leading English trusts text frequently cited by the courts, it will be found that English law clearly discourages anyone who would draft a non-charitable purpose trust. "[T]he lack of someone to enforce [such] a trust is fatal to its validity save in special anomalous cases that are not to be extended."[6] Checking into that statement, the reader discovers that the judgments of the Court of Appeal in *Endacott (Re)*,[7] as a leading authority on the subject, unequivocally say that the old 'anomalous' first instance cases — allowing trusts for the maintenance of a specific animal, a gravestone or war memorial, for the furtherance of fox hunting, and for the private saying of masses for the dead — constitute a closed list. Harman L.J.[8] was very clear. "[T]here have been decisions at times which are not really to be satisfactorily classified, but are perhaps occasions when Homer has nodded. [A]t any rate these cases stand by themselves and ought not to be increased in number, nor indeed followed, except where the one is exactly like another. Whether it would be better that some authority now should say those . . . troublesome, anomalous and aberrant . . . cases were wrong, this perhaps is not the moment to consider."

The traditional view holds that every trust must be for the benefit of legal persons. The trustee's obligations (the 'trusts') are enforced by the ascertained beneficiary; that is the essence of the trust

4. For example, is a building being used "for religious purposes" if a humanist group meets there for some part of the time? If under the terms of the trust the opinion of a particular person is binding on this question, the courts can rule whether or not the trustees are acting in conformity with the trust terms.
5. D. Hayton, P. Matthews, and C. Mitchell, eds., *Underhill and Hayton: Law of Trusts and Trustees*, 17th ed. (London: LexisNexis Butterworths, 2006).
6. *Ibid.*, para. 1.74.
7. [1960] Ch. 232, [1959] 3 All E.R. 562. A testamentary trust "for the purpose of providing some useful memorial to myself." Held void.
8. *Supra*, at pp. 250-251 (Ch.).

relationship. And the contingent as well as the vested beneficiary has a proprietary interest in the trust property. Even in the case of a discretionary trust, the beneficiary awaiting exercise by the trustee of the discretion has a right to future trustee selection for proprietary gain, but until he is selected not a proprietary interest. It is only by acting together that all the discretionary beneficiaries together may be able to assert such an interest.[9] Charitable trusts as trusts to further a purpose for the benefit of the public are an exception, because as trusts for the public's benefit they are enforced by the Attorney General acting on behalf of the Crown in its *parens patriae* capacity. This, the argument runs, is evidently a unique situation.

Enforcement of the trust by a beneficiary (or two or more beneficiaries together) is a concomitant feature of the beneficiary principle. This principle is generally regarded as intended by Grant M.R. in *Morice v. Bishop of Durham*.[10] "Every other trust [than a trust for a charitable purpose] must have a definite object. There must be somebody, in whose favour the court can decree performance."[11] The Master of the Rolls was in fact addressing the need for certainty of object in all but charitable trusts, as was Lord Parker in *Bowman v. Secular Society*.[12] However, Grant M.R.'s words have been read as a requirement that a beneficiary be present to enforce the trustee's obligation.[13] The beneficiary principle assumed in England an increasingly axiomatic nature as the twentieth century progressed. *Endacott (Re)* in 1959 very much echoed its thinking.[14]

9. The rule in *Saunders v. Vautier* (1841), 4 Beav. 115, 49 E.R. 282, affd Cr. & Ph. 240, 41 E.R. 482 (Ch.), applies to a discretionary trust (or trust power), but only when all the named or described beneficiaries are the sole individuals entitled to the trust property. No beneficiary has an individual proprietary interest. Together they claim the property. However, in the case of a mere power the proprietary interests in the property are vested in the person or persons who take in default of appointment. So no possible appointee could have any such interest.
10. (1804), 9 Ves. Jun. 399 at p. 404, 32 E.R. 656 at p. 658.
11. The will read, "in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve." On appeal Lord Eldon upheld the decision that this was invalid. This went beyond what is charitable: (1805), 10 Ves. Jun. 522, 32 E.R. 947.
12. [1917] A.C. 406, 441. See also *Price (Re)*, [1943] 2 All E.R. 505, at pp. 509-10, where the court considered that certainty of object was the key element in connection with the validation of non-charitable trust purposes.
13. See *Underhill and Hayton*, *op. cit.*, footnote 5, at paras. 8.144 to 8.167.
14. The same year in *Leahy v. Att. Gen. for N.S.W.*, [1959] A.C. 457, [1959] 2 All E.R. 300, the Privy Council had said precisely the same thing.

(2) Another English view

However, a more relaxed position was taken in *Denley's Trust Deed (Re)*[15] ten years later. Again the problem was with non-charitable purpose trusts, but the purpose was not included in the 'anomalous' list. The case concerned a trust that provided land as a sports ground. It was primarily for the benefit of employees of a named company, and secondarily for the benefit of such other persons as the trustees approved. Goff J.'s approach adds to the purposes that the law permits, and does so by way of a criterion or test. If the object of a trust, though delineated as a purpose, is "directly or indirectly for the benefit of an individual or individuals",[16] and that individual or those individuals are ascertained or ascertainable,[17] he said, any one of them should be regarded as having standing to enforce the trust. In fact, he added, because there are ascertained or ascertainable persons benefiting from the trust who will enforce the trust, the criterion does not violate "the mischief of the beneficiary principle."[18] The *Denley (Re)* trust instrument stated that the employees of the named corporation were "entitled to the use and enjoyment of the land". The employees had standing to sue for trustee breach, and, it was held, this satisfied the beneficiary principle.

It is important to note that this alternative view does not claim that all non-charitable purposes that satisfy the basic requirements, earlier described, are valid. Some will be valid; others will not. The test as to whether there is validity involves construction of the instrument (or words used). If the trust object is at first sight expressed as a purpose, but is primarily for the benefit of persons, and those persons are ascertained or ascertainable, they have standing to enforce the trust. If on the other hand the purpose is predominantly "abstract or impersonal", as Goff J. said,[19] and any persons who are to benefit from its furtherance are of secondary significance, then the trust is void. The objection is not with the trust object; it is that in these

15. [1969] 1 Ch. 373, [1968] 3 All E.R. 65.
16. *Ibid.*, at p. 383.
17. *Ibid.*, at p. 386.
18. *Ibid.*, at p. 384.
19. *Ibid.*, at p. 383. The beneficiary principle validates a trust if it is "for the benefit of individuals", and renders void only "purpose or object trusts which are abstract or impersonal." The benefit of individuals in these abstract or impersonal cases "is so indirect or intangible or [the trust] is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust." Because the *Denley* trust was not of the "abstract or impersonal" character, Goff J. stopped there; those cases, he said, "can be considered if and when they arise".

instances of the abstract or impersonal "there is no beneficiary or *cestui que trust*."[20] There is therefore no one who has the requisite *locus standi*.

Underhill and Hayton supplies instances in English case law of these two categories of validity and invalidity:

> Within the former category will be trusts providing a maintenance fund for historic buildings and gardens owned by trustees for the benefit of beneficiaries, or providing a sinking fund for repairs to a block of flats for the benefit of lessees or providing for the education of employees' children. Within the latter category will be trusts for furthering the overriding purposes of a political party or of a non-charitable religious order or of an unincorporated association.[21]

It will be noticed that in the examples of 'the former category' the purpose readily reveals an intended benefit to ascertainable persons. But observe the stark contrast in *Underhill and Hayton*'s two sets of examples. In 'the latter category' the language of the trust instrument is not directly to provide benefit to a non-charitable organization, but to its purposes or description. Does that mean that the maintenance of a showcase private garden is simply a purpose, while assisting small bookselling businesses is a trust for persons? Or can we say the residents of the house, if not the more remote passers by, indirectly benefit from seeing daily the well-kept garden? As for assisting small businesses, is that "impersonal"?

Nevertheless, however elusive in practice this distinction may be between valid and invalid non-charitable purpose trusts, *Denley's Trust Deed (Re)* does bring within the range of validity further such trusts. Yet some caution is necessary, because the decision appears to retain in England an uncertain status.

It was followed in *Lipinski (Re)*,[22] where the trust was for the Hull Judeans (Maccabi) Association to be used solely in constructing and improving new buildings for the Association. And in *Northern Developments Holdings Ltd. (Re)*[23] Megarry V.-C. considered the trust in question to be "the *Quistclose* type of trust".[24] It was established for the benefit of certain creditors but not so as to vest a beneficial interest in any of them. On the other hand, *Denley's (Re)* reasoning was criticized and not followed in *Grant's Will Trusts*

20. *Ibid.*
21. *Underhill and Hayton*, *op. cit.*, footnote 5, at para. 8.155.
22. [1976] Ch. 235.
23. (unreported, October 6, 1978). Considered in *Carreras Rothmans Ltd. v. Freeman Mathews Treasure Ltd.*, [1985] 1 Ch. 207 at pp. 222-23, [1985] 1 All E.R. 155 at p. 166.
24. *Ibid.*, at p. 223.

(Re).[25] Vinelott J. in that case, and most commentators, interpret the *Denley* trust as being simply a trust for individuals (and therefore not a non-charitable purpose trust at all). Vinelott J. expressly considered[26] the *Denley* facts to be indistinguishable from a trust to distribute income at the trustees' discretion in favour of and among a class of persons defined by relationship to the settlor (in this case, an employer).

