

**PROTECTING BENEFICIARIES FROM
PROTECTORS: HOW WE MIGHT EXPECT THE
JUDICIARY TO PROVIDE A CHECK ON DONEES
WITH POWERFUL POWERS**

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If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (Publius, Federalist No. 51, *The New York Packet*, Friday, February 8, 1788)

1. INTRODUCTION

Despite the paucity of domestic jurisprudence, some Canadian lawyers insert protector clauses into their trust instruments.

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While there is no definitive convention as to what constitutes a protector, they are typically donees of powers that seek to limit the authority of an instrument's trustees.¹

Consequently, unless a trust instrument specifies how protectors ought to conduct themselves, trustees and beneficiaries must rely on the courts to delineate a given protector's powers. On the surface, this is not a problem. After all, beneficiaries regularly petition the courts to remove or reprimand trustees despite the trust instrument's silence on such matters. Yet, protectors are (at least putatively) distinct from trustees. Moreover, as their powers may significantly vary based on the terms of a given instrument, we cannot presuppose that the jurisprudence on trustee powers will automatically elicit helpful guidance.

Considering the above, this article will provide an overview of how Canadian courts might approach the most common powers bestowed onto protectors. Particular attention will be paid to whether these powers will be viewed as fiduciary in nature, as well as to the expected judicial intervention. Regarding the latter issue, this paper will focus on protector removal, setting aside a particular a mistaken appointment, and the standard of review for a protector's trustee removal power.

2. WHAT IS A PROTECTOR?

Within a trust instrument's *Dramatis Personae*, "protectors" can enable settlors to "retain some power or powers of control that otherwise would be given to the trustee".² The kind of control that a given protector has over a trustee varies with the terms of the instrument itself. Some have observed, "[t]he term 'protector' is used in such a variety of situations and ways that, absent specific context, it signifies little more than that a person who... has been granted a power affecting the operation of the trust".³

While a protector's powers may vary, some terms are more common than others. Helpfully, Birss J. found "that trust deeds which include a protector often provide for one or both of the following:

1. Waters' *Law of Trusts in Canada*, 5th Ed. **4.IV – PROTECTORS** [Waters].
2. *Ibid.*
3. Matthew Conaglen and Elizabeth Weaver, "Protectors as fiduciaries: theory and practice" *Trusts & Trustees*, Vol. 18, No. 1, 2012 at 19 [Protector as Fiduciary].

- 1) a power to remove and appoint trustees and
- 2) a power of negative consent, in that various powers of the trustees are only exercisable with the protector's consent."⁴

("Common Protector Powers")

3. WHY APPOINT THEM?

As aptly stated by Peter Hodson, "[e]very settlor who appoints a protector has a particular hazard from which he is seeking to protect the trust fund and those ultimately entitled to it".⁵ For international trusts, the hazard is quite clear. As Waters provides, "[t]he settlor of an offshore trust will not infrequently create a "protector" position, and assume that position him or herself, probably with the intention that another succeed him or her".⁶ Undoubtedly, the settlor is anxious about:

relinquishing part of his or her assets into the hands of offshore trustees whom he does not know personally and who are based thousands of miles away. This concern may be exacerbated by the fact that trust deeds often deliberately give trustees wide discretionary power over trust funds so that they may react promptly to any situation even if it was unforeseen at the time the trust was established.⁷

There are perceived benefits for appointing protectors in domestic trusts as well. Much like the mischief described above, settlors of domestic trusts may want some reassurance when relying on professional trustees that they do not know well.⁸ Alternatively, either kind of trust might opt to endow a protector with more targeted powers. As Waters notes, protectors can be empowered to break trustee deadlock where trustee unanimity is required as well as look after the interests

4. *JSC Mezhdunarodniy Promyshlenniy Bank and another v. Pugachev and others*, 20 ITEL 905 at 180 [JSC].

5. Peter Hodson, "The trust protector: friend or foe?" *Trusts & trustees*, 2006, 12:6 at 9.

6. *Supra*, note 1, at footnote 86.

7. Deborah Hartnett and William Norris, "The protector's position - suggesting some basic principles", P.C.B. 1995, at 109-110 [Protector's position].

8. *Ibid.* However, surely the concerns over trusting one's trustees are less remote when settling a domestic trust. One is no longer required to fork over their wealth to a faraway company, but instead could choose a more suitable (and local) individual to be their trustee.

of vulnerable beneficiaries.⁹ Relatedly, Phillip Renaud argues that:

The appointment of a protector in respect of a domestic trust has several distinct advantages: flexibility of the trust is maintained, and the appointment of an independent third party as protector may mitigate either against abuse of a power otherwise delegated to a trustee who is also a beneficiary (who would have a self-interest in the trust), or a trustee who may wish to avoid exercising broad powers for fear of exposing himself to liability.¹⁰

In their textbook on drafting trusts in Canada, James Kessler and Fiona Hunter acknowledge that the power to remove trustees (in both domestic and international trusts) “does seem to offer a solution to the settlor’s fears that trustees may refuse to resign or will resign only on unacceptable terms”.¹¹ Similarly, both domestic and international trusts may include a protector provision in order to reduce agency costs. Taken this way,

The principal reason for choosing to appoint a protector rather than a co-trustee is the difference in decision making structure that results from the protector/trustee relationship... The settlor can use a protector as a check on trustee behavior without making the protector a full partner in trust decision making. Moreover, the authority model - trustee as decisionmaker with protector as a check - also limits (but does not eliminate) the potential for quid-pro-quo decision making by co-trustees who have to interact on a regular basis with respect to trust administration.¹²

