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Read All About It: Franchisor Loses Second Claim for Disclosure Exemption

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INTRODUCTION

The disclosure obligations under the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "***Wishart Act***"), as well as under franchise legislation in various other provinces across Canada[1], form a cornerstone of franchise law and a significant source of potential liability for franchisors and those who are deemed to be franchisor's associates.

The *Wishart Act* imposes an obligation on the part of the franchisor to make detailed disclosure about itself and the franchise opportunity to the prospective franchisee by delivery of a disclosure document, coupled with a right on the part of the franchisee to rescind the franchise agreement if proper disclosure is not made; and sue for: (i) if payment for the rescission damages pursuant to ss. 6(6) of the *Wishart Act* is not made, and/or (ii) damages for a failure to comply with the disclosure obligation or a misrepresentation[2]. Pursuant to s. 6(2) of the *Wishart Act*, a franchisor's failure to provide adequate disclosure permits a franchisee to rescind the franchise agreement without penalty within the two (2) years of the signing of the franchise agreement.

To prevent individuals from hiding behind corporate structures, the *Wishart Act* expands the scope of liability to influential parties in the franchising process who failed to ensure compliance with the *Wishart Act*. Specifically, "franchisor's associates", who are defined under s. 1(1) of the *Wishart Act* as any individual or entity who:

> (a) is directly or indirectly controlled by the franchisor;
>
> (b) is directly involved in the granting of the franchise by exercising significant operational control over the franchisee; and
>
> (c) is owed a continuing financial obligation by the franchisee in respect of the franchise;

are jointly liable, with the franchisor, for the damages.

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[1] Presently, this includes British Columbia, Alberta, Manitoba, New Brunswick, and Prince Edward Island. Saskatchewan is also considering its own franchise legislation with the introduction of Bill, 149, *The Franchise Disclosure Act*.

[2] Defined as (a) an untrue statement of a material fact; or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

Ss. 5(7)(a) and s. 5(8) of the *Wishart Act* provides an exemption (the "**Resale Exemption**") to a franchisor from the obligation to provide a disclosure document, if:

> (a) the grant of a franchise by a franchisee if,
>
> (i) the franchisee is not the franchisor, an associate of the franchisor or a director, officer, or employee of the franchisor or of the franchisor's associate,
>
> (ii) the grant of the franchise is for the franchisee's own account,
>
> (iii) in the case of a master franchise, the entire franchise is granted, and
>
> (iv) the grant of the franchise is not effected by or through the franchisor;

Section 5(8) states that that a grant is not effected by or through a franchisor merely because,

> (a) the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant; or
>
> (b) a transfer fee must be paid to the franchisor in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.

In the recent decision of *1901709 Ontario Inc. et al. v. Dakin News Systems Inc.*[3], the court considered how the level of involvement of a franchisor in franchisee-franchisee transactions may preclude a franchisor from relying on the Resale Exemption thus triggering the disclosure obligations set forth in the *Wishart Act*[4]. The *Dakin News* decision is another illustration of how courts narrowly interpret exemptions from the disclosure obligations to ensure that the overarching objectives of the *Wishart Act*, which is fundamentally a consumer protection legislation, are met.

BACKGROUND

In 2013, Bingyang Tan and 1901709 Ontario Inc. (collectively, the "**Franchisee**") entered into a purchase agreement for an operating "International News" franchise. Consistent with the provisions of most franchise agreements, the purchase required the approval of Dakin News Systems Inc. (the "**Franchisor**"). Although the Franchisor did not have any direct contact with the Franchisee, the Franchisor required the Franchisee to:

(a) complete a "six-step procedure" (though in the authors' view there was nothing out of the ordinary in this "six-step procedure" which should have resulted in the Franchisor being unable to rely on the Resale Exemption, except for the payment of the $20,000.00 inventory fee referenced in (b) below);

(b) pay a $20,000.00 inventory fee over and above the amount the Franchisee paid to the selling franchisee for inventory; and

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[3] 2022 ONSC 6008 (Ont. S.C.J.) [*Dakin News*].

[4] Also see *2256306 Ontario Inc. and Ali Reda v. Dakin News Systems Inc. et al.* ("**Dakin 1**") in which the same franchisor was denied the use of the exemption but under different circumstances.

