

The Future of Trusts

A Canadian Perspective

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Trust & Estate Planning Practice Group



S H E A N E R L A N D

L A W

Overview

- Trust Law in Canada
- A New “Trustscape”
 - Creating a new framework and defining a modern approach to trusteeship
- Managing Discretionary Trusts

Trust Law in Canada

- Mainly common law based – thin legislation (compared to U.S., for example)
 - Codification movement is afoot
- A federalist system
 - Trust law is a matter of provincial jurisdiction
 - Taxation of trusts is federal jurisdiction
 - Quebec – civil law; equity not imported
- No trust registry – privacy still respected

Financial Reporting

- Current standard: common law
 - Accounting must be rendered to beneficiary upon request (not periodic)
 - No particular form or standard, e.g. audited financials not required
- Proposed legislation may require annual reporting
 - Assets & liabilities
 - Receipts and disbursements

Investment and Risk

- Prudent investor rule
- Proposed legislation provides a two-tiered standard of care
 - “Lay” trustees
 - Professional trustees – higher standard

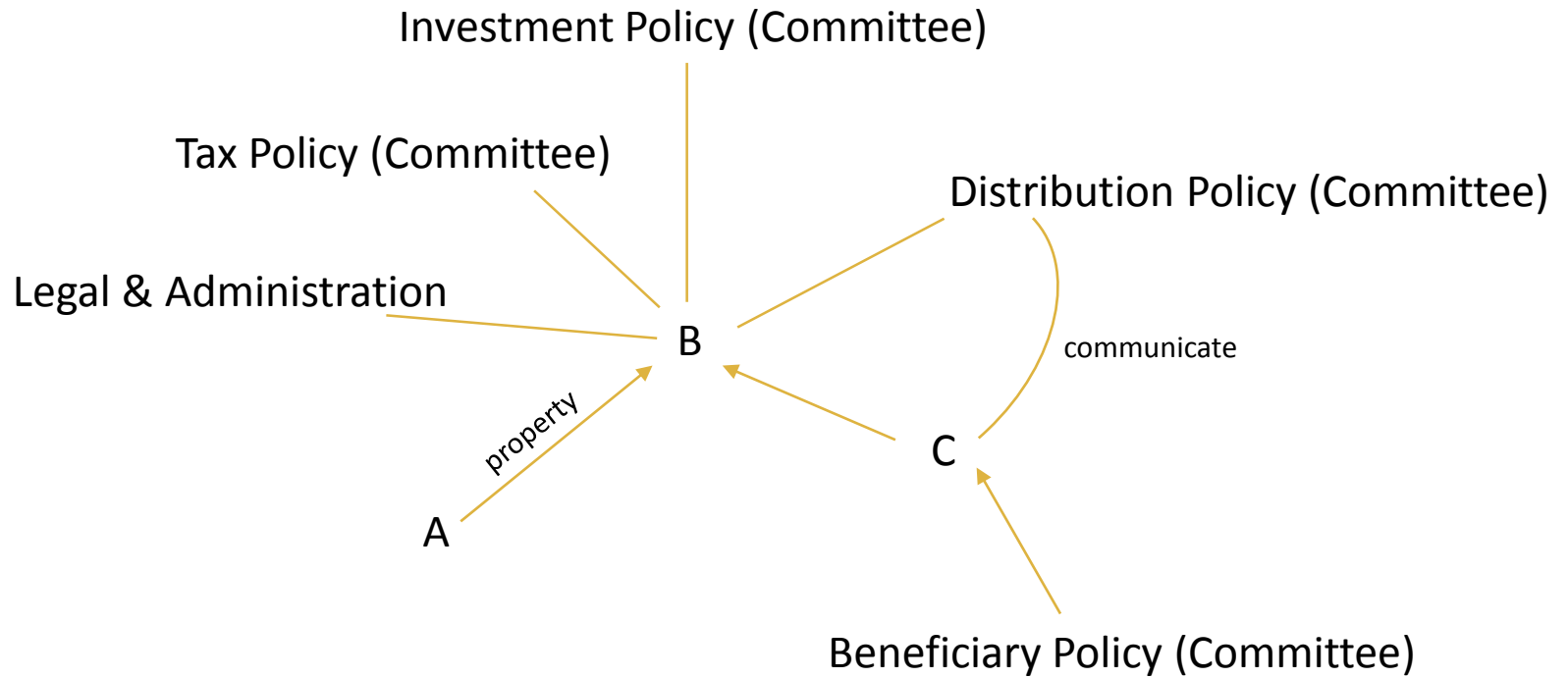
Communication With Beneficiaries

- Current law: duty to provide information
 - Common law requires information and accounts to be provided on request
- Proposed legislation: qualified beneficiary concept
 - Notice of conflicts of interest
 - Report at each fiscal period
 - Notice of trustee compensation
- Movement towards greater transparency in communication with beneficiaries

Why a New Trustscape

- Trusts can do great good, and they can also do great harm
- Trustees are focused on process, on playing defence
- The problem lies in prioritizing the financial relationship over the human relationship
- The solution lies in reprioritizing the relational over the financial