4. PROBLEMS ENDEMIC TO THE OFFICE OF A PROTECTOR

Utilizing a protector is not without its downsides. The 2002 New Zealand Law Commission Report observed that “the promotion to centre-stage of a player who is neither trustee nor beneficiary necessarily creates uncertainty as to the precise obligations and liabilities of a protector and as to the effect of

9. Waters, *supra*, footnote 1.

10. Philip J. Renaud, “Protectors in Domestic Trusts” (2008) 27:3 Est Tr & Pensions J 241 at 248 [Renaud].

11. James Kessler and Fiona Hunter “Drafting Trusts and Will Trusts in Canada” Chapter 7 Trustees’ Powers- 5. Guidance And Control Of Trustees - **h. Power to Dismiss Trustees** [Kessler].

12. Stewart E. Sterk, “Trust Protectors, Agency Costs, And Fiduciary Duty” 27 Cardozo L. Rev. at 2776 [Sterk].

the protector's role on the obligations and liabilities of the trustee".¹³ This "uncertainty" may quickly devolve into a "inefficient diffusion of responsibility".¹⁴ On the flip side, where diffusion of responsibility is skewed rather than uncertain, a moral hazard might arise. For example, where the protector has the power to replace the trustee, the latter might "be *especially inclined* to follow the former's directions".¹⁵ This would incentivize the trustee to become the protector's agent, and not "a watchdog for the interests of the beneficiaries".¹⁶

Indeed, Kessler provides that "while powers to remove trustees can be found in Canadian trusts, the authors consider the power to be *draconian* and should not be a standard form".¹⁷ Then again, we might expect a Canadian court to respond to excessive or inappropriate protector control by attaching a fiduciary duty to their powers.

5. DOES 'FIDUCIARY' MEAN ANYTHING?

Before determining whether a Canadian court would classify a protector as holding a 'fiduciary power', it is important to acknowledge that the label does not have a universal meaning. In his highly influential paper, "Fiduciary Powers", Professor Cullity (as he was then known) identified nine different meanings to the term.¹⁸ Arguably, this degree of definitional variability renders the label meaningless. As Antony Duckworth put it, "You cannot sensibly talk of a protector being a fiduciary, or not being a fiduciary, without making clear what you mean by 'fiduciary'".¹⁹ Tellingly, the word was both problematized and pragmatically resolved in a 2017 Chancery Division decision whereby Birss J. reasoned that

The question whether the powers given to the protector can be labelled 'fiduciary' or not probably does not matter. *The distinction which really matters is between a power which the protector* (who in this case is also

13. "Some Problems in the Law of Trusts," 2002 NZLC R79. Para 21 [NZLC]. Retrieved from <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R79.pdf>.

14. Sterk, *supra*, footnote 12, at 2778.

15. *Ibid.*

16. *Ibid.*

17. Kessler, *supra*, footnote 11.

18. See Maurice C. Cullity, "Fiduciary Powers" (1976) 54:2 Can B Rev 229.

19. Antony Duckworth, "Protectors: law and practice" *Trusts & Trustees*, 19:1, 2013 at 99 [Duckworth].

one of the Discretionary Beneficiaries) *could lawfully exercise in a selfish way in favour of himself and against the interests of the other Discretionary Beneficiaries...[compared to] power which could only properly be exercised for the purpose of furthering the interests of the Discretionary Beneficiaries as a class on the other hand.* The latter may well be the same thing as a fiduciary power but it does not matter. If the power is in the latter class then its exercise against the interests of the other Discretionary Beneficiaries could be unlawful and ineffective, and a court could so rule...²⁰

Consequently, Birss J. defined a fiduciary power in the negative sense. In other words, a fiduciary power is one that is not held personally (which unlike a fiduciary power may be exercised selfishly).²¹ Similarly, for our purposes, the fiduciary label is primarily meant to describe donees who will be subject to greater judicial scrutiny when exercising their power in a selfish manner as opposed to those who can overtly benefit themselves with less intervention from the bench.

(a) Do Protectors Hold Fiduciary Powers?

Typically, the construction of the trust instrument will be the arbiter as to whether a given power is personal or fiduciary in nature.²² At the same time, “the court is entitled to construe the powers and duties as a whole and work out what is going on, as a matter of substance”.²³ The far reaching nature of the powers commonly given to a protector should make classifying them as fiduciaries an uncontroversial proposition (in absence of a clear intent to make them personal).

Indeed, viewing protectors as fiduciaries should help preserve the enforceable rights of beneficiaries. The importance of this objective was highlighted in the English Court of Appeal case of *Armitage v. Nurse*, in which Millet, L. J. held that: “There is an irreducible core of obligations owed by the trustee to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.”²⁴ Arguably, protectors must also abide by this “irreducible core” and

20. *JSC, supra*, footnote 4, at 186.

21. *Ibid.*, at 187.

22. Waters, **17.IV – THE CAPACITIES IN WHICH POWERS MAY BE HELD.**

23. *JSC, supra*, footnote 4, at para. 167.

24. *Armitage v. Nurse* (1997), [1998] Ch. 241 (C.A.) at 253.

