
Symposium: Beneficial Ownership and the Income Tax Act

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ABSTRACT

This paper examines the concept of beneficial ownership in the Income Tax Act (ITA). It was written as part of a series of studies for the Canadian bijuralism project. It examines the meaning of beneficial ownership, in equity and as interpreted under modern tax legislation. The study will be of interest to both civil law and common law lawyers because it concludes that the meaning of “beneficial ownership” for purposes of the ITA is no longer obvious. The study closes with a recommendation that if harmonization of legislative provisions in the ITA with the law of Quebec is to be achieved, a first step will be clarifying the intended meaning of certain expressions as currently used in the legislation, starting with “beneficial ownership.”

KEYWORDS: BIJURALISM ■ DISPOSITION ■ EQUITY ■ TRANSFER ■ TRUST ■ OWNERSHIP ■ QUEBEC

CONTENTS

Overview	402
Preliminary Points	403
Historical Overview of Equity/the Common Law and the Law of Trusts	405
Owner/Ownership	408
Beneficial Owner/Ownership	409
What Does “Beneficial Ownership” Mean?	412
What Is the Nature of a Trust Beneficiary’s Interest in a Trust in Canada?	415
What Is the Meaning of “Beneficial Owner,” “Beneficial Ownership,” and “Beneficially Owned” in the ITA?	423
“Beneficial Ownership,” “Beneficial Owner,” and “Beneficially Owned”	424
Categories of Meaning	424
Statutory Groupings of Meanings for “Beneficial Owner,” “Beneficial Ownership,” and “Beneficially Owned”	428
Category 3: Detailed Explanation	433
How Does the CCRA Interpret the Expressions “Beneficial Owner,” “Beneficial Ownership,” and “Beneficially Owned”?	436

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“Beneficial Ownership,” “Owner”/“Beneficial Owner,” and “Beneficially Owned”	438
The Trust as an Individual Is Not a Factor	440
The Trust as an Individual Is a Factor	441
Specific Interest in Trust Property	449
Disposition: Change in Beneficial Ownership	450
Pre-2001 Position	450
2001 Amendments	451
Conclusions	452

OVERVIEW

As part of the Canadian bijuralism project, the Department of Justice requested research on a series of questions about the meaning of certain equitable expressions used in Canadian law, and in particular about their meaning in the context of the Income Tax Act.¹ The purpose of this study is to analyze these meanings with a view to harmonizing these expressions with the laws of Quebec.

This paper examines the meanings of “beneficial ownership,” “beneficial owner,” and “beneficially owned,” both in the common law and in the context and provisions of the ITA. It also examines the interpretation of each expression by the Canada Customs and Revenue Agency (CCRA) and the conformity of that interpretation with domestic law. The paper focuses specifically on these three concepts; it does not discuss concepts related to “beneficial interest,” “beneficially interested,” and “beneficial entitlement,” which were included in the research project. The latter analysis is omitted both for reasons of brevity and because the expression “beneficially interested” is defined for purposes of the ITA.²

This study will be of interest to both civil law and common law lawyers because it concludes that the meaning of the expressions “beneficial owner,” “beneficial ownership,” and, for that matter, “owner,” for purposes of the ITA, is no longer

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the ITA”). Unless otherwise stated, statutory references in this paper are to the ITA.

2 Subsection 248(25) provides that a person (or partnership) is “beneficially interested” in a trust if that person has any right, whether immediate, future, contingent, absolute, or conditional, as a beneficiary under a trust to receive any of the income or capital of the trust. In addition, a person not otherwise “beneficially interested” in a trust may be deemed to be “beneficially interested” where, under the terms or conditions of the trust or any arrangement, the person may, because of the exercise of any discretion by anyone, become beneficially interested at a later time. Under this deeming rule, the trust must have acquired property from the particular person, a person not dealing at arm’s length with the person, a controlled foreign affiliate, or a non-resident corporation that would be a controlled foreign affiliate if it were a corporation resident in Canada. The definition also includes a person who has given any guarantee on behalf of the trust or provided any other form of financial assistance. As a result of this definition, if the trustee has a discretionary power to allocate income or capital among a group of people named in the trust, the named persons are considered to be “beneficially interested” in the trust for tax purposes.

obvious. To the contrary, multiple meanings for these expressions exist, and credible legal argument leads to a conclusion that for different tax purposes, different or multiple taxpayers may be considered owners or beneficial owners of property. This is particularly so in the case of trusts. The conclusions of the study have important implications both for tax planning and for the avoidance of unintended tax results where the beneficial ownership of property is at issue.

The paper is divided into five main sections. The first section contains the overview and some preliminary points for consideration. The second section provides a brief history of equity and the law of trusts, and then discusses the concept of beneficial enjoyment, the meaning of the expression “owner,” and the modern use of the concept of beneficial ownership. Against this background, the third section of the paper reviews the meaning of the expression “beneficial ownership” in the context of the ITA. It also considers how important the concept of beneficial ownership is for the purposes of the ITA where the expressions “beneficial ownership,” “beneficial owner,” and “beneficially owned” are not used, and how beneficial ownership would be determined in such circumstances. For example, the definition of “Canadian partnership” in subsection 102(1) requires that all of the members of the partnership be resident in Canada. If an interest in a Canadian partnership is held by a trust, who is relevant for the purpose of determining whether the definition of a “Canadian partnership” is met—the trustee, the trust, or the beneficiary? The fourth section provides a summary of the CCRA’s interpretation of “beneficial ownership,” “beneficial owner,” and “beneficially owned.” The fifth section offers some recommendations and conclusions.

Preliminary Points

The distinction between a legal titleholder at common law and a person who has beneficial enjoyment of or a beneficial interest in property is well established in equity and plays a critical role in Canadian law. Often we see this precise legal terminology translated into expressions such as “legal ownership” and “beneficial ownership.”³ The meaning of these expressions is well entrenched in the legal thinking of common law lawyers; thus, in most legislation and in the jurisprudence, where the expression “beneficial owner” or “beneficial ownership” is used, the meaning is assumed to be self-evident. It is perhaps for this reason that the interpretation of these terms is rarely discussed in statutes or in contemporary case law. For purposes of this study, however, it is necessary to examine the precise meaning of these expressions. Several points should be established at the outset to provide a foundation for the analysis that follows.

First, the concepts of beneficial owner, beneficial ownership, and beneficially owned are drawn from the law of equity and bring with them a rich history of equitable remedies, defences, and causes of action. The concepts emerged because

3 The expression “beneficial owner” is also sometimes loosely used to refer to the owner or legal titleholder where the beneficial enjoyment of the property also belongs to that legal titleholder.

the common law adopts the position that ownership is indivisible. Equity allows a notional division of ownership—legal title being in one person and beneficial ownership in another. These terms provide a description of this technical contrast.

Second, the meaning of each concept is best understood by reference to the context in which the expression is used, including the equitable cause of action and the remedy applicable. For example, in modern terminology a person may be described as the “beneficial owner” in property law or in trust law, though for entirely different reasons. In property law, a purchaser under an agreement of purchase and sale is referred to as the beneficial owner because the remedy of specific performance may be available. In trust law, the use of the expression “beneficial owner” results from recognition of the beneficiary’s ability to compel the trustee to duly administer the trust. In both contexts, however, the expression “beneficial owner” is used because the courts recognize the claimant’s equitable right and provide an equitable remedy.

Third, since at least the 1880s, there has been heated debate among trust authorities over the use of the word “owner” in describing a beneficiary’s interest in trust property.⁴ The owner at common law held title to the property and enjoyed all the other rights of property ownership. A trust imposed a duty on the common law owner to hold the property for the benefit of someone else. Thus, one of the key rights of ownership—the enjoyment of the property—no longer belonged to the titleholder. Equity provided the person intended to benefit with a means to enforce the right of enjoyment. This was a personal right, or right in personam, against the trustee. It was not a proprietary right, or right in rem, with respect to the trust property itself.⁵ Therefore, it is not strictly accurate to refer to the beneficiary of a trust as the beneficial owner of trust property since this suggests that the beneficiary has a right in rem with respect to the trust property.

Fourth, many of the most significant Canadian decisions that address the nature of a trust beneficiary’s interest and whether a beneficiary has a specific interest in trust assets have been in the context of tax statutes for the purpose of revenue collection.⁶

Finally, different terminology is often used to describe the same concept; for example, one finds references to the “beneficial” or “equitable” owner or a “beneficial”

4 An important and unresolved issue in Canada and other jurisdictions is the precise nature of a trust beneficiary’s interest in specific trust property. See D.W.M. Waters, “The Nature of the Trust Beneficiary’s Interest” (1967) vol. 45, no. 2 *Canadian Bar Review* 219-83, at 220. For a review of the history of uses and trusts, see Mark R. Gillen and Faye Woodman, eds., *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery, 2000), chapter 1. See also, D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984).

5 Over time, however, a beneficiary was able to enforce his or her rights with respect to the trust property against third parties in certain circumstances. As discussed below, it was the evolution of these third-party rights that led to the argument that the beneficiary may have a right in rem with respect to trust property.

6 See the discussion at notes 73 to 89, *infra*.

or “equitable” interest.⁷ The words “beneficial” and “equitable” both express the concept that the claimant has a right that is recognized in equity and that will be enforced by the courts under its equitable jurisdiction.

These matters are discussed further below.

HISTORICAL OVERVIEW OF EQUITY/THE COMMON LAW AND THE LAW OF TRUSTS

Expressions that include the words “beneficial owner,” “entitlement,” or “interest(s)” have their root in the body of English law known as equity. These expressions import with them notions of a fiduciary obligation, an obligation that has been enforced in equity through nine centuries, first by the king through the lord chancellor, later through the courts of chancery, and in Canada, since the 1880s, by the superior courts of each province. The role of equity at each of these stages has been to bring justice and fairness to the common law. The fiduciary obligation or duty was the main reason for equity’s intervention with the common law.

Equity had at its roots petitions by dissatisfied medieval litigants to the king. Petitioners generally alleged that justice had not been done, not because of a defect in the law itself but in the law’s administration. The chancellor, to whom the king generally referred these petitions, often held high ecclesiastical office and training in Roman law, canon law, or both. Drawing from these legal principles, the chancellor intervened not to rewrite the common law, but rather to prevent its strict application if such application would be unjust. This intervention frequently took the form of a prohibition or injunction against enforcing a common law court judgment if, for example, the judgment was improperly obtained.

The chancellor and later the courts of chancery also became active in the equitable administration of uses (trusts). The chancellor’s role in this respect dates back as early as 1225 and was critical to the enforcement of the trust. Specifically, the chancellor ensured that the trustee (feoffee to uses) did nothing with the trust property other than what was agreed with the settlor. For example, at common law, if A transferred land to B (feoffee to uses) to hold for the use or benefit of C (cestui que trust), the common law courts viewed B as possessing the sole interest in the land and did not recognize the beneficial claim that A wanted C to have in the property. Equity filled this gap. The courts of chancery, in exercising their equitable jurisdiction, would find persuasive ways, such as threats of imprisonment, to encourage B to live up to his promise with respect to the land.

The use (trust) became very popular as a way to avoid creditors and other feudal responsibilities, and the rights of the cestui que trust (beneficiary) were recognized

7 Perhaps further confusing the matter of terminology, Robert Megarry and M.P. Thompson, eds., *Megarry’s Manual of the Law of Real Property*, 7th ed. (London: Sweet & Maxwell, 1993), 64, refer to the beneficial owner of a legal estate and state that “[t]he ability of the beneficial owner of the legal estate (*i.e.*, one who has the equitable interest as well as the legal estate for his own benefit) to separate the legal from the equitable interest is one of the fundamentals of English law.”

and enforced in equity through the 13th, 14th, and 15th centuries. By the end of the 15th century, most people regarded the equitable interest of the cestui que trust as something akin to what we call “equitable title” or “beneficial ownership” today.⁸ This equitable title was also enforced by the courts of chancery.

By the 18th century, the use of equitable remedies to resolve legal disputes through the courts of chancery was well established. In 1873, by virtue of the Judicature Act, the jurisdiction of the Court of Chancery was transferred to a new Supreme Court of Judicature, and for the first time, law and equity were both administered in England by one court.

Most provinces in Canada enacted similar judicature acts by the 1800s.⁹ This legislation effectively reformed the Canadian court structure and resulted in the transfer of total jurisdiction over equitable matters to the courts of common law (the supreme courts of the provinces). As a result, equitable remedies, defences, and causes of action were available for the first time in the common law courts.

At the time that the judicature acts came into effect in Canada, it was generally believed that the fusion of law and equity was procedural and not substantive.¹⁰ There would continue to be two bodies of law, equity and common law, but one court would now administer these. The fused Canadian courts would therefore recognize and enforce both the trustee’s legal title to trust property and the equitable interest of the trust beneficiary if the trustee attempted, for example, to transfer the property to a third party¹¹ or fraudulently to retain it for himself or herself. In a conflict between the rules of equity and the rules of the common law, most judicature acts specifically provide that equity will prevail.¹² Thus, equity is very much alive in the modern common law, and the rights of the beneficiary in equity to the trust property are recognized and continue to be enforced by Canadian courts.

A second significant development in the evolution of uses and trusts was the adaptation of the concept of equitable (beneficial) interest for much more elaborate purposes. Originally the use or trust related only to land. All that was required to create an enforceable right for the beneficiary in equity was that the land be

8 See Philip Girard, “History and Development of Equity,” in Gillen and Woodman, *supra* note 4, chapter 2, at 20.

9 See, for example, Nova Scotia’s Judicature Act, RSNS 1989, c. 240, as amended, and Alberta’s Judicature Act, SA 2000, c. J-2, as amended.

10 See Girard, *supra* note 8, at 35.

11 Equity will enforce the beneficiary’s title against any person to whom property of the trust is transferred by the trustee except in the case of a bona fide purchase for value without notice. It may therefore also be said that the beneficiary enjoys a form of quasi-property interest in that the beneficiary would have standing to trace trust property to a third party, although the property would be recovered for the trust. See A.H. Oosterhoff and E.E. Gillese, *Text, Commentary and Cases on Trusts*, 5th ed. (Scarborough, ON: Carswell, 1998), 29, note 109, and their reference therein to “H.A.J. Ford and W.A. Lee, assisted by Peter McDermott, *Principles of the Law of Trusts*, 3d ed. (Sydney: L.B.C. Information Services, 1966), § 1790, who state this proposition by analogy to the right of the beneficiary of an unadministered estate to recover estate assets.”

12 Girard, *supra* note 8, at 36.

conveyed *unto and to the use of the trustee in fee simple*, in trust for the cestui que trust. The trustee's role in this situation was straightforward: to hold the fee simple (legal title) to the land, to turn over the profits to the cestui que trust, to dispose of the land in accordance with conveyor's instructions, and to undertake all necessary proceedings to protect or recover the land.¹³

When one considers the simplicity of this method of splitting legal title from beneficial enjoyment of property, it is not surprising that the cestui que trust, or beneficiary, came to be thought of as the real owner—or, as sometimes stated in modern terminology, the “beneficial owner”—of the property. However, the right of the beneficiary in equity was primarily a right against the trustee to enforce the terms of the trust.¹⁴ The transparency of the beneficiary's right, and the property to which it led, is obvious in the transfer of land to a trustee in fee simple for the benefit of an identified beneficiary. It is from this simple structure that the concept of beneficial owner can most clearly be traced. The cestui que trust was considered the beneficial owner in equity. The trustee was considered the legal owner at common law.