Best Practices for the New Trustscape



Best Practices for the New Trustscape

- Traditional Duties (table stakes)
- Higher-order Fiduciary Principles (differentiator)
 - Do no harm
 - Fidelity
 - Regency
 - Discernment
 - Courage
- Traditional duties focus on the financial
- Higher- order fiduciary principles focus on the relational
- Both are ripe for significant improvement



Best Practices on Beneficiary Relations

- Currently beneficiaries think only of their rights. What do I get? When?
- But the new paradigm ascribes to them a responsibility to individuate
- An active mentoring process is the optimal path to this end
- In the spirit of the “best interests of the relationship” it is ideal for the beneficiaries to aspire to the highest bar of maturity



Improved Communication With Beneficiaries

Individuate (v)

1 :to give individuality to

2 :to form into a distinct entity

(Merriam-Webster dictionary)

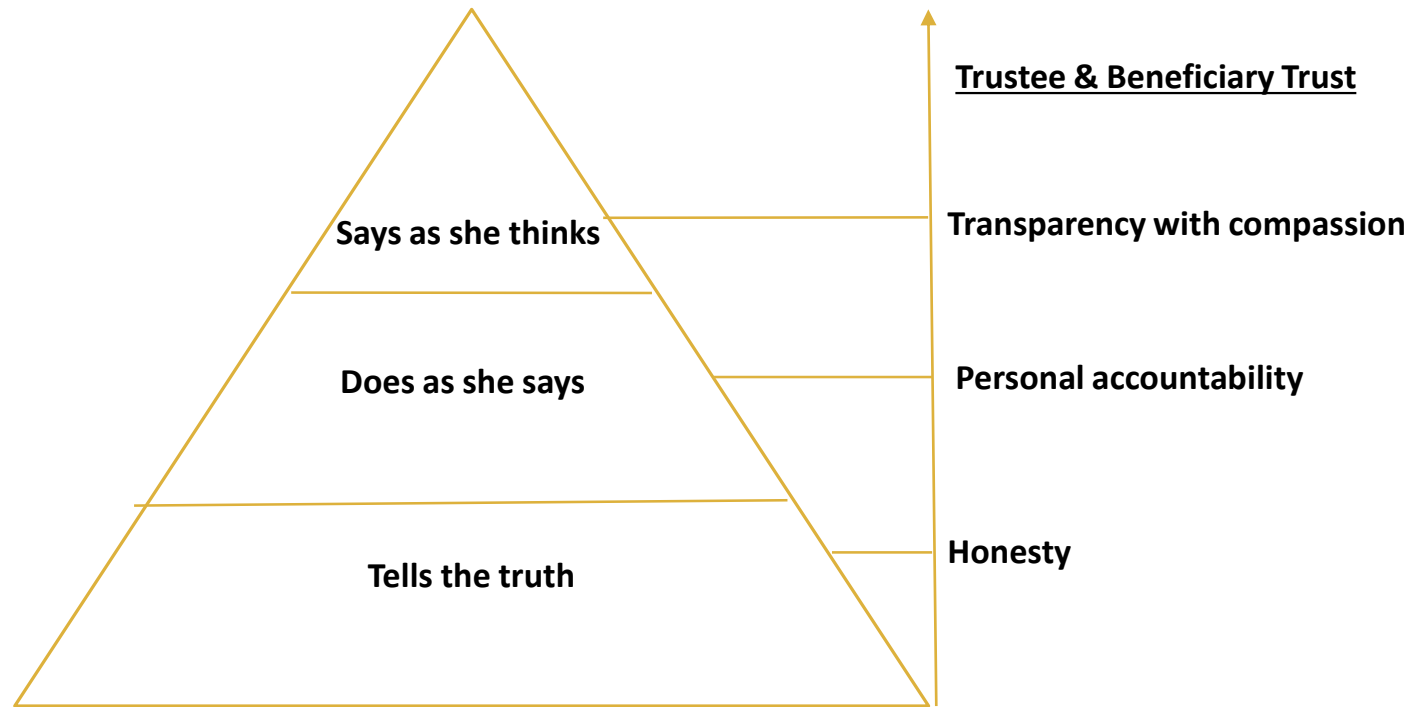
Responsibility to Individuate

- New concept
- Corresponds to trustee's duty to steward the trusts most important assets – intellectual capital
- Places a corresponding responsibility on the beneficiaries to reciprocate, and be accountable to individuate