“exercise their powers and functions bona fide in the way they consider to be in the interests of the beneficiaries”.²⁵

On the other hand, some have noted that whether protectors are in fact fiduciaries is “open to argument”.²⁶ This perspective is well encapsulated by the Royal Court of Jersey in *the Bird Trust* which found that:

The powers of a protector vary considerably from one trust to another. In some he may be given very limited powers; in others they may be extensive. It is a question of construction of the particular trust deed as to whether a particular power of a protector is fiduciary or not. It may well be the case that, in relation to a particular trust, some powers of a protector are fiduciary and others are personal.²⁷

A similarly tentative classification of their fiduciary status was also reached by the New Zealand Law Commission which reasoned that:

Where the provision under consideration in effect confers on the protector a dispositive power, a mandate to dispose of property not his own, it seems sufficiently probable that a court would treat the protector as the donee of a power of appointment...

Where, on the other hand, the provision under consideration confers on the protector a power other than a dispositive power, it seems reasonably clear that a court would, despite the terminology of the instrument, classify the protector as a trustee or subject to fiduciary or contractual obligations sufficient for the protection of the beneficiaries.²⁸

Notably, Renaud argues that,

the New Zealand conclusion is likely the conclusion that will be reached by Canadian courts. Fiduciary relationships may arise depending on the circumstances of each case. The courts have been clear that the traditional categories of fiduciary relationships are not closed, and that, depending on the context of the situation, fiduciary relationships may arise.²⁹

Invariably, we must also consider the dynamics that inspire the

25. Terence Tan Zhong Wei, “The irreducible core content of modern trust law” *Trusts & Trustees*, Vol. 15, No. 6, August 2009 at 482.

26. Protector’s position, *supra*, footnote 7, at 111.

27. *Re the Bird Charitable Trust and the Bird Purpose Trust; Basel Trust Corporation (Channel Islands) Ltd. v. Ghirlandina Anstalt and others*, 11 ITELR 157 at 82 [*Bird trust*]; see also Protector as Fiduciary, *supra*, footnote 3, at 20.

28. NZLC at para 21.

29. Renaud, *supra*, footnote 10, at 260.

creation of a trust in the first place. On the one hand some settle a:

trust of family property where the objective is not to hide and protect the settlor's assets from creditors but rather to hold assets for the benefit of members of a family over an extended period of time. In that family context, a scheme with trustees—who may be professionals—and a protector who is neither a trustee nor the settlor nor a member of the class of beneficiaries, and who exercises their powers and obligations as a fiduciary, makes sense....³⁰

By contrast:

an unscrupulous person seeking to use a discretionary trust to protect assets from creditors, a trust which includes a role for that unscrupulous person as a protector with very wide powers of veto and to remove and appoint trustees may perhaps achieve the desired result.... By construing expressly unfettered powers as subject to a fetter, whether it is as a fiduciary or as subject to some other limit and scrutiny, the court could be assisting the settlor in avoiding his creditors.³¹

Notwithstanding this juxtaposition, asserting that “context” determines a protector’s fiduciary status is unhelpful. Practically, this means that solicitors will lack the kind of certainty that breeds effective planning. Relatedly, litigators will lack the concrete criteria needed to determine whether a duty has been breached. However, we might approach the fiduciary question “in a more confined way, by asking whether a particular power held by a particular protector is—or is not—held in a fiduciary capacity”.³² Seen this way, it would be worthwhile to determine whether the common powers bequeathed onto a protector would be considered fiduciary. Establishing the status of these powers will, in turn, provide much needed clarity to planners and litigators dealing with protector clauses.

6. THE POWER OF CONSENT

(a) *The Semi-Fiduciary Position*

According to Kessler and Hunter, where the trust instrument is silent on the protector’s fiduciary status, “the protector’s

30. *JSC*, *supra*, footnote 4, at 181.

31. *Ibid.*, at 182 and 187.

32. Protector as Fiduciary, *supra*, footnote 3, at 20.

power of consent is (in the authors' terminology) semi-fiduciary only".³³ These authors further clarify that a semi-fiduciary power of consent means that, "the consenter has a power of veto, which he may exercise or not subject only to the requirements of good faith and proper motive".³⁴ On a practical level, this distinction between "semi-fiduciary" and "fiduciary" powers boils down to the extent to which the holder may benefit himself. In this regard, they assert that the former has more latitude than the latter.³⁵

Notably, Kessler and Hunter's semi-fiduciary analysis makes extensive reference to *Portland v. Topham*.³⁶ Importantly, this House of Lords decision specifically dealt with a power of appointment.³⁷ In finding that the power was improperly used, Lord St. Leonards reasoned that:

the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, *act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power*, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.³⁸

While this language might curtail the abuse of a protector power, this author contends that it is doctrinally misplaced for our purposes.

(b) Rebuttal to the Semi-Fiduciary Position

With due respect to Hunter and Kessler, the *Portland*/"semi-fiduciary duty" standard is an unhelpful reference point for evaluating a given protector's power of consent. The ability to obtain jurisprudential guidance from appointment powers to consent powers is hampered by the fact that the latter can be administrative in nature (e.g., requiring protector consent prior to trustee investing trust property). On this point, the court in *Re Circle* cautioned that, "Passages lifted from cases involving

33. Kessler, *supra*, footnote 11. Chapter 7, v. Nature of Protector's Powers and Duties §7.33, footnote 3.

34. *Ibid.*, at NATURE OF POWERS OF CONSENT AND APPOINTMENT §7.37.