Matters soon became much more complicated. The fact that the trustee held legal title or the fee simple to land did not prevent trusts from being declared with respect to the holders of the equitable estate. For example, a beneficiary might be given use of the land for life or for a term of years, with a gift of the remainder of the property to someone else; or a beneficiary's interest might be contingent or based on the happening of an event such as marriage or the birth of a child.

The role of the trustee also began to change. Originally, the trustee was a mere nominee or “man of straw” who performed a passive role in holding legal title to trust property: “the feoffee was a dormant instrument compelled by equity to obey the directions of the *cestui que use*.”¹⁵ However, over time, the law permitted “the creation of special trusts under which the trustee might be directed to perform such duties as the sale of land, the accumulation of profits, the management of estates and so on.”¹⁶

The subject matter of the trust also changed; whereas the “use” applied only to land, virtually any asset can now be transferred to a trust.¹⁷ Thus, trust arrangements evolved far beyond what we today refer to as a bare trust, to include active duties on the part of the trustee and complex interests held by the beneficiaries.

As a result of these many developments, it may no longer be clear on a practical level who is the “real” or “beneficial” owner of trust assets. There may be multiple

13 Oosterhoff and Gillese, *supra* note 11, at 6.

14 The beneficiary also has some rights against third parties to trace and recover trust property.

15 E.H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 15th ed. (London: Butterworths, 1994), 55.

16 *Ibid.*

17 An important exception is an interest in joint tenancy. The title would first have to be severed into a tenancy in common.

beneficiaries. These beneficiaries may have vested or contingent interests. The trustee may have wide discretion in selecting the trust beneficiaries or the amounts of income or capital each will receive. A trustee may also have powers such as a power of appointment to select additional beneficiaries. As a result, language such as “legal owner” and “beneficial owner,” which may have been useful as an abbreviated way of describing the beneficiary’s right on a simple transfer to a trustee (nominal title holder) for the benefit of the cestui que trust, may not be useful in describing ownership in the context of many modern trusts and, in particular, discretionary trusts. The obvious problem is the difficulty of determining who has beneficial enjoyment of the trust property.

Nonetheless, the expressions “beneficial owner” and “beneficial ownership” are often used in modern terminology, both in Canada and internationally. What exactly do these expressions mean? More important, what do they mean in the context of the ITA?

Owner/Ownership

To understand the expressions “beneficial owner” and “beneficial ownership,” it is useful to begin with the commonly understood meaning of “owner.”¹⁸ *Black’s Law Dictionary*, 7th edition, defines an “owner” as “[o]ne who has the right to possess, use, and convey something; a proprietor.”¹⁹ It follows, according to *Black’s*, that “ownership” is “the collection of rights allowing one to use and enjoy property, including the right to convey it to others.”²⁰ Ownership also implies the “right to possess a thing regardless of any actual or constructive control.”²¹

In a text on Canadian property law, Gillese describes “ownership” as “an enforceable bundle of rights that links a person to a thing.”²² She suggests that, “the rights can be grouped under three headings: the right to physical use, the right to enjoyment (e.g., income and services) and the right to management (sales, lease, devise and mortgage).”²³ Honoré presents a more elaborate description, identifying 11 elements that he claims provide the most complete conception of ownership:

18 For a general discussion of this issue, see Barbara Pierre, “Classification of Property and Conceptions of Ownership in Civil and Common Law” (1997) vol. 28 *Revue générale de droit* 235-74.

19 *Black’s Law Dictionary*, 7th ed., under the heading “owner.” *Stroud’s Judicial Dictionary of Words and Phrases*, 5th ed., defines the “owner” or “proprietor” of a property as “the person in whom (with his or her assent) [the property] is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it.”

20 *Black’s Law Dictionary*, 7th ed., under the heading “ownership.”

21 *Ibid.*

22 Eileen E. Gillese, *Property Law: Cases, Text and Materials*, 2d ed. (Toronto: Emond Montgomery, 1990), 2:1.

23 *Ibid.*

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income from the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary.²⁴

Ziff reduces this list of key elements of “ownership” to four:

- (i) possession, management and control;
- (ii) income and capital;
- (iii) transfer *inter vivos* and on death; and
- (iv) protection under law.²⁵

Other descriptions begin by assuming that the “owner” is generally the “beneficial owner”:

Most property, of course, is held both legally and beneficially, *i.e.*, the person with title also has the right to use and enjoyment. Indeed so much is that taken for granted that it would be odd to describe the owner of a fee simple interest in real property as the “beneficial owner,” or to say that he has the “beneficial enjoyment,” or owns the “beneficial estate,” or is “beneficially entitled” to ownership; he is just “the owner” and that he owns it for himself is just assumed.²⁶

Beneficial Owner/Ownership

The adjective “beneficial,” when added to the word “owner,” is widely used in legal contexts “to distinguish a right or power one possesses for his own use and enjoyment from one possessed for the use and enjoyment of another.”²⁷ As indicated above, the primary locus for this distinction is found in the law of trusts: the trustee has legal title to the trust property, but he holds it for the beneficiary of the trust, who has the “beneficial interest” in or beneficial enjoyment of the property.²⁸

24 A.M. Honoré, “Ownership,” in A.G. Guest, ed., *Oxford Essays in Jurisprudence, A Collaborative Work* (London: Oxford University Press, 1961), 107-47, at 113.

25 Bruce Ziff, *Principles of Property Law*, 3d ed. (Toronto: Carswell, 2000), 2 (citation omitted).

26 Arthur Allen Leff, “The Leff Dictionary of Law: A Fragment: Part 3” (July 1985) vol. 94 *The Yale Law Journal* 1855-2251, at 2149.

27 Ibid.

28 Slightly different terminology is often used in the law of real property. The “legal titleholder” is said to have a legal estate in land and the “equitable titleholder” an equitable or beneficial interest in the land. These terms may also be used in a context other than that of a trust since equitable remedies apply in a number of contexts. For example, the purchaser under a contract for the sale of real property is said to be the “beneficial owner” although the vendor still holds legal title. The words “beneficial owner” are used in this context because the purchaser may have a right of specific performance (an equitable right) with respect to the property in question, which will be enforced by the common law courts if the terms of the contract are not met.

In consulting legal dictionaries, one can also find some general descriptions of who is considered a “beneficial owner.” *Black’s Law Dictionary*, 6th edition, for example, defines a “beneficial owner” as “[o]ne who does not have title to property but has rights in the property which are the normal incident of owning the property.”²⁹ *Black’s Law Dictionary*, 7th edition, defines “a beneficial owner” as “[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else.”³⁰

These typically vernacular definitions, however, do little more than restate well-established equitable principles. More detailed and specific definitions can be derived from other sources, such as court decisions dealing with the use of these expressions in the context of a particular statute. For example, in considering the definition of “complainant” in section 238 of the Canada Business Corporations Act,³¹ the Ontario High Court stated:

A “beneficial owner” is one who is the real owner of property even though it is in someone else’s name. The nominal owner has legal title to the property but the real owner can require the nominal owner to convey the property to him and transfer legal title to him.³²

In the context of section 43(3) of the Federal Court Act,³³ the Federal Court of Appeal offered the following interpretation of the same term:

As I see it, the expression “beneficial owner” serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative, or an agent.³⁴

Neither of these interpretations may be of assistance, however, in determining the meaning of the words in any context other than the one before the court in each case.

The meaning of “beneficial owner” in the context of a Canadian tax statute has been addressed in several decisions. For example, in *J.C. MacKeen Estate v. Min. of Finance (NS)*, Hart J described a “beneficial owner” in the context of the Succession Duty Act of Nova Scotia³⁵ in the following manner:

29 *Black’s Law Dictionary*, 6th ed., under the heading “beneficial owner.”

30 *Black’s Law Dictionary*, 7th ed., under the heading “owner.” For a discussion of the meaning of “belongs to,” see also *Re City of Kitchener and Reg. Mun. of Waterloo* (1978), 94 DLR (3d) 760 (Ont. HCJ).

31 RSC 1985, c. C-44.

32 *Csak v. Aumon* (1990), 69 DLR (4th) 567, at 570 (Ont. HCJ).

33 RSC 1970 (2d Supp.), c. 10.

34 *Mount Royal/Walsh Inc. v. Ship “Jensen Star” et al.* (1989), 99 NR 42, at 47 (FCA).

35 An Act Respecting Succession Duties, SNS 1972, c. 17 (herein referred to as “the Succession Duty Act”).

It seems to me that the plain ordinary meaning of the expression “beneficial owner” is the real or true owner of the property. The property may be registered in another name or held in trust for the real owner, but the “beneficial owner” is the one who can ultimately exercise the rights of ownership in the property.³⁶

The judgment of Hart J was sustained on appeal. MacKeigan CJ, delivering the judgment of the Court of Appeal, said in his reasons:

The real owner, the person “beneficially entitled” to [the property], can require the nominal owner to let him use or have possession of the property, or to give him the income from it, or otherwise to let him have the benefit and enjoyment of it. He usually can require the nominal owner to convert the property into another form or to transfer the legal title to some other nominal owner. Above all, he is able, unless restricted by the terms of a specific trust, to call on the nominal owner to convey the property to him and to transfer its legal title to him, the real owner. If he does so, he will then fully acquire the property by achieving full ownership and will cease to be merely beneficially entitled to it.³⁷

Thus, in this decision, the meaning of “beneficial owner” is tied to the meaning of “beneficially entitled.” At issue was whether a corporation, by reason of the death of a testator, acquired or became beneficially entitled to property of the deceased. If so, each of the shareholders of the corporation was deemed under the Succession Duty Act to be a successor of property of the deceased to the extent of the amount by which the value of his or her shares in the corporation increased as a result of the corporation’s acquiring or becoming beneficially entitled to the property. The meaning of “beneficial owner” set out above should therefore be viewed as restricted to these facts or the wording in this legislation.

36 [1977] CTC 230, at 247; (1977), 78 DLR (3d) 66, at 85 (NSSCTD) (sub nom. *Cowan v. Minister of Finance, N.S.*). This passage was cited with approval by Martland J in *R.A. Jodrey Estate v. Min. of Finance (NS)* (sub nom. *Covert et al. v. Minister of Finance (N.S.)*), [1980] CTC 437, at 442; [1980] 2 SCR 774, at 784. In *MacKeen*, the testator had common shares in Rockingham Investments Ltd. (“Rockingham”), a company incorporated in Alberta. His wife was the sole shareholder of a separate company. Similarly, three of their daughters were each sole shareholders in three other companies. Each of the four companies owned by the wife and daughters had a wholly owned subsidiary; all eight companies were incorporated in Alberta. The testator, his wife, and the three daughters were all Nova Scotia residents. On the testator’s death, he left his shares in Rockingham to his executors to hold in trust; the net income of the trust was to be paid during his wife’s lifetime to the subsidiary of the parent company of which she was the sole common shareholder. On the wife’s death, the shares in Rockingham were to be divided into four equal parts, three of which were to go to the subsidiary companies of the parent companies of which each of the three daughters was a sole common shareholder, while the fourth part was to go to another daughter who was not a resident of Nova Scotia. The minister of finance of Nova Scotia claimed over \$500,000 from the widow and three daughters as resident successors under the Succession Duty Act.

37 *Cowan v. Minister of Finance, N.S.* (1978), 89 DLR (3d) 426, at 433-34 (NSSCAD).

If one were to search for a general meaning of “beneficial ownership,” that provided by the US Supreme Court almost a century ago is probably the most useful. It provides as follows:

The expression, beneficial use or beneficial ownership or interest, in property is quite frequent in the law, and means in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of someone in his behalf.³⁸

The distinguishing aspect of this description is that “beneficial ownership” is described as a right to the enjoyment of property, a right that is measured by the dual requirements that the right is recognized by law and can be enforced by the courts. This statement thus implicitly acknowledges that there may be different types of beneficial interests in a trust, not all of which will result in the sole right to beneficial enjoyment of the trust property. For example, it plainly cannot be said that all beneficiaries of a discretionary trust have full beneficial enjoyment of the trust property, since matters such as whether the beneficiary’s interest is vested, contingent, subject to a future interest, and so on, all operate to deny this notion. The best that can be said is that all of the beneficiaries, regardless of the nature of their interest, when viewed in their entirety, beneficially enjoy or own the trust property. However, some authorities dispute even this conclusion.³⁹

What Does “Beneficial Ownership” Mean?

According to *The Dictionary of Canadian Law*, “beneficial ownership” includes “ownership through a trustee, legal representative, agent or other intermediary.” *Black’s Law Dictionary*, 7th edition, shares this view but includes in the definition of “beneficial owner” a person “for whom property is held in trust.—Also termed *equitable owner*.”⁴⁰ Some authors and tax cases have introduced the notion that the beneficiary of a trust may beneficially own or have an interest in specific trust assets.⁴¹

38 *Catholic Missions v. Missoula County*, 200 US 118, at 127-28 (1905).

39 See *Gartside v. Inland Revenue Commrs.*, [1968] AC 553 (HL). See also Geraint Thomas, *Thomas on Powers* (London: Sweet & Maxwell, 1998), 377-87. Thomas distinguishes between an exhaustive discretionary trust with a closed class of beneficiaries and a non-exhaustive trust. In the case of an exhaustive trust with a closed class of beneficiaries, it is argued that under the principle in *Saunders v. Vautier* (1841), 4 Beav. 115; 49 ER 282 (Rolls Ct.); aff’d. (1841), 1 Cr. & Ph. 240; 41 ER 482 (Ch.), the beneficiaries may collectively collapse the trust and deal with the property as their own. “In the case of a *non-exhaustive* discretionary trust, or in the case of any discretionary trust where the class of beneficiaries is not closed, the position is different: all of the beneficiaries for the time being, even acting collectively, cannot demand payment of the trust fund to them or direct its application on their behalf” (Thomas, at 380).

40 *Black’s Law Dictionary*, 7th ed., under the heading “owner.”

41 This is a highly debated point, which has at its root the right of a beneficiary to enforce an equitable interest in any trust property transferred by the trustee to a third party, except by way

This view has not been accepted in the conventional teaching on the nature of the rights of the cestui que trust. The complaint made by those of the conventional view is that such a position asserts that the cestui que trust has a right in rem—that is, that he or she is the equitable owner of the trust property. Conventional doctrine views the rights of the cestui que trust as rights in personam, as against the trustee to enforce the terms of the trust.