(c) execute a new franchise agreement and sublease agreement.

Shortly thereafter, the Franchisor informed the Franchisee that if he wished to renew the franchise agreement, which would otherwise expire in one (1) year, he was required to: (a) pay $75,000 for a rebranding initiative; and (b) make a prepayment to refurbish the premises.

The Franchisee served a Notice of Rescission on the Franchisor, stating that he didn't receive disclosure from the Franchisor as required by the *Wishart Act*. In addition to suing the Franchisor, the Franchisee also sued Dakin West Inc., who was the sublandlord under the sublease, Samuel Davis, the principal of the Franchisor and sublandlord, and an employee of the Franchisor, as "franchisor's associates". The Franchisor argued that it was exempt from its disclosure obligations pursuant to the Resale Exemption.

THE DECISION

(A) Availability of Exemption

In determining whether the Franchisor "effected" the transfer or not, the Court recalled Karakatsanis J.'s holding in *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*[5], where it was determined that the Resale Exemption only applies where the franchisor is:

> "not an active participant in bringing about the grant and does nothing more than 'merely' exercise its rights to consent to the transfer. In such circumstances, the power imbalance does not bear upon the decision to become a franchisee and plays no role in effecting the grant."

Considering the actions taken by the Franchisor, the court held that they went far beyond the mere exercising of the right to consent. Rather, the Franchisor guided and controlled the entire transaction, including requiring the Franchisee to enter into a new franchise agreement and sublease and pay a new $20,000 inventory fee. The existing agreements and inventory were not simply co-opted by the Franchisee, but an entire new franchisor-franchisee transaction occurred in disguise. As such, the court held that the exemption from disclosure was unavailable to the Franchisor, and the failure to provide said disclosure entitled the Franchisee to recission under section 6(2) of the *Wishart Act*.

(B) Determination of a Franchisor's Associate

The court held that Dakin West, as a completely controlled subsidiary, and Mr. Davis, as the source and directing mind of the grant process and ultimate authority over who is approved as a franchisee, were both franchisor associates and therefore jointly liable.

On the other hand, the Court held that employees of the Franchisor (including one person who was not named in the litigation but was very much involved in the franchise approval process) who by virtue of their positions are required to implement a process over which they have no control, were held to be not "controlled" by the Franchisor, nor able to exercise sufficient operational control over the approval process. The Court mentioned that had they been

[5] 2011 ONCA 467.

independent contractors, the result may be different, but their status as employees effectively shielded them from liability.

CONCLUSION

Given the potential liability, franchisors must be scrupulous about relying on the Resale Exemption. The franchisor's role in the transfer of a franchise should be clearly defined and restricted solely to activities necessary to reasonably assess whether to approve the transfer, as well as to the costs that are reasonably incurred in executing the transfer. Above all, franchisors with compliant disclosure documents for new franchisees will almost always assume less risk by delivering a disclosure document to a transfer franchisee[6] than in attempting to rely on the Resale Exemption.

Though the *Dakin News* decision appears to provide some clarity on which persons are deemed to be franchisor's associates, and thus held jointly liable, in our view this aspect of the decision is wrongly decided, and that Mr. Smagaran (and Ms Yelisyeyenko who was not named in the litigation but referenced in the decision) are exactly the types of persons who should be jointly and severally liable as franchisor's associates.

Finally, lawyers must be careful to ensure that they provide the correct advice to either their franchisor or transfer franchisee clients, failing which they could be liable for a claim of post-rescission damages if:

(A) The franchisor's lawyer failed to:

(i) advise the franchisor of its disclosure obligation under the *Wishart Act*, or its ability to use the Resale Exemption, resulting in a franchisee exercising its right to rescind; or

(ii) prepare a compliant disclosure document to be used by its franchisor client in the context of a transfer, resulting again in the transfer franchisee exercising its right to rescind;

(B) The transfer franchisee's lawyer fails to advise their client of its rights arising from the franchisee not receiving a compliant disclosure prior to purchasing the franchise, and the franchisee misses out on the opportunity to rescind its franchise agreement within the time provided for under the *Wishart Act*.

