Consulation paper on the law of trusts #1

THE RULE IN SAUNDERS V. VAUTIER
AND THE VARIATION OF TRUSTS

Law Reform Commission of Saskatchewan
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The Law Reform Commission Act:

"The Commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law."
EXECUTIVE SUMMARY

This is the first of a series of consultation papers the Commission intends to issue on aspects of the law of trusts in Saskatchewan. After assessing responses to the consultation papers from the Bar and other interested persons, the Commission will prepare a report making recommendations for reform of trust law in the province.

In Saskatchewan, an express trust established by will or inter vivos can be terminated or modified either by application of the rule in Saunders v. Vautier or by the court under The Variation of Trusts Act. The rule in Saunders v. Vautier permits the beneficiaries of a trust, when all are capacitated adults, to call upon the trustee to terminate the trust and distribute the trust property as they direct. It has been criticised by commentators and courts as a violation of the settlor's intent. The rule has been abolished in Alberta and Manitoba, and abolition has been recommended in Ontario.

The Commission has concluded that the rule is indefensible in the circumstances in which it is most often applied: Termination of a trust designed to postpone transfer of full control of property to a beneficiary until the beneficiary reaches a stipulated age beyond the age of majority. A properly drafted trust can achieve this goal, with the result that the rule only applies in practice in cases of inadvertence to the rules of construction established by the courts. In some cases, premature termination or variation of a trust is justified by changed circumstances. However, in the Commission's opinion, modification of a trust should only occur with court approval under The Variation of Trusts Act.

If the Commission's proposal is adopted, some amendments to The Variation of Trusts Act will be necessary to accommodate the new regime. In addition, the Commission has reviewed the operation of the Act and recommends some minor amendments to clarify its language and purposes.
I. INTRODUCTION

A trust makes it possible to confer a beneficial interest in property on one or more persons without giving them unfettered control over the property by appointing a trustee to manage it. The document creating the trust regulates the way in which the trustee administers the trust property. The trust document, supplemented by the general law of trusts, determines such things as the way in which trust funds may be invested and the purposes for which trust property can be used.

Outside the commercial world, trusts are most often established in Saskatchewan by will. They are usually designed to preserve the trust property to insure that all the beneficiaries receive the intended benefit. For example, a testator may establish a trust to provide income for a spouse during his or her lifetime, with the proviso that after the spouses' death, the trust will terminate, and the property conveyed by the trustee to the testator's children. During the life of the trust, the trustee will dissipate the capital only to the extent permitted by the terms of the trust, so that all the beneficiaries will receive what the testator intended them to have.

Even a trust such as this, created for relatively straight forward purposes, will usually include detailed and specific directions to guide the trustee. Circumstances may arise which were not foreseen by the testator, and trust provisions may no longer effectively serve the purpose for which they were created. In Saskatchewan, the terms of a trust can be modified in two ways when the need arises. Under the rule in Saunders v. Vautier, when all the beneficiaries of a trust are competent adults, and all agree to terminate the trust, they can together require the trustee to bring an end to the trust, or resettle the trust property on new terms. No application to the court is necessary if the rule is applied; the trustee is required by law to respect the beneficiaries' wishes. If there are minor, incapacitated, or as yet unborn beneficiaries, the rule does not apply. However, an application can

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1This description of the purpose of trusts applies, of course, only to express trusts, not constructive or resulting trusts created by operation of law. This Report, however, will be exclusively concerned with the former.

2See Waters, Law of Trusts in Canada, (2nd ed), 1984, p. 963. A fuller statement of the rule will be given below.
be made to the court under The Variation of Trusts Act\textsuperscript{3} to modify the terms of the trust. The variation can be made if the court is satisfied that it is not contrary to the wishes of beneficiaries who cannot speak for themselves.

This report examines variation of trusts in Saskatchewan under the Act and the rule. The rule in Saunders v. Vautier has attracted criticism from the bench and legal profession, and has been abolished in two provinces. It will, therefore, be the primary focus of attention in what follows. Any change in the rule will inevitably require amendment of The Variation of Trusts Act. The Act was designed to supplement the rule, and thus cannot stand alone without modification. In addition, some aspects of the Act apart from its relationship to the rule in Saunders v. Vautier are in need of review.

II. THE RULE IN SAUNDERS V. VAUTIER

A. An Overview

Variation of a trust overturns the scheme for administering the trust property conceived by the settlor. Trust law is erected is the proposition that the settlor, while relinquishing title and personal control over the property, is entitled to set rules and conditions that determine how the trust property is to be managed. The whole purpose of a trust is to carry into effect the settlor's intentions in regard to the property. When a dispute arises over the meaning of the terms of a trust, the basic rule of construction adopted by the courts is to give effect to the intention of the settlor if it is possible to discern it from the language of the trust document.\textsuperscript{4} If the terms of the trust cease to appropriately serve the ends they were designed to achieve, variation can be justified as a corrective measure, but a variation that remakes the trust so that it significantly changes the purposes of the

\textsuperscript{3}The Variation of Trusts Act R.S.S. 1978, c. V-1.

\textsuperscript{4}On the settlor's intention, see generally Donovan Waters, The Law Of Trusts In Canada (2nd), pp. 85 ff.
trust is difficult to reconcile with the basic policy of the law of trusts.