Gifts to unincorporated associations, a not infrequent manner of organization in England, less so in common law Canada, may be expressed as being for a purpose. It may be the purpose or one of the purposes of the association, or some activity within its powers the association is to undertake. However, though an association is not a legal person, and the purpose or purposes may not be charitable, this gift is not on the 'anomalous' list. Under English case law a gift to or in trust for such an association is valid only if it can be construed as a gift to the existing members,[27] or to the members for the time being subject to the rules of the association.[28] In both instances it is a crucial element that the members have vested property (beneficial) interests, and that together they can at any time reallocate or dispose of the association's assets, including the gifted trust property, as they choose. They can divide it or its proceeds of sale between themselves, if they wish. Unless the association is charitable, however, the gift is invalid if by its terms or the association's rules it is not for the disposal of the members, whether they be existing members or members from time to time, but for the furtherance of a purpose or purposes. It is then a non-charitable purpose trust.

In the context of unincorporated associations *Denley (Re)* is perceived of in English courts as providing a third manner of validation, should the gift be neither to existing association members, nor, as it was held to be in *Horley Town Football Club (Re)*,[29] to members from time to time subject to the association rules. The gift may ostensibly be for a purpose or purposes, *Denley (Re)* is understood to say, but when analyzed it is a gift for ascertained or ascertainable individuals who are to benefit from the carrying out of

25. [1980] 1 W.L.R. 360, [1979] 3 All E.R. 359. A would-be testamentary gift to a "Labour Party [constituency] property committee" for the benefit of the constituency headquarters.
26. *Ibid.*, pp. 370-71 (W.L.R.).
27. As joint tenants or (in Canadian authority) as tenants in common.
28. These rules in law are regarded as having been contractually agreed between the members.
29. [2006] W.T.L.R. 1817 (Ch.). It was consequently held that the Club's trustees held the gift on a bare trust for the members having beneficial proprietary interests.

the purpose. However, there is disagreement among courts and commentators as to whether *Denley (Re)* decides these individuals may constitute or include persons who enjoy one or more association advantages but who are not themselves members with proprietary interests in the association's trust-held assets.[30]

From a Canadian perspective it might be said that the question arising out of *Denley (Re)* of how 'indirect' a benefit can be before the expressed purpose assumes an abstract or impersonal character is part of the general difficulty of distinguishing between 'person trusts' and 'purpose trusts'. That is likely to be any drafter's concern. Also, when the dispositive instrument has already taken effect, so much turns upon the language chosen by the settlor when the distinction is being made between 'person' and 'purpose' trusts. Given the uncontrived wording of so many testamentary and even *inter vivos* dispositions that cross one's desk, construction of the disposition — whether by the court or counsel's opinion — can develop a linguistic artificiality of its own, almost removed from what was the actual intent.

A doctrinal problem with *Denley's Trust Deed (Re)* is what 'for the benefit of' is intended to mean. The trust beneficiary is widely recognized in the common law system as one who has an equitable proprietary interest in the trust property.[31] And that is the generally received implication of the so-called beneficiary principle. From this proprietary interest of the trust beneficiary, as previously mentioned, springs the rule in *Saunders v. Vautier*.[32] Though the employees of the corporation in *Denley (Re)* were held to have enforcement powers, whether they had or needed to have proprietary interests was, as observed above, not discussed by the court.[33] Critics have zeroed in on this characteristic of the *Denley* non-charitable trust. As interpreted by *Denley (Re)*, the beneficiary principle seems to mean the enforceability of the trust. Proponents of the traditional view — *i.e.*, there are only two types of trust; trusts for individuals and

30. It seems more likely that Goff J. intended to include 'benefiting' persons who have no proprietary interest, but his silence as to the significance of the proprietary nature of a trust beneficiary's interest has led traditionalists to say he could not have intended such an inclusion.
31. G. Thomas and A. Hudson, *The Law of Trusts* (Oxford: O.U.P., 2004), at paras. 6.13 to 6.21.
32. See, *supra*, footnote 9, and the text to that note.
33. The trustee power to select others to benefit was but a mere power, so those individuals clearly could not terminate the trust. The employees for their part would have the right of termination only if they could be said to constitute a class within a discretionary trust setting, as Vinelott J. observed in *Grant's Will Trusts (Re)*. See, *supra*, text to footnote 26.

exceptionally charitable purpose trusts — therefore think the decision is wrong, or that, if valid, that it is because it is simply a 'person' trust. Others, given the historic interpretation of the beneficiary principle and the apparent absence in *Denley* of a proprietary interest in those who derived benefit, simply remain puzzled. *Lewin* feels able to say only that the *Denley* trust is "notable".[34] In *Horley Town Football Club (Re)*[35] the court appears to have been relieved when it found it did not have to consider the applicability of *Denley (Re)*. Referring to the *Saunders v. Vautier* aspect of beneficial proprietary interests, it stated, "there are difficulties with regard to termination of such a trust which make it an unsafe basis for decision".

(3) Trust and power

If the English court, whether of the traditional or the *Denley (Re)* persuasion, will not recognize a non-charitable purpose in trust form there is a further question. Does case law allow the court to read a trust as if it were a grant of a power? If so, it is the usual understanding of the advocates of that approach that the trustees, having title to the fund assets, are not obligated but would have the authority to carry out the purpose. Perpetuity legislation in five Canadian jurisdictions provides that non-charitable trusts with 'specific' objects must take effect as powers, but six of the common law provinces are silent on the subject.[36]

In terms of the case law this approach is also questionable. If property is transferred *inter vivos* for a void purpose trust, the transferee trustee will hold the property on resulting trust for the transferor, though it has certainly been suggested in a first instance English court that to interpret a would-be trust as a power is feasible.[37] However, as *Underhill and Hayton* point out,[38] this first instance suggestion awaits appellate approval. Moreover, an express or implied settlor-conferred authority must exist before it is possible to construe a trust in the alternative as a power. And even making that statement shows how seldom this will be possible. A power cannot be

34. J. Mowbray *et al.*, *Lewin on Trusts*, 18th ed. (London: Sweet & Maxwell, 2008), at paras. 4-39 to 4-43. This text takes a neutral position on the subject of non-charitable trusts.
35. *Supra*, footnote 29, at para. 131.
36. See *Waters, op. cit.*, footnote 2, at p. 632, and pp. 348-351. This legislation is considered later under section 7 of this article.
37. *Underhill and Hayton, op. cit.*, footnote 5, at para. 8.156. The power would last until it is revoked or the death of the creator of the power.
38. *Ibid.*, at para. 8.144.

inferred if the language of the asset transferor clearly imposes upon the transferee solely an obligation to carry out the purpose,[39] and in most cases this is likely to be the case. So far as a void testamentary purpose trust is concerned, the alternative power construction appears impossible. Some person will be designated to take on the failure of the trust, and in those circumstances the will can hardly be said to have impliedly extended to such person any obligation (or power) at all. The trust has simply failed.

On the other hand there is nothing to prevent the testator[40] or settlor conveying the intended property on trust for the testator's estate or the settlor, but conferring on the trustee an express power to further a non-charitable purpose.[41] The trustee is not in a position to take the property for himself, as could a donee. But here there is a problem. The only person with an interest in the property would be the gift-over donee, and dutiful exercise of the power is not likely to be a concern of such a donee. Power is a poor substitute for a trust.

3. The Approach in Australia and New Zealand

In Australia, which also on settlement received English law, the same difficulties continue to exist with non-charitable purpose trusts. And the distinction between the person who may enforce a trust and a trust beneficiary, *i.e.*, one with a proprietary interest as a vested or contingent beneficiary, has been underlined. However, it is enforcement that seems again to be the principal concern. *Jacob's Law of Trusts in Australia*[42] comments: "purpose trusts, even when they are valid[43] are only upheld to a limited extent. Nobody can insist that they be performed. The trustees may or may not perform them at their option, but they can neither be compelled to perform them nor be prevented from doing so." *Endacott (Re)* is again cited as a leading authority.[44]

Sometimes, as *Jacob's* observes of the English and Commonwealth case authorities,[45] the judicial explanation for declaring void the

39. *Ibid.*, at para. 1.74.
40. *Sed quaere* whether there may be a delegation of the power of testamentary disposition. Except in Australia, however, this has not been a problem in Commonwealth courts.
41. See Goff J. in *Denley's Trust Deed (Re)*, *supra*, footnote 15, at p. 387 (Ch.).
42. J.D. Heydon and M.J. Leeming, eds., *Jacob's Law of Trusts in Australia*, 7th ed. (Sydney: LexisNexis, 2006), at para. 1108.
43. A reference to the 'anomalous' trusts, part of the reception of English law in Australia.
44. See also another leading Australian work, H.A.J. Ford and A.W. Lee, *Principles of the Law of Trusts* (Australia: Thomson Law Book, looseleaf), at paras. 5230 to 5260.

particular trust is that there is no certainty of object, because whatever is to be achieved is too vaguely expressed. Or the trust purpose may be illegal, against public policy, or capricious. It may also be that the perpetuity period (operating as a rule of duration) is violated. But, as has been noted also in this article, these are objections that are not restricted to non-charitable purpose trusts, though a number of would-be non-charitable trusts have been held invalid for one or more of these reasons. The essential objection, concludes *Jacob's*, is 'the beneficiary principle' that "[t]here must be somebody in whose favour the court can decree performance."[46] And, if that means that any person who has a direct or indirect interest in the trust may enforce it, *Jacob's* questions who this includes other than a trust beneficiary. Is the person included who takes by way of a gift over on failure of the trust? It surely does not include a person who would incidentally derive benefit, like the person who enjoys looking at the showcase garden of the deceased testator.[47] If it means there must be a trust beneficiary in the commonly understood sense, then the 'anomalous' trusts of non-charitable validity are indeed an exception. They are "impossible of justification".[48] Perhaps they are wrongly decided, *Jacob's* implies, but are rescued from that fate by the absence of challenge over the years.