In each of these scenarios, the lawyer may be found to be liable for the post-rescission damages awarded to the transferee franchisee. Furthermore, the errors made by the lawyer in these scenarios cannot be rectified. Accordingly, it is imperative that a lawyer advising a franchisor, or that were failed to be claimed by a transferee franchisee, be familiar with the *Wishart Act*, and particularly the disclosure obligation imposed upon franchisors.

[6] Provided that the franchisor includes all material facts and agreements in the disclosure document given to the transfer franchisee, which necessarily must be site specific.

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Anderson v Anderson and the Variations of the *Miglin* Analysis

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In May 2023, the Supreme Court of Canada (SCC) rendered its decision in *Anderson v Anderson*[1] and clarified the approach to considering non-presumptively enforceable domestic contracts between separating spouses. After a two-decade history of Supreme Court of Canada cases commenting on the adoption (and rejection) of the *Miglin v Miglin*[2] analysis applied to domestic contracts, *Anderson* sets down foundational pillars for future courts to follow.

Anderson was a case about a "kitchen table" agreement dealing with family property division. In writing for a unanimous court, Justice Karakatsanis asserted that the *Miglin* test should not be applied to every case dealing with a domestic contract.[3] However, *Miglin* principles are still very influential in both frameworks laid out first by the Saskatchewan Court of Appeal and then by the SCC in this case.

The general commentary from the SCC in a string of cases after *Miglin*, beginning with *Hartshorne v Hartshorne*,[4] through to *Rick v Brandsema*[5] and *L.M.P. v L.S.*,[6] reflected this struggle with precisely what test to apply to different types of domestic contracts within different legislative schemes. *Miglin* was a case about spousal support and s. 15(2) of the *Divorce Act*.[7] In many, but not all of the SCC domestic contract cases that followed *Miglin*, the SCC has declined to apply the *Miglin* analysis because the interpretation of provincial and federal legislation (beyond the *Divorce Act*) called for a different framework. But despite the ambiguous history, *Miglin's* principles are relied on more than ever by lower courts, and recently, in *Anderson*. What kind of "tailored" framework was applied in *Anderson*, and how did it differ from the original *Miglin* analysis?

The *Miglin* analysis adopted a contextual framework to discern the weight to be afforded to separation agreements dealing with spousal support under s. 15(2) of the *Divorce Act*. It proceeds in two stages:

1. The first stage has two parts:

    a) First, the court must evaluate the "circumstances surrounding the negotiation and execution of the agreement" to determine whether there were any vulnerabilities or circumstances of oppression that affected the bargaining process (citation omitted).[8]

[1] 2023 SCC 13 [*Anderson SCC*].
[2] 2003 SCC 24 [*Miglin*].
[3] *Anderson SCC*, above at para 7.
[4] 2004 SCC 22.
[5] 2009 SCC 10.
[6] 2011 SCC 64.
[7] R.S.C 1985, c.3 (2nd Supp.).
[8] *Anderson SCC*, above at para 26.

b) Second, the court must assess the substance of the agreement to determine whether it is "in substantial compliance with the general objectives of the [legislation] at the time of creation (citation omitted).[9]

2. The second stage looks again to the substance of the agreement at the time of its enforcement to evaluate whether it still reflects the original intentions of the parties and remains consistent with the objectives of the Act.[10]

Facts

The parties, Mr. and Ms. Anderson, were married in Saskatchewan for three years and separated on May 11, 2015. Both parties came into the relationship with considerable assets, including houses, vehicles, items of personal property, RRSPs, savings and pensions.[11]

On July 19, 2015, the parties drafted a written agreement. The agreement stated, *inter alia,* that "all income, pension, investments, benefits, and any other of the like" earned during the marriage will remain solely with that individual except for the family home and household goods, which they owned jointly.[12] The agreement specified that the family home and goods would be dealt with at a later date. Both parties signed the agreement before two of their friends who acted as witnesses. Neither party benefited from independent legal advice before signing the agreement, nor had they exchanged financial disclosure.