35. *Ibid.*

36. (1864), 11 H.L.C. 32.

37. *Ibid.*, at 1242.

38. *Ibid.*, at 1251.

construction of powers of appointment, i.e. dispositive powers, must be treated with caution in any analysis of an administrative power, whose *raison d'être*, nature and effects may be quite different.”³⁹

Portland's relevance is further undermined by the fact that leading trust law scholars doubt that a non-trustee's dispositive consent power is fiduciary (or even “semi-fiduciary”). For example, Underhill's *Law of Trusts and Trustees* found that “there is good scope for argument that the protector's power to withhold consent to proposed distributions or to direct distributions is a personal power, especially in the case of a settlor who is the protector”.⁴⁰ Similarly, Thomas and Hudson state that “there is no reason why a protector with a dispositive power must necessarily be in a fiduciary position any more than any other non-trustee appointor”.⁴¹ Yet, it should be noted that a dispositive consent power given to a protector who was a third party has been held to be fiduciary.⁴² As will be discussed below, when a protector has an additional role under the instrument, the fiduciary label will adjust accordingly.

Seen this way, the obligations that *Portland* imposes on a non-trustee's power of appointment are of little guidance for our purposes. Notwithstanding the (often) non-fiduciary nature of a protector's dispositive consent power, we must still delineate what duties (if any) are placed on a protector with an administrative consent power. To this end, we are assisted by the (*Re*) *Rogers* decision.

(c) *Re Rogers*

This Ontario Court of Appeal decision from 1928 effectively imposed a fiduciary duty on a non-trustee donee endowed with an administrative power of consent. In this case, the subject trust instrument required that the trustees “shall at all times consult with and be governed by the advice of the said A. H.

39. *Re the Circle Trust; HSBC International Trustee Limited v. Wong and others* at 16.

40. *Bird trust, supra*, footnote 27, at 83 citing Underhill and Hayton, *Law of Trusts and Trustees* (17th ed., 2007) at paras. 1.81-1.83.

41. *Ibid.*, *Bird trust*, at 84 citing Thomas and Hudson, *The Law of Trusts* (2004) at para. 23.35.

42. *Re the Freiburg Trust; Mourant & Co Trustees Limited v. Magnus and others*, 6 ITELR 1078 at 6 [*Freiburg*]. Yet, we should not infer too much from this particular decision, as no explanation as given as to why such a protector should warrant the designation.

Beaton (“the Advisor”) in all matters relating to my investment in the *National Life Ass'ce Co. of Canada* [*National Life*].⁴³

Importantly, the Advisor (or de facto protector) had developed a pecuniary interest in National Life after the testator had passed away. At the same time, he had unreasonably prevented the trustees from selling the estate’s National Life shares on numerous occasions. In analyzing the instrument’s arrangement, Justice Orde remarked that:

A provision in a will directing that the executors and trustees shall be “governed by the advice of” one who is neither a beneficiary nor a trustee or executor himself, and who *occupies no other position of a fiduciary character* whatsoever towards the estate and is consequently under no responsibility to the estate or its beneficiaries, is itself quite out of the ordinary...⁴⁴

More importantly, Justice Orde also found that the advisor’s interest obscured:

his judgment and *prevents him from acting wholeheartedly* in the interest of the estate... It was his duty to adhere to his position or resign from the post (whatever it was) that he occupied with reference to the estate... he has placed himself in a position where his interest may conflict with his duty [i.e. by purchasing shares of National Life]...⁴⁵

Put another way, the court rendered the advisor a fiduciary, despite its reluctance to use the term. On this point Renaud argues that “if the court had the benefit in 1928 of the reasoning in the more recent decisions of the Supreme Court of Canada, it might have concluded that the beneficiaries had a peculiar vulnerability to the exercise of the discretion by the “super-trustee” (protector) and that he was therefore a fiduciary”.⁴⁶ However, Renaud qualifies this conclusion by adding that “if the protector was indeed totally independent, and had not put himself in a conflict of interest, today’s court may have interpreted the power as a pure power and not interfered with the exercise or non-exercise of the power”.⁴⁷

(d) Consent Power Given to a Beneficiary

While helpful, Renaud’s qualification on the *Rogers* decision

43. *Rogers (Re)*, [1928] O.J. No. 110 at para. 5 [*Rogers*].

44. *Ibid.*, at para. 8.

45. *Ibid.*, at paras. 30 and 36.

46. Renaud, *supra*, footnote 10, at 253.

47. *Ibid.*

is incomplete. Some circumstances would even allow a non-independent party with a power of consent to benefit themselves without court intervention. For example, in the *Rawson* decision, the trustees' power and discretion were only exercisable with the written consent of protectors who were also beneficiaries.⁴⁸ Justice Smith interpreted the protectors' dual status as beneficiaries as evidence that their power was given in order:

to protect their own interests and not primarily, or at all, for the proper administration of the Stead Fund. This giving of the power of veto to protect one's interest suggests that the power is not a fiduciary but for the benefit of the donee of that power... It will also follow that in the exercise of their powers they will not have been subject to the control of this court were exercising powers of fiduciaries.⁴⁹