Jacob's therefore regards *Denley's Trust Deed (Re)* as "contrary to the authorities and difficult to justify in principle",[49] and in Australia its weight is lessened by three subsequent decisions[50] that consider mention of persons[51] in the trust objects as being ineffective to make a purpose trust valid.[52] It therefore seems likely to be the current Australian conclusion, sharing the traditional view in England, that a trust to be valid is either within the 'anomalous' list or it is a trust for the benefit of individual trust beneficiaries.

New Zealand is another significant Commonwealth jurisdiction that, like common law Canada, took its legal doctrinal base from

45. Heydon and Leeming, *op. cit.*, footnote 42, at paras. 1106 to 1107.
46. *Morice v. Bishop of Durham*, *supra*, footnote 10.
47. See, *supra*, p. 1, first para.
48. *Supra*, footnote 44, at para. 1107.
49. *Ibid.*, at para. 1104.
50. *Flavel (Re)*, [1969] 1 W.L.R. 444, [1969] 2 All E.R. 232; *Tidex v. Trustees Executors & Agency Co. Ltd.*, [1971] 2 N.S.W.L.R. 453, at p. 465; and *Strathalbyn Show Jumping Club Inc. v. Mayes* (2001), 79 S.A.S.R. 54, at para. 49.
51. *E.g.*, employees, and polo club members.
52. Ford and Lee, *op. cit.*, footnote 44, at para. 5260, draws attention to the fact that no reported Australian decision has to date adopted the reasoning in *Denley (Re)*.

England. The situation there is similar to that of England and Australia. A leading New Zealand text, Garrow and Kelly, *Law of Trust and Trustees*,[53] concludes that "apparently contradictory decisions" make "it difficult to draw many clear conclusions". And "it seems unlikely that new categories of purpose trusts will be approved by the courts in future."

4. Conclusion as to the English, Australian, and New Zealand perspectives

The lawyer who emerges from this research of non-Canadian Commonwealth authority and opinion will likely conclude that the only purpose trusts that are valid in the Commonwealth are charitable, or are within the exceptional miscellany of purposes that first instance English courts accepted in various nineteenth century will cases, apparently because there existed certainty of purpose. *Endacott (Re)* in the Court of Appeal in England sought to put an end to any extension of this group. *Denley's Trust Deed (Re)* would validate further non-charitable purpose trusts provided it can be said as a matter of construction of the trust wording that the direct or indirect benefit of particular individuals is the uppermost concern in the language and therefore the primary intent of the settlor or testator. Whether this conception of indirect 'benefit', and the absence in this case of proprietary interest in those who would benefit, satisfies the beneficiary principle, and whether *Denley's Trust Deed (Re)* itself was a purpose trust anyway, are matters of keen debate.

The non-charitable purpose trust has been described as "the poor relative of the trust world",[54] which is one way of describing the sorry state of the law in England, Australia and New Zealand as to the public near-charitable purpose trust and the private purpose trust.

5. Common law Canada

The researching lawyer returns to Canada. Is it indeed the same here? After all, the American Uniform Trust Code, 2000, makes provision for the creation of non-charitable purpose trusts.[55] It reads:

53. N.C. Kelly, C. Kelly and G. Kelly, eds., *Law of Trust and Trustees*, 6th ed. (New Zealand: LexisNexis, 2005), at paras. 13.12.1 and 13.12.2. See also to the same effect, including interpretation of *Denley (Re)* as "a trust for individuals and not a purpose trust at all", Andrew S. Butler, gen. ed., *Equity and Trusts in New Zealand* (Wellington, N.Z.: Thomson Brookers, 2003), at paras. 4.5.1-4.5.6.

54. The STEP Journal, February 2008, *Comment*.

55. Subss. 409.1 and 2. The Code introduces for these trusts a perpetuity period

"A trust may be created for a noncharitable purpose without a definite or definitely ascertained beneficiary", and a "trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court." To date the Code[56] has been adopted, including its section 409, in 20 states.[57] Does another wind blow in North America?

Denley's Trust Deed (Re) has in fact twice come under examination in Canadian decisions. But a different approach from that of England, Australia and New Zealand may there have emerged. If the portent of these two cases is eventually sustained in the appeal courts, these first instance approaches to non-charitable trusts could lead to a distinct Canadian case law on the subject.[58]

In *Keewatin Tribal Council Inc. v. Thompson (City)*[59] a trust that benefited certain First Nation bands[60] was in question. The applicant Tribal Council was incorporated without share capital, and its members were a number of named bands. The Tribal Council, reflecting the interests of all the bands, was incorporated to "provide resource and human development among Indian people in Northern Manitoba", and it owned three buildings in Thompson City, two of which were used to house Indian students of the named bands

of 21 years, but the significance of this is less because so many states have now abolished the perpetuity rule.

56. Intended for state jurisdictions with less trust litigation than states like New York, Illinois, California and Texas.

57. Slight variations in the legislative enactment of s. 409 have been made in 8 states. See *Uniform Laws Annotated*, Master Ed., Vol. 7C (Thomson, 2006).

58. At trial *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2004), 8 E.T.R. (3d) 169, [2005] 3 W.W.R. 97 (Alta. Q.B.), affd 28 E.T.R. (3d) 174, [2007] 2 W.W.R. 474 (Alta. C.A.), leave to appeal to S.C.C. refused [2007] 1 S.C.R. vii, at paras. 40-49 (Alta. Q.B.), was held to involve a non-charitable trust that failed to satisfy the *Denley* test, but on other grounds the decision was reversed on appeal ((2007), 28 E.T.R. (3d) 174 (Alta. C.A.)), and unspecified reservations were otherwise expressed concerning the trial court judgment (see *supra*, at para. 57).

59. [1989] 5 W.W.R. 202, 61 Man. R. (2d) 241 (Q.B.).

60. 'Band' is a term used in the federal *Indian Act*, R.S.C, 1985, c. I-5, s. 2(1), to mean a "body of Indians". Whether a band for all purposes, for some purposes, or (as an unincorporated association) for no purposes, is a legal entity is left by the silence of the Act as an open question. The latest word is that of Johnston J. in *West Moberly First Nations v. British Columbia*, [2008] 5 W.W.R. 746, 78 B.C.L.R. (4th) 83, 2007 BCSC 1324, when the court held that an Indian band has the capacity to sue and be sued. See paras. 44-55 of the *West Moberly* judgment. Under the *Indian Act* an elected band council governs band matters, but if no council is in office the elected chief of the band acts as the council.

attending high school. By trust indenture the Council declared itself vis-à-vis the two housing buildings "a bare Trustee only for and on behalf of the Beneficial Owners", the latter being the named Indian bands. Under Manitoba provincial statute "lands held in trust for any tribe or body of Indians" are exempt from municipal tax, and the Tribal Council claimed this exemption for the land and student residential buildings on the land. Indeed, it was apparent that the trust had been formed to take advantage of this statutory provision for Indian trusts. The provincial tax authority refused the exemption on the grounds that the trust was an invalid non-charitable trust. One of its arguments was that "the trust is void because the Indian bands as unincorporated associations cannot be beneficiaries of a trust."[61]

In the Manitoba Queen's Bench court Jewers J. agreed that the trust was expressly in favour of the bands. The trust instrument could not be interpreted as being in favour of "the individual members of the bands, either for the present or for the present and the future."[62] Nor could it be said that it was the intention of the Tribunal Council as settlor "to give an interest in these properties to such a great number of individuals so that they could each hold respective shares as tenants in common."[63] So there was no intention to give proprietary interests in the land to indeterminate numbers of band members, present or future.