Ms. Anderson then filed for divorce on December 10, 2015, without claiming property division or spousal support.[13] She included in her petition that there was an existing agreement dealing with property and spousal support. The husband filed an answer and counter-petition a year and a half later, on May 5, 2017. Mr. Anderson counter-filed to ask the court to divide the family property, arguing that he signed the agreement without legal advice and under duress.[14]

At trial, the judge found the agreement not binding and gave it no weight. He recognized that it was not an agreement that complied with s. 38 of the Saskatchewan *Family Property Act* (*FPA*), which deals with the formal requirements of an interspousal contract.[15] However, s. 40 of the *FPA*, allowed him to consider the agreement. Section 40 states that "the court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable".

At the first stage of the trial judge's analysis, he asked whether the agreement was, at the time it was executed, fair and reasonable.[16] He concluded that it was not. His reasons were

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[9] *Id.*
[10] *Id.*
[11] 2021 SKCA 117 at para 4 [*Anderson* CA].
[12] *Id.* at para 8.
[13] *Id.* at para 11.
[14] *Id.* at para 12
[15] S.S. 1997, c. F-6.3, s. 38 [*FPA*].
[16] *Anderson CA,* above at para 16; *Anderson v Anderson,* 2019 SKQB 35, at para 90 [*Anderson QB*].

that the "absence of legal representation of either party before, or at the time, it was executed" was "most troubling". He also pointed to three additional factors:

> a) the agreement was unenforceable because "other matters were as yet unconcluded", notably the issue of the family home and household contents;
>
> b) the parties had little understanding of the value of their assets and liabilities; and
>
> c) Ms. Anderson had subsequently pursued a formal s. 38 agreement with the husband (to no avail), as well as disclosure of information relating to Mr. Anderson's business interests.

Those factors caused the trial judge to conclude that the agreement was "more akin to an agreement to agree" and that there was no *consensus ad idem* or "meeting of the minds" to make the agreement enforceable. Thus, the trial judge did not give any weight to agreement and ordered that the value of the couple's assets be divided according to the *FPA*. Ms. Anderson was required to pay Mr. Anderson about $90,000 after equalizing the parties' net family properties in accordance with the *FPA*. Ms. Anderson appealed the decision.

The Court of Appeal

The Court of Appeal of Saskatchewan set aside the trial order, concluding that the agreement signed by the parties should be given great weight. It ordered that, ultimately, Mr. Anderson must pay Ms. Anderson about $5,000. The Court of Appeal applied a more principled approach to the exercise of judicial discretion in considering the domestic contract under s. 40 of the *FPA* based on the *Miglin* framework.[17] The court also referred to *Rick v Brandsema*,[18] where the Supreme Court extended the *Miglin* framework and applied it to property division.

The Court of Appeal applied the *Miglin* framework almost *verbatim* and put forward a 4-step approach when dealing with an interspousal agreement under s. 40 of the *FPA* as follows:[19]

1. a court must ask itself whether there is an agreement in the contractual sense of *consensus ad idem* or a "meeting of the minds";

2. the onus then shifts to the party asserting it to be invalid, unenforceable or that it should be given little weight. If challenged, a court must look to the circumstances surrounding negotiation and execution to determine whether there is any reason to discount the agreement, such as any indication of "oppression, pressure, or other vulnerabilities" that would render the negotiation process flawed, or conditions of the negotiations, including whether there was professional assistance;

3. if no issues arise with respect to the negotiation or execution of the agreement, a court must go on to examine the substance of the agreement to determine if its terms are fair

[17] *Id.* at para 52.
[18] 2009 SCC 10.
[19] *Anderson CA* at para 58.

and reasonable in the sense that they are in substantial compliance with the general objectives of the *FPA*; and

4. where the agreement is found to be in substantial compliance with the general objectives of the *FPA* at the time it was prepared, great weight should be given to it, unless a new or a changed circumstance has arisen such that its terms "no longer reflect the parties' intentions at the time of execution" or are no longer in substantial compliance with the general objectives of the *FPA*.