A number of modern authors have provided useful summaries of both sides in this debate.⁴² The following outlines one of these summaries. The British author Gray differentiates the two main views: the “orthodox” view and the “wider” view. He describes the orthodox view as follows:

The more generally accepted view of the nature of beneficial rights is that once expressed by Professor J.B. Ames, who observed that

A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject-matter of property as any physical *res*.^[43]

Maitland went further in his efforts to maintain that equitable estates and interests are not rights *in rem*. According to Maitland, the trustee “is the owner, the full owner of the thing, while the cestui que trust has no rights in the thing.”^[44] In Maitland’s view, it was simply not true to say that “whereas the common law said that the trustee was the owner of the land, equity said that the cestui que trust was the owner.”⁴⁵

Those individuals who hold the wider view take a very different position about the rights of the cestui que trust, as Gray indicates in the following summary:

To other jurists it has seemed plausible to maintain that the rights of the cestui que trust comprise more than mere rights *in personam*. This wider view attributes greater significance to substance than to form. It recognizes that the legal estate of the trustee

of a bona fide purchase for value without notice of the trust. It is said that this right is much like a proprietary right and leads to the description of the beneficiary as the beneficial or equitable owner of trust property. If a beneficiary owns trust property, a number of consequences follow; among them, it has been argued, there is an ability to tax beneficiaries with respect to the assets of a trust or income generated by a trust of which he or she is a beneficiary. See *Baker v. Archer-Shee*, *infra* note 61, and the discussion in the text accompanying notes 61 to 72, *infra*.

42 See, for example, Oosterhoff and Gillese, *supra* note 11, at 24-30; and Waters, *Law of Trusts*, *supra* note 4, at 24.

43 J.B. Ames, “Purchase for Value Without Notice” (1887-88) vol. 1, no. 1 *Harvard Law Review* 1-16, at 9.

44 F.W. Maitland, *Equity: A Course of Lectures*, revised by John Brunyate (Cambridge: Cambridge University Press, 1936, reprinted 1969), 47.

45 Kevin Gray, *Elements of Land Law* (London: Butterworths, 1987), 51.

is in most cases a mere “shadow” following the equitable estate “which is the substance.”^[46] Support for this view may be found in the range of third parties against whom the cestui can enforce his rights. With the sole exception of the bona fide purchaser without notice, all third parties are bound by the trust, and in this sense the cestui is able to assert an “equitable ownership” of the trust property against almost all the world.^[47] Thus for Salmond:^[48]

If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of some one else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner. As between trustee and beneficiary, the law recognises the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large.⁴⁹

Gray provides the following conclusions, which, like those of many Canadian trust authors, are inconclusive and unhelpful in bringing resolution to the debate:

Ultimately the question whether a cestui que trust has rights *in rem* or rights *in personam* may simply be a matter of emphasis and perspective. From the earliest times there has been a willingness to concede that the cestui holds at the very least the benefit of an obligation and that this benefit may well, in some sense, comprise a *form* of “equitable ownership.” This view receives support from an altogether more modern and more radical conception which sees the very *enforceability* of a claim to be the essence of a property right.⁵⁰

46 See *Town of Cascade v. Cascade County*, 243 P 806, at 808; 75 Mont. 304, at 311 (1925). “This wider view” was that typically espoused by Lord Mansfield CJ, who stated quite clearly in *Burgess v. Wheate* (1759), 1 Eden 177, at 217; 28 ER 652, at 668, that “trusts are considered as real estates, as the real ownership of the land.” Cited in Gray, *supra* note 45, at 52.

47 The immunity conferred on the bona fide purchaser is, of course, an undeniable qualification on the “ownership” of the beneficiary. It was Langdell who pointed out that “if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice”: C.C. Langdell, “A Brief Survey of Equity Jurisdiction” (1887-88) vol. 1, no. 2 *Harvard Law Review* 55-72, at 60. For a contrary view, see Scott, *infra* note 53, at 278, as cited in Gray, *supra* note 45, at 52.

48 P.J. Fitzgerald, ed., *Salmond on Jurisprudence*, 12th ed. (London: Sweet & Maxwell, 1966), 256-57. See also the statement of Isaacs J in *Hoysted v. Federal Commissioner of Taxation* (1920), 27 CLR 400, at 422, that equity “regards the cestui que trust of property as the true owner of the property itself,” cited in Gray, *supra* note 45, at 52-53.

49 Gray, *supra* note 45, at 52.

50 *Ibid.*, at 54.

Although Gray's comments are of little assistance in resolving the issue of whether a beneficiary's rights are considered to be in personam or in rem, they are helpful in pointing out that the more generally accepted view, at least in the United Kingdom, is that of Ames and Maitland: the beneficiary's right is against the trustee and not in the trust property itself. Thus, it cannot generally be said, for trust law purposes, that a beneficiary is the beneficial owner of trust assets, except as a short form for describing the right of the beneficiary to enforce the terms of the trust against the trustee and any third parties to whom the law recognizes that beneficial rights extend.

What Is the Nature of a Trust Beneficiary's Interest in a Trust in Canada?

How is the nature of a beneficiary's rights, either in personam or in rem, viewed in Canada? Is a beneficiary viewed as the beneficial owner of trust property? Can a beneficiary have an interest in specific trust assets? These issues are discussed below.

As stated, there has been considerable debate in a non-tax context about whether a beneficiary can be considered to be the beneficial owner of, or to have a specific interest in, trust property. Leading authorities in the field have expressed very different and often impassioned views on the matter.⁵¹ Maitland, for example, thought that to view a trust beneficiary as an owner of trust property was "simply to court fallacies of reasoning."⁵² Some American authors, on the other hand, view the beneficiary as an equitable owner of the trust property. For example, Scott maintained that "[t]he trustee is merely a buffer between the beneficiary and the world, carrying some of the rights of ownership in himself, but always on behalf of the beneficiary."⁵³ In his opinion, to speak of the rights of the cestui que trust as equitable ownership is "a perfectly proper use of terms and one which accurately expresses the nature of his rights"⁵⁴ and that to "speak of equitable ownership is just as accurate a use of terms as to speak of legal ownership."⁵⁵

Canadian courts have clearly had an uneasy battle with the issue, and in particular the issue of whether a beneficiary can be considered to have a specific interest in trust property. Nevertheless, it is apparent that Canadian courts have found, particularly (but not exclusively) for purposes of revenue collection, that a beneficiary

51 Ibid., at 51.

52 As cited in Waters, "Nature of Trust Beneficiary's Interest," supra note 4, at 220. For a review of the history of uses and trusts, see Gillen and Woodman, supra note 4, at chapter 1. See also Waters, *Law of Trusts*, supra note 4, at 14-16. In later years, Maitland, supra note 44, at 110, conceded that the cestui que trust has "rights which in many ways are treated as analogous to true proprietary rights, to *jura in rem*."

53 Austin Wakeman Scott, "The Nature of the Rights of the Cestui que Trust" (1917) vol. 17, no. 4 *Columbia Law Review* 269-90, at 290.

54 Ibid., at 276.

55 Ibid., at 275.

may have a beneficial interest in or beneficial ownership of trust property.⁵⁶ As a result, in a modern Canadian context, it is probably most correct to say that although a beneficiary's rights in trust property are primarily viewed as personal against the trustee, they may also be treated as proprietary with respect to trust assets, depending on the context. The beneficiary's rights are personal against the trustee if the issue is whether the trustee has properly administered the trust. As some authors point out, however, sometimes it is the relationship of the beneficiary to the trust property that is at issue.⁵⁷ In those circumstances, the proprietary aspect of the beneficiary's rights may predominate. A number of examples of when this may occur are offered; they include the right of beneficiaries to call for trust property if they are sui juris under the rule in *Saunders v. Vautier*,⁵⁸ the right of tracing trust property to third parties, and the right of a beneficiary against the trustee if he or she has misapplied trust property but continues to retain it in specie. At issue in each of these examples is the relationship of the beneficiary to the trust property and not an action against the trustee for the proper performance of the trust.

The most common context in which the proprietary nature of a beneficiary's interest in trust property is stressed is that of revenue collection. In that context, in issue is how the beneficiary's interest in or enjoyment of the trust assets is to be viewed for tax purposes. This issue has arisen under a number of different taxing statutes, both in Canada⁵⁹ and in other jurisdictions. To resolve the matter, the courts have looked to what is sometimes referred to as the "substance" of the trust beneficiary's interest in the trust.⁶⁰

The leading case in this area is *Baker v. Archer-Shee*,⁶¹ a decision of the House of Lords. In that case, Alfred Pell, a US citizen, left the residue of his estate by his will upon trust (in the events that happened) to apply "the whole of the . . . income and profits . . . to the use of my daughter Frances during her life,"⁶² with remainder over. The trust was situated in New York and the trustee was a New York trust company. The trust property consisted entirely of non-British securities. Frances was married to Sir Martin Archer-Shee, a UK resident, who was assessed under the British Income Tax Act, 1918 for the income paid to Frances's use from the trust since the marriage. None of this income had ever been remitted to her in England, but had been paid by the trustee (less any sums required for US income tax and the trustee's fees and expenses) to her order at a New York bank.

56 See *Minister of National Revenue v. Trans-Canada Investment Corporation Ltd.*, infra note 73 and the discussion that follows.

57 See, for example, Oosterhoff and Gillese, supra note 11, and Waters, supra note 4, at 24.

58 Supra note 39.

59 In Canada, the issue has arisen under both succession duty legislation and the ITA.

60 For a discussion of this issue, see Gillen and Woodman, supra note 4, at chapter 1.

61 [1927] AC 844 (HL).

62 Ibid., at 857.

Under the British Income Tax Act, a person resident in the United Kingdom was liable for tax on all “possessions out of the United Kingdom [including] stocks, shares, or rents in any place out of the United Kingdom”⁶³ on which the taxpayer was entitled to receive and did receive the interest and dividends; but with respect to “possessions out of the United Kingdom other than stocks, shares, or rents,”⁶⁴ the tax liability extended only to “the full amount of the actual sums annually received in the United Kingdom.”⁶⁵ In short, Sir Martin Archer-Shee was liable only if the funds paid into the New York bank account were income arising from securities.

Rowlett J, in the King’s Bench decision, outlined the arguments of both parties succinctly:

Mr. Maugham says that she [Lady Archer-Shee] has no interest specifically in the stocks, shares and rents at all, and that they are not her possessions. The question is whether that is an argument which carries him home in this case. Of the correctness of the proposition generally speaking there can be no doubt at all. What this lady enjoys is not stocks, shares and rents or other property subject to the will, but what she does enjoy and has got is the right to call upon the trustees, and to force the trustees if necessary, to administer this property during her life so as to give her the income arising therefrom, according to the trust. *Her interest is that of equity and it is not an interest in the specific stocks and shares at all. There is no doubt about the correctness of that. But the question is whether that is so for the purpose of Income Tax.*

The view put forward on behalf of the Crown is that in this case she receives the income from these stocks and shares because the possessions need not be her possessions in a legal or specific sense for the purpose of Schedule D, Case V; she has income from the stocks and shares *de facto*.

It seems to me that I must adopt that latter view. Without in the least impugning the correctness of Mr. Maugham’s description of this state of affairs from a legal point of view, for the purposes of classifications and distinctions in this Act I must adopt the view that she has income from the stocks and shares [emphasis added].⁶⁶

The majority of the House of Lords agreed with Rowlett J’s conclusions. Two of the House of Lords judges dissented. Viscount Sumner raised a number of important issues in his reasons about the relationship between what is clearly the result at law and the result being proposed for tax purposes. His views reflect those espoused by Maitland that saw the trustee as the owner of trust property:

My Lords, the position of the equitable tenant for life and of the investments which form the trust fund, is so clear, both in law and equity, that, apart from any special

63 Ibid., at 864.

64 Ibid.

65 Ibid.

66 *Archer-Shee v. Baker* (1926), 11 TC 749, at 754; [1927] 1 KB 109, at 116-17 (HCJ—KB Div.).

prescriptions, express or implied, of the law relating to income tax, there can, I think, be no doubt about them.

The trustee has the full legal property in the whole of the trust fund and the beneficiary has not. Apart from special provisions in particular settlements, which do not affect the general principle, the trustee is not the agent of the beneficiary, who can neither appoint nor dismiss him. She cannot require him to change or forbid him to change the particular investments of the fund. There is no liability on the beneficiary for the trustee's acts on the principle of respondeat superior and, unless the trust deed otherwise provides, the trustee must act without remuneration to himself and cannot in any case sue the beneficiary on any implied promise to pay. It is the trustee alone who can give a discharge for interest, rent or dividends to the parties who have to pay them in respect of the invested trust estate, nor need they know the beneficiary in the matter. All that the latter can do is to claim the assistance of a Court of Equity to enforce the trust and to compel the trustee to discharge it. This right is quite as good and often is better than any legal right, but it is not in any case one, which for all purposes makes the trust fund "belong" to the beneficiary or makes the income of it accrue to him *eo instanti* and directly as it leaves the hand of the party who pays it. I do not understand that, so far, there was any contest. *The appellant's argument is that, whatever may be the legal position of the capital and the equitable position of the trustee and the cestui que trust as regards the right to the income, for income tax purposes the law is otherwise, and that under the Income Tax Act and by virtue of some implication the "accrual" is to the beneficiary* [emphasis added].⁶⁷

Viscount Sumner went on to state that if the income is to be taxed to the husband in the circumstances, the reason must be in the statute itself (a point with which I strongly agree):

It follows that it is in the terms of the Income Tax Act or in some decided construction which binds your Lordships, that the inland revenue can alone find authority for the present contention, that the person "entitled to" the income is the beneficiary, and a rule of "income tax law," which so completely and uncompromisingly disregards the regular law of trusts and the ordinary law of property, is one that must be enacted beyond doubt or question.⁶⁸

Lord Blanesburgh, in his dissent, made a similar point about the tax result. In his view, the position of Lady Archer-Shee based on private law principles was clear. This, however, did not necessarily dictate the tax outcome:

My Lords, the ultimate question in this appeal turns upon the description which in income tax phraseology ought properly to be applied to the moneys paid during the two years in question by the Trust Company of New York to the order of Lady Archer-Shee, the Respondent's wife, at Messrs. J. P. Morgan and Co.'s bank there. None of these moneys have been received in the United Kingdom. It is that fact

67 Supra note 61, at 850.

68 Ibid., at 851.

which, if his contention as to their true description be correct, enables the respondent to say that he is not liable to pay income tax in respect of them, either in whole, in part, or at all.⁶⁹

Lord Blanesburgh's comments speak to the crux of the matter. Regardless of what the private law outcome may be, the real question is what is the nature of a beneficiary's interest in a trust when considered in the context of the legislation that is sought to be applied, in this case the British Income Tax Act.

The decision in *Archer-Shee* is also important for a second reason. In finding liability to tax in this case, the House of Lords also held, in effect, that Lady Archer-Shee was the beneficial owner of the interest and dividends from all securities held by the trust. It was for this reason that her husband was assessable on the trust income. Lord Wrenbury said:

In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends. This, I think, follows from the decision of this House in *Williams v. Singer*, and in my opinion the Master of the Rolls correctly stated the law when he said "that in considering sums which are placed in the hands of trustees for the purpose of paying income to beneficiaries, for the purposes of the Income Tax Acts, you may eliminate the trustees. The income is the income of the beneficiaries; the income does not belong to trustees."⁷⁰

It is of some significance that Lady Archer-Shee was the sole income beneficiary of a fixed trust, a fact that no doubt assisted in the finding by the House of Lords. The decision has been roundly criticized,⁷¹ particularly on the basis that it totally ignores Maitland's well-respected thesis that the beneficiary has no proprietary right to specific assets in the trust.⁷²

69 Ibid., at 872.

70 Ibid., at 870 (citations omitted).

71 "A Periodical Menace to Equitable Principles," in Harold Greville Hanbury, *Essays in Equity* (Oxford: Clarendon Press, 1934), 16-22, at 18, describes the decision as "a contradiction of clear equitable principle" and a "menace which arose only from looseness of language and forgetfulness of Maitland's axiom, unless the case was explained as solely concerned with income tax law." See also George W. Keeton, *The Laws of Trusts, A Statement of the Rules of Law and Equity Applicable to Trusts of Real and Personal Property*, 8th ed. (London: Pitman & Sons, 1963), 287-88, for comments about this decision.