Because of the importance attached to the intentions of the settlor, it is rather surprising that the rule in Saunders v. Vautier permits the beneficiaries of a trust to prematurely terminate the trust and require the trustee to transfer legal title to the trust property directly to them, even when to do so violates the clear intention of the settlor.

In practice, the rule is most often applied when there is a single beneficiary, and termination of the trust is postponed under the terms of the trust past the age of majority. The case which is conventionally regarded as establishing the rule was of this sort. Daniel Vautier was left stock in the East India Company by his great uncle. The terms of the trust established by the will required the trustees of the estate to accumulate the dividends on the stock until Daniel reached the age of twenty-five, and then convey the stock and dividends to him. Nine years after his great uncle's death, Daniel reached the age of majority. Since he intended to marry and set himself up in business, he asked the trustees to transfer the stock to him. They refused to do so. Daniel took his case to Chancery, which ruled in his favour.5

The reported decision in Saunders v. Vautier does not disclose why Daniel Vautier's great uncle determined to postpone the gift until Daniel was several years beyond the age at which he would otherwise have had full legal capacity to deal with the property himself. In modern cases, the motive for postponement is usually a reservation about the maturity and responsibility of the beneficiary. This is a legitimate concern that would be respected by the courts in other contexts. In fact, with only a slight alteration in drafting, the will in Saunders v. Vautier would have effectively carried out the testator's intention. For example, had the will provided that another beneficiary was to receive the stock in the event that Daniel failed to survive to age twenty-five, he would no longer have been the sole beneficiary, and could not alone have forced premature termination of the trust.

Although the court in Saunders v. Vautier rationalized its decision on the basis of authority and established canons of construction, the policy underlying the rule it enunciated is by no means

clear. Waters suggests that the rule was "assumed by the English courts rather than consciously adopted", and observes that "at no time has there been justification of its far-reaching effects upon those trusts to whose circumstances it chances to apply." Courts in the United States have uniformly rejected arguments in favour of re-inventing the rule in that country. Judicial criticism of the rule in Canada has a long history, but the rule is too well established on this side of the border to be overturned. More recently, the rule has attracted the attention of law reformers and legislatures. The Alberta Law Reform Commission recommended abolition of the rule in 1972. The Manitoba and Ontario commissions have followed suit. The rule was abolished in Alberta in 1973 and in Manitoba in 1983.

If the rule in Saunders v. Vautier has any contemporary justification, it likely lies in the fact that some trusts postponing termination when only adult beneficiaries remain no longer serve their original purpose, and can create inconvenience, or even hardship, if continued to their natural end. A trust set up to ensure that a beneficiary with only a life interest does not dissipate the assets of the

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6Waters, note 3, p.976.

7The leading case is usually regarded as Claflin v. Claflin 20 N.E. 454 (1889). The American courts have taken the position that a settlor's "material intention" should be disturbed only if it is contrary to law or public policy. See generally A.W. Scott, The Law of Trusts (3rd), 1967.


12see Trustee Act, R.S.A. 1980, c. T-10, s.42.

13see S.M. 1982-83, c.38, s.4.
trust to the detriment of the residual beneficiaries has served its real purpose if all the beneficiaries are competent and can agree on a mutually satisfactory disposition of the property. It has been suggested that the rule in *Saunders v. Vautier* should be retained in such cases, but abolished in cases like *Saunders v. Vautier* itself, where something more than preservation of the property through a succession of interests was intended by the settlor.  

Partial abolition of the rule is a viable alternative to the Alberta and Manitoba legislation. However, it is perhaps not now as attractive an approach to reform as it once was. Since adoption of variation of trusts legislation in Saskatchewan and other Commonwealth jurisdictions, the notion that judicial review of the trust arrangements is appropriate has been accepted as part of the policy of the law of trusts. The abolition legislation in Alberta and Manitoba, and the proposed abolition legislation in Ontario, are all predicated on the existence of a judicial power to vary trusts in appropriate cases.

**B. The Substance of the Rule**

A distinction was made above between two types of trust provision that attract application of the rule in *Saunders and Vautier*. One hand, a trust may postpone a gift until the beneficiary reaches a certain age, or until the happening of a specified event. This was the circumstance in the case of *Saunders v. Vautier* itself, and the rule enunciated in the case has been referred to as the "narrow" version of the rule. Waters characterizes it in this manner:

Where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee.  

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14 Waters, note 3, 979 notes this approach to reform of the rule.

15 Waters, note 3, p.963.
However, the way in which the court in *Saunders v. Vautier* justified its decision invited an extension of the rule.

The court in *Saunders v. Vautier* proceeded from the notion that the beneficiaries are the ultimate owners of the trust property, and if competent, should be able to decide what is to be done with it. If there is a sole capacitated beneficiary, and the beneficial interest has vested in him so that either he or his heirs must inevitably be entitled to the property free of the trustee's control, the time has come to dispense with trustee. To the objection that the settlor apparently intended that the trustee remain in place, it can be replied that the if the settlor has made an absolute gift of the beneficial interest in property, the settlor's primary intention is simply to make the gift. Once vesting has occurred, there is no reason to retain the paraphernalia of the trust.