The Court of Appeal disagreed with the trial judge that the facts of this case lead to the conclusion that the agreement failed to satisfy the first step of the test, that is, that there was no *consensus ad idem*. Both the court of appeal and later, Justice Karakatsanis, agreed on the following points regarding the validity of the agreement under s. 40 of the FPA: a) the involvement of counsel in this case was not a prerequisite to the agreement's validity; b) the parties' deferring the issue of the family home until a later date does not present grounds to question the validity of the agreement where the parties have included in the agreement a detailed and objective method by which to resolve the issue later; and c) the agreement may still be valid despite all issues in the agreement not be resolved.[20]

The Supreme Court

On appeal to the Supreme Court, Mr. Anderson raised the issue of the integrity of the bargaining process as grounds for appeal, proposing that enforcing the agreement would be unfair since the parties did not engage in financial disclosure or obtain independent legal advice. Justice Karakatsanis, writing for a unanimous Supreme Court, disagreed with the proposition.[21] She stated the Court of Appeal noted in its reasons that the husband did not "allude to inadequate disclosure or uneven knowledge of the parties' respective assets and liabilities" at trial,[22] nor what there any lack of understanding by either party of each other's finances.[23] Justice Karakatsanis later uses the Court of Appeal's findings to conclude that there were no vulnerabilities or unfairness at the time the parties signed the agreement, as there were no prejudice to Mr. Anderson regarding a lack of disclosure or understanding of the parties' assets, nor was the lack of legal advice a reason to conclude the parties did not understand the agreement.[24]

Justice Karakatsanis reversed the Saskatchewan Court of Appeal decision in several respects. However, in exercising the court's discretion under Section 40 of the *FPA* and referencing the *Miglin* analysis, the framework ultimately adopted by Justice Karakatsanis is one step shorter than the Court of Appeal's analysis. Justice Karakatsanis relied on an array of *Miglin* principles

[20] *Anderson SCC* at paras 58 – 63.
[21] *Id.* at para 66.
[22] *Anderson CA* at para 103.
[23] *Id.* at 114.
[24] *Anderson SCC* at para 71-72.

and tailored the traditional test by adopting three of the four steps of the quasi-*Miglin* framework put forward by the Court of Appeal in their decision.

Justice Karakatsanis stated the Court of Appeal failed to "appropriately tailor the analysis to the governing statutory scheme",[25] and adopted the following three-step framework when deciding how much weight to give to the agreement in accordance with s. 40 of the *FPA:*[26]

1. The court will need to satisfy itself of the agreement's validity;

2. The court must ask whether any substantiated concerns about the agreement's formation were raised, such that it would be unfair to consider it, such as circumstances surrounding negotiation and execution that is tainted by pressure, or circumstances of oppression, exploitation, or other vulnerability; and

3. The court must review the substance of the agreement with what is fair and equitable in the circumstances, considering objectives and factors of the legislative scheme. But this is not a strict standard, as such a review risks gutting the legislation's enablement of private ordering.

In essence, Justice Karakatsanis removed the fourth step of the Court of Appeal's analysis, or, in other words, the second stage of the *Miglin* test, but applied the first stage. Recall that the final step in the *Miglin* analysis looks again to the substance of the agreement at the time of its enforcement to evaluate whether it still reflects the original intentions of the parties and remains consistent with the objectives of the Act.

This case is important because it effectively weakens the second stage of the *Miglin* analysis when applied to the context of family property division. Justice Karakatsanis supported this tailoring of the analysis by comparing the obligations of spousal support to the division of family property at paragraph 30:

> [30] … Spousal support is primarily a prospective and ongoing obligation that looks to future value, and is in part based on means and need; "[t]he default assumption is that, spousal support is open to modification in response to changing circumstances"(citation omitted) […] The division of family property, by contrast is a chiefly retrospective exercise: it takes stock of property brought into and acquired during the spousal relationship as past contributions giving rise to a property entitlement (citation omitted).[27]

In assessing the weight to be applied to the agreement, Justice Karakatsanis came to the same conclusion as the Court of Appeal and afforded it great weight.[28]

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[25] *Id.* at para 39.
[26] *Id.* at paras 48-51.
[27] *Id.* at 30
[28] *Id.* at 63