"In my opinion", said the judge, "the gift must be viewed as one to be used for the purposes of the individual bands: in other words, a purpose trust."[64]

Having taken note that the perpetuity rule has been statutorily abolished in Manitoba, so that there was no difficulty on that score, Jewers J. observed that "[t]he only question is whether there is in this case a want of beneficiaries".[65] *Denley's Trust Deed (Re)* was then reviewed, and Jewers J. draws attention to the fact that in that case it was the right to the use and enjoyment of the trust property by the corporate employees that led Goff J. to the conclusion the trust was enforceable and therefore did not offend the beneficiary principle. In the *Keewatin* circumstances "there are potentially very real benefits",[66] Jewers J. said, because while attending school the

61. *Keewatin*, *supra*, footnote 59, at p. 209 (W.W.R.).
62. *Keewatin*, *supra*, footnote 59, at p. 216. Existing members take as absolute beneficial owners; a trust for both existing and future members may be void for uncertainty of trust objects, as well as perpetuity. See, *Keewatin*, *supra*, footnote 59, at p. 215.
63. *Keewatin*, *supra*, footnote 59.
64. *Keewatin*, *supra*, footnote 59.
65. *Keewatin*, *supra*, footnote 59.
66. *Keewatin*, *supra*, footnote 59, at p. 217.

bands' children were entitled to use the residential buildings free of charge. And, if that was not enough to give band members the *locus standi* to enforce the trust, the band councils or the band chiefs could surely claim that standing.

Jewers J. concluded with these key words:

> The real question is one of enforceability and nothing else. There is absolutely no problem with a charitable trust, which will be enforced by the Attorney General, however impersonal its objects; similarly, there should be no problem with a non-charitable purpose trust where there is any number of persons with standing to enforce it.[67]

No appeal was taken by the provincial tax authority, and Jewers J.'s words were left to the annals of precedent.

The interest of the *Keewatin* case lies in the fact that there was no extended review of English precedent on the subject of the closed list of 'anomalies' or of property transfers to unincorporated associations. Nor was there any attempt to determine whether Sir William Grant, M.R. in *Morice v. Bishop of Durham* at first instance had meant "somebody" in the sense of a person, a beneficiary, who has a proprietary interest. Instead, from the beginning Goff J.'s judgment in *Denley's Trust Deed (Re)* was seen as the way forward. However, though he emphasized thereby that non-charitable purpose trusts are valid even if they fail to appear on the 'anomalous' list, Jewers J. did not draw attention to the fact that that case only extended validity to some further trusts that under the traditional approach would have failed.

And the reason this silence occurred is that counsel for the First Nations in the *Keewatin* case, and the court also, had no need to go beyond *Denley (Re)*.[68] Some purpose trusts are saved, and this, it was argued, is one. If the employees of the *Denley (Re)* company were direct or indirect receivers of benefit, as Goff J. had required, so were the members of the particular Indian bands. And, as noted above, if the band members were held to have no *locus standi*, the governing band councils and band chiefs clearly had standing.

Keewatin can therefore be interpreted as simply a *Denley* case. *Denley* was taken at face value as a purpose trust, but where individuals, taking benefit or able by right of office to enforce the trust, could be identified. Indeed, Jewers J. may have intended no more than to follow *Denley (Re)*. However, his words are wider that

67. *Keewatin*, *supra*, footnote 59.
68. Nothing was made of the fact that *Denley (Re)* concerned a gift for the benefit of the employees and others; the Tribal Council and the bands were acquiring assets in settlement of their treaty rights.

that. To repeat, "The real question is one of enforceability and nothing else. There is absolutely no problem" as to the enforcement of a charitable trust, and, "similarly, there should be no problem with a non-charitable purpose trust when there is any number of persons with standing to enforce it." The proposition those words support, one would suggest, is that there is no problem with any non-charitable purpose trust, whether it directly or indirectly benefits ascertainable persons or it seeks the furtherance of an abstract or impersonal purpose, provided there is someone with the standing to enforce it.

That proposition is today of prime significance. The enforcement of the purpose is isolated as the essential issue, and it enables purpose trusts to be seen as valid, whether those trusts be construed as charitable or non-charitable. Provided there is certainty of object (or purpose), the chosen purpose satisfies the law and public policy concerns, and is administratively workable, while at the same time the perpetuity rule is met in those jurisdictions that still possess the rule, Jewers J.'s words would mean that charitable and non-charitable trusts are all of a piece. Purpose trusts that are charitable will continue for tax and concessionary reasons to be distinguished from those that are not, but there is no apparent reason for the retention of a conceptual dichotomy of valid purpose trusts and invalid purpose trusts. Purpose trusts by definition are not trusts for individuals, and this renders the beneficiary principle, plus the issue of the proprietary interest of the beneficiary, irrelevant. The sole issue that remains is enforcement of the trustee's task.[69]

Keewatin Tribal Council Inc. v. Thompson (City) has recently been followed, and its reasoning approved, in *Peace Hills Trust Company v. Canada Deposit Insurance Corp.* ("CDIC").[70] This was a decision in the Court of Queen's Bench of Alberta. This time it concerned a trust for the benefit of a single Indian band.

A grant of capital was made by the federal authority to a specific Indian band, and, as agreed with the federal authority, a trust was created by the band with five persons as trustees and the Peace Hills Trust Company as depositary of the granted sum. The band was the trust beneficiary. The issue was whether the trust of some twenty-one million dollars in value was for the benefit of individual members of the band as "the true beneficiaries",[71] or it was primarily a purpose trust as a trust for the band. If as the trustee and the band contested it

69. Express appointment in the trust instrument of an 'enforcer' is something to which this article will return.
70. (2007), 288 D.L.R. (4th) 237, [2008] 7 W.W.R. 372, 2007 ABQB 364. Judgment was given on November 2, 2007.
71. *Ibid.*, at para. 14.

was the former, the CDIC was required by statute to apply a deposit insurance of $100,000 to the share in the trust fund of each individual band member. If as the CDIC argued the trust was a purpose trust (a trust for the band), the CDIC was required to apply the $100,000 limit to the purpose object (*i.e.*, the band) only as the sole insurance beneficiary. This meant that the entire trust fund would have a maximum deposit insurance coverage of $100,000 only.

The trust object was this: that the trust fund be employed for the purchase of land for the long term benefit of the band, the costs associated with such land purchase, and the purchase of authorized investments. A separate account, also to be held as trust fund, was to be drawn upon for the further purchase of investments, the payment of authorized expenses, and a onetime disbursement to the band (as opposed to its members) for promoting the development and administration of, and the services provided by, the band.

Thomas J.[72] determined that the questions put to the court were, (1) whether a non-charitable purpose trust can be created in Canada,[73] (2) if so, whether the trust instrument created a valid purpose trust, and (3) if so, what was the limit of deposit insurance for such a trust.

He did not canvass the case law on gifts to unassociated associations, but, as the wording of the first question suggests, took the path set by Jewers J. in the *Keewatin* case. The first question, as framed, was whether "non-charitable purpose trusts",[74] presumably whatever their purpose content, constitute a phenomenon recognized by the law in Canada. Thomas J. was of the opinion that whether such trusts are valid in Canada had been decided in the positive by Jewers J. in 1989.[75] Like Jewers J., he followed *Denley's Trust Deed (Re)*, but said he had "particular regard to the approach taken in *Keewatin*".[76] His conclusion was that a non-charitable purpose trust can indeed be created in Canada.[77]

72. Mr. Justice D.R.G. Thomas.
73. *Supra*, footnote 70, at paras. 3 and 16, his words were, "[c]an a valid purpose trust be established under Canadian law?"
74. *Peace Hills*, *supra*, footnote 70, at para. 2.
75. *Peace Hills*, *supra*, footnote 70, at paras. 24-26. Whether a trust is for the benefit of individual persons, or is to further a purpose, is a matter of construction, the judge said. Did the settlor or testator intend the one or the other? As the judge illustrated, it is possible for a case to fall quite easily either side of the line.
76. *Peace Hills*, *supra*, footnote 70, at para. 29.
77. "I conclude that a non-charitable purpose trust may be created in Canada and would be recognized by the courts of this country." The perpetuity rule, if applicable in the particular Canadian jurisdiction, must not be contra-

However, it is a nice question whether *Peace Hills* does not carry its enthusiasm for non-charitable purpose trusts a little too far. Thomas J. observed that the majority judgment of the Supreme Court of Canada in 1994 in *Schmidt v. Air Products of Canada Ltd.*[78] stated "[a]t no point that a valid non-charitable purpose trust could not exist in Canadian law."[79]

Some non-charitable trusts have always been valid in Canada; the statement above seems to mean that the Supreme Court did not deny that non-charitable purpose trusts are nevertheless valid. But surely the court's silence must be seen in context. An issue raised in *Schmidt* by one of the parties was whether a corporate pension plan is a purpose trust (*i.e.*, to provide specified benefits for those in corporate employment) or a trust for individuals. Cory J. for the majority had no doubt a pension plan is a trust for individuals, but he cannot be said to have distinguished between 'anomalous' trusts and *Denley* trusts, or *Denley* trusts and a generalized type of trust known as non-charitable purpose trusts.[80] The same is true of Adams J.'s words in *Bathgate v. National Hockey League Pension Society*,[81] which Cory J. cited. Thomas J. noted this citation. Adams J. and the Pension Commission of Ontario, whose words Adams J. was himself adopting, were merely concerned to say that pension trusts are not purpose trusts. Pension trusts are "traditional" trusts; purpose trusts for "charity and animals" have no beneficiaries.

Nevertheless, in *Peace Hills* the *Keewatin* judgment was agreed with and followed. Thomas J. found that the trust in the *Peace Hills* case was a purpose trust. There was "no evidence that any individual member of the Band has any equitable interest" in the trust fund.[82] As

vened, "and there must also be some person with standing to enforce the trust." *Peace Hills*, *supra*, footnote 70.