A similar view of the protector-beneficiary combination was adopted in *Re the Z Trust*. This case reviewed a power of amendment given to the grantor and a management committee.⁵⁰ One of the issues before court was whether a committee member was entitled to approve an amendment that would directly benefit him.⁵¹ While ultimately finding that the member at issue could benefit himself, Smellie J. observed that "here the power of control is conferred on one of the beneficiaries, *the power is more likely to be, although it is not necessarily, conferred on him for his own benefit and not for the benefit of the other beneficiaries also*".⁵²

(e) *Recap on Protector's Power of Consent*

In short, when determining the duties that attach to a power of consent, we should eschew the "semi-fiduciary" analysis. Attaching the adjective "semi" to the fiduciary label likely only engenders confusion.⁵³ Moreover, its foundational case, *Portland*, appears to have limited utility for our purposes. Instead, the alternative authorities listed above provide a more applicable consideration of which consent powers are in fact fiduciary. Minimally, we might start by presuming that a

48. *Rawson Trust Co. Ltd. v. Perlman et al*, [1990] BHS J. No. 64 at 10.

49. *Ibid.*, at 92 and 98.

50. 1997 CILR at 258. Retrieved from <http://cilr.judicial.ky/Judgments/Cayman-Islands-Law-Reports/Cases/CILR1997/CILR970248.aspx>.

51. *Ibid.*, at 266.

52. *Ibid.*, at 267.

53. Duckworth, *supra*, footnote 19, at 99.

protector's dispositive consent power is a personal and an administrative consent power is fiduciary.

Obviously, there are exceptions. In addition to instruments where the settlor specifically allows a protector to benefit himself, we can also expect less judicial scrutiny of protectors who are simultaneously listed as beneficiaries. On the flipside, dispositive consent powers will be more likely to be fiduciary when given to a third party. As summarized by Birss J, when a protector has another role in the trust scheme the court must "consider objectively what the purpose is for which the power has been conferred. Putting it another way, the question is: for whose benefit, as a matter of construction of the trust deed, has the power been given?"⁵⁴

7. THE POWER TO REMOVE AND APPOINT TRUSTEES IS FIDUCIARY IN NATURE

Back in the late 19th century, *Re Skeats Settlement* held that the power to appoint a new trustee was fiduciary in nature. Kay J. came to this conclusion by constructing a hypothetical:

Suppose (which happens not unfrequently) that the trustees, under the terms of the deed, are entitled to remuneration by way of annual salary or payment: could the person who has the power of appointment put that up and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is, that *he cannot exercise the power for his own benefit*. Again, why not? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature; and I, therefore, come to the conclusion, independently of any authority, that the power is a fiduciary power.⁵⁵

The above decision was affirmed in the Australian case *Re Burton*. In describing the fiduciary nature of a trustee appointment power, Davies J. noted that:

The power to remove a trustee and to appoint a new trustee *is neither a general power of appointment nor a power which may be executed in the interests of the Appointor*. The interests of persons other than the Appointor must be taken into account. The power is a trust or fiduciary power, being a power conferred by a deed of trust, and *must be exercised accordingly, in the interests of the beneficiaries*.⁵⁶

54. *JSC*, *supra*, footnote 4, at 203.

55. *Re Skeats' Settlement; Skeats v. Evans* (1989), [1886-90] All E.R. Rep. 989.

56. *Ibid.*, at 5.

A similar conclusion was reached by the Bermuda High Court in *Re STAR land STAR II Trusts; Von Knieriem v. Bermuda Trust Co.*⁵⁷ The trust instrument in this case provided that “[t]he Protector shall have power to remove a Trustee from office provided that such power shall not be exercised unless there shall be at least one Trustee continuing to act in the trusts hereof after such removal”.⁵⁸

Relying on this provision, the protector removed one trust company (BTC), and appointed another trust company (Grosvenor) in its stead. BTC attacked this move claiming that the powers were fiduciary, “and that they were to be exercised responsibly not arbitrarily in the interests of the beneficiaries as a whole and not simply according to the personal wishes of the Protector or by Settlor or both”.⁵⁹ Like Davies J. in *Re Burton*, Justice Puisne of the Supreme Court of Bahamas ultimately gave a lot of deference to the *Re Skeats* decision. Indeed, Justice Puisne specifically upheld the protector’s use of his removal power as he did not run afoul of:

the duties enunciated by Kay J. in *Re Skeats’ Settlement*, supra, that there is no evidence that the Protector when appointing Grosvenor as Trustee exercised that power corruptly for his own personal benefit and that there is no evidence that Grosvenor will be subservient to the Protector or that the Protector will control Grosvenor in the exercise of Grosvenor’s fiduciary powers. Furthermore, I find that BTC has failed to prove that the Protector made the appointment of Grosvenor as trustee of the Trusts with a corrupt purpose.⁶⁰

Interestingly, a slightly different rationale is outlined by Matthew Conaglen and Elizabeth Weaver. These scholars argue that the trustee removal power falls into a class of:

powers which impinge upon the trustees’ position as ‘ultimate guardians of the trust’ are likely to be treated as fiduciary, to some degree at least, so that the court can retain a supervisory jurisdiction. We suggest that it is unlikely that the court will allow that supervision to be avoided by language purporting to free the protector from any fiduciary obligations, but, again the touchstone is always the settlor’s objectively determined intention.⁶¹

57. (1994), SCI Vol. 38 188, Vol. 39 47 [STAR].

58. *Jurgen Von Enieriem v. Bermuda Trust Company Limited Civil Jurisdiction*, 1994 No. 154 at 12-13.

59. *Ibid.*, at 12.