The SCC also took issue with the way that the Court of Appeal valued two key assets, first, the family home, and then, the business interests of the husband, Mr. Anderson. Turning first to the business interests of the husband, Justice Karakatsanis noted the Court of Appeal's final order dividing the value of some of the significant assets, such as the husband's business interests, clearly contradicted the agreement. Despite the Court of Appeal finding the agreement binding, and despite the "logic and attraction" to the remedy of enforcing the agreement as it is,[29] the Court of Appeal still went ahead and divided some assets according to s. 21 of the *FPA*. The SCC stated this was "clearly wrong" and it went against the binding agreement.[30] The agreement was clear; "the wife surrendered *all* rights to the husband's business interests at the time of separation in July 2015".[31] The Court of Appeal dividing Mr. Anderson's business interests at any date of valuation resulted in unfairness.[32]

In terms of the date of valuation for the family home, the Court of Appeal chose the date Ms. Anderson started her divorce claim, December 2015, as the valuation date. Justice Karakatsanis disagreed with the choice of this date, as the Court of Appeal did not take into consideration the husband's ongoing contribution to the maintenance of the home since the separation of the parties up to the date of trial in June 2018. Moreover, the intention of the parties, as reflected in the agreement, was to defer the resolution of the issue of the family home to a later date. Justice Karakatsanis ordered that the valuation of the family home should be the date of trial.[33] Taking into consideration these conclusions, Justice Karakatsanis ordered that the Court of Appeal's decision be set aside, that Ms. Anderson pay Mr. Anderson $43,382.63 after dividing the family home and household goods, and that each party bear their own costs.

Anderson provides guidance on how domestic contracts that may not meet certain contractual formalities should be handled. However, the facts were unique. Surprisingly, in this case, independent legal advice and financial disclosure were not required for the SCC to decide that the agreement was binding, which is uncommon. The parties in this case understood each other's finances well enough to convince the court that disclosure was not necessary. Moreover, the lack of independent legal advice did not create any unfairness in this case.

Applying this case to future disputes will be challenging, given the unique nature of the facts, but what will be worth considering will be the application of the *Miglin* principles.[34] The SCC has clearly pointed to *Miglin* being the cornerstone of analysis when it comes to determining the enforceability of domestic contracts in Canada, despite the history of the application and rejection of its test, but much will turn on the legislative scheme in place in a province. *Anderson* has set its pillars firmly in the world of domestic contracts, but not without acknowledgment of the foundational principles of *Miglin*.

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[29] *Anderson CA*, above at para 132.
[30] *Anderson SCC*, above at para 79.
[31] *Id.* at para 77.
[32] *Id.* at para 75.
[33] *Id.* at para 76.
[34] See *El Rassi-Wight v Arnold*, 2024 ONCA 2, where *Anderson* was distinguished on its facts in a case about the enforceability of informal domestic contracts under Ontario's *Family Law Act*.

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Revisiting the Basics of Trusts

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Reviewed below are some of the most basic trust law principles that we so frequently encounter and apply (often in less than basic ways) in an estates and trusts practice and which are often relevant in other practice areas.

The Validity of a Trust

In order to be validly settled (created), a classic express trust must satisfy the following requirements:

- The person creating the trust (the settlor) and the trustee must have the requisite mental capacity.
- The ***three certainties*** must be present:
    1. ***Certainty of intention***: the intention to create a valid trust; it must be apparent that the settlor was aware of and had the objective of creating a valid trust at the time of transferring trust property to the person or persons who will hold assets in trust for the beneficiaries (the trustee(s));
    2. ***Certainty of subject matter***: the asset or assets to be held in trust must be ascertainable; and
    3. ***Certainty of objects***: it must be clear who the beneficiaries are (or who they can be).
- The trust property must be transferred from the settlor to the trustee.
- Any other necessary formal requirements must also be met. For example, a trust relating to interests in real property must generally be in writing.

Where we see an attack on the validity of a trust, it is often because of an issue relating to the three certainties. For example, in the case of a "sham trust", there is typically an intention to deceive the (future) creditors of the settlor rather than the certainty of intention.