78. (1994), 115 D.L.R. (4th) 631, [1994] 2 S.C.R. 611 *sub nom. Schmidt v. Air Products Canada Ltd.*, 3 E.T.R. (2d) 1.

79. *Peace Hills*, *supra*, footnote 70, at para. 28.

80. Cory J. in fact said, "[t]rusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void. . . A pension trust is a "classic" or "true" trust and not a mere trust for a purpose." (*Schmidt*, *supra*, footnote 78, at p. 31 (E.T.R.)). The *Keewatin* decision was not cited in any of the three *Schmidt* judgments, and may not have been brought to the attention of the Supreme Court.

81. (1992), 98 D.L.R. (4th) 326, 11 O.R. (3d) 449 at p. 510 (Ct. (Gen. Div.)), affd 110 D.L.R. (4th) 609, 16 O.R. (3d) 761 (C.A.), leave to appeal to S.C.C. refused 114 D.L.R. (4th) vii, 4 E.T.R. (2d) 36*n*.

82. *Peace Hills*, *supra*, footnote 70, at para. 43. As a consequence there was a single deposit insurance limit of $100,000. Thomas J. had previously said [*ibid.*, at para. 42] that "the mere fact that individual persons benefit indirectly from the operation of a trust does not automatically make them

for the enforceability of the trust Thomas J. noted this was not an issue before the court, but he observed that, as in *Keewatin*, the right of enforcement existed. The band council, the chief, or members of the band "would have the standing necessary to enforce the trust."[83]

If there had been the same emphatic finding in each case that purpose was intended, not the benefit of individuals, an English court would likely have held that the *Keewatin* trust and the *Peace Hills* trust were unavoidably void. *Denley (Re)* could save neither.[84] However, in Canada those two cases appear to understand *Denley (Re)* as having created a hybrid 'purpose'/'person' trust. The end result is two decisions that, perhaps as their *ratio decidendi*, support the proposition that for practice purposes there are two questions: (1) is the trust in question for the furtherance of a non-charitable purpose, however secondary or primary the purpose may be; and (2) if so, is there somebody who has the standing to enforce the obligation(s) of the trustee?

6. Enforcing the trust

When *Denley's Trust Deed (Re)* was argued and decided in 1968, it is unlikely that anyone present would have given thought to a trust being enforced by a person who has no expectation of receiving benefit, directly or indirectly, from the property held in trust.[85] To all appearances Goff J. was thinking solely of trust enforcement by ascertained or ascertainable persons[86] who would or might derive benefit from the trustee's obligated activity. He would likely have been pondering how remote that person may be in the derivation of

the intended object of the trust." Cf., *Horley Town Football Club (Re)*, *supra*, footnote 29, at para. 99.

83. *Peace Hills, supra*, footnote 70, at para. 45.

84. Alternatively, if the court were inclined towards the *Denley (Re)* third route to saving non-charitable purpose trusts, it might decide that this is a transfer to the bands or band for a purpose that nevertheless reveals itself to be — as a matter of classification — for the band or bands as communities of individuals.

85. Since *Pettingall v. Pettingal* (1842), 11 L.J.Ch. 176, however, so-called 'negative' enforcement has been favoured by some courts. In *Thompson (Re)*, [1934] 1 Ch. 342, for instance, Clauson J. ordered that (1) the legatee and trustee of a gift to further fox-hunting undertake prior to receipt that he would discharge that task, and (2) if the money was spent otherwise, the residuary legatee was at liberty to apply to the court. For an opinion concerning the merits of such an order, see *Underhill and Hayton, op. cit.*, footnote 5, at para. 8.182.

86. *I.e.*, persons identified as qualified to receive benefit, or persons who on their coming forward can be identified as so qualified.

benefit before a trust for individuals becomes a trust for an impersonal purpose.

Since the mid-1980s an alternative mode of enforcement has been recognized in the offshore jurisdictions of the Commonwealth common law world. Bermuda was the first to enter the scene with a statutory validation of non-charitable purpose trusts and of an 'enforcer' of the designated purpose appointed by the trust instrument or by authority of the statute. After this a number of offshore jurisdictions did the same, the most liberal such legislation being the STAR trust of the Cayman Islands. The latter permits persons and purposes, charitable or non-charitable, to be trust objects of the same trust. The purpose clauses of the STAR trust are enforced by a party (other than a trustee) authorized by the trust instrument or by legislation, and in place of the beneficiaries this party will also enforce the person-benefiting clauses.[87]

In the offshore jurisdictions the so-called 'protector', who emerged in those jurisdictions during the 1980s, has since come to play a major part in the operation and administration of offshore trusts. This party is frequently made an 'enforcer'. The 'protector' is appointed by or with the authority of the trust instrument, is rarely a beneficiary of the trust, but can both demand an accounting, as if he were a beneficiary, and also sue the trustees for redress if breach has occurred. From the beginning, it seems, the role of this intervener was to monitor the trustees' performance of their duties, and to question the trustees; the right to 'enforce' the trust terms was a natural complement of the monitoring authority. With the trustee offshore, and the beneficiaries (as well as the settlor) being on the mainland, the initial reason for this policing role is self-evident. However, the offshore 'protector' emerged in all the offshore jurisdictions from drafting practice allegedly following historic English statutory law, and it seems that 'protector' monitoring and enforcement was conceived of as authorized by the principle of settlor autonomy.

On the Canadian mainland, however, as elsewhere in the Commonwealth, the experience is different. Other than in the offshore jurisdictions there is in the Commonwealth no legislation on the subject.[88] And case law also is silent throughout England,

87. See further, for the legislation of the offshore jurisdictions introducing non-charitable purpose trusts, *International Trust Laws*, (Bristol: Jordans Publishing, looseleaf), Vol. 2, B4.1 to B4.139.

88. In Canada the Yukon Territory has *An Act to Amend the Trustee Act*, S.Y. 2001, c. 11, on its statute book introducing the non-charitable 'purpose trust' and providing for an 'enforcer' of such trusts. However, to date the Act has not been proclaimed.

Canada, Australia, and New Zealand. However, the latest edition of *Underhill and Hayton*[89] takes the very unusual step for an English 'black letter' law text of arguing that English courts are doctrinally in a position to recognize a trust instrument appointment of an 'enforcer'. It advocates that that recognition be made. The editors seek such a recognition not only for non-charitable purpose trusts, but trusts also for persons, in those circumstances where one or more beneficiaries on the taking effect of the trust are incapacitated or are unborn.[90]

While there is no case decision in Canada known to the writer confirming that the settlor or testator may appoint a person authorized to 'enforce' the trusts created,[91] it is observable that there is a significant number of Canadian law offices drafting domestic (or internal) trusts that include 'protectors' and enumerate protector powers. Some expressly, most impliedly, authorize the 'protector' to enforce the trust terms against the trustees. The argument supporting this practice again appears to be, as in the offshores, that there is no apparent reason why the introduction of the protector as an 'enforcer' of the trust terms should not be seen as part of settlor autonomy. The argument notes that settlors may reserve powers to themselves, and also grant them to third parties. Why should not the power to enforce the trustees' obligations be one of those powers?

Now in Canada the judgments in *Keewatin* and *Peace Hills* have brought into focus two trust law contentions which highlight the significance of that practitioner reasoning. First, there need be no distinction between the validity of 'person' and 'purpose' trusts, and, secondly, enforcement is a trust element independent of the proprietary character of a beneficial interest. The question now is whether Canadian courts will confirm that settlor autonomy includes the settlor or testator appointment of an 'enforcer'.

What are the prospects for this occurring? It is sometimes said that the introduction of non-charitable purpose trusts other than those 'anomalously' recognized is properly for legislative chambers, not the courts. Nevertheless, the recognition that *Underhill and Hayton* advocate, and that flows from the *Keewatin* and *Peace Hills* decisions, is a recognition of non-charitable purpose trusts that embraces all

89. *Op. cit.*, footnote 5, at paras. 8.157 to 8.167.
90. The editors see no public policy objection to their recommendations.
91. The only word on the subject, *Rogers (Re)*, [1929] 1 D.L.R. 116 (Ont. C.A.), of a third party having administrative powers is not concerned with the issue of a person other than a beneficiary having the right to bring action against trustees in alleged breach.

such trusts. However, the Canadian law reform agencies have been hesitant. Two agencies (Manitoba and British Columbia) have recommended that non-charitable trusts of a non-profit (or near-charitable) nature should be statutorily permitted, and a third, in Ontario, would provide that for all purposes, not just perpetuity, non-charitable purpose trusts take effect as powers.[92] The Ontario Commission would also codify the *Denley (Re)* formula or test for recognition. No reform group has suggested that private purpose trusts, such as are found in offshore commercial transactions should be the subject of legislation. So far as provincial and territorial legislatures themselves are concerned, it is evidently single, specific purposes, like cemetery perpetual care trusts, that are of interest.[93]

Quistclose trusts[94] might be regarded as another area in case law where non-charitable purpose trusts have been recognised. Is this a jumping off point for a generalized recognition? *Quistclose* trusts are more associated with insolvency and bankruptcy law, however, and the policy issues arising there. And probably in most instances they could be characterized as being for the direct or indirect benefit of ascertained or ascertainable persons. These are the settlor's creditors.[95] Whatever the analogy that might be made with *Denley* trusts and indirect recipients of benefit who have no proprietary interest, the *Quistclose* trust is commonly regarded as a discrete trust situation.