72 A few years later, the decision was overturned on the basis that the law in New York was not the same as that in the United Kingdom, a premise directly contrary to that relied on by the House of Lords in their decision. See *Garland v. Archer-Shee*, [1931] AC 212; (1930), 15 TC 693, at 729 (HL). Expert evidence was adduced as to the law of the United States to the effect that under that law, the wife had no estate or interest in the securities, stocks, or shares, but rather her sole right was to compel the trustees to discharge their duties under the will. As a

Archer-Shee was nonetheless applied by the Supreme Court of Canada in 1956 in *Minister of National Revenue v. Trans-Canada Investment Corporation Ltd.*⁷³ At issue was whether taxable dividends paid to a trustee and later distributed to a corporate beneficiary retained their identity as taxable dividends in the beneficiary's hands for purposes of subsection 27(1) of the Income Tax Act.⁷⁴ If so, the dividends were deductible by the recipient corporation in calculating its taxable income.

Cameron J of the Exchequer Court first determined that Trans Canada Investment Corp. Ltd. was the beneficial owner of the underlying shares held by the trust. His reasoning is somewhat unclear. His Lordship said:

From these facts and particularly because he could at any time demand that the Trustee deliver to him his proper proportion of the shares in the "underlying companies," it seems to me that the holder of the series "B" certificate was, in fact, the beneficial owner of the basic shares represented thereby.⁷⁵

He then went on to state that the dividends received retained their character in Trans Canada's hands notwithstanding the intervening trust. His reasoning was as follows:

[N]o one [else] had any beneficial interest in such shares. The number of shares to which he was entitled in each company was fixed at the time he purchased the certificates, remained the same throughout, and he was entitled to physical possession thereof, upon demand.

Under these circumstances I do not think that the amounts which the appellant received were other than dividends from the "underlying companies." The majority decision of the House of Lords in *Archer-Shee v. Baker* strongly supports that view.⁷⁶

In the Supreme Court, Cartwright J, in his reasons for judgment, agreed that "the mere imposition of a trustee between the dividend-paying companies and the beneficial owner of the shares did not change the character of such sum."⁷⁷ Unfortunately, the Supreme Court was not asked to determine whether Trans Canada was

result, Lady Archer-Shee could not be considered the beneficial owner of the trust income under conflict-of-law principles. Whether the law in New York was in fact different from the law in the United Kingdom is a matter of some speculation.

73 [1956] SCR 49; [1955] 5 DLR 576. *Archer-Shee* was also cited in *Pan American Trust Company v. Minister of National Revenue*, [1949] Ex. CR 265.

74 The Income Tax Act, SC 1948, c. 52.

75 *Trans-Canada Investment Corp. v. MNR*, [1953] Ex. CR 292, at 296.

76 *Ibid.*, at 296-97 (citation omitted).

77 *Trans-Canada*, supra note 73, at 62; 588. This aspect of the tax characterization of income received by a beneficiary from a trust was generally resolved by the introduction of ITA subsection 108(1), effective for 1981 and subsequent tax years. Subsection 108(1) deems the income to be income from property. However, some aspects of the character of dividends received from a trust by a corporation through a trust remained unresolved under the ITA until 2001. Although subsection 104(20) permitted the trust to designate the payment of a capital dividend to a particular beneficiary, it did not affect the ability of the beneficiary to flow through the

in fact the beneficial owner of the shares. In his reasons for judgment, Cartwright J stated simply that “[t]he finding of the learned trial judge that the appellant was the beneficial owner of the shares in the underlying companies was not questioned before us.”⁷⁸

Rand and Estey JJ dissented on the tax effect of the intervening trust and whether *Archer-Shee* applied. Rand J argued that the respondent trust corporation was entitled only to a fractional part of the underlying securities. That element was not present in *Archer-Shee*. He also stressed the enormous complexity of the trust as evidenced by the holders of certificates, the charges on the funds, the powers of the administrator, and the voting powers over the stocks. In his view, there was clearly “an intermediate origin of income”⁷⁹ distinct from both the underlying companies and the certificate holders. Estey J agreed with Rand J but conceded that “[t]he intervention of a trustee or of more than one beneficiary will not, in circumstances such as existed in *Baker v. Archer-Shee*, destroy the identity of the dividends or cause them to lose their character as such.”⁸⁰ The facts concerning this trust corporation in his view simply went much further.

Trans-Canada carried *Archer-Shee* to the furthest limit it has achieved in Canadian law by finding that a beneficiary of a complex trust had a specific interest in trust assets for the purpose of tracing the source of trust income.⁸¹ It is an unsatisfactory decision in that the Supreme Court did not make a finding that Trans Canada was the beneficial owner of the trust property, but instead relied on the finding of the trial judge. The trial judge’s comments leave one with the impression that his finding of beneficial ownership was based on the ability of the beneficiary to demand his proportion share of the shares in the underlying corporations, thus suggesting a bare trust. However, the judge also made it clear that the trustee could vote the shares and had the power to sell and convert them, thus refuting the notion of a bare trust. Rand J in his dissent also made it clear that the trustee had certain active duties in relation to the sale or purchase of stocks and the investment of proceeds. *Trans-Canada* thus leaves as an open question when and if a beneficiary will be considered to beneficially own or hold a specific interest in trust assets for tax purposes. It is significant that in *Trans-Canada* beneficial ownership of the shares was found notwithstanding that there were multiple beneficiaries and trustees with active trustee duties. The important point seems to have been that the interest of the particular beneficiary was fixed and the source of trust income identifiable.

exemption. Thus, a corporate beneficiary that received a capital dividend was not able to flow through this amount tax-free. The 2001 amendment to subsection 104(20) now permits this result.

78 Supra note 73, at 62-63; 588.

79 Ibid., at 53; 579.

80 Ibid., at 59; 585.

81 *Trans-Canada* has been cited in subsequent decisions. See, for example, *Ansell Estate v. MNR* (sub nom. *Canada Trust Co. v. Minister of National Revenue*), 66 DTC 5508; [1966] CTC 785 (Ex. Ct.); and *Shortt and Quinn v. MNR*, 60 DTC 1056; [1960] CTC 78 (Ex. Ct.).

In *Shortt and Quinn v. MNR*⁸² a few years later, the Exchequer Court found that the beneficiaries had an interest in specific trust assets. The court assumed that each of the two appellants was a beneficial owner of one-half share in an unincorporated business, under their mother's will (although reasons for the finding were not provided). The business was under the administration of the testatrix's husband, the father of the appellants, who was also trustee and executor of his wife's estate. According to the provisions of the will, the appellants' shares of the profits of the business for the years 1953 and 1954 were held and reinvested in the business. The minister treated these sums as investment income received from an estate operating a business. The appellants claimed that the trustee received earned income only from carrying on the business and that the profits remained earned income when paid to them as beneficiaries.

After citing *Syme*, *Archer-Shee*, and *Trans-Canada*, Thurlow J stated:

[T]he factual situation, as I view it, is one wherein the income in question was income from the carrying on by the trustee of a business which was vested in him as trustee for the appellants and others, but wherein the net income from such business, as determined by the trustee, belonged entirely to the appellants.⁸³

The beneficiaries were therefore able to claim the tax benefits available as if they had received earned income and not investment income from the trust.

Almost 20 years later in *Min. of Rev. (Ont.) v. McCreath*,⁸⁴ the Supreme Court of Canada again suggested that a beneficiary of a trust may hold an interest in specific trust property for tax purposes, in this case a discretionary trust.⁸⁵ In *McCreath*, the significant issue was whether Mrs. McCreath, who retained a general power of appointment exercisable by will, reserved to herself "an interest in the property passing under the trust so as to make it 'property passing on the death of the deceased'"⁸⁶ as defined in section 1(p)(viii) of the Ontario Succession Duty Act.⁸⁷ Dickson J described the "property passing" under the settlement as the equitable interest in a voting trust certificate representing 99,986 common shares in the capital stock of Mount Royal Paving and Supplies Limited, which were transferred by Mrs. McCreath to the trustee. According to the Supreme Court, an interest in the corpus of the trust (the interest in the Mount Royal Paving and Supplies

82 *Shortt and Quinn*, supra note 81.

83 *Ibid.*, at 1058; 82.

84 [1976] CTC 178 (SCC).

85 As a general rule, a beneficiary of a discretionary trust is not regarded as having a proprietary interest; see the discussion in *Gartside*, supra note 39, and in *In re Weir's Settlement Trusts*, [1971] Ch. 145 (CA). Essentially the question must be determined on the construction of the particular statute, a point made clear in *McCreath*, supra note 84. See also Thomas, supra note 39, at 380.

86 *McCreath*, supra note 84, at 182.

87 RSO 1960, c. 386 (now repealed).

shares) was retained by Mrs. McCreath until the time of her death, notwithstanding that the trust was completely discretionary.⁸⁸

Although each of these decisions was made under other statutes or provisions of the ITA that have since been repealed, the message is clear. For some tax purposes, a beneficiary may have an interest in specific trust property. *Trans-Canada* is also authority for the proposition that even multiple beneficiaries of a complex trust may “beneficially own” trust property. The matter of the source of income received by a beneficiary from a trust, which was the issue in *Trans-Canada* and *Shortt and Quinn*, has been resolved by the introduction of subsection 108(5), which deems amounts received by a beneficiary from a trust to be income from property. The matter of when a beneficiary is considered to have a specific interest in or to beneficially own trust assets remains, however, unresolved except with respect to specific deeming rules in the ITA.⁸⁹

WHAT IS THE MEANING OF “BENEFICIAL OWNER,” “BENEFICIAL OWNERSHIP,” AND “BENEFICIALLY OWNED” IN THE ITA?

Who is the owner or beneficial owner of trust property in context of the ITA?⁹⁰ The importance of this issue is evident from the former debate about who is the owner of assets of a bare trust, a debate finally resolved in the March 2001 amendments to the ITA.⁹¹ Its importance will also no doubt be seen in the interpretation of the requirement that a disposition of property must not result in a change in the beneficial ownership of the property, introduced in the definition of “disposition” in subsection 248(1)⁹² and seen throughout the new rollover provisions governing

88 At one time, there was concern that this reasoning would extend to the deemed disposition provisions under the ITA. Fortunately, the CCRA has opined that a power of appointment is not subject to the deemed disposition provisions in subsection 70(5): CCRA document no. 2000-0013235, October 3, 2000. It has been suggested that any attempt to tax the donee of a power of appointment “depart[s] from fundamental proprietary concepts”: Maurice C. Cullity, “Powers of Appointment,” in *Report of Proceedings of the Twenty-Eighth Tax Conference*, 1976 Conference Report (Toronto: Canadian Tax Foundation, 1977), 744-62, at 749.

89 See, for example, ITA subparagraphs 256(1.2)(f)(i) to (iv).

90 For the purposes of the ITA, a reference to a trust is a reference to the trustee (subsection 104(1)). In this, the ITA recognizes the trust law conclusion that there is no separate legal personality in the trust. However, the ITA treats the trust as a separate patrimony of assets distinct from the trustee’s personal property (subsection 104(2)).

91 These amendments were contained in Bill C-22, An Act To Amend the Income Tax Act, the Income Tax Application Rules, Certain Acts Related to the Income Tax Act, the Canada Pension Plan, the Customs Act, the Excise Tax Act, the Modernization of Benefits and Obligations Act, and Another Act Related to the Excise Tax Act, first reading March 21, 2001; SC 2001, c. 17 (herein referred to as “the 2001 technical bill”).

92 Until the 2001 amendments, the definition of “disposition” in subsection 248(1) was the only provision in the ITA containing such a reference. The original purpose of the provision may have been to prevent a disposition on a transfer of property to a bare trust. Over time, the

self-benefit trusts and qualifying dispositions (discussed later in this paper). Do the expressions “beneficial ownership,” “beneficial owner,” and “beneficially owned” have the same meaning in each of the contexts/provisions in which they are used in the ITA⁹³ as they do at common law? Does the ITA reflect the view that the beneficiary’s rights are in rem or in personam, and does that view change depending on the context?

The following analysis of the intended meaning of these expressions is taken from Department of Finance technical notes, CCRA interpretations, case law, and private law. It is important to keep in mind that the meaning of each expression must be construed within the context of the particular provision in which it occurs. Nonetheless, to the extent that some of the provisions reflect shared meanings, the provisions can be roughly grouped and the intended meanings considered together.

“Beneficial Ownership,” “Beneficial Owner,” and “Beneficially Owned”

Categories of Meaning

At least four categories of meaning can be identified for the expressions “beneficial ownership,” “beneficial owner,” and “beneficially owned” when used in the context of a trust. These categories provide the basis for the subsequent grouping and analysis of statutory provisions according to their use of these expressions. The four categories are summarized below.

1. *The owner is the beneficial owner.* “Beneficial ownership” includes ownership by the legal titleholder if that person also has beneficial enjoyment of the property. In short, the expression “beneficial owner” also includes the owner, and property is considered to be “beneficially owned” by that person.
2. *The beneficiary is considered to be the beneficial owner as a result of tax decisions and the operation of the ITA.* The expressions “beneficial ownership,” “beneficial owner,” and “beneficially owned” include ownership by a person where a bare trustee, agent, or other intermediary holds legal title to the property.⁹⁴ Thus, if an agent holds legal title for a taxpayer, it is the taxpayer and not the agent who is considered the “beneficial owner.”⁹⁵ This result occurs

provision was also relied on to avoid a disposition on a transfer by a politician to a blind trust. It is perhaps from this usage that a beneficiary came to be thought of as the beneficial owner of trust property. Ironically, many politicians’ blind trusts would not meet the new requirements for a rollover of assets to a trust.

93 The expressions “beneficial ownership,” “beneficial owner,” and “beneficially owned” appear in approximately 35 places in the ITA.

94 Presumably this would also include equivalent relationships in Quebec (subsection 248(3)).

95 This conclusion is reached as a consequence of both case law and the CCRA’s assessing practice with respect to situations where a bare trust will be ignored for tax purposes. According to the CCRA, a bare trust is a trust under which the settlor is the sole beneficiary and can cause the property to revert back at any time: *Income Tax—Technical News* no. 7, February 21, 1996. For

because in these circumstances the trust relationship is ignored for the purposes of subdivision k of division B of the ITA. Subdivision k (sections 104 to 108) contains provisions governing the computation of income for trusts and their beneficiaries. If subdivision k applies to a trust, subsection 108(5) operates to prevent the deduction of, for example, capital cost allowance, terminal losses, or capital losses by the beneficiary. The case law concerned with whether a trust is a bare trust has generally focused on whether the trust is subject to subdivision k, and not on the broader question of who owns or beneficially owns the trust property for other purposes of the ITA.