Illustrating the Concept of a Trust

To assist in explaining how a trust works, we might find it helpful to refer to the example of a ***piggybank***:

- The settlor puts the first coin in the piggybank and hands it over to the trustee for safekeeping;

- Other assets may be added to the piggybank over time by the settlor or third parties;

- The trustee holds the piggybank and has control over when it is opened and, subject to the terms of the trust (whether oral or set out in a written trust deed), coins or other assets are distributed to the beneficiaries;

- The trustee themself does not have an interest in what they hold in the piggybank (unless they are also a beneficiary of the trust);

- Once the settlor puts their coin into the piggybank (and absent an expressly-reserved power of revocation or their status as one of the beneficiaries), they can no longer have it back;

- Similarly, the beneficiaries (again, subject to the terms of the trust) may not have any enforceable rights in the coin/other assets held in the piggybank until distributions are made and/or dependent on the manner in which the trustee may exercise their discretion; and

- Over time, the trustee (or the court) may smash the piggy bank open as part of the variation or winding up of the trust.

While it may not be perfect and suit all situations, the piggybank example can assist in illustrating how a trust works in a straightforward manner. Exploring just how many of the trusts encountered in a legal practice may fit into this most basic model is interesting to keep in mind as we work through our files.

The piggybank example may be of some assistance in understanding the mechanics of an express trust, but resulting trusts and constructive trusts, which arise by operation of law, are subject to different requirements and are different in nature.

Resulting Trusts

In an estates and trusts practice, we often see the term "resulting trust" thrown around. Sometimes, in court materials, relief is sought in the form of a "resulting trust and/or constructive trust" just to make sure that we have all of our bases covered, but it can be important to understand the differences.

Resulting trusts are said to fall into two main categories:

1. ***Those that arise on the failure of a classic (express) trust:***

    - The trust could fail, for example, for lack of the three certainties, lack of mental capacity of the settlor, or on the basis that the purported trust was procured by undue influence, or the objects of the trust could be fully satisfied, leaving a surplus in the trustee's hands; and

- Ordinarily, the result would be the return of the assets to the (intended) settlor, unless the evidence establishes that they intended to benefit the (intended) trustee with the assets.

2. ***Those that operate as the result of a presumption of resulting trust:***

- For example, there is a presumption of resulting trust with respect to gratuitous transfers from a parent to an adult child; and

- The resulting trust will be imposed absent evidence rebutting the presumption of resulting trust, which can establish that a gift was instead intended.

While earlier Canadian case law also recognized "common intention" resulting trusts, the Supreme Court of Canada has since suggested that this category of resulting trust has no further role.[1]

Because rebuttable presumptions are so closely interrelated with intention, whether or not a resulting trust can be imposed often becomes a question of intention at the time of the transfer of an asset. In fact, as the established categories of resulting trusts reflect, the matter of intention is key in determining whether a resulting trust may be imposed. Assets may be impressed with a resulting trust on the basis of the original asset-holder's (presumed) intentions. As estates and trusts litigators know well, from a practical perspective, identifying evidence capable of corroborating a party's personal evidence that a gift was intended (thereby rebutting the presumption of resulting trust), is a hurdle that we often face.

Constructive Trusts

Constructive trusts have been said to be the hallmark of unjust enrichment, lying at the heart of this equitable doctrine.

Historically, constructive trusts have been imposed in circumstances where "good conscience" requires it. More recently, there has been some debate over whether constructive trusts can still be applied where there is neither an unjust enrichment nor a wrongful gain.

The doctrine of unjust enrichment remains flexible and expansive. As we saw in *Moore v Sweet*,[2] which remains a leading decision of the Supreme Court of Canada in this area of the law, the test requires:

- The enrichment of the defendant/respondent;

- A corresponding deprivation of the claimant; and

- The absence of "juristic reason" for both the enrichment and corresponding deprivation.

[1] See, for example, *Kerr v Baranow*, 2011 SCC 10.
[2] 2018 SCC 52.

There are a number of circumstances in which a constructive trust has been imposed that fall outside of what we normally think of traditionally as an unjust enrichment case, but, interestingly, where this test can still be satisfied and "good conscience" requires restitution.

Conclusion

Lawyers practising in all areas of law are likely to encounter convoluted structures involving trusts and/or issues relating to whether assets are held outright or in trust for the benefit of one or more beneficiaries. Even when dealing with complex structures and trust litigation, basic trust principles continue to apply and keeping it simple can assist us in understanding the most advanced scenarios.