The range of sophisticated private purposes that contemporary business planning produces also creates concerns. The observable enthusiasm in the offshore jurisdictions for non-charitable purpose trusts is not for non-profit public trusts, but these private purpose trusts.[96] The implications of legislating the inclusion of private purpose trusts has been said on the mainland to call for distinct legislative consideration. One law reform body has expressly taken that position.[97]

92. OLRC, *Report on the Law of Charities*, 1996, c. 14 (Vol. 2), where also the earlier reports of Manitoba (1992, Report #47) and B.C. (1992, LRC 128) are discussed. A "general recognition" (p. 448) that non-charitable purpose trusts are valid is commended by M. Pawlowski, J. Summers, "Private Purpose Trusts — A Reform Proposal" (2007), 71 Conv. & Prop. Law. 440, writing with regard to England. They would take the legislative route pioneered by the offshore jurisdictions.
93. *E.g.*, Nova Scotia. See *Waters, op. cit.*, footnote 2, at pp. 541 and 636.
94. See *Waters, op. cit.*, footnote 2, at pp. 89-90, 565.
95. But see, *supra*, the text to footnote 23 of this article.
96. Usages offshore include moving receivables off corporate books for securitization purposes.
97. British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, BCLI Report No. 33, October 2004, at pp. 8-9.

Also *Underhill and Hayton*'s contention[98] has been countered.[99] It is the position of *Underhill and Hayton* that it is not the existence of a beneficiary *per se*, but the enforceability of the trust obligation, which is the element the historic case authorities require. The counter argument disagrees; the authorities to the contrary are indeed concerned with there being a beneficiary to enforce the trust. It is vital for the trustee/beneficiary (or obligation/rights) relationship, states the counter position, that the beneficiary have an interest of some kind that provides for him a self-advantage. It does not matter whether or not the interest is also 'proprietary'. The beneficiary presses his rights in order to ensure that the gains intended for him from trustee performance are forthcoming. An 'enforcer' appointed by the instrument will be someone other than a beneficiary with self-interest to assert. The enforcer has a personal right of enforcement, very much in the nature of a contractual right, but his successor will have no contractual relationship with the settlor or testator. At this point, it is said, the *Underhill and Hayton* contention breaks down. The glue, as it were, in that unique trustee obligation and beneficiary right relationship does not exist between trustee and 'enforcer'. This leads the counter argument to the conclusion that the beneficiary principle is sound and indispensable for every valid trust. Charity, as we have seen, is the established exception.

Nevertheless, though there is room for despondency, none of this compels one to turn away with a shrug from the advocacy of *Underhill and Hayton*. Reluctance to move to the general recognition of purpose trust objects may often reveal simply the conservative attitude that was exemplified in *Endacott (Re)*. As for the counter argument to the *Underhill and Hayton* position on the beneficiary principle and enforceability, analytically compelling as that argument is, those looking for the confirmation in Canada of an unqualified recognition of all non-charitable purposes can reasonably say, let's design an enforcement clause that meets the practical requirements and wait and see how case law recognition works out. After all not only is the trust itself a creature of case law evolution, but legislation, if necessary as events reveal, is better drawn when the problems are already the subject of experience in the field.

98. See, *supra*, footnotes 89 and 90, and the text to those notes. This contention was first put forward by D.J. Hayton in (2001), 117 L.Q.R. 96, reproduced in David Hayton, ed., *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (U.K.: Kluwer Law International, 2002), at pp.189-201.

99. See P. Matthews, "From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust" in Hayton, *ibid.*, at p. 203, esp. at pp. 216-231.

Possibilities for solution are then more practicably assessable.[100] The prize of recognition is well worth the effort to find, if perhaps over time, a sound doctrinal reconciliation with current theory.

7. The perpetuity legislation of the 1960s in Canada

Does this legislation throw a monkey wrench into the courts recognizing the non-charitable trust of any content as a valid trust?

Reference was earlier made[101] to the Perpetuities Acts of Ontario, Alberta, British Columbia, the Yukon and the Northwest Territories. These jurisdictions, which like other Commonwealth jurisdictions were led by the 1964 legislation in England reforming the perpetuity rule, have introduced a novel element that is absent from other Commonwealth legislation. For some years previously the American Law Institute, *Restatement, Trusts, Second*,[102] had argued that the invalid non-charitable purpose trust rather than fail should take effect as a power, and on the recommendation of its Law Reform Commission[103] Ontario introduced this feature into its 1966 Perpetuities Act. This introduction was followed in each of the four Canadian jurisdictions that subsequently legislated along the same lines.

The provision in all five jurisdictions is the same in its opening subsection.[104] "A trust for a specific non-charitable purpose that creates no enforceable interest in a specific person (a) shall be construed as a power to appoint the income or capital, as the case may be . . ." The question to be considered here is whether in these five jurisdictions the court is barred by contrary legislative provision from

100. Also, as Hayton not unfairly points out, *supra*, footnote 96, all states that have ratified the Trusts Convention are required to recognize foreign trusts. Such a trust may be an offshore, protector-enforced trust with assets, beneficiaries or the furtherance of purpose being carried out in the ratifying state. Mainland ratifying jurisdictions — this includes seven of the Canadian provinces — should surely be ready for the domestic conceptual implications of this.

101. See, *supra*, footnote 36.

102. Paras. 123-125. The *Restatement, Trusts, Third*, para. 47, retains this position. See the Reporter's Notes to para. 47 for an explanation of this retention.

103. OLRC Report No. 1, *Perpetuities and Accumulations*, 1965, at pp. 35-41.

104. *Perpetuities Act*, R.S.O. 1990, c. P.9, s. 16(1); *Perpetuities Act*, R.S.A. 2000, c. P-5, s. 20(1); *Perpetuity Act*, R.S.B.C. 1996, c. 358, s. 24(1); *Perpetuities Act*, R.S.N.W.T. 1988, c. P-3, s. 17(1) opening flush and (1)(a); *Perpetuities Act*, R.S.Y. 2002, c. 168, s. 20(1). B.C. employs the word, 'must', rather than 'shall', but evidently the meaning is the same.

holding under case law that, assuming all other requirements are met, every non-charitable purpose trust is valid if it is enforceable.

The question before the Alberta court in *Peace Hills* was whether this was a trust for the benefit of an Indian band, or for the individual band members. The court held that this was a purpose trust (*i.e.*, for the band), but perpetuity was not argued before the court, and it was taken no further by the court. In fact it appears that the governing law of the trust was that of Saskatchewan,[105] a jurisdiction without the perpetuity legislation under consideration.

Contrary interpretative positions may be taken on the effect of this perpetuity legislation, and it is useful to consider the arguments that can be made both for the Acts having a restricted applicability, and for their having an applicability to all non-charitable purpose trusts.

(1) Four interpretations as to when the Acts apply, and when they do not

All the following interpretations draw a line between trusts to which the Acts apply, and those to which the Acts do not apply. Three of the distinctions result from the lack of clarity in the legislation itself. The fourth stems from the far-reaching effect that the legislation produces. Regardless of intent, the trusts that are within the Acts function as powers.

The first distinction is that the five Acts are concerned solely with contraventions of the case law perpetuity rule. That is the only occasion when non-charitable purpose trusts are to be construed as powers. If the particular trust does not contravene that rule, the Act of the particular jurisdiction does not apply. A second distinction is this: the Acts are concerned not only with perpetuity violation but also with the enforcement of the trustee's obligation. If in fact there is no perpetuity violation and there is someone with standing to sue — a *Denley (Re)* enforcer or an individual expressly empowered to enforce the trust — the Acts have no application.

A third distinction springs from the provision in the legislation that a trust shall be construed as a power if the trust in question "creates no enforceable equitable interest in a specific person". The legislative thought in using that language may have been to distinguish between 'person trusts' (or 'beneficiary trusts') and 'purpose trusts', but in practice the line between the two is in fact a matter of construction. Less technically put, whether a trust is one or the other is often a matter of perception. The difficulty with the above language commences because an "interest" under Commonwealth and

105. *Supra*, footnote 70, at para. 46.