This logic can obviously be applied to any case in which all persons who may benefit under the terms of trust are capacitated and able to agree on what should be done with the property. The courts tacitly accepted this extension of the rule as originally formulated, though it appears to have been Underhill, in an influential text, who provided an explicit statement of the expanded rule:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.  

Note that under the expanded rule, not all interests need to have vested for the beneficiaries to call upon the trustees to terminate the trust. However, if the capacitated beneficiaries represent the sum total of all interests under the trust, they together "own" the entirety of the property. Moreover, the settlor's primary purpose will have been carried out in so far as everyone intended to benefit will have received an interest in the property that he or she regards satisfactory when the trust is terminated. Note also that Underhill's version of the rule permits the beneficiaries to force either

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16 *Underhill on Trusts (11th),* 1959, Art. 68. This passage has frequently been cited with approval by Canadian courts. See for example, *Re Johnston* (1964), 48 D.L.R. (2nd) 573 (B.C.).
termination or modification of the trust. Some doubt has been expressed that the logic underlying the rule is consistent with modification rather than variation, but since the beneficiaries could, after terminating the trust, resettle the property on themselves on new terms, the distinction is probably without practical importance.

On either the narrow or expanded versions of the rule, to permit the beneficiaries to terminate the trust, all must agree, and all must be of full age and otherwise capacitated.\(^\text{17}\) If there are minor or incompetent beneficiaries, or potential beneficiaries who are as yet unborn, the trust cannot be terminated or modified without court approval under *The Variation of Trusts Act*. If there is a sole beneficiary, the rule can be invoked only if it is clear that there is no other person potentially interested in the trust property. Thus the sole beneficiary's interest must be vested rather than contingent. If any other person may become entitled to the trust property under the terms of the trust, the rule cannot be invoked.

The rule is consistent and logical on its own terms, but does not in consequence uniformly prevent settlors from postponing transfer of trust property to a beneficiary. The most common device for avoiding application of the rule is postponement of vesting by providing for a gift over in the event of the beneficiary death.\(^\text{18}\) This, of course, makes it clear that the beneficiary does not have an absolute interest in the trust property. The beneficiary may be granted maintenance, or even the entire income earned by the trust property, until the termination date without undermining the effectiveness of this mechanism. A gift over is thus often inserted in a trust for the express purpose of avoiding the rule in *Saunders v. Vautier*, and can be safely used for this purpose without

\(^{17}\)Waters, note 3, pp.966–970 suggests that there are six common circumstances in which the rule can be invoked: (1) where the settlor attempts to postpone a gift to a certain age, or (2) to a certain date; (3) where provision is made for payment of a gift in instalments; (4) where the trustees are given discretion as to when the gift is to be made; (5) where the beneficiary is a charity; and (6) where there is a power to appoint a remainderman in a life beneficiary. The last is sometimes treated as a separate rule, the rule in *Barford v. Street*.

\(^{18}\)This mechanism was upheld by the Saskatchewan courts in *Re Salterio* (1981), 14 S.R. 23, affirmed (1981), 130 D.L.R. (2nd) 341.
materially affecting the settlor’s plans.

Other devices have also been held to avoid the rule, but careful drafting is necessary to ensure the desired result. For example, if a trustee has a discretion whether or not to advance a benefit to the beneficiary, the rule may be avoided. However, the scope of the discretion required to achieve this purpose is uncertain. For example, in Re Hamilton, the beneficiary was to receive one quarter of a bequest upon the age of majority. The remainder was to be held at the discretion of the trustees for such time "as they think best". This bequest was held to be subject to the rule.\textsuperscript{19} Waters is of the opinion that a discretion will avoid the rule only if it gives the trustees a clear authority not to pay anything out to the beneficiary at all.\textsuperscript{20}

C. The Policy of the Rule: A Critical Review

The substance of the rule in Saunders v. Vautier antedates the case that gave it its name. Something like the modern form of the so-called narrow version of the rule appears to have been accepted at least as early as a 1727 decision, Love v. L'Estrange.\textsuperscript{21} When the rule was given its definitive statement in Saunders v. Vautier, the court did not regard the concepts it advanced to justify it as novel, nor did it seem necessary to give much attention to the policy of the rule. As noted above, the court approached the problem before it as essentially a matter of construction: The settlor's primary intention was deemed to be to confer an absolute gift on the beneficiary. Once the gift vested, the intention had been carried out, and since no other person had any claim on the property except the trustee, the trust could be collapsed.

The attractiveness of the rule to the judges who created it was in large part its simplicity as a rule of construction. Trusts are generally to be interpreted so as to carry out the intention of settlor. But in complex trusts, divining true intent can be a difficult task. Certainly, the technicalities and

\textsuperscript{19}(1912) 12 D.L.R. 861 (Ont. C.A.).

\textsuperscript{20}Waters, note 3, 970.