60. *Ibid.*, at 18-19.

61. Protector as Fiduciary, *supra*, footnote 3, at 19.

Put simply, Conaglen and Weaver reason that the trustee removal power is fiduciary because it affects the trustees. Helpfully, we might use this “trustee impact” criteria in order to determine whether other powers bestowed onto protectors (or any other donee) are fiduciary.

8. JUDICIAL INTERVENTION

(a) Removing a Protector with a Dispositive Consent Power

While the above sections have established that some of the common powers bestowed on a protector can be curtailed by fiduciary duties, we must still determine when a court would go so far as to remove a protector. Unsurprisingly, certain actions (or inactions) would be more likely to attract this degree of intervention. For example, we have already established that a protector’s dispositive consent power is more likely to be viewed as a personal power.⁶² Therefore, we might cite *Re Armstrong* for the proposition that a court *cannot* remove a protector who fails to use such a power.⁶³ In this case, the court was reviewing a non-trustee [Jane Armstrong] with power of appointment. As Clauson J. put it, “Jane Armstrong is not a trustee. If she refused to act in the matter the court could not appoint another person to act in her place”.⁶⁴ At the same time, judicial non-engagement has its limits. A court would not allow a protector’s inaction to devolve into a trust’s maladministration.⁶⁵

In terms of precedent, we are benefited by the *Re Freiburg* decision. In this particular trust, the protector’s written consent was required “for the exercise by the trustee of certain of its powers including the power to make appointments of capital and income to any of the beneficiaries”.⁶⁶ Unfortunately, the protector was unable to exercise his consent power as he was serving time in prison for defrauding the trust in question.⁶⁷ Admittedly, Bailiff Bailhache found that “A protector is in the

62. *Bird trust*, *supra*, footnote 27, at 83-84.

63. *Re Park Public Trustee v. Armstrong*, [1931] All E.R. Rep. 633.

64. *Ibid.*, at 634.

65. *JSC*, *supra*, footnote 4, citing Hon Mr Justice David Hayton *The International Trust* (3rd ed., 2011) at 4.7; see also *Rosewood v. Schmidt*, [2001] WTLR 1081.

66. *Freiburg*, *supra*, footnote 42, at 2.

67. *Ibid.*, at 4.

position of a fiduciary and the court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name.”⁶⁸ However, the fiduciary element does not seem to be doing a lot of work in Bailiff Bailhache’s reasoning. This is evidenced by his appeal to the fact it would “be quite unconscionable and unthinkable that this court should have no jurisdiction to remove a protector who was thwarting the execution of a trust or who was otherwise unfit to exercise the functions entrusted to him by the trust instrument”.⁶⁹ Seen this way, court intervention is not strictly confined to donees with fiduciary powers. Instead, a protector may be removed when he is evidently “unfit” and/or “thwarting the execution of a trust”.

Therefore, even if we contend that the dispositive consent power is presumptively personal (and will thusly attract greater judicial deference), we can still suppose court intervention will occur in extreme circumstances analogous to *Re Freiburg*. Put simply, the court’s inherent jurisdiction can be relied upon to rectify the situation.

(b) Removing a Protector with an Administrative Consent Power

Regarding the removal of a protector with an administrative power of consent, we can return to (*Re*) *Rogers*. Like Bailiff Bailhache, Orde J. did not take kindly to the suggestion that the advisor’s power was beyond judicial scrutiny. Specifically, he asserted that:

to contend that the so-called control over the management of the estate given him [the advisor] can hamper or limit the power of the Court to advise the trustees and to give directions for the due administration of the estate is to place Beaton [the advisor] *in the extraordinary and quite unknown position of a sort of super-trustee who is neither responsible to the trustees or the beneficiaries nor subject to the control or direction of the Court.*⁷⁰

Consequently, the court allowed the trustees to dispose of the estate’s shares without consulting the advisor and held that they no longer needed to consult him going forward.⁷¹

68. *Ibid.*, at 6.

69. *Ibid.*, at 7.

70. *Rogers, supra*, footnote 43, at 11.

71. *Ibid.*, at para. 37.

(c) Mistakenly Used Consent Power

A protector might mistakenly use, rather than maliciously abuse, their consent power. While highly circumstantial, a Canadian court could theoretically declare a protector's consent power invalid when the latter was mistaken about an appointment's legal ramifications. As a starting point, Canadian courts have accepted the *Pitt v. Holt* decision from the Supreme Court of the United Kingdom.⁷² As summarized by Newbury J. speaking on behalf of the British Columbia Court of Appeal:

the Court [in *Pitt v. Holt*] reviewed various older authorities concerning equitable rescission on the grounds of mistake, de-emphasizing (if not rejecting) a previous distinction between the "effects" of a mistake and its "consequences". (See especially *Gibbon v. Mitchell* [1990] 1 W.L.R. 1304 (Ch. Div.)) The Court decided that rescission will be available in the context of an error made by the trustees of a trust where a "causative mistake of sufficient gravity" occurs and the mistake is either one "as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction."⁷³

Under this framework, rescission is arguably also available where the protectors make similar kinds of errors. Indeed, this situation is reflected in *Re Bedford Estates*. The trust deed in this case required the beneficiary's consent before the trustees made an appointment. At issue was a series of appointments undertaken by the trustees. While designed to reduce capital gains liabilities, the transactions ultimately had the opposite effect.⁷⁴ Like the trustees, the beneficiary with the consent power made the appointments on the basis of mistaken legal advice.⁷⁵ Importantly, neither he nor the trustees would have engaged in this planning exercise if they had been aware of the fiscal consequences.⁷⁶ Accordingly, the court set aside the transaction. Notably, Lloyd LJ was unconcerned about the fact that the appointment power was exercisable by trustees, and a non-fiduciary beneficiary.⁷⁷ In other words, the doctrine of mistake was readily available, irrespective of the donee's fiduciary status.