Canadian common law, as we have seen, is proprietary in nature. The chose in action is property.[106] The *Denley (Re)* corporate employees, and the *Keewatin* and *Peace Hills* band members, however, did not have 'proprietary interests'. The benefiting of the 'corporate employees' or of the First Nation band(s) meant that anyone on the company payroll, or any registered member of a qualifying band, might derive spin off benefit, and *Denley (Re)* would concede to these persons, through their "direct or indirect benefit", as *Denley* puts it, a standing to compel the trustees to discharge their trust duties. Such standing has been analysed, as we have seen, as a personal right as opposed to an interest. Had the *Keewatin* and *Peace Hills* trusts been governed by the five jurisdictions' perpetuity legislation, one of two results might have come about. If the band members were to be regarded as having only spin off benefit (whether *Denley* would describe that benefit as direct or indirect), these First Nation trusts under the legislation would have operated as powers. If on the other hand — which was not the case — the band members had been held to derive individual benefits, a band being "a body of Indians" without reference to present and future members of the body, the legislation would probably not have applied, and each such trust would have operated as a trust. So trusts will either be 'person trusts' and operate as trusts, or, if the perceived emphasis leans towards 'purpose', fall under the legislation and operate as powers.[107]

The same result flows from a fourth interpretation. This to the effect that all the existing anomalous list trusts received from English law become powers under the Acts. *Denley (Re)* trusts become powers, and any other non-charitable purpose trust, like the *Drummond (Re)* trust, does also. Only classic 'person trusts' operate as trusts. In other words, the interpretation is that the legislation applies to every non-charitable purpose trust. This was the decision of Stevenson L.J.S.C. (as he then was) in the case of *Wood v. Alberta (Public Trustee)*[108] He held that the Acts apply whether or not there is a perpetuity problem with the particular non-classic

106. Civil law jurisdictions possess a model of trust that gives personal rights only to the trust beneficiary. A very clear line exists between the civil law model and the common law model, because of this historically, well established difference.

107. E.E. Gillese and M. Milczynski, *The Law of Trusts*, 2nd. ed. (Toronto: Irwin Law, 2005), at p. 69, points out that the *Denley* outcome recognizes a purpose trust as a trust, whereas the legislation produces something 'radically' different from the trust creator's intent.

108. (1977), 1 E.T.R. 285, [1977] 6 W.W.R. 273, 9 A.R. 427 (S.C.). This was in the early days following the enactment of the Alberta perpetuity legislation, and the court was examining the recent legislation *de novo*.

trust.[109] And he considered that the legislation is not concerned with enforceability.[110] The object of the legislation in his Lordship's view is to "convert" all non-charitable purpose trusts into powers.[111] So the distinction here is between 'person trusts' (enforced by beneficiaries with proprietary interests) and any other form of trust. The latter now operates as a power.

So, at the end of the day, all four interpretations of the legislation lead to unfortunate results. Even if the legislation is read as *Wood v. Alberta (Public Trustee)* decides, a trust obligation becomes a power (in nature a discretion) where the legislation applies, and where it does not the fiduciary obligation — that is, a trust — remains.[112]

These four interpretations constitute very divergent positions, and the explanation for this may lie to some extent in the origins of this legislation. In February, 1965, when the Ontario Law Reform Commission ("OLRC") reported to the Ontario government on the subject of perpetuities, recommending the legislation that was enacted in Ontario in the following year, the situation was different from today. No Commonwealth jurisdiction then would have conceived of the non-charitable purpose trust as other than the 'anomalous' list of miscellaneous purposes received from English law. And perhaps of most importance *Denley's Trust Deed (Re)* had not been decided.[113] Inspired by the *Restatement*, the OLRC's

109. He was of the view that, if the legislative intent was solely to alter the perpetuity rule, the only thing the Act needed to do with regard to these trusts was to adopt the 'wait and see' rule, and set a trust duration period.

110. *Supra*, footnote 108, at p. 301 (E.T.R.). His reason was that "those who take if the power is not exercised (here next-of-kin) are available to ensure execution." See *Waters, op. cit.*, footnote 2, at pp. 632-33, for comment as to whether this 'availability' is trust enforcement. Also see the comment of *Underhill and Hayton, op. cit.*, footnote 5, on the court order in the fox-hunting case.

111. He was interpreting the Act's meaning in using the word, "construe". *Supra*, footnote 108, at p. 301 (E.T.R.).

112. Though the 1965 OLRC report is silent, the apparent thesis of the legislation is that most trust creators would rather have something than nothing. The section in each Act goes on to provide a maximum validity period for the "trust" of 21 years, and a gift over on termination of "the trust" as to "trust" property then remaining. In Ontario, Alberta, and the Yukon the gift over is to the person(s) entitled to that property as if the "trust" had been *invalid* from the time of its creation. In the N.W.T. it is the person(s) entitled as if the "trust" had been *valid* from the time of its creation, and in B.C. it is the person(s) entitled *at the close of the 21-year period*. Why this difference exists in N.W.T. and B.C. is not clear. Moreover, each of these entitlements apparently prevails over any provision of the testator or settlor to the contrary. However, the legislative intent remains to be established in the courts.

apparent modest intention was to go somewhat further than the list, and to give effect of a kind — a very different kind — to all non-charitable purposes that satisfy the certainty of object requirement. The other four jurisdictions followed in the path of the Ontario legislature. The Northwest Territories did this in 1968, Alberta in 1972, British Columbia in 1975, and the Yukon in 1980.

(2) The Acts create a trust power

So, what is the conclusion? Are the courts in these five jurisdictions in a position to declare all non-charitable purpose trusts valid, if an 'enforcer' has been appointed, and the trust object, as conceived and stated, otherwise meets the basic requirements[114] for a valid trust?

It would be ironic if a legislative reform that was intended to offer some assistance towards the extension of validity beyond the 'anomalous' list should now prevent the case law from attaining the principle that recognizes the validity of all non-charitable purpose trusts. And it is submitted that that need not be the interpretation of the five jurisdictions' legislation.

Each Act refers to the trust being "construed" as a power, but invariably continues thereafter to speak of a "trust" for non-charitable purpose(s). Even if, as was said in *Wood v. Alberta (Public Trustee)*, "construed" means 'converted', *i.e.*, the trust is converted into a power, that change of verb does not detract from the fact that the legislative language throughout subsection 1 and the following subsections retains the language of "trust". The section provides that the "trust" shall operate as if it is a power. But the legislation does not require the trustee power to be interpreted as a mere power.[115] The legislation is silent on that subject.

If the appeal courts were to confirm that any non-charitable purpose trust is valid[116] when an 'enforcer' of the trust is appointed by the creator of the trust, the submission of this paper is that in the five jurisdictions the statutory power should be interpreted as a trust power. The enforcer, like the beneficiary of a discretionary trust, is in

113. And, according to the report of *Wood v. Alberta (Public Trustee)* in 1997, it was not cited to that court.

114. *I.e.*, including the case law perpetuity period, which is lives in being plus 21 years, or 21 years if there are no lives in being.

115. The trustee of a mere power must *bona fide* consider exercise of the power, but may properly decide not to make an exercise. Mere power would of course be the understood meaning when there is no power of enforcement of the "trust".

116. Supposing the basic requirements discussed at the beginning of this paper are met.

a position to compel the trustee both to give its mind to an appropriate consideration of what should be done in carrying out the purpose task, and then to act accordingly. This *is* the trust power. The case law recognition of all non-charitable trusts would simply cause "power" in the Acts to mean 'trust power'.

In that event all trusts, whether in the five jurisdictions or elsewhere in Canada, would take effect as enforceable obligations concerning property. None would take effect as a mere power. Whether a 'person trust', a 'purpose trust' (charitable or otherwise), or a mix of the two, all would be valid trusts.[117]

8. The aftermath of a recognition by way of case law

(1) Would it include trusts for individuals?

The recognition of all non-charitable trusts that otherwise satisfy the basic requirements for express trusts would be established. Would that recognition apply only to purpose trusts, or to trusts for individuals also?[118] Enforcement of the trust by a settlor or testator appointed 'protector' might indeed be advantageous when the beneficiary is incapacitated by age or mental infirmity, or is untutored in matters of finance or enfeebled by sickness or old age. Professional trustees might prefer such an arrangement. And it is imaginable that creators of trusts contemplating the future would welcome the opportunity given to appoint the 'enforcer'. Of course, it is not likely that any court would accept that such recognition can derogate from or take away existing beneficiary rights. On the mainland it would probably be regarded as cardinal that there be no derogation from those rights.[119]

117. If the legislation applies, the maximum duration is 21 years. This may emphasize the necessity to decide when the Acts apply, and when they do not. If the case law applies the same duration period of 21 years is imposed, except where the trust creator has introduced a royal (or notorious) lives clause. This is sometimes found in First Nation trusts. It was a provision of the *Peace Hills* trust instrument: see, *supra*, footnote 70, at para. 46.
118. Providing no beneficiary right or interest is in any way compromised, existing case law on settlor autonomy would draw no distinction.
119. One can see justification for a contrary position. For instance, the settlor or testator may have in mind that the 'enforcer' will play the role of mediator, and only ultimately litigate when the stress and costs of litigation appear unavoidable. The trust instrument therefore requires that all breach of trust actions be undertaken through the 'enforcer' only.

(2) The unavailability of the judicial inherent charity jurisdiction

Purpose trusts that are not charitable will not qualify for access to the administrative or *cy-pres* scheme-making jurisdiction of the courts.[120] That jurisdiction is inherent vis-à-vis charitable purposes, but clearly does not extend to non-charitable purposes. So the settlor or testator will have to provide comprehensively, when introducing 'protectors' into the trust instrument. There is nothing on 'protectors' in any mainland Trustee Act, and there is no onshore case law on the subject. The non-charitable purpose trust drawn by the practitioner must therefore be certain and workable; only the trust instrument can provide these elements. It must be clear what is to happen if furtherance of the purpose becomes impossible, it no longer responds to contemporary need (and in the judgment of whom?), or a surplus remains when the purpose has been carried out. The same comprehensiveness is required in appointing an 'enforcer'. Appointment (and the mode of appointment) of successors, the retirement, removal, and liability (and to whom?) of 'enforcers' for fraud or negligence in the performance of the enforcement duties, their remuneration (if any), reimbursement of expenses (who is to reimburse, and from what source?), and indemnification; the trust instrument must cover all these topics.