\textsuperscript{21}(1727) 5 Bro. Cas. 59, 2 E.R. 532 (H.L.)
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often obtuse verbiage that infected the intergenerational settlements used to order the affairs of the English gentry in the eighteenth and early nineteenth centuries created more than a few problems of construction. As much damage might be done to a settlor's wishes by strict interpretation of the terms of a settlement as by risking to identify a "primary intention" and giving it effect. As the Manitoba Law Reform Commission observed,

If it is apparent from a "true construction" of the gift provision that the testator intended the beneficiary to have an absolute interest in the property gifted, and has, in effect, given such an interest, this will be deemed by the court to be the testator's primary intention, and any other directions which detract in any way from the beneficiary absolute interest will be disregarded as being logically and politically indefensible.22

Waters suggests that, on the logic of the court in Saunders v. Vautier, it is a "simple, almost pragmatic conclusion" that a capacitated, sole beneficiary "should be able to say what he wants done with the property".23 Yet neither the Manitoba Law Reform Commission nor Professor Waters is convinced that the rule is an acceptable approach to termination of trusts. The appeal of the rule to its makers is rooted in the history of trust law. The purpose of the family settlement was primarily to ensure that land--- the basis of wealth and status in an aristocratic society--- remained in the family from generation to generation. The role of the trustee was to prevent the head of the family for the time being from dealing with the land in such a way as to compromise the family interest as a whole, both in present and future generations. However, such arrangements sometimes threatened to become so complex that the land could scarcely be dealt with in a commercially reasonable manner. The courts often found it necessary to rescue the legitimate purposes of trusts from the suffocating detail that settlements attracted.24 In this context, the court's focus on "primary intention" is explicable. Unnecessary fetters on the disposition and enjoyment of land were looked upon with

23Waters, note 3, p. 963.
24see the Commission's report Proposals Relating to the Rule Against Perpetuities for a discussion of the role of the family settlement in the history of trust law.
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suspicion. Thus in 1859, the court in Gosling v. Gosling had no difficulty stating baldly that

The principles of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of property given to them by a will ... unless during the interval the property is given for the benefit of another.25

In an era when the principal purpose of trust arrangements was protection of beneficiaries in succession, the notion that the "primary intention" has been achieved when all beneficiaries are capacitated and agree to end the trust becomes "a simple, pragmatic conclusion". Nor is it surprising that nineteenth-century American courts rejected the English approach. Family settlements were never as important in the United States as in Britain. The laissez-faire attitude expressed in the determination of American law makers to preserve the intention of testators in virtually every case is therefore hardly to be unexpected.

From a modern perspective, the problem with the traditional rationale for the rule is that it embodies a generalization about the purposes of trusts that is no longer valid, if in fact it ever was. In a relatively recent western Canadian case, Fries v. Fries, a testator made a simple bequest to his son: His trustees were given a legacy with directions to pay the income to the son until he reached the age of twenty-five, then pay the principle to him. The testator thought it prudent to protect the capital from the immature judgement of his heir until he was old enough to have sown his wild oats. The lawyer who drew the will was, of course, rather imprudent. The legacy clearly attracts the rule in Saunders v. Vautier, and was held to do so.26 But why should this be? The purpose of the trust was clear, and clearly not simply to protect the trust property during the minority of the testator. Had the testator wished his son to have the legacy on coming of age, he could easily have said so in his will. The trust did not tie up property in a complex trust for an unreasonable period of time. Although the testator evidenced a rather paternalistic attitude toward his son, the property was his to give or withhold. It is hardly unreasonable that the beneficiary of a gift should be held in law to the conditions attaching to it. Yet the rule in Saunders v. Vautier compelled the court to overturn the

25 (1859), John's 265, 70 E.R. 423.

26 [1977] 1 W.W.R. 289 (Man.).

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conditions and defeat the intention of the testator.

A distinction can be made between "simple" and "special" trusts. A simple trust is one in which property is left on trust without any express directions to the trustee. A special trust, on the other hand, is one in which the trustee is "called upon to exert himself actively in the execution of the settlor's intention".

The trustee of a simple trust has no duty other than to convey the trust property to the beneficiary, whom equity recognises as *de jure* owner. The beneficiary is thus accorded a right to demand that the trust be terminated and the legal title conveyed to her. A trust that has run its natural course toward termination is analogous. If, for example, duties have been imposed on a trustee to preserve the capital of an estate under the terms of an intergenerational trust, the trustee has fulfilled his duties when the last of the beneficiaries come of age. A rule permitting beneficiaries to terminate such a trust would amount to little more than an extension of the termination rule applying to simple trusts.

Trusts such as those in *Saunders v. Vautier* and *Fries v. Fries* are special trusts. A duty was imposed on the trustee in each case to hold and manage the property for the protection of the beneficiary until he reached an age deemed sufficient by the settlor to manage the property himself. Terminating these trusts prematurely is not analogous to termination of a simple trust, unless the testator's full intent is ignored. Replacing the testator's full intent with the narrower "primary intention" identified by the court in *Saunders v. Vautier* makes sense only in the context of the age in which the decision was made.

The reconstruction of the considerations that led the courts to create the rule in *Saunders v. Vautier* attempted above demonstrates Water's contention that the rule was "assumed by the English courts rather than consciously adopted". Whether the rule was ever good policy or not, it is no longer defensible in terms of the original rationale. Modern support for the rule must be found

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27 The importance of the distinction in this context was pointed out by the Manitoba Law Reform Commission, note 10, p. 7.