72. See *Pallen Trust (Re)* (2015), 385 D.L.R. (4th) 499, 2015 BCCA 222 (B.C. C.A.) citing *Pitt v. Holt* 2013 UKSC 26 *Pitt v. Holt*, 2013 UKSC 26 (U.K. S.C.) throughout.

73. *Ibid.*, *Pallen* at 2. For a more fulsome discussion of mistake in the trust context see *Waters' 9.II – SETTING THE TRUST ASIDE - C. – Trusts Based on Mistaken Assumptions*.

74. *Re Bedford Estates; Sieff and others v. Fox and others*, 8 ITELR 93 at 10-20.

75. *Ibid.*

76. *Ibid.*, at 27.

However, *Bedford Estates* was decided before *Pitt v. Holt*. The latter appears to narrow the availability of the mistake doctrine only to fiduciaries. As described by Waters', *Pitt* stands for the proposition that “[a] fiduciary decision can be retroactively set aside when it was made for the wrong reasons, but only when this rises to the level of a decision made in breach of fiduciary obligation”.⁷⁸ Consequently, the mistake doctrine may only be relevant for protectors who hold their powers in a fiduciary capacity.

(d) Removing a Trustee on the Three Grounds

There is good reason to believe that a protector removing a trustee on the basis that the trustee refused to act, was unfit, or incapable of doing so (“the three grounds”), will have his decision subject to similar criteria as a court removing a trustee on those grounds. As Waters provides:

If persons having an express or statutory power to appoint new trustees purport to replace a trustee on the grounds that he or she refuses to act, is unfit to act, or is incapable of acting, and the trustee disputes that he or she falls into the category alleged, the court can be asked to determine what constitutes unfitness or incapability. The court will have to make a similar decision if it is asked to remove a trustee, whether or not it is also asked to make a new appointment.⁷⁹

Put another way, we might expect a court to consistently adjudge when one of the three grounds is triggered, regardless of whether the court or a protector is relying on one of the grounds to remove a trustee. Admittedly, the application of these three grounds is highly circumstantial. As such, Canadian courts have consistently followed Lord Blackburn’s exhortation in *Letterstedt v. Broers*,⁸⁰ namely that the “main guide must be the welfare of the beneficiaries”. Importantly, Lord Blackburn recognized the limitations of this rule acknowledging that: “Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of

77. *Ibid.*, at 112.

78. 18.IV – LIABILITY OF TRUSTEES IN THE EXERCISE OR NON-EXERCISE OF DISCRETION.

79. Waters’ *Law of Trusts in Canada*, 5th Ed.16 – Death, Retirement, and Removal of Trustees B. – Circumstances Justifying Removal (“Circumstances”).

80. (1884), [1881-85] All E.R. Rep. 882 (South Africa P.C.) at 887.

great nicety. But they proceed to look carefully into the circumstances of the case.”⁸¹

While the caselaw is quite extensive, Waters succinctly distills the kinds of misconduct that have resulted in trustees being removed by Canadian courts under the penumbra of “welfare of beneficiaries”. The list includes: dishonestly, acting manifestly in bad faith, having a conflict of interest, persistent omissions and mistakes, failure to maintain an even hand, disagreement between trustees (to the point which prevents the exercise of their powers and thereby harms beneficiaries), as well as disharmony between trustee and beneficiaries (provided the disharmony creates some detriment for the beneficiaries).⁸²

Additionally, Pattillo J. in *Johnston v. Lanka Estate* summarized the principles (“removal principles”) that should guide the court’s discretion in deciding whether to remove estate trustees:

- (1) the court will not lightly interfere with the testator’s choice of estate trustee;
- (2) clear evidence of necessity is required;
- (3) the court’s main consideration is the welfare of the beneficiaries; and
- (4) the estate trustee’s acts or omissions must be of such a nature as to endanger the administration of the trust.⁸³

Therefore, a disgruntled trustee who was removed by a protector might bring an application to the court to evaluate the protector’s decision on the basis of the beneficiary welfare jurisprudence as well as the removal principles. Yet, there is another legal test that provides equally compelling reference points.

(e) An Alternative Standard

In *Stewart*, the British Columbia Supreme Court was asked to decide whether trustees properly removed their fellow trustee as per the instrument’s terms. The court approvingly cited Eileen E. Gillese, *The Law of Trusts*, 3rd ed for the proposition that,

81. *Ibid.*

82. *Supra*, footnote 1.

83. *Johnston v. Lanka Estate* (2010), (*sub nom.* *Johnston v. Lanka*) 103 O.R. (3d) 258, 2010 ONSC 4124 (Ont. S.C.J.) at para. 15; followed in *Haines v. Haines Estate*, 2012 ONSC 1816 (Ont. S.C.J.) at para. 10.