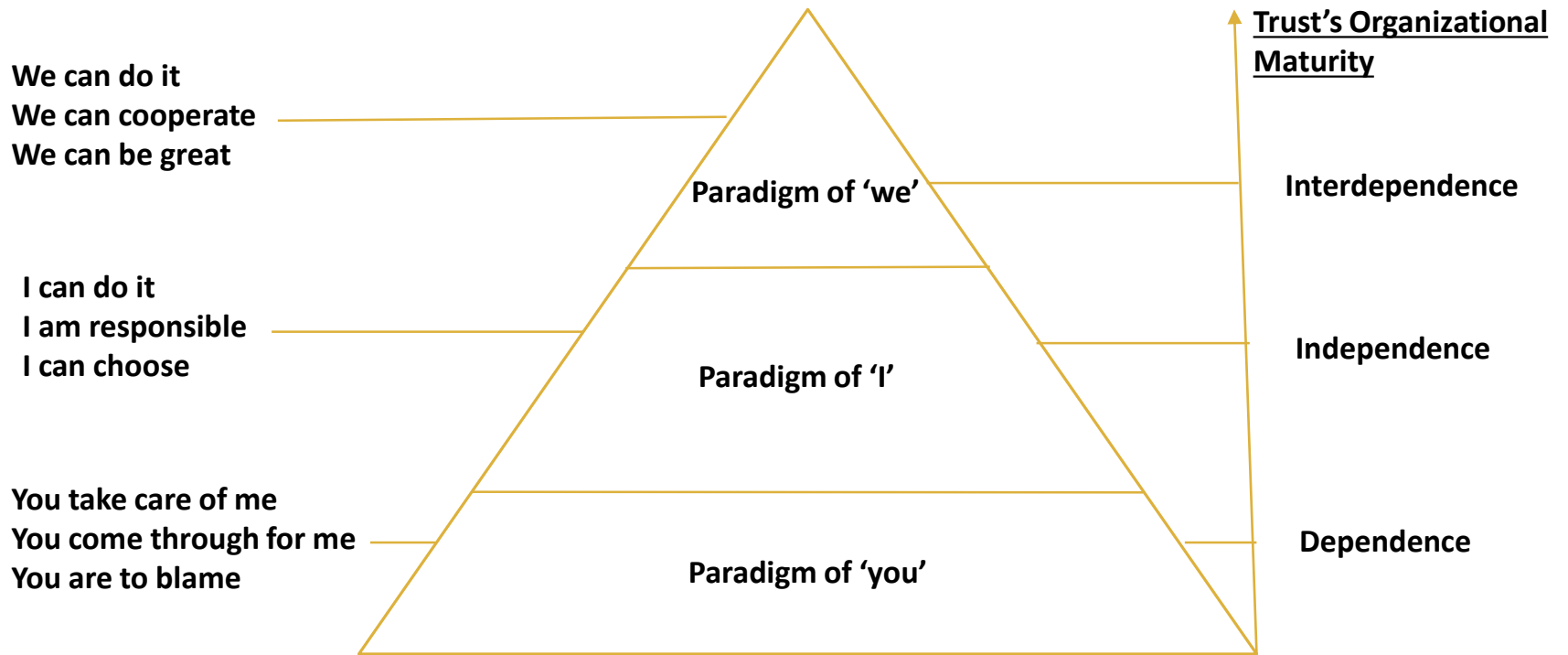
How to Individuate?

- Education and mentoring
 - Minimum: financial literacy
 - Better: financial stewardship
 - Highest: best interests of the relationship; corresponding to trustees' fiduciary duties
- Highest Bar of Integrity
- Highest Bar of Maturity

3 Bars of Integrity



3 Bars of Maturity



The Key to Individuation

- The beneficiaries most important question is who will mentor me?
- The key is to partner with the trustee to master the three main trustee functions:
 - administrative tasks (preparing and understanding financial reports, paying taxes and communicating effectively with advisors)
 - invest the assets wisely
 - distribute in accordance with the intent of the trust
- The harder part is more sophisticated mentoring/coaching to get to the highest bar



The New Financial Paradigm

- Enhancing returns through managing risks
- Enhancing returns through managing horizon
- Enhancing returns through managing skill
- Enhancing returns through managing costs

Managing Discretionary Trusts

- Whenever a Trustee is asked to exercise discretion, rather than exercise the specific instructions and powers, there are significant considerations:
 - Managing Distributions
 - Identifying the Process
 - Understanding Key Questions
 - Knowing the “True Intent” of the Settlor

Managing Distributions

- If beneficiaries are laser focused on one thing, it is distributions
- What do I get?
- When?
- Why not more?
- This is the lowest bar on the maturity continuum!
 - The source of frustrations and lawsuits reside
- Operating at the highest bar is much preferable, and an antidote to lawsuits



Process for Discretionary Trusts

- Read the entire deed to discern settlor's intent
- Go to extraneous communications and documents if necessary
- Consider the "HEMS" of each beneficiary
- Consider the resources of each beneficiary
- Consider taxes
- Consider the spousal and family situation of each beneficiary
- Consider the creditor issues of each beneficiary

Trustee Key Questions to Discretionary Beneficiaries

- What are your concerns?
- What are your goals?
- How can I help?

What Does the Law & Common Sense Say?

- Look to the deed
- Look to the purpose of the distribution
- Look to the spirit of the trust creator
- Policy, committee and constant communication

Advice to the Trustees

- Communicate (over communicate)
- Become informed
- Consider the tax issues
- Ask for help (advisors and experts)
- Document rationale
- Seek advice and direction of the court, or consent of all beneficiaries
- Make distributions, not loans
- Set the agenda

Meetings

- Agenda
- Business meetings
- Private setting
- Prepare, prepare, prepare and communicate
- Schedule social time

Questions and discussion