28 Underbill, note 17, p. 6.
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elsewhere.

It has been suggested that the rule is justified because the interests of the living are to be preferred to those of the dead.\(^{29}\) Daniel Vautier had good reason for seeking to terminate his great uncle's trust---an impending marriage and business opportunity. His benefactor could hardly have predicted Daniel's circumstances a decade after his own death. Why, then, according to this point of view, should an adult beneficiary not be entitled to call for property that is his, and on which no one else has a claim? But this argument presupposes that the beneficiary should be regarded as the absolute, unconditional owner of the trust property. If a beneficiary is considered to be the owner, then he arguably has every right to the property. If, however, he is regarded as a donee under certain conditions, then he has no absolute right to ignore the conditions. He has given no value for the property, and the settlor was under no legal obligation to benefit him.\(^{30}\) In fact, the argument against the "dead hand" is no more than a restatement of the original rationale for the rule in more modern guise. The law does not ordinarily ignore the settlor's intention. It can do so when the rule in \textit{Saunders v. Vautier} is applied only by regarding the beneficiary as unconditional owner of the property. It is possible to do so only by characterizing the "primary intention" of the settlor as a simple transfer of the property to the beneficiary.

The rule might still be supported as a matter of policy if it could be demonstrated that trusts imposed on capacitated beneficiaries are a source of practical difficulty. Certainly, there are cases in which everyone would agree that termination of a trust would produce a happier result than its continuation. But that is true of trusts that do not attract the rule as well as those that do. Most of the trusts to which the rule applies do not attempt to impose unreasonable delays on the use and enjoyment of property. Few of the reported decisions involve much more than a postponement to age twenty-five or thirty.

Equally importantly, the rule does not even purport to attempt to prevent a settlor from postponing termination past the age of majority in all cases. Those trusts that are caught by the rule

\(^{29}\)see Ontario Law Reform Commission, note 11, p. 409.

are simply poorly drafted, not more obnoxious for any policy reason. In practice, it is often difficult to predict whether a particular formula in a trust provision will avoid the rule. An estate planner has rather aptly summarized some of the pitfalls facing a drafter who seeks to avoid the rule:

...[O]ne must bear in mind:
(i) the tricky distinction between a "gift" and a "direction to pay" .... [a gift] "to a $100.00 to be paid to him at 25"...vests immediately.

(ii) generally that there is a presumption of immediate vesting where the gift is accompanied by a gift of interim income....[but] maintenance given as a distinct gift... does not raise a presumption of vesting.

(iii) that the fact that the gift is followed by a gift over to another donee does not necessarily prevent the first gift from vesting in the meantime...

(iv) that the rules as to vesting of conditional gifts of personal property differ from those relating to real property.31

The rule in Saunders v. Vautier is thus rendered rather capricious in its application. As the Alberta Law Reform Commission observes,

the law should not lay traps that require sophistication to avoid....The fact that the rule can be got around by careful drafting actually invalidates the rationale for it. There is no point to a rule which merely penalizes poor drafting and there is nothing to be said for a policy that can be got around by a different form of words.32


32Alberta Institute, note 9, p. 5.
D. Reforming the rule

1. Reform or Abolition?

In the Commission's opinion, the rule in *Saunders v. Vautier* can no longer be defended in its present form. The best course for law reform to take in regard to the rule may not be so obvious, however. Waters' text on trust law suggests three possible approaches to reform of the law to give greater significance to the settlor's intention:

The first was to adopt the American ... doctrine [no departure from the settlor's intention], the second was to prohibit the termination of trusts in those factual circumstances which have excited judicial criticism of *Saunders v. Vautier*, and the third was to make all trust termination subject to judicial consent under the terms of variation of trusts legislation.\(^\text{33}\)

Waters' second option represents the minimum reform that could regarded as consistent with contemporary attitudes toward the function and purpose of personal trusts. The most significant criticisms of the rule canvassed above are directed toward situations like those in *Saunders v. Vautier* itself, in which a clear intention to postpone a gift to a sole beneficiary is overridden by the rule. It is in this class of cases that the doctrine of primary intention does the most damage to the true intention of testators. Continued application of the rule in such cases could be justified only on the basis of a general policy against paternalistic arrangements designed to protect competent adults from themselves. If this policy were taken seriously, it would be necessary to extend the rule, not abrogate it. However, as noted above, such a policy has never been a consistent part of Anglo-Canadian trust law, and there is no practical reason for adopting it.

On the other hand, there is no strong reason in principle why a trust should not be terminated when its purposes have truly been fulfilled. An intergenerational trust intended to do no more than protect the second generation of beneficiaries from possible depredations by the first has served its

\(^{33}\text{Waters, note 3, p. 979.}\)
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purpose when the second generation has come of age, and can agree with the survivors of the first
about how the trust property should be disposed of. In such cases, the trust is terminated under the
rule, not because an abstract primary intention has been fulfilled, but because the full intent of the
settlor has been carried out. The trust lives on only because the settlor could not have anticipated
that the last beneficiaries would be able to agree about disposition of the property. Their agreement
makes continuation of the trust unnecessary.

Logically, reforming the rule to remove the doctrine of primary intention so that it ceases to
apply to trusts clearly designed to postpone a gift to protect beneficiaries from themselves is
attractive. However, there is a serious practical difficulty in adopting this approach to reform. The
intention of a settlor is something that can be discovered from the words of a reasonably well-drafted
trust document. Motive, however, is another matter, and is rarely explicitly expressed in trusts and
wills. A trust may attempt to postpone a gift both to protect a beneficiary from herself, and to protect
beneficiaries in succession. The intent to postpone may be clearly expressed in the form of the trust
provisions drafted for that purpose. The motive for adopting these formulae usually remains a matter
of speculation. Unfortunately, motive cannot be ignored when attempting to determine the full
intention of the settlor if intention in this sense is taken (as it must be) to mean purpose.