If the jurisdiction retains the perpetuity rule, thought must be given to the use of a so-called royal (or well-known) lives clause in the trust instrument. Most non-charitable purposes will probably be carried out within 21 years, but as is done with First Nations trusts[121] provision for greater duration should be considered.

(3) Trustee power to amend and terminate the trust

The conferment upon the trustees of a power to amend the administrative terms or to change the dispositive provisions of the trust should be introduced into the instrument. It can always be stated that the intent behind the conferment is to further the better carrying out in the trustees' discretion of the trust's essential — and defined — purpose. If the trustee(s) are to have a power of trust termination, complementing the amendment power, this should be expressly conferred also.

120. For the scheme-making jurisdiction, see *Waters, op. cit.*, footnote 2, ch. 14, Part VI.

121. *Supra*, footnote 117.

(4) Judicial power to consent to a variation 'arrangement'

If circumstances occur during the lifetime of the non-charitable purpose trust for which provision is not made in the instrument, would the legislation apply that with court approval authorizes in almost all Commonwealth jurisdictions the variation or termination of trusts? The statutory variation and termination provisions in all but two Canadian jurisdictions are very particularly aimed at difficulties that occur with trusts for individuals. The discretionary approval the court may give or withhold to any proposal for such variation or termination turns upon the court's consideration as to whether 'benefit' is thereby conferred upon those who, being minors, mentally incapacitated, unborn or unascertained, cannot consent for themselves. The variation of charitable purpose trusts requires the court to consider whether the designated purpose is no longer capable of being furthered, or has become impracticable in contemporary circumstances. Though the court has this authority under its inherent *cy-pres* jurisdiction, if the statutory variation and termination provisions are to apply to any purpose trust, it is evident that statutory amendment is necessary. And by including charitable trusts in their legislation this is what Manitoba and Alberta have done.[122]

However, Manitoba also includes non-charitable purpose trusts in extending its variation and termination provisions to purpose trusts. The court is empowered to consent to a proposed variation or termination "where the benefits under the trust are to be used, directly or indirectly, for a specified purpose, and there is no person who is able or empowered to consent on behalf of all those persons, whether born or unborn and whether ascertained or not, who might derive some benefit from benefits used for that purpose, on behalf of all those persons."[123] Presumably the appointed enforcer or the trustees would bring forward the "proposed arrangement". There is no conflict of laws provision in the Act, but it seems more likely that the trust would have to be governed by Manitoba law in order for any court of the province to exercise its consent power.

8. Summary and Conclusion — the acorn and the oak tree

The apparent present position in common law Canada is that any non-charitable purpose may be the object of a trust if that purpose is exactly the same as one of the miscellaneous list of objects received historically by way of English case law. This rather odd body of law

122. See *Waters, op. cit.*, footnote 2, at pp. 1316-1317.
123. *Trustee Act*, C.C.S.M. c. T160, s. 59(5)(g).

has been rendered less significant by an English court's later introduction of a formula or test. This determines when non-charitable purposes are validly created, and it has been accepted by courts in Canada. If the object (or purpose) is expressed in such a manner that ascertained or ascertainable persons may directly or indirectly derive benefit from the carrying out by the trustee of the purpose, the purpose is a valid trust object. If no such person or persons can be ascertained because the expression of the purpose is "abstract"[124] or it is otherwise "impersonal",[125] the trust fails because there is no one who can enforce the trustee's obligations. No reported court decisions exist in any Commonwealth jurisdiction where the formula was accepted, applied and the particular non-charitable purpose failed the test. Nor has any court provided examples of the abstract or impersonal.[126] None has discussed how far a contention in favour of the indirect benefit of ascertainable persons can be carried before it is too fanciful and would be rejected.

Two first instance Canadian cases suggest there is no difficulty in the courts now going further than that case, and recognizing the validity of all non-charitable purposes. This, those courts say, is because the essential requirement for a purpose trust is not such matters as certainty or perpetuity, which are elements to be satisfied with regard to any express trust, but that there is someone to enforce the trust obligation. For a purpose trust to be valid enforceability of the particular purpose must be possible. Is this now the common law of Canada? Will the appeal courts of the country uphold that recognition if there is an express appointment of an 'enforcer'?

A formula or test is a marked improvement, but it distinguishes between would-be trusts. There are sheep and goats. There are purposes that are for the benefit of known or knowable individuals, and those that are not. The former are valid for trust purposes; the latter invalid. And the reason for the distinguishing was that the *Denley* court was anxious to adhere to the beneficiary principle, which it considered it was indeed doing; a valid trust, charity apart, must always have an individual as a beneficiary. From one point of view this state of the law is not so bad. The skilled drafter will so frame the client's otherwise abstract or impersonal purpose so that, if it is at all possible, there are ascertained or ascertainable individuals who may be seen as qualified to receive benefit. But once away from clubs and associations of persons, which includes the company employees of *Denley (Re)* itself, the trust drafter can never draft with

124. *E.g.*, 'the study of a new spelling and grammar for the English language'.
125. *E.g.*, 'teaching young people the skills of rock climbing'.
126. See, however, *supra*, footnote 58.

confidence. With distinctions drawn between beneficiary trusts and purpose trusts, *Denley* trusts and abstract or impersonal trusts, there is always the chance of someone challenging the instrument, and a finding of invalidity. The court finds the trust purpose to be on the wrong side of the line. With regard to the perpetuity legislation in the five jurisdictions, this introduces, though solely in Canada, yet another separation of one purpose from another. Some purpose trusts are not caught by this statutory power-'conversion' process; others are. What is the law attempting to achieve with this policy? The writer can think of no persuasive answer.

This article does not therefore pursue the distinctions, leading to the valid and the invalid under case law or the five perpetuity Acts. Instead it supports the introduction of the total recognition of purposes by the appellate courts in all Canadian jurisdictions. The argument of this article is that the courts are in a position to do this, because even in the five jurisdictions the legislation is so framed that it is compatible with such a recognition.[127]

Any such legal development will likely lead to the need for limited case law adjustment or even statutory involvement at some time in the future, but that is not unfamiliar and everything has to start somewhere. Every oak tree, we are reminded, started as an acorn. The jumping off point is *Denley (Re)*, the English case that extended *locus standi* to enforce the trustee obligation to persons who derive benefit though apparently some or all of these persons may have no proprietary interest(s) in the trust property.[128] To date the proposition does not appear to have been considered by any court, but this article supports the position that a disinterested 'enforcer' appointed by the trust instrument qualifies for standing. Assume, then, that the basic requirements — lawfulness, no violation of public policy, certainty, workability, and if necessary perpetuity provision — are satisfied. Assume also that the trust instrument in question is

127. The sole difference would be that a trust power under the legislation would be valid only for 21 years. See, *supra*, footnote 117. If a longer duration is desired, and no redrafting to bring in ascertained or ascertainable benefiting persons is possible, it has to be argued that the legislation is inapplicable. Nevertheless, it is perhaps some consolation that, if *Denley (Re)* is accepted as correct, and purpose cannot be expressed in a manner that qualifies, the legislation applies only to 'abstract' and 'impersonal' purposes.

128. *Locus standi* would otherwise appear to be one constituent element only, or better perhaps a consequence, of a 'beneficial interest'. As noted earlier, no reference was made in *Denley (Re)* to the proprietary character of trust beneficiary interests. Elsewhere in the Commonwealth this has lessened the reliable authority of the case. See in Australia, Heydon and Leeming, *op. cit.*, footnotes 42 and 49, and in England, *Lewin on Trusts*, *op. cit.*, footnote 34, at para. 4-41.

clearly in favour of ascertained or ascertainable beneficiaries or that it appoints an 'enforcer'. The trust to this point is acceptable. Thereafter, as Goff J. said in *Denley (Re)*, the content of the particular purpose is not an issue.[129]

Keewatin and *Peace Hills* can be understood as having judicially ushered in the idea that all non-charitable purpose trusts are valid, provided there is enforceability, and the hope of this article is that appeal courts will consider themselves to be in a position to declare generally, as Jewers J. did in the *Keewatin* case, that this is so. Such an appellate decision would lead to the finality of conceptual distinctions between 'person' and 'purpose' trusts so far as validity is concerned. Charitable trusts will still need to be distinguished for reasons of perpetuity, scheme-making and tax, but the validity of a purpose trust as such will no longer be an issue, whatever its content.

And in Canada the drafting lawyer may greet the testator or settlor with the news that, yes, it is possible to create the desired trust.

129. *Supra*, footnote 15, at p. 383. "The objection is not that the trust is for a purpose or object *per se*, but that there is no beneficiary or *cestui que trust*."