“[i]n so far as the removal of trustees is concerned, if the trust instrument specifies a mechanism for removing a trustee from office, its terms will govern”.⁸⁴ Abrioux J. went on to qualify that “[w]hen the court is asked to remove trustees and *there is no mechanism* provided for under the trust indenture, removal will only occur in *restricted* circumstances”.⁸⁵ While Abrioux J. approvingly cited the removal principles enumerated above, both the applicants and the beneficiaries took real issue as to whether those principles ought to apply. Importantly, this case involved removal of a trustee by virtue of the trust deed itself as opposed to by court order.⁸⁶ Moreover, the parties submitted another passage from Waters which provides that the court will only interfere with the valid exercise of trust powers if:

- a) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision;
- b) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or
- c) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.⁸⁷

(“The interference test”)

Essentially, the parties sought to reframe the issue. This was not a case about whether a trustee was properly removed, but a case about trustees validly exercising their power. As such, the parties argued that the court should conduct a general review as to whether the trust power was exercised validly, rather than superimposing the removal principles relied upon by courts when they, themselves, remove trustees. Notably, Abrioux J. acknowledged that “[i]t may well be that there is not a substantive difference between this broadly stated test [judicial interference with the valid exercise of trust powers] and the framework that would apply on a court application to remove a trustee”.⁸⁸

However, he also provided that this was “an issue I need not resolve on this application”.⁸⁹ This is because the paucity of

84. *Stewart v. Stewart*, 2018 BCSC 556 (B.C. S.C.) at para. 57.

85. *Ibid.*, at para. 59.

86. *Ibid.*, at para. 71.

87. *Ibid.*; This can also be found in Waters’ 18.IV – LIABILITY OF TRUSTEES IN THE EXERCISE OR NON-EXERCISE OF DISCRETION.

88. *Ibid.*, at 72.

evidence on record failed to establish the rationale of the trustees when they opted to exercise their trustee removal power. In particular, “the relevant meeting minutes, together with the other meagre evidence on the issue, [were] insufficient for me [Abrioux J] to conclude that the decision was made in conformity with considerations (a) and (b) [see the interference test above]”.⁹⁰

Put differently, because there was no evidence indicating that the power was used inappropriately, Abrioux J. dismissed the application and upheld the trustees use of their removal power. However, this case leaves lingering uncertainty as to which criteria would be used to review a protector’s trustee removal decision.

(f) Does it Matter which Test Will Apply?

There is some merit to Justice Abrioux’s observation that the distinction between these tests may be illusory. Even under the valid exercise of a power analysis, the power in question ultimately deals with the removal of a trustee. Put this way, a court tasked with determining whether the power was exercised in a reasonable manner, with proper considerations, and in good faith, may very well end up taking recourse to the removal principles. After all, how do you determine if a removal power was exercised unreasonably? Surely, even in this analysis the jurisprudence dealing with court-imposed trustee removal provides a useful metric for “reasonable.” Additionally, both tests share the common feature of attempting to promote beneficiary welfare.

On the other hand, the trustee removal principles seem to require a higher threshold for removing a trustee when compared to a broadly worded power subject to a more circumscribed judicial intervention. The former analysis starts with the assumption that the trustee ought not to be removed unless there is a compelling reason to do so. By contrast, the latter analysis assumes that the donee of a trustee removal power validly removed a trustee unless there is evidence to the contrary. Similarly, the removal principles will not “lightly” remove a trustee, they require “necessity”, and seek to prevent the estate from being “endangered”. As Abrioux J. put it, removals coming from the court in absence of a trust instrument

89. *Ibid.*, at 72.

90. *Ibid.*, at 73.

mechanism only occur in “restricted circumstances”. By contrast, removals arising from the trust instrument itself will be (presumptively) governed by its terms. Consequently, these collective differences between the tests could plausibly render different outcomes when applied to the same set of facts.

9. CONCLUSION

The reasons for including a protector in a trust instrument are manifold. Whether a settlor is concerned about a trust’s bottom line, a trustee’s trustworthiness, or a vulnerable beneficiary, a protector can be an important tool. Invariably, the particular powers bequeathed onto a given protector will reflect that specific goals and circumstances of the settlor. However, the role’s inherent fluidity ignites myriad questions as to the precise expectations and obligations that ought to govern any one protector. This uncertainty becomes especially salient when a protector veers from his mandate in a manner that is not explicitly contemplated by the instrument. The dearth of on point Canadian authorities only exacerbates this problem.

Fortunately, relying on the international jurisprudence and (*Re*) *Rogers* we can plausibly predict that the protector’s common powers will frequently have a fiduciary label affixed to them. In particular, the administrative consent power as well as power to remove and appoint new trustees will be more likely to attract a fiduciary label. On the other hand, the dispositive consent power’s overt similarity to a non-trustee with a power of appointment will militate in favour of deeming it non-fiduciary in nature. However, all of these presumptions may be rebutted if the donee has a dual role in the instrument that favours a different conclusion.

Yet classifying a protector’s power as fiduciary does not complete the analysis. Regardless of whether a particular power is fiduciary, the jurisprudence indicates that the court will intervene if a protector’s idleness is harming the trust’s administration. Similarly, a protector’s mistaken use of a fiduciary power could be rectified by the doctrine of rescission. Less clear is the standard of review we can expect for a protector with a trustee removal power. However, regardless of whether the valid exercise of power, or removal principles reference point is used, we can at least take comfort that the

welfare of the beneficiary caselaw can provide guidance to estate planners and litigators alike.