A beneficiary of a trust described in a subsection 104(1) arrangement is also considered to be the beneficial owner, since the trust is ignored for tax purposes. That subsection provides that a trust is deemed “not to include an arrangement under which the trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust’s property.” This would include a trust arrangement involving beneficiaries other than the settlor and extends the notion of when a trust will be ignored under the Act considerably beyond former arrangements that were considered to be bare trusts under the CCRA’s *Technical News* no. 7.⁹⁶ There may also be more than one beneficiary under a subsection 104(1) arrangement, resulting in a number of taxpayers being viewed together as the beneficial owner(s).⁹⁷

It is not clear after the 2001 technical amendments whether the expressions “beneficial ownership,” “beneficial owner,” and “beneficially owned” would be interpreted by the courts to include beneficial ownership by the beneficiary of a self-benefit trust (subparagraph 73(1.02)(b)(ii)) or a trust to which a qualifying disposition is made (subsection 107.4(1)). This conclusion

the relevant case law, see *The Queen v. Robinson et al.* (sub nom. *Adams v. R.*), 98 DTC 6232; [1998] 2 CTC 333 (FCA); *Brookview Investments Ltd. v. MNR*, 63 DTC 1205; [1963] CTC 316 (Ex. Ct.); *Fraser v. The Queen*, 91 DTC 5123; [1991] 1 CTC 314 (FCTD); and *Pan-American Trust Co. v. MNR*, 49 DTC 672; [1949] CTC 229 (Ex. Ct.).

- 96 Supra note 95. To some extent, subsection 104(1) may encompass the situations discussed above, where a bare trustee, agent, or other intermediary holds legal title. However, when subsection 104(1) arrangements were introduced in 2001, it was not claimed that the new provision was intended to override former case law about who is a bare trustee, nor has *Technical News* no. 7, to my knowledge, been revoked. Accordingly, in any of the situations referred to above, the taxpayer would continue to be considered the beneficial owner. Beneficiaries under a bare trust as defined in *Technical News* no. 7 would, however, include a much narrower group than those who would be considered beneficial owners of trust property by virtue of subsection 104(1).
- 97 However, if there is more than one beneficiary and their interests differ (for example, if one of the beneficiaries has only a life interest, a possibility that the wording in subsection 104(1) does not seem to preclude), it is unclear to me who would be regarded as the beneficial owner of the trust property for tax purposes. Presumably the beneficiary with the life interest would be considered the beneficial owner of the income interest, and the capital interest holders would be considered the beneficial owners of the trust capital.

is based on the statutory requirement that a transfer to such a trust must not result in a change in beneficial ownership. It follows that if there is no change in beneficial ownership on the transfer to the trust, those provisions that refer to the beneficial owner or beneficial ownership would include, in the absence of any indication to the contrary, ownership through the trust by the very persons who transferred the property to it. Unlike subsection 104(1) arrangements, self-benefit trusts and trusts to which a qualifying disposition is made remain subject to subdivision k.

Case law also suggests that if a resulting or constructive trust is found, the person for whom property is held is the beneficial owner of the property.⁹⁸ The exact timing of when this will occur is unclear in the case of a constructive trust.⁹⁹

There is some case law support for the view that a beneficiary is the beneficial owner of or has an interest in specific trust property for particular tax purposes.¹⁰⁰

Deeming provisions are also sometimes used to treat the beneficiary as the owner of trust property for some tax purposes.¹⁰¹

98 See, for example, *Holiziki v. The Queen*, 95 DTC 5591 (FCTD), and *Kostiuk v. The Queen*, 93 DTC 5511 (FCTD).

99 See Catherine Brown and Cindy L. Rajan, "Constructive and Resulting Trusts: Challenging Tax Boundaries" (1997) vol. 45, no. 4 *Canadian Tax Journal* 659-89.

100 Generally, subdivision k treats the trust as the "owner" of trust property for the purpose of calculating income, capital gains, or capital losses with respect to trust property. The courts, in obiter, have cast doubt on who is the owner for other purposes of the ITA. For example, in the Supreme Court of Canada decision in *Trans-Canada*, supra note 73, the court based its decision on the fact that dividends retained their character in the hands of the trust beneficiaries who were the "beneficial owners" of the trust property. In *Pan-American Trust*, supra note 73, the Exchequer Court also found the beneficiaries of a trust to be the beneficial owners of the shares. Recently, in *Chan v. The Queen*, 99 DTC 1215; [2000] 1 CTC 2022 (TCC), Bonner TCCJ commented, at paragraph 12, "A rollover is provided in the case of a subsection 107(2) transaction because there is, in substance, no disposition whereby a gain could be realized. The beneficiary in such a case holds, after the transaction has been completed, full title to the property of which previously was a beneficial owner [sic]." See also subsection 19(5.1), which was added by section 11(5) of the 2001 technical bill. Subsection 19(5.1) adds a deeming rule in respect of the meaning of "Canadian citizen" as used in the definition of "Canadian newspaper" in subsection 19(5). Subsection 19(6) provides that if a trust is to meet the requirements of ownership of a Canadian newspaper, each beneficiary of the trust must meet the definition. In effect, if the right to publish is held by a partnership and one of the partners is a trust, the requirement of ownership by Canadian citizens is not met unless each beneficiary of the trust otherwise qualifies under subsection 19(5). These provisions imply that beneficial ownership for tax purposes may be viewed as belonging to the beneficiaries and not to the trust or the trustee.

101 See, for example, paragraph 256(1.2)(f), which deems a beneficiary to own shares held by a trust for purposes of the associated corporation rules; and clause (e)(iii)(B) of the definition of "Canadian newspaper" in subsection 19(5), which deems shareholders of a holding corporation

3. *The beneficiary is the beneficial owner of trust property on the basis of private law principles.* The beneficial owner or person with beneficial ownership is the person who is recognized in the law of trusts as one who has a right to beneficial enjoyment of the trust property.¹⁰²
4. *The trust is the owner of trust property.* Deeming rules in the ITA determine who is the owner of trust property. The basic structure of subdivision k is based on the fiction that the trust is an individual and, at least for the purpose of calculating capital gains, capital losses, and income or claiming tax deductions, is the owner of trust property. Whether the trust as an individual should or will be considered the “owner” or “beneficial owner” of trust property for other tax purposes is, in my view, a matter of conjecture under the current structure of the ITA.¹⁰³

The statutory fiction that the trust is an individual and the owner of trust property is one of the most obvious points of conflict with private law concepts. The trust is clearly treated as the owner of trust property for tax purposes in a number of provisions in the ITA. However, the assumptions underlying the 2001 technical amendments are based on the premise that the beneficiary of a trust is the beneficial owner.¹⁰⁴ It appears that what is meant by the use of the expression “beneficial owner” in the context of these amendments is that the beneficiary is one who both before and after the transfer of the property to the trust beneficially enjoys or has beneficial enjoyment of that property. An important task for tax planners and legislators alike will be differentiating between who is considered to be the beneficial owner of the trust property for purposes of the disposition provisions; who is the owner for purposes of calculating gains and losses, income, and tax deductions in respect of trust property (the trust); and who is the beneficial owner or owner for other purposes of the ITA. It will also be important to ascertain the circumstances in which the trust will *not* be considered the owner for some tax purposes. A related and equally important concern is who will be considered to be the owner in those circumstances—the trustee or the beneficiary.

or members of a partnership to own shares held through a corporation or a partnership for purposes of the definition of “Canadian newspaper” in subsection 19(5). In the case of a trust governed by the laws of Quebec, paragraph 248(3)(f) provides that property to which a person has a right as a beneficiary in a trust shall, notwithstanding a servitude, be deemed to be beneficially owned by that person. Although paragraph 248(3)(f) is stated to deem beneficial ownership by a beneficiary for purposes of the ITA, it is difficult to imagine that the provision would be interpreted by the courts in a manner that afforded different rights or obligations to a beneficiary under a Quebec trust from those afforded to a beneficiary under a common law trust.

102 For a more detailed description of this category, see the discussion at note 112, *infra*, and following.

103 Subsection 104(2).

104 Whether this conclusion is limited to transfers as described under the 2001 technical amendments is not clear.

***Statutory Groupings of Meanings for “Beneficial Owner,”
“Beneficial Ownership,” and “Beneficially Owned”***

The statutory provisions under review have been divided into five groups. Four of these groups are based on similarities in the use of the various expressions, with reference to the four categories of meaning described above. The fifth group comprises provisions that do not fit neatly either into any of the first four groups listed below or into a separate group based on similar meaning.

1. The specific provisions under review involve property surrendered by a debtor to a creditor, property seized by a creditor, or property acquired by an insurer (see table 1). The meaning of the expression “beneficial ownership” in these provisions most obviously falls into category 1, which defines “beneficial ownership” as ownership. The meaning of “beneficial ownership” in categories 2 and 4 also may apply. Thus, the expressions “beneficial ownership,” “beneficial owner,” and “beneficially owned” as used in these provisions could include the reacquisition of beneficial ownership through a bare trust, agent, or other intermediary under a subsection 104(1) arrangement. It also appears that the meaning of “beneficial ownership” in these provisions would include the reacquisition of ownership by a trust, if the trust was the original creditor.¹⁰⁵

In appropriate circumstances, a court might interpret “beneficial ownership” in these provisions to include beneficial ownership of a beneficiary through a trust, if the property is reacquired by, for example, a fixed trust of which the creditor is the sole beneficiary, particularly if the trust is a self-benefit trust or the result of a qualifying disposition. This conclusion about the meaning of “beneficial ownership,” as used in this context, is based on a potential legal argument that the beneficiary should be considered the beneficial owner of trust property in these circumstances for tax purposes. Conversely, if the trust is not a bare trust or a subsection 104(1) arrangement, a plausible legal argument is that the trustee is the beneficial owner in this context.¹⁰⁶

2. The meaning of “beneficial ownership” in the second grouping of provisions (see table 2) falls within categories 1, 2, and 3. The provisions listed are those added to the ITA in March 2001 that refer to a transfer that does not result in a change in beneficial ownership of the property.¹⁰⁷ The meaning underlying these provisions relies on both the determination of who is the beneficial owner as a result of the application of specific ITA provisions (such as subsection 104(1)), and the private law concept of beneficial ownership, as that expression is used by some. As well, the owner is considered to be the

105 This interpretation relies on subsection 104(2), which deems a trust to be an individual for purposes of the Act. If the trust reacquired the property as a creditor, it follows that the trust would be considered the beneficial owner for purposes of this provision.

106 See also the discussion at notes 42 to 54, *supra*.

107 The legally precise, less controversial expression would refer to no change in “beneficial interest” or “enjoyment.”

TABLE 1

Provision	Expression	Context
Subsection 79(2)	“the beneficial ownership of the property is acquired or reacquired”	Surrender of property by a debtor to a creditor
Subsection 79.1(2)	“the beneficial ownership of the property is acquired or reacquired”	Seizure of property by a creditor
Subsection 138(11.93)	“the beneficial ownership of the property is acquired or reacquired”	Acquisition of property by an insurer as a result of debtor’s failure to pay

TABLE 2

Provision	Expression	Context
Subparagraph 69(1)(b)(iii)	“a disposition of a property that does not result in a change in the beneficial ownership of the property”	Determination of proceeds on the disposition of property to a trust
Paragraph 69(1)(c)	“a disposition that does not result in a change in the beneficial ownership of the property”	Determination of cost on the acquisition of property
Subparagraph 73(1.02)(b)(ii)	“does not result in a change in beneficial ownership of the property”	Requirement for a rollover on transfer of property to a trust
Paragraph 104(4)(a.4)	“the transfer did not result in a change in beneficial ownership of that property”	Determination of deemed disposition date for certain trusts
Paragraph 107.4(1)(a)	“the disposition does not result in a change in the beneficial ownership of the property”	Definition of “qualifying disposition”
Subparagraph 122(2)(f)(iii)	“no change in the beneficial ownership of the property resulted from the transfer”	Exclusion from tax rate otherwise applicable to an inter vivos trust
Subsection 248(1) “disposition,” paragraphs (e), (f), and (k)	“as a consequence of which there is no change in the beneficial ownership of the property”	Exclusion from the definition of “disposition”
Subsection 248(25.2)	“the first change after that time in the beneficial ownership of the property”	Exclusion from the definition of “disposition” until a change in beneficial ownership occurs

beneficial owner, a necessary assumption if no change in beneficial ownership is to occur when property is transferred to a trust.

As noted above, the trust is deemed to be an individual and is treated as the owner of trust property for many purposes of the ITA.¹⁰⁸ The technical notes to the provisions listed here suggest, however, that the use of the expression “beneficial ownership” in these provisions is based on private law notions of beneficial enjoyment. The CCRA has stated in a technical interpretation, “As stated in the explanatory notes released by the Department of Finance, where the individual is the sole income and capital beneficiary of a trust during his or her lifetime, the retention of a general power of appointment by the individual on the transfer of property to such a trust would not be expected to result in a change in beneficial ownership of the property for the purpose of a transfer described in subparagraph 73(1.02)(b)(ii) [in respect of a self-benefit trust].”¹⁰⁹ Beneficial ownership is assumed to belong to the transferor both before and after the transfer to the trust, and not to the trust itself or to the trustee.

3. The third group comprises provisions that take their primary meaning under category 1 and include the owner within the meaning of “beneficial owner,” or rely on the private law concept of beneficial ownership (enjoyment) in category 3 (see table 3). Subparagraph 107.4(2)(a)(ii) refers to “the value of each beneficiary’s beneficial ownership . . . in each particular property of the transferor trust.” The use of the expression “beneficial ownership” in this context implies that the beneficiary can and does enjoy beneficial ownership of each property of the trust. The method of meeting the requirement appears to be the creation of an identical transferee trust, with identical properties and identical beneficiaries having identical interests as in the transferor trust.¹¹⁰ There is no suggestion that the trusts must be bare trusts in these circumstances. Paragraph 107.4(3)(k) refers to a taxpayer’s beneficial ownership in a capital interest in a trust.
4. Some provisions rely on both the meaning of beneficial ownership resulting from the operation of the ITA and the private law notion of beneficial enjoyment (see table 4). The meaning of “beneficially owned” would include the meanings found in categories 1, 2, and 4 above—that is, the property is considered to be beneficially owned by the owner in his or her personal capacity; by the taxpayer as beneficial owner if the property is held through

108 This general rule is subject to a number of provisions that deem the beneficiary to be the beneficial owner of, or to beneficially own, trust property. See, for example, subparagraphs 256(1.2)(f)(i) to (iv), which deem a beneficiary to own shares held by a trust for purposes of the associated corporation rules. One might also consider paragraph 248(3)(f), discussed in note 101, *supra*, and in the fifth grouping of provisions at the end of this section.

109 CCRA document no. 2000-0048735, May 24, 2001.

110 This approach was confirmed in a comfort letter from the Department of Finance dated March 7, 2001.

TABLE 3

Provision	Expression	Context
Subparagraph 107.4(2)(a)(ii)	“as a consequence of the disposition, the value of each beneficiary’s beneficial ownership at the beginning of the period . . . is the same as the value of the beneficiary’s beneficial ownership at the end of the period”	Condition for a rollover on certain trust-to-trust transfers under the qualifying disposition provision
Paragraph 107.4(3)(k)	“a taxpayer’s beneficial ownership in the property ceases to be derived from the taxpayer’s capital interest in the transferor”	Adjustment to cost base of a taxpayer’s capital interest in a trust on certain qualifying dispositions

a bare trust, agency, or subsection 104(1) arrangement; and finally, by a trust if the property is owned by a trust as a taxpayer. (This assumes that the trust would be considered to be the owner of the trust property because it is deemed to be an individual for purposes of the ITA.) The expression in this context could also arguably include shares that are “beneficially owned” within the meaning of that expression under category 3—that is, by a beneficiary if the shares are held by a trust.