The rule in Saunders v. Vautier provides what amounts to a self-help remedy. When the rule
applies, the beneficiaries can demand as a matter of right that the trustee wind up the trust. No
application to court is necessary unless the trustee improperly refuses to distribute the trust property
or disagrees that the rule is applicable. Because of the broad scope of the rule at present, there is
usually not much difficulty in determining whether the rule applies except in cases involving poorly
drafted or unusual trust provisions. But if cases that now fall under the rule by virtue of the primary
intention doctrine are excluded from the rule, it will be more difficult to determine when the rule
applies. Except in the simplest cases, determining whether the full purposes of a trust have been
carried out is too onerous a task to be left to the trustee. If the trustee errs in favour of the wishes

34 Of course, a settlor may choose to give the trustee a
discretion to determine when the time has come to wind up the
trust. Such an approach was attempted, for example, in Re Hamilton,
and would have succeeded if the trust had postponed vesting during
the time when the discretion could be exercised. However, such a
(continued...)

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of the beneficiaries, the settlor's intentions may be defeated without the benefit of a judicial inquiry to determine what that intention might have been. If the trustee errs on the side of caution, a court application will follow, and the benefit of the self-help aspect of the rule will be lost.

In the Commission's opinion, partial abolition of the rule is not a viable option. As a practical matter, it must be rejected in toto. Otherwise, it might well be less mischievous to leave it in place. This means, of course, that some trusts to which the rule presently applies will continue in operation after they have served their purpose. The consequences of this fact will be mitigated, however, if the right to apply for variation or termination of a trust under The Variation of Trusts Act remains in place. This would amount to making all trust termination subject to judicial consent, Water's third option. Determining whether the purposes of a trust have been sufficiently fulfilled to justify terminating it is appropriately a matter to be determined after an objective inquiry before the courts.

2. The Rule and Variation of Trusts

Making all trust terminations subject to The Variation of Trusts Act has been described by Waters as

a compromise between the prohibition of the American position which heavily favours the settlor's intent, and the Saunders v Vautier rule which as heavily favours the beneficiaries' contrary wishes.\(^{35}\)

This is the approach favoured by the Alberta, Manitoba and Ontario Law Reform Commissions, and adopted by the legislatures of the first two provinces. The American approach to trust termination

\(^{34}\)(...continued)
discretionary power is unusual. It should not be assumed that the settlor had confidence enough in the trustee to leave the time of termination of the trust to him in the absence of an express direction to that effect.

\(^{35}\)Waters, note 3, p. 979.
rests on a strong laissez-faire bias that has never been part of Anglo-Canadian trust law. In many respects, it is as much a product of the nineteenth century as the rule in *Saunders v. Vautier*. It has been argued above that there are is a good, practical reasons for retaining some judicial power to terminate a trust that do not violate the settlor's intent. If the rule over-reaches in one direction, the American approach over-reaches in the other. Even if the American doctrine favouring respect for the settlor's "material purpose" is accepted, there does not appear to be any good reason for denying the beneficiaries a method to call for termination of the trust when its material purpose has been achieved.

The American approach could not be adopted in any event without jettisoning *The Variation of Trusts Act*. But making termination of trusts subject to the Act in all cases may not be entirely satisfactory without modification of the legislation. *The Variation of Trusts Act* does more than simply permit the court to terminate a trust when its purposes have been achieved. Under the Saskatchewan version of the legislation36, the court possesses a broad discretion to modify or terminate a trust, whether or not all the beneficiaries are capacitated.37 Thus, if all trust terminations were brought within the Act, the court could terminate even a trust of the type in *Saunders v. Vautier* or *Fries v. Fries*, in spite of the settlor's clearly-expressed intention. This, of course, is not always a bad thing. There are, as has been suggested above, cases in which changed circumstances would make variation desirable. Variation in such cases is consistent with the Anglo-Canadian attitude toward modification of trusts, which is reflected in *The Variation of Trusts Act* itself. However, if the rule in *Saunders v. Vautier* is abolished without doing more than subjecting all terminations of trusts to *The Variation of Trusts Act*, the court may not be accorded adequate criteria for determining when variation is appropriate.

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36 see note 14. The Saskatchewan Act is based on the Uniform *Variation of Trusts Act*, adopted by the Uniform Law Conference of Canada in 1961. The Uniform Act was adopted in all provinces except Ontario and New Brunswick, which modelled their legislation on the English *Variation of Trusts Act*. Alberta and Manitoba have amended their Acts to accommodate abolition of the rule in *Saunders v. Vautier*.

37 The court may approve, on behalf of infant, incapacitated and unascertained beneficiaries, "any arrangements... varying or revoking all or any of the trusts or enlarging the powers of the trustees..." (s.3(1)).
Variation of trusts legislation as presently conceived in Saskatchewan is designed to apply when the rule in *Saunders v. Vautier* does not give the beneficiaries a right to terminate the trust because their interests have not yet vested or there are infant, incapacitated or unborn beneficiaries interested in the trust. The principle notion incorporated in the legislation is substituted consent: The court "may, if it thinks fit" consent on behalf of those beneficiaries who cannot consent for themselves. In carrying out this duty, the court is governed by section 3(2) of the Act:

The court shall not approve an arrangement on behalf of any person coming within clause (a), (b) or (c) of subsection (1) [infants, incapacitated persons, and persons whose interests have not vested] unless the carrying-out thereof appears to be for the benefit of that person.