5. The final grouping discusses the meaning of the expressions in provisions that do not fit neatly into any of groups 1 to 4 (see table 5). For example, subsection 146.3(1) relies solely on the meaning of “beneficial owner” as the owner.¹¹¹ This grouping also includes deeming provisions to determine beneficial ownership requirements if property is held by a trust. Beneficial ownership in the context of the definition of “Canadian newspaper” in subsection 19(5), for example, is determined with reference to the provisions in subsection 19(5.1). Specifically, if a newspaper is owned by a partnership and the partnership interest is owned by a trust, subsection 19(5.1) effectively disqualifies the partnership from meeting the Canadian ownership requirements for a “Canadian newspaper” unless all of the beneficiaries of the trust otherwise meet the definition. This provision obviates the need to look any further for the meaning of “beneficial ownership.” Subsection 19(6), which is not listed, also plays a unique role in determining ownership for the purposes of the definition of “Canadian newspaper.” It provides that if the right to publish is owned by a trust, the newspaper is not a “Canadian newspaper” unless each beneficiary under the trust is a person, partnership,

111 Subsection 146.3(1) is a provision dealing with registered retirement income funds (RRIFs). By contract, the RRIF is required to pay certain amounts each year to the RRIF annuitant. Some of the property held by the RRIF may be held by the RRIF holder as a trustee and some as the beneficial owner or owner. An annuitant under a RRIF would clearly not be considered to own property held by the RRIF.

TABLE 4

Provision	Expression	Context
Subparagraph 85.1(2)(b)(ii)	"the vendor or persons with whom the vendor did not deal at arm's length . . . beneficially owned shares of the capital stock of the purchaser"	Requirement for a share-for-share exchange
Subparagraph 85.1(6)(b)(ii)	"immediately after the exchange the vendor . . . beneficially owned shares of the capital stock of the foreign purchaser"	Requirement for a share-for-share exchange involving a foreign purchaser
Subclause 87(9)(c)(ii)(A)(II)	"the capital stock of each predecessor corporation beneficially owned by it"	Determination of cost base of a parent's share in a predecessor corporation on a merger
Subclause 112(3.2)(a)(ii)(C)(II)	"the trust, the beneficiary and persons not dealing at arm's length with the beneficiary owned" ^a	Stop-loss rules on a disposition of shares
Subparagraph 115.2(2)(b)(iii)	"investments in the non-resident that are beneficially owned by persons and partnerships"	Exclusion from the definition of "carrying on business in Canada"
Paragraph 115.2(3)(b)	"investments in the entity that are beneficially owned by persons and partnerships"	Definition of "designated entity" in respect of a Canadian service provider
Subparagraphs 133(8)(a)(i) and (iii)	"all of its issued shares . . . were beneficially owned by non-resident persons"	Definition of "non-resident-owned investment corporation"
Subsection 227(4.1)	"property beneficially owned by Her Majesty"	Claims by Her Majesty for unremitted source deductions

^a Although this section refers to a beneficiary or other persons who own the shares, it is clear that, for purposes of the ITA, "owner" means or includes the beneficial owner. This provision is therefore viewed as similar in meaning to the others in this grouping.

association, or society described in that subsection. In addition, the meaning of "beneficial owner" in subsection 19(5) includes the meanings found in categories 1, 2, and 4.

Paragraphs 107.4(2)(a) and (b) also contain specific deeming rules. These clarify that there is no change in beneficial ownership for purposes of the qualifying disposition rules in subsection 107.4(1). As discussed under the third grouping above, one of the criteria that must be met to fall within this deeming rule is that there is no change in "the value of each beneficiary's beneficial ownership . . . in each particular property of the transferor trust."

The deeming rule in paragraph 107.4(2)(b) addresses the transfer of property by a taxpayer between a registered retirement savings plan and a registered retirement income fund. A change in the beneficial ownership of the property and therefore a disposition is deemed not to occur if the annuitant under the plan remains the same.

TABLE 5

Provision	Expression	Context
Subparagraph 19(5)(a)(i)	“interests representing in value at least $\frac{3}{4}$ of the total value of the partnership property are beneficially owned”	Definition of “Canadian newspaper”
Clause 19(5)(e)(iii)(B)	“at least $\frac{3}{4}$ of the fair market value of all of the issued shares of the corporation, are beneficially owned”	Definition of “Canadian newspaper”
Paragraph 107.4(2)(a)	“there is deemed to be no resulting change in the beneficial ownership of those properties”	Deeming rules for certain qualifying dispositions between trusts
Paragraph 107.4(2)(b)	“the transfer is deemed not to result in a change in the beneficial ownership of the property”	Deeming rules for transfers of property between an RRSP and a RRIF
Subsection 146.3(1)	“whether held by the carrier as trustee or beneficial owner thereof”	Description of property held by a RRIF
Paragraph 248(3)(f)	“property . . . shall . . . be deemed to be beneficially owned by the person at that time”	Deeming rules for Quebec trusts

Paragraph 248(3)(f) is a deeming rule for the purposes of application of the ITA in relation to Quebec. Among other things, it deems a beneficiary with a right under a trust to beneficially own the trust property. The meaning of “beneficially owned” in this context would likely include category 1, category 2 where applicable, and in some circumstances category 3. In short, courts would probably interpret the provision as creating an equivalent result for beneficiaries under a common law trust and beneficiaries under a trust governed by the laws of Quebec. There is no case law to support this view.

Category 3: Detailed Explanation

“BENEFICIAL OWNER”

The 2001 amendments introduce throughout the ITA the notion that a beneficiary is the “beneficial owner” of trust property or, more specifically, that property can be transferred to a trust without a change in beneficial ownership. Is the beneficiary of a trust also considered the “beneficial owner” of trust property for other tax purposes, and if so, when?¹¹² The answer is of fundamental importance in a taxing statute that imposes a tax result based on who is the beneficial owner of property. In the absence of specific statutory guidelines, how does one determine this answer? A number of factors should be considered.

112 The answer to this question has never been clear, except perhaps with respect to a bare, resulting, or constructive trust, or, more recently, a subsection 104(1) arrangement.

First, reference must be made to subdivision k—specifically, to subsection 104(2), which deems a trust to be an individual for purposes of the ITA. It is clear that, for purposes of subdivision k and the reporting of income and claiming of deductions, the trust is considered to be the owner of the trust property. If this deeming provision does not apply for all purposes of the ITA, a point that in my view is unclear, reference must presumably be made to private law to determine who is considered to be the “beneficial owner” of trust property. If such consideration is made, the debate (dating back to the 19th century) as to whether a beneficiary “beneficially owns” trust property or simply has a right against the trustee to compel performance of the trust¹¹³ is of tremendous relevance.¹¹⁴ For example, it would be the basis for a legal argument about whether a corporation is a Canadian-controlled private corporation¹¹⁵ when the trustee is a Canadian resident but the beneficiaries of a discretionary trust are not.

Is the beneficiary the beneficial owner of trust property, as the advocates of rights in rem would claim, or are the beneficiaries’ rights restricted to beneficial enjoyment of the trust property, as those who argue that the rights are in personam would claim? If the latter advocates are correct, is the trust property owned by the trustee or the trust?

Before an answer to this question is attempted, a number of other questions should be asked. What policy considerations underlie the specific provision? Should both the legal titleholder and the beneficiary be considered in determining the answer? Should it matter if the trust is discretionary or fixed? How do tax decisions primarily interpreting succession duty legislation or other tax statutes affect the determination of who is the beneficial owner for purposes of the ITA?¹¹⁶ Can one rely on the conclusion reached by the Supreme Court of Canada that a beneficiary under a trust may have a specific interest in trust assets for some tax purposes, and/or rely on obiter by that court¹¹⁷ that the beneficiaries are, in some cases, the beneficial owners of trust property? Or should we conclude that when Supreme Court judges use the expression “beneficial owner,” what they really mean is that the beneficiaries beneficially enjoy the trust property?¹¹⁸

An important point is that the issue of whether a beneficiary is the beneficial owner of trust property arises both when the words “beneficial owner/ownership”

113 For a discussion of this issue, see Waters, “Nature of Trust Beneficiary’s Interest,” *supra* note 4, at 220.

114 A resolution of this debate and/or a determination of who is the “beneficial owner” of trust property for tax purposes would help to resolve many difficult conceptual issues relating to the application of specific tax provisions.

115 See the definition of “Canadian-controlled private corporation” in subsection 125(7).

116 See the discussion of these cases at notes 73 to 89, *supra*.

117 See *Pan-American Trust*, *supra* note 73, at 296. See also the comments of Cartwright J in *Trans-Canada*, *supra* note 73.

118 This is a fair conclusion since the expression “beneficial ownership” as used in the statute was not at issue in *Pan-American Trust* and *Trans-Canada*. At issue was the source of the dividend income.

or “owned” are used, and whenever the issue of ownership is included in broader concepts, such as who holds shares, who shares “belong to,”¹¹⁹ or who is “related”¹²⁰ or “affiliated.”¹²¹ This issue is also significant in determining whether a corporation is a “Canadian corporation,” or a partnership a “Canadian partnership,” or a newspaper a “Canadian newspaper,”¹²² to name a few examples. All of these determinations rely on who is considered to own or, in some cases, control trust property for tax purposes. Is it the trustee, the trust, or the beneficiary? The answer, in my view, is often not obvious.

Can private law provide some certainty in determining who is the beneficial owner of trust property for purposes of the ITA? In my view, it does not. Although the expression “beneficial owner” is often used, any answer found in private law is uncertain and unhelpful for two important reasons. First, the ITA interjects the fiction that the trust is an individual for purposes of the ITA. Second, in almost every case in which a beneficiary has been found to have a specific interest in or ownership of trust property, revenue collection has been at issue. In reaching their conclusions, Canadian courts have therefore rejected private law, sometimes in very strong terms. In *McCreath*, Dickson J stated, “I do not believe that the niceties and arcana of ancient property law should be fastened upon with mechanical rigidity to determine the effect of a modern taxation statute whose purpose is plain.”¹²³ It therefore seems that the matter of what “beneficial ownership” means for tax purposes must be settled within the structure of the ITA.

Where does this discussion leave us for purposes of interpreting the current provisions of the ITA and the concept of beneficial ownership therein? First, for purposes of determining who pays tax on trust income and who can claim tax deductions, the owner of trust property is the trust. If the trust is a bare trust or a

119 Subsection 186(2).

120 Subsection 252(1).

121 Subsection 252.1(1).

122 One example of the difficulty in determining whether the trustee or the beneficiaries are the beneficial owners of a right in a Canadian newspaper can be seen in the former definition of “Canadian newspaper or periodical” in section 19. In CCRA document no. 2002-0138045, June 27, 2002, it was argued by the taxpayer that for purposes of clause 19(5)(e)(iii)(B), in the case of a discretionary trust, the trustee beneficially owns trust property, and therefore the residency of the beneficiaries should not matter in determining whether the Canadian citizenship requirements under that section were met. This is the legal argument that follows from Maitland’s in personam thesis about the nature of the beneficiaries’ rights (see the discussion at notes 41 to 45, *supra*). If the beneficiary has only a right of enjoyment in the trust property, it follows that ownership must lie with the trustee, subject to a duty to the beneficiary. The issue of whether a trust with non-resident beneficiaries will meet the Canadian ownership requirements for purposes of section 19 if the right to publish is held directly by the trust has been resolved by the amendment of subsection 19(6). As discussed above, that subsection provides that the trust will not meet the ownership test in the definition of “Canadian newspaper” unless all the beneficiaries under the trust individually qualify under that definition.

123 *Supra* note 84, at 187.

subsection 104(1) arrangement, the beneficial owner or owner is the beneficiary.¹²⁴ If there is a specific deeming rule, beneficial ownership is determined on the basis of the deeming provision.¹²⁵ In all other cases, beneficial ownership for tax purposes will be determined on the basis of a combination of private law concepts, case law, and tax policy.

As discussed, determining who beneficially owns trust property as a private law matter is not at all settled. Thus, the debate about whether a beneficiary can be said to have an interest in specific trust property (“beneficial ownership”) as a matter of trust law may be highly relevant in determining how provisions in the ITA are to be interpreted and applied, both where the words “beneficial owner” are used and where that concept is determinative of the tax result—in short, wherever the tax outcome revolves around the determination of who owns the property.

NO CHANGE IN “BENEFICIAL OWNERSHIP”

The new rollover provisions in subparagraph 73(1.02)(b)(ii) (self-benefit trusts) and paragraph 107.4(1)(a) (qualifying dispositions) require that the transfer “does not result in a change in [the] beneficial ownership of the property.” Before the 2001 amendments, if one were to describe when, for tax purposes, a transfer of property does not result in a change in beneficial ownership, one would likely describe a transfer of property to a bare trust, in which the settlor is the sole beneficiary, or perhaps a transfer of legal title, if legal title is held under a resulting or constructive trust.¹²⁶ In all other transfers involving trusts, a change in beneficial ownership (as the latter concept is conventionally understood)¹²⁷ arguably occurs. The change occurs because the trustee is considered in law to be the owner, subject to the rights of the beneficiary under the terms of the trust deed. There may, however, be no change in the transferor’s right to beneficial enjoyment of the transferred property.

HOW DOES THE CCRA INTERPRET THE EXPRESSIONS “BENEFICIAL OWNER,” “BENEFICIAL OWNERSHIP,” AND “BENEFICIALLY OWNED”?

The following discussion of the CCRA’s interpretation of the expressions “beneficial owner,” “beneficial ownership,” and “beneficially owned” is based on a review of interpretation bulletins, information circulars, technical interpretations, and answers

124 This conclusion may also extend to resulting or constructive trusts; however, in the case of a constructive trust, the timing may be at issue.

125 Query whether both the deeming rule and the private law principle would apply, particularly in the context of the associated corporation rules.

126 The CCRA’s assessing position with respect to so-called protective trusts, as described in *Technical News* no. 7, *supra* note 95, also added some support to the view that certain transfers to a trust under which the settlor was the sole beneficiary might avoid being assessed on a disposition of the property to the trust.

127 See the discussion at note 42, *supra*, and following.

found in round table discussions. Occasional reference is also made to the CCRA's assessing position as described in case law. The listed materials should be viewed as illustrative only and do not include all published CCRA materials that include these expressions, either expressly or by implication.

The discussion is based on a number of assumptions.

First, in my view, it is an impossible task to relate these expressions to meanings found in the private law in many instances, since, for tax purposes, the trust is treated as a taxpayer and not a relationship. Any answer to or interpretation of the questions posed above that necessarily include a consideration of the trust as an individual cannot therefore be found by reliance on private law principles alone. The meaning must be found in the legislation itself, its purpose, and the intention of its drafters.