When a gift to a sole beneficiary is postponed past the age of majority without a gift over in the event of the premature death of the beneficiary, the gift is vested. Thus, section 3(2) would not apply, and the court would have no jurisdiction to give or withhold consent on the beneficiaries behalf. This is, of course, a consequence of the fact that under the present law, court approval is not required to terminate such a trust. If all trust terminations are brought within *The Variation of Trusts Act*, the court might find it difficult to refuse to terminate the trust. In the result, the rule in *Saunders v. Vautier* would continue to be in effect, but only on a *pro forma* application to the court.

Clearly, abolition of the rule must be accompanied by some jurisdiction in the court to approve or reject a proposed variation or termination of a trust involving adult beneficiaries. The Alberta Commission thought that sufficient direction would be given to the court by providing that, in addition to applying a best interests test in regard to infant and incapacitated beneficiaries, the court must in all cases be

...satisfied that...in all the circumstances at the time of the application to the court the arrangement appears otherwise to be of a justifiable character.

This proposal was subsequently adopted in the Alberta legislation abolishing the rule.\(^{38}\)

\(^{38}\) *Trustees Act (Alta.),* note 12, s. 37(7).
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The reported cases under the Alberta regime suggest that it is achieving its purpose. In *Re Kinnee v. The Public Trustee*, for example, the court declined to terminate a trust on application of an eighteen year old beneficiary, even though language sufficient to avoid the rule in *Saunders v. Vautier* had not been used in the trust provision of the will. The court reached its conclusion after carefully considering the reasons why the beneficiary desired to terminate the trust, and the settlor's motives for postponing the gift. It found that the beneficiary desired to sell the trust property, an interest in a house, to his father, and that the settlor had been apprehensive about the influence of the beneficiary's father on him. In the result, the court dismissed the application, but suggested that the beneficiary might return to court at a future date.39

Nevertheless, some reservation about the Alberta formula was expressed by the Manitoba Law Reform Commission, which recommended an explicit direction to the court to take into consideration the settlor's intention.40 The Commission did not, however, draft an alternative to the Alberta proposal, and the reform legislation in Manitoba followed the Alberta legislation *verbatim* in this respect. The Ontario Law Reform Commission also expressed dissatisfaction with the Alberta formula. It proposed that

65.(4) The Court shall not approve an arrangement unless it is satisfied, ....

(b) that having regard both to the intentions of the settlor or testator in creating the trust and to all the circumstances of any beneficiary [who is capacitated]..., the arrangement is one which ought to be approved.

(5) A living settlor may give evidence concerning his intentions and his views on the proposed arrangement, and any evidence of the intentions of a living, but incapacitated settlor, or of a testator, may be presented to the Court.41


40 Manitoba Law Reform Commission, note 10, p. 29.

41 Ontario Law Reform Commission, note 11, p. 515-16.
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The Commission is of the opinion that a provision similar to that proposed by the Ontario Commission would assist in clarifying the policy underlying abolition of the rule in Saunders v. Vautier.

III. OTHER AMENDMENTS TO THE VARIATION OF TRUSTS ACT

The Saskatchewan Variation of Trusts Act, like its counterparts in other provinces, is modelled closely on the English Variation of Trusts Act.\(^\text{42}\) The English Act was adopted in 1958, following recommendations of the Law Reform Committee made in the previous year.\(^\text{43}\) The Saskatchewan Act was adopted in 1969.\(^\text{44}\) The impetus for adoption of the legislation was the rapid pace of change in capital markets and taxation policy in the post war Britain. As Waters has noted 1945 saw the change of everything. From then on inflation eroded fixed-interest investments, so that the real capital value declined, and high taxation substantially depleted the trust capital everytime a beneficiary died and the person entitled to the successive beneficial interest came into possession.\(^\text{45}\)

The changing climate, and in particular, the impact of new tax regimes on trusts, had a profound impact on family trusts established before the war, and still a significant repository of the wealth of England. Trust arrangements that had made sense when they were established often had disastrous consequences in the post war world. For a time, it appeared that the courts might remedy the situation. The lower courts recognized an inherent jurisdiction to vary trusts to achieve more

\(^{42}\)1958, 6&7 Eliz. 2, c.53.

\(^{43}\)Law Reform Committee, Court’s Power to Sanction Variation of Trusts (Sixth Report), 1957.

\(^{44}\)S.S. 1969, c. 71.

\(^{45}\)Waters, p. 901.
favourable tax treatment, but in *Chapman v. Chapman*, the House of Lords held that no such remedial jurisdiction exists.\(^46\) *The Variation of Trusts Act* was adopted in direct response to this decision.

The need for variation of trusts legislation was not as acute in Canada as in Britain. Nevertheless, uncertainty about the scope of judicial power to vary trusts in the wake of *Chapman v. Chapman* and recognition that long-term financial planning had become more difficult than in the past combined to make adoption of the English reform attractive in Canada. Ontario copied the English legislation in 1959, and other provinces followed.