Second, the CCRA is often required to interpret and apply the concepts underlying these expressions (in particular, the concept of beneficial ownership) in situations where it is crucial to the tax result to determine who is the "beneficial owner," even though the words "beneficial owner," "beneficial ownership," or "beneficially owned" are not used. For example, the CCRA has been called on to determine the tax status of a corporation or to determine whether a partnership meets the definition of a "Canadian partnership" if the partnership interest is held by a trust. At issue in these situations is whether it is the residence of the beneficiaries or the residence of the trustee that governs the tax outcome. The answer generally depends on who is considered to be the owner (or "beneficial owner") of the trust property for the purpose of the particular statutory provision. How is this to be decided?

Finally, since the implementation of the 2001 technical amendments, the CCRA must analyze whether there has been "a change of beneficial ownership" on a transfer of property. If the transfer is to a trust, the CCRA is required to adopt the view, in the context of these provisions, that the transferor and subsequent beneficiary of the trust is the beneficial owner of the trust property, but at the same time to respect the fiction that the trust is an individual and the owner of the trust property for other purposes of the ITA.¹²⁸ Again, the CCRA cannot rely on private law in making its determination, since the issue of whether a beneficiary is considered to be the beneficial owner of trust property is not at all settled in private law. As discussed earlier, the more conventional private law view is that a beneficiary has a right of enjoyment in the trust property, a right in personam, that can be enforced against the trustee.¹²⁹ Those who suggest in a Canadian context that a beneficiary can or does beneficially own or have a specific interest in trust property rely largely on tax decisions that have interpreted specific statutory provisions to support this view. These cases have adopted what is sometimes referred to as the

128 Subsection 104(2). As a result, capital gains and losses, capital cost allowance, and other tax deductions are all calculated, and tax is paid, by the trust as an individual taxpayer. Private law is obviously of no assistance in elucidating the concept of ownership of trust property in the context of this fiction.

129 For a detailed discussion of this debate, see the text at notes 42 to 45, *supra*.

“substance approach” to determine the issue and have generally done so for the purpose of revenue collection.¹³⁰ Those who argue that a beneficiary can be considered to be the beneficial owner of trust property have been accused by some trust experts as courting “fallacies of reasoning.”¹³¹

The following offers a general discussion of the questions posed and the CCRA’s views, beginning with the concepts of ownership and beneficial ownership.

“Beneficial Ownership,” “Owner”/“Beneficial Owner,” and “Beneficially Owned”

In *Interpretation Bulletin* IT-437R,¹³² the CCRA provides the following commentary with respect to the ownership of, in this case, real property. (The references in the bulletin are to paragraph (e) of the definition of “disposition” in former section 54, which excluded “any transfer of property by virtue of which there is a change in the legal ownership of the property without any change in the beneficial ownership thereof.” A similar exclusion is provided in the new definition of “disposition” in subsection 248(1).)

In the common law jurisdictions, two forms of property ownership are recognized—legal and beneficial. Normally “legal ownership” exists when title is transferred to, recorded in, registered in or otherwise carried in the name of a person.¹³³

The term “beneficial ownership” is used to describe the type of ownership of a person who is entitled to the use and benefit of the property whether or not that person has concurrent legal ownership. A person who has beneficial ownership rights but not legal ownership can enforce those rights against the holder of the legal title.¹³⁴

Since in most cases the same person has both legal and beneficial ownership, determining ownership on the basis of beneficial ownership alone is often not required.¹³⁵

Interpretation Bulletin IT-170R also discusses when beneficial ownership passes on the sale of property:

Since possession, use, and risk are the primary attributes of beneficial ownership, registration of legal title alone is of little significance in determining the date of disposition. Factors that are strong indicators of the passing of ownership include:

- (a) physical or constructive possession (refer to IT-50R),
- (b) entitlement to income from the property,

130 For a discussion of this approach, see the text at notes 46 to 50 and 73 to 89, *supra*.

131 Waters, “Nature of Trust Beneficiary’s Interest,” *supra* note 4, at 220, quoting Maitland.

132 *Interpretation Bulletin* IT-437R, “Ownership of Property (Principal Residence),” February 21, 1994.

133 *Ibid.*, at paragraph 2.

134 *Ibid.*, at paragraph 3. This paragraph uses the words “beneficial ownership” but acknowledges that the term is used to describe the right of the beneficiary to enforce the rights against the holder of the legal title. This is an accurate description of the beneficiary’s rights in trust law.

135 *Ibid.*, at paragraph 5.

- (c) assumption of responsibility for insurance coverage, and
- (d) commencement of liability for interest on purchaser's debt that forms a part of the sale price.¹³⁶

Similarly, in determining the status of a corporation for tax purposes, the CCRA recognizes in *Interpretation Bulletin* IT-391R that the shareholdings of a corporation are to be looked at from the point of "beneficial ownership" and not merely from the perspective of legal title or ownership:

In determining the shareholdings of the corporation, the emphasis is on beneficial ownership. For example, where an agent or bare trustee holds shares of a corporation on behalf of a number of principals, this should not be counted as one shareholder, but rather the number of such principals would be so considered. In the case of a pension fund or holding company, each fund or company counts as one shareholder.¹³⁷

Again, in *Interpretation Bulletin* IT-64R4, the CCRA states that the beneficial ownership is to be considered in determining the ownership of shares for the purposes of association and control:

The owners of shares of a corporation are considered to be those persons who are the beneficial owners of such shares. This is the case even if the shares are registered in the corporation's share register in the name of another person or persons such as a nominee or bare trustee.¹³⁸

IT-391R and IT-64R4 both refer to situations involving a bare trust, with the result that the trust is ignored for purposes of ITA and the beneficiary is considered to be the beneficial owner. Noticeably absent in the bulletins is commentary about whether a beneficiary would ever be considered to be the beneficial owner of the shares in a context other than a bare trust.

The issue of determining who is the beneficial owner of property has also arisen in a number of contexts in the technical interpretations. The facts have involved bare trusts,¹³⁹ the effect of a conditional sales agreement¹⁴⁰ or mortgagee in possession,¹⁴¹ and a resulting trust.¹⁴² In each situation, the CCRA has interpreted the

136 *Interpretation Bulletin* IT-170R, "Sale of Property—When Included in Income Computation," August 25, 1980, paragraph 8.

137 *Interpretation Bulletin* IT-391R, "Status of Corporations," September 14, 1992, paragraph 4.

138 *Interpretation Bulletin* IT-64R4, "Corporations: Association and Control," August 14, 2001, paragraph 15.

139 See *Technical News* no. 7, *supra* note 95; CCRA document no. 9911585, September 9, 1999; CCRA document no. 9827567, January 6, 1999; and CCRA document no. 2000-0048195, March 7, 2001.

140 CCRA document no. 9827567, January 6, 1999.

141 CCRA document no. 9518727, October 26, 1995.

142 CCRA document no. 2000-0048195, March 7, 2001.

language in a manner that, in my view, is consistent with its use in the statute. The CCRA's overall assessing position in making its determination appears to rely largely on the interpretation bulletins quoted above. The following perhaps best expresses the CCRA's approach: "the determination of the beneficial owner of property is primarily one of fact which involves a review of the relevant written documentation and a review of the conduct of the parties involved."¹⁴³

Are the findings by the CCRA regarding the beneficial owner of trust property generally consistent with that meaning at common law or in the statute? The answer to this question depends to a large extent on whether the trust as an individual must be considered as a factor by the CCRA. This matter is discussed below.

The Trust as an Individual Is Not a Factor

In circumstances where the trust is not considered to be an individual for tax purposes, the CCRA is able to revert to private law and rely largely on the substantive legal relationship of the parties. In performing its task, the CCRA is generally faithful to private law principles and generally bases its assessing position on an arguable point of law. Two examples illustrate this point. The first is the CCRA's interpretation of subsections 79(2) and 79.1(2); the second is the CCRA's interpretation of the term "bare trust" and its effect for tax purposes.

Subsections 79(2) and 79.1(2) set out the circumstances in which property is considered to be surrendered by a debtor to a creditor or property is seized by a creditor. In either case, the triggering event is the acquisition or reacquisition of beneficial ownership of the property by the creditor as a result of the non-payment of the debt. In CCRA document no. 9518727,¹⁴⁴ the CCRA sets out its views of whether beneficial ownership passes under subsection 79(2) to a mortgagee in possession. The opinion relies on basic property law principles, and reads in part as follows:

The term "beneficial ownership" describes the ownership of a taxpayer who is entitled to the use and benefit of property whether or not he has concurrent legal ownership. Factors to be considered (some of which are discussed in paragraph 8 of IT-170R as you point out) include the right to possession, the right to collect rents, the right to call for the mortgaging of the property, the right to transfer title by sale or will, the obligation to repair, the obligation to pay property taxes and other relevant rights and obligations. In our view, the registration of a quit claim deed (as discussed in IT-505) on the property in due course after default would generally be indicative of these attributes being present such that beneficial interest in the property could be said to have been reacquired by [name deleted] at that time.¹⁴⁵

143 CCRA document no. 9705717, April 16, 1997.

144 CCRA document no. 9518727, October 26, 1995. See also CCRA document no. 2000-0005797, March 30, 2000.

145 CCRA document no. 9518727, October 26, 1995.

The CCRA's interpretation of provisions of the ITA that rely on the concept of a bare trust for the tax result¹⁴⁶ are also relatively consistent with private law principles,¹⁴⁷ although a fairly strict view is taken of what a bare trust entails. A good example of this can be found in the CCRA's statement in *Technical News* no. 7, which provides inter alia that where property is held by a bare trust, the CCRA will

ignore the trust for income tax purposes and will consider the transferor/settlor to be the owner of the property for all purposes of the Act.

It was further stated that we generally view a trust under common law to be a bare trust when:

- the trustee has no significant powers or responsibilities, and can take no action without instructions from the settlor;
- the trustee's only function is to hold legal title to the property; and
- the settlor is the sole beneficiary and can cause the property to revert to him or her at any time.¹⁴⁸

Technical News no. 7 recognizes that in a bare trust the trustee has no significant powers (a point well recognized in trust law) but restricts the application of the concept to situations where the settlor is the sole beneficiary. This is not a restriction that is imposed at common law or in case law.¹⁴⁹ The CCRA's views on what is a bare trust may have been largely replaced by the amendment of subsection 104(1), which now provides a statutory definition of when a trust will be ignored for purposes of the ITA. This definition is considerably broader in its scope than that in *Technical News* no. 7.

The Trust as an Individual Is a Factor

The CCRA states in a number of interpretation bulletins that it relies on private law if a term is not defined in the ITA.¹⁵⁰ This task becomes somewhat more difficult, and the CCRA's interpretation less consistent, where the issue to be settled is the ownership of trust property, especially if the role of the trust as a taxpayer must be taken into consideration. Some sympathy must be expressed for the CCRA in these

146 See *Interpretation Bulletin* IT-216, May 20, 1975, paragraph 2; and *Interpretation Bulletin* IT-437R, supra note 132, at paragraph 10.

147 See, for example, the assessing position in *De Mond v. The Queen*, 99 DTC 893; [1999] 4 CTC 2007 (TCC). The CCRA submitted that none of the trusts were bare trusts on the basis of the three requirements stated in *Technical News* no. 7 (supra note 95). The trustees had very significant powers and responsibilities under the declaration of trust, and the settlor was not the sole beneficiary, since under the terms of the trust, the trustees had the power to make a distribution to anyone.

148 *Technical News* no. 7, supra note 95.

149 See, for example, *Brookview Investments*, supra note 95.

150 See, for example, *Interpretation Bulletin* IT-449R, "Meaning of 'Vested Indefeasibly,'" September 25, 1987, paragraph 1.

circumstances. As stated, private law is of little assistance once the fiction that the trust is an individual for tax purposes has been interjected. The determination of who is the owner of trust property must instead be made largely within the context of the ITA, which also offers little guidance by way of definitions. Nonetheless, how the trust relationship is viewed by the CCRA will have important tax consequences.

For trust law purposes, it has long been recognized that a trust beneficiary has a personal right against the trustee to compel proper administration of the trust. Since the early 20th century, it has also been recognized, particularly in tax cases, that the beneficiary may have a proprietary interest in the trust assets.¹⁵¹ The beneficiary is also considered, often at the insistence of revenue authorities, to be the beneficial owner of, or to have a beneficial interest in, the trust property, again for purposes of revenue collection.¹⁵² The view is apparently not shared by all representatives of the CCRA, one of whom stated in a recent technical interpretation that “the Canada Customs and Revenue Agency has not accepted, as a general proposition, that the beneficiary of a trust is the beneficial owner of the trust property.”¹⁵³ Who, then, is the relevant taxpayer in a particular transaction: the trust itself, the trustee, or the beneficiary? The following discussion examines the CCRA’s views on this matter.

IS THE OWNER THE TRUST OR THE BENEFICIARY?

Does or should the CCRA view the trust as the owner of trust property, relying on the legislative framework in subdivision k, or are there occasions when private law principles should override to determine who is the “real” owner of trust property for the purpose of the provision under review? The difficulty in answering this question becomes apparent in some of the technical interpretations in which the answer has been requested by taxpayers. Six technical interpretations have been chosen to illustrate this point.

In the first technical interpretation,¹⁵⁴ the facts involved a trust and a corporation that formed a partnership. The issue was whether the beneficiaries of the trust would be considered to be members of the partnership (that is, carrying on the business of the partnership), and if they were members of the partnership, would they be considered to be related to the partnership for the purposes of paragraph 110.6(14)(d).

151 For a good discussion of this issue, see Waters, “Nature of Trust Beneficiary’s Interest,” *supra* note 4, and Oosterhoff and Gillese, *supra* note 11, at 24-30.

152 See, for example, the Supreme Court of Canada decision in *Trans-Canada*, *supra* note 73. See also paragraph 248(3)(f), which provides that for the purposes of the application of the ITA in Quebec, a property in relation to which a person has, at any time, a right as a beneficiary under a trust “shall . . . be deemed to be beneficially owned by the person at that time.” See also the wording of subsection 74.4(4), which refers to a beneficiary’s beneficial interest in specific trust assets.

153 CCRA document no. 9824535, November 10, 1999.

154 *Ibid.*

The CCRA's response was that the beneficiaries of a trust would not be considered members of the partnership where the trust owned an interest in the partnership. Hence, paragraph 110.6(14)(d) would not apply to deem the partnership to be related to the beneficiaries. The stated reason for these conclusions is as follows:

The Canada Customs and Revenue Agency has not accepted, as a general proposition, that the beneficiary of a trust is the beneficial owner of the trust property. There are no look-through provisions in the Act to permit the beneficiary of a trust to be the owner of the trust property comprising a partnership interest. Accordingly, the beneficiary would not, on this basis alone, be considered a member of the partnership and as such, would not be related to the partnership under paragraph 110.6(14)(d) of the Act.¹⁵⁵

This position is in marked contrast to the position adopted in the second technical interpretation under review,¹⁵⁶ which addressed the important question of ownership in the definition of "Canadian newspaper or periodical" in former subsection 19(5).¹⁵⁷ At issue was whether a trust that was a partner of a partnership holding the exclusive right to produce and publish a newspaper or periodical would satisfy the ownership and income tests in that definition.

The taxpayer suggested three options as to how the "ownership" and "income" tests could be applied:

1. to apply the test to the trust itself since under the ITA a trust is a separate person,
2. to apply the test to the trustee, or
3. to apply the test to the beneficiaries of the trust.