*The Variation of Trusts Act* gives the courts a broad discretion to approve "arrangements" varying or revoking trusts upon application of one or more of the beneficiaries. In jurisdictions that have not abolished the rule in *Saunders v. Vautier*, the legislation operates as an extension of the rule. The court is authorized to approve a variation or revocation of a trust on behalf of infant, incapacitated, or unascertained beneficiaries if it is satisfied that the change is for their benefit.

Unlike the rule in *Saunders v. Vautier*, however, the Act is seldom used to simply terminate a trust prematurely. Because all the beneficiaries of a trust to which the Act applies are not competent adults, applications under the Act typically request modifications of trusts to deal with circumstances that were not foreseen when the trusts were created. The courts have consistently held that the power to vary a trust exists to preserve the purposes for which the trust was established. In the result, the intention of the settlor has been recognized as a guide to exercise of the power. In the leading case of *Re Ball's Settlement*, Megarry, J. held that

If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying the trust. But if an arrangement, while leaving the substratum, effectuates the purposes of the original trust by other means, it may still be possible to regard the arrangement as merely varying the original trust, even though the means employed are wholly different and even though the form is

\(^{46}[1954] A.C. 429.\)
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completely changed.\textsuperscript{47}

In the result, The Variation of Trusts Act does not attract the criticisms of the rule in Saunders v. Vautier discussed in this Report.

Since 1958, a considerable body of authority has accumulated under the Act. No major problems of either policy or interpretation have been identified by the courts, law reform agencies, or commentators. There are, however, some minor difficulties that should be addressed.

Although The Variation of Trusts Act gives the court very wide power to revoke or vary a trust, it has been held that the court lacks jurisdiction to approve an arrangement that amounts to a resettlement of the trust property on a entirely new foundation.\textsuperscript{48} This limitation appears to result from the fact that the courts possess no jurisdiction in equity to settle property upon a trust. The Variation of Trusts Act does not expressly alter this principle; it permits only variation of an existing trust.\textsuperscript{49}

In practise, the distinction between resettlement and variation is often difficult to discern. If the proposed arrangement appears to be the best course of action to the court, the tendency is no doubt to characterize it as something less than a resettlement. As noted above, in Re Ball's Settlement, Megarry suggested that as long as the "substratum" of the trust remains, the arrangement can be approved. The substratum need not amount to much. In Re Holt's Settlement, for example, the court replaced powers of appointment with defined interests in trust for the members of the class in whose favour the appointments might have been made.\textsuperscript{50} Arrangements are occasionally rejected

\textsuperscript{47}[1968] 2 All E.R. 438. See also Re Irving (1977), 66 D.L.R. (3rd) 387 (Ont. H.C.), which provides an extensive review of the authorities on the scope of the power to vary.

\textsuperscript{48}Re T.'s Settlement Trusts [1963] 3 All E.R. 759.

\textsuperscript{49}see Waters, p. 918-919.

\textsuperscript{50}[1968] 1 All E.R. 470.
on the basis that resettlement is contemplated,\textsuperscript{51} but as the Law Reform Commission of Ontario has observed, the line between resettlement and variation is "very narrow".\textsuperscript{52} The Saskatchewan Commission agrees with its Ontario counterpart that there is no good policy reason for the distinction. The Commission recommends that \textit{The Variation of Trusts Act} be amended to permit resettlement of trust property.

Where there is no trust, the court lacks jurisdiction to make one under the Saskatchewan \textit{Variation of Trusts Act}. In the result, the court cannot intervene even when a trust-like arrangement has been created. For example, in \textit{Re Davies}, legacies were left to infants without creating a trust. Rather than appoint a guardian to administer the legacies, it was proposed to deposit them with a trust company on trust for the infants until they reached the age of majority. The court was of the opinion that the arrangement was desirable, but could find no jurisdiction to approve it.\textsuperscript{53} Alberta variation of trusts legislation has been amended to allow the courts to settle property left by will to an infant or incapacitated person on trust.\textsuperscript{54} The Ontario Law Reform Commission has recommended a similar amendment.\textsuperscript{55} This reform should be adopted in Saskatchewan.

The last matter to be considered is one more of form than substance. The Saskatchewan Act contains a rather peculiar rule adopted from its English counterpart. While the court must ordinarily be satisfied that any variation is for the benefit of infant or incapacitated beneficiaries, an exception exists when the court is required to approve an arrangement on behalf of members of a discretionary trust class whose interest is contingent on bankruptcy or attempted alienation by the holder of a preceding life interest. The provision was designed to operate in conjunction with statutory protective trusts created under the English \textit{Trustee Act, 1925}. It makes no sense in Saskatchewan, where the statutory protective trust does not exist. This provision has been repealed in Alberta and

\textsuperscript{51}\textit{Re T.'s Settlement Trusts}, above.

\textsuperscript{52}\textit{Report on the Law of Trusts}, p. 422, above.

\textsuperscript{53}[1968] 1 O.R. 349.

\textsuperscript{54}S.A. 1973, c. 13, s. 12.


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Manitoba.⁵⁶ It should be repealed in Saskatchewan as well.

⁵⁶See Manitoba Report, p. 25, above.