The taxpayer asked which of these approaches the CCRA would use to make its determination. The CCRA gave the following answer:

Pursuant to subsection 19(6) of the Act, where a trust holds the exclusive right to produce and publish a newspaper or periodical, the newspaper or periodical will not

155 Ibid.

156 CCRA document no. 9902305, November 10, 1999.

157 Former subsection 19(5) defined a "Canadian newspaper or periodical" to mean a newspaper or periodical where exclusive right to publish issues of such newspaper or periodical was held by Canadian citizens or by certain partnerships, associations, and corporations. If a partnership held the exclusive right to produce and publish the newspaper or periodical, two further conditions must be met: (1) partnership interests representing at least three-quarters of the total value of the partnership property must be beneficially owned by Canadian citizens, corporations, described in paragraph (e) of the definition of Canadian newspaper or periodical ("permitted corporations"), or a combination thereof ("the ownership test"); and (2) at least three-quarters of the income or loss of the partnership from any source must be included in the determination of income of Canadian citizens, permitted corporations, or a combination thereof ("the income test").

qualify as a Canadian newspaper or periodical unless each beneficiary of the trust is a Canadian citizen, Permitted Corporation, partnership or association described in the definition of a Canadian newspaper or periodical. *Although subsection 19(6) of the Act does not apply to the situation where a trust is a partner in a partnership that holds the right, it is our opinion that the same approach should be extended to the trust as partner, i.e. a look through to the beneficiaries of the trust* [emphasis added].¹⁵⁸

As discussed earlier, section 19 of the ITA was recently amended, adding a deeming provision in respect of the meaning of “Canadian citizen” included in the definition of “Canadian newspaper.” The amendments operate to disqualify a partnership from meeting the requirements for the definition of “Canadian newspaper” if a partnership interest was held by a trust, unless each beneficiary under the trust otherwise individually meets the ownership requirements.¹⁵⁹

This seemingly abrupt reversal of positions by the CCRA about who beneficially owns trust property is no surprise. The CCRA has responded in each case either to protect the revenue base or to uphold the policy underlying a provision. There are no clear principles of trust law to assist in the CCRA’s decision making since, as discussed, such principles are based on the premise that the trust is a relationship and not a fictitious individual.¹⁶⁰

The third technical interpretation¹⁶¹ addressed the matter of whether property had been distributed from a trust to a beneficiary, including a discussion of the determination of who owned the trust property. The following comments of Judge Bonner in *Chan v. The Queen*¹⁶² are included in the technical interpretation:

Subsection 107(1) deals with ordinary dispositions by way of sale or gift of the taxpayer’s interest in the trust. Subsection 107(2) is tailored to suit cases in which a trust “distributes” the property of a trust to a beneficiary thereby reducing or eliminating the latter’s beneficial interest. A rollover is provided in the case of a subsection 107(2) transaction because there is, in substance, no disposition whereby a gain could be realized. The beneficiary in such a case holds, after the transaction has been completed, full title to the property of which previously was a beneficial owner [sic].

The CCRA’s answer to the question of what constitutes a “distribution” for purposes of subsection 107(2) is as follows:

158 CCRA document no. 9902305, November 10, 1999.

159 See subsection 19(5.1), added by the 2001 technical bill, *supra* note 100.

160 See also CCRA Memorandum, *Manufacturing, Partnership and Trust Division*, November 18, 1991, describing a situation where the taxpayer argued that if a bare trustee (a Canadian corporation) held the partnership interest of a non-resident, the partnership would meet the requirements of the definition of Canadian partnership as a result of the trustee’s (trust’s) residence in Canada, but the non-resident beneficiary should be considered the owner for other purposes of the ITA since he or she was the beneficial owner of the trust property.

161 CCRA document no. 1999-0013485, January 25, 2001.

162 *Chan*, *supra* note 100, at paragraph 12.

The issue of whether a beneficiary's interest in a trust is a right to compel the trustees to properly administer the trust and a right to the trust property has not yet been settled. However, as it can be said that the beneficiary already had the beneficial entitlement to the property held by the trust, it is our view that subsections 107(2) and (5) require a positive action by the trustee. Generally this would be the physical distribution of the property by the trust.¹⁶³

This answer, in my view, encapsulates the issue faced by the CCRA in dealing with the concept of beneficial ownership in the ITA. Is the beneficiary's right a right in personam or in rem? In the determination of whether a beneficiary has beneficial ownership of trust property for tax purposes, must the beneficiary be beneficially entitled to the property? If so, what does "beneficial entitlement" mean for this purpose?¹⁶⁴ Is the right to distribution of trust property a requirement to establish beneficial ownership of trust property for tax purposes? The obvious point to be taken from the CCRA's comments is that in many cases, there is no clear mechanism for determining who is the beneficial owner of trust property.

In the fourth technical interpretation,¹⁶⁵ the issue was whether a beneficiary of a trust controls shares held by the trust. The answer is necessary to determine whether persons are related, or whether a corporation is a "Canadian-controlled private corporation."¹⁶⁶ Resolution of the issue is complicated by paragraph 251(5)(b), which provides that, for this purpose, a taxpayer who has a right under a contract, in equity, or otherwise to acquire shares of a corporation either immediately or in the future, and either absolutely or contingently, shall be treated as being in the same position as if that person owned the shares. The CCRA provided the following interpretation of paragraph 251(5)(b):

Where shares of a corporation are owned by a trust, the Department's general position is that paragraph 251(5)(b) will only apply where the beneficiaries have an absolute, though not necessarily immediate, right to the shares under the terms of the trust. It will not generally be applied where the trustees have absolute discretion to deal with the trust property, including the right to sell the shares owned by the trust to a third party.¹⁶⁷

163 CCRA document no. 1999-0013485, January 25, 2001.

164 The generally understood meaning of "beneficially entitled" is that the person so entitled can sue for and recover the property in question. See *Jodrey Estate*, supra note 36.

165 CCRA document no. 2m01530, July 29, 1992. Similar comments are found in "Revenue Canada Round Table," in *Report of Proceedings of the Forty-Third Tax Conference*, 1991 Conference Report (Toronto: Canadian Tax Foundation, 1992), 50:1-40, question 9, at 50:6-7.

166 See subsection 251(2).

167 CCRA document no. 2m01530, July 29, 1992. See also IT-64R, supra note 138, and *Interpretation Bulletin* IT-243R3, "Dividend Refund to Private Corporations," May 21, 1985 (replaced by *Interpretation Bulletin* IT-243R4, February 12, 1996), which states that where the non-resident beneficiaries have an absolute right to the shares under the terms of the trust, paragraph 251(5)(b) will apply to deem the beneficiaries to be in the same position in relation to the control of the

The CCRA adopted a similar position in the fifth technical interpretation,¹⁶⁸ concerning the application of paragraph 251(5)(b) to the beneficiary of an estate. In the case under review, Mrs. X was the sole beneficiary of her husband's estate. The CCRA opined that she therefore had the right to the shares of the corporation "provided that there are some left after the executor is done with his duties" and that her right was a right referred to in subparagraph 251(5)(b)(i):

Therefore, Mrs. X would be deemed to have the same position in relation to the control of the corporation as if she owned the shares . . . for the period of time when the shares . . . are registered in the name of Mr. X's accountant, the sole executor of Mr. X's estate."¹⁶⁹

Such a determination would doubtless be made retroactively to the date of death, assuming that the shares were not needed to meet the deceased's debts.

One conclusion that can be drawn from these last two technical interpretations is that the CCRA views an absolute right to specific trust assets as an equitable right that is sufficient to meet the deemed ownership requirements in paragraph 251(5)(b).¹⁷⁰ It follows that if the trust were discretionary, the CCRA may not view the beneficiaries as the beneficial owners of trust property, but instead would look to either the trustee or the trust as the owner of the property.

The matter of whether a beneficiary beneficially owns trust property has also been addressed in the context of a testamentary trust.¹⁷¹ In this sixth and final technical interpretation reviewed here, the issue was whether a residual capital beneficiary acquired beneficial ownership of a property held in a testamentary trust when the trust was created. The CCRA did not think this was so:

Unless the trustee can reasonably be considered to act as agent for the beneficiary, the beneficiary does not have beneficial ownership of the property held in the trust but rather, has an interest in the trust."¹⁷²

corporation as if the beneficiaries owned the shares themselves. Contrast this with the potential result under paragraph 248(3)(f) if the trust is a Quebec trust.

168 CCRA document no. 9235395, January 12, 1993.

169 Ibid.

170 However, it appears that if property is acquired by a beneficiary on the testator's death, the intervening estate is sufficient to prevent a finding that the property has been acquired by way of gift, bequest, or inheritance for purposes of paragraph 69(1)(c). The CCRA has opined that in those circumstances, the requirement of paragraph 69(1)(c) that a taxpayer acquire property "by way of gift, bequest or inheritance" is not met where property of a deceased individual is transferred to his estate upon his death because no gift, bequest, or inheritance is provided to the estate; thus, there can be no deemed cost to the estate under paragraph 69(1)(c). See CCRA document no. 2000-0044165, February 11, 2002.

171 CCRA document no. 2001-0080117, September 11, 2001.

172 Ibid. See also the CCRA's position in *A. Boger Estate v. MNR*, [1991] 2 CTC 168 (FCTD); *aff'd*, [1993] 2 CTC 81 (FCA); and *W.M. Hillis & I. Hillis v. The Queen*, [1983] CTC 348 (FCA).

The CCRA takes a similar position in *Interpretation Bulletin* IT-449R,¹⁷³ which deals with the meaning of the expression “vested indefeasibly,” a prerequisite if the testamentary rollover rules are to apply. The bulletin provides that in all of the provisions in which “vested indefeasibly” is used, it refers to the “unassailable right to ownership of a particular property that, in consequence of death of the owner, has been transferred or distributed either to a spouse, a spouse trust or a child of the deceased.”¹⁷⁴ The CCRA then goes on to provide that

a property vests indefeasibly in a spouse or child of the deceased when such a person obtains a right to absolute ownership of that property in such a manner that such right cannot be defeated by any future event, even though that person may not be entitled to the immediate enjoyment of all the benefits arising from that right. *Where property is held in trust for the benefit of one or more persons it is the Department's view that such property normally vests indefeasibly in the trust and not in a beneficiary thereof* [emphasis added].¹⁷⁵

If the property vests in a trust (other than a trust for a spouse or common law partner),¹⁷⁶ there is no rollover of the property on death. Do the CCRA's comments also imply that the property would be considered to be owned by the trust in these circumstances? This would be the obvious conclusion if the property vested indefeasibly in an individual.

A number of other technical interpretations address the matter of who is the beneficial owner of trust property for tax purposes, but they are not consistent in their conclusions. In one, the beneficial owner of trust property was stated to be the trust.¹⁷⁷ In a later technical interpretation, the beneficial owner of the trust property was said to be the Indian band.¹⁷⁸ A similar statement about who owns trust property was made in another interpretation, which further provided that

[i]n keeping with trust law principles, the trustee (the corporation) would be considered to be the legal owner of the trust property (i.e., the church, school and other buildings), while the members of the Congregation (the beneficiaries) would have title to the right of enjoyment in the property, that is, the beneficial title. Accordingly, in our view, beneficial ownership of the land and buildings would belong to the members of the Congregation.¹⁷⁹

173 Supra note 150.

174 Ibid., at paragraph 1.

175 Ibid. This comment is somewhat surprising when one considers that for private law purposes, trust property vests in the trustee. See *Halsbury's Laws of England*, 4th ed., vol. 48, at 343.

176 As an administrative concession, the CCRA will also permit property to be transferred to a trust for a minor child provided that certain conditions are met. See *Interpretation Bulletin* IT-268R4, “Inter Vivos Transfer of Farm Property to Child,” April 15, 1996, discussed at note 183, infra.

177 CCRA document no. 9924305, November 4, 1999.

178 CCRA document no. 2001-0116045, January 16, 2002.

179 CCRA document no. 9515676, February 13, 1996.

The opinion of the CCRA that the beneficial owner of trust property may be the beneficiary is also plain in the words chosen in IT-129R¹⁸⁰ and IT-268R4.¹⁸¹ IT-129R states:

Where funds deposited with a lawyer by a litigant or litigants for safekeeping and investment, pending a court order or settlement establishing their proper disposition, earn income the Department considers such income to be income of a trust and recognizes the beneficial owner is the eventual recipient of the funds.¹⁸²

IT-268R4 is even more explicit about determining who is the beneficial owner of trust property:

A parent may transfer property described in subsection 73(3) . . . to a trust solely for the benefit of his or her minor child. However, for property transferred to such a trust to qualify for a rollover . . . the following additional conditions must be met: . . .

(b) *the terms of the trust must provide for the property to be held in trust for the exclusive benefit of the child and there must not be any trust provision which could have the effect of depriving the child of any rights as the beneficial owner of the property* [emphasis added].¹⁸³

IS THE OWNER THE TRUSTEE OR THE TRUST?

The issue of whether the trustee or the trust is to be considered the owner or controller of trust property has arisen largely in the context of tax provisions relating to the determination of who controls or is affiliated with another corporation. In this context, each has been selected as the operative player for tax purposes by the CCRA.¹⁸⁴

For example, a trust is considered to “control” a corporation and therefore be related to it.¹⁸⁵ A trustee also may be considered to control a corporation¹⁸⁶ or may

180 *Interpretation Bulletin* IT-129R, “Lawyers’ Trust Accounts and Disbursements,” November 7, 1986. See also CCRA document no. 9831647, February 19, 1999.

181 *Supra* note 176.

182 *Supra* note 180, at paragraph 10.

183 *Supra* note 176, at paragraph 13. See also *Interpretation Bulletin* IT-486R, “Intergenerational Transfers of Shares of a Small Business Corporation,” December 31, 1987 (cancelled September 26, 1994).

184 See, for example, the range of opinions with respect to affiliated persons in CCRA document no. 1999-0015705, March 2, 2000, which deals with an inter vivos trust, as compared with CCRA document no. 1999-0010805, February 21, 2000 and CCRA document no. 1999-0010825, February 22, 2000, which discuss an estate.

185 See CCRA document no. 9235395, January 12, 1993.

186 This was the view expressed in CCRA document no. 9130715, May 11, 1994, involving an amalgamation. Mr. A controlled one of the two amalgamating corporations (A Ltd.) in his personal capacity and the other (B) as sole trustee of a family trust. After the amalgamation, he would control the amalgamated company as a result of his personal shareholdings. The CCRA opined that Mr. A, as sole trustee of the family trust, controlled B and was therefore related to

cause a corporation and a trust to be affiliated.¹⁸⁷ On the other hand, both the trustee and the trust have been ignored in favour of the relationship between the beneficiaries and a corporation.¹⁸⁸ For yet other purposes, the CCRA has stated that the beneficiary of a trust is not considered to be the beneficial owner of the trust property for tax purposes.¹⁸⁹ The underlying problem in each of these interpretations is the determination of who should be considered the owner for the purposes of the ITA, or, in other words, on what basis the tax result should attach: the legal title or some notion of “beneficial enjoyment.”

Specific Interest in Trust Property

The CCRA has also been asked on other occasions to opine on how a beneficiary’s interest in a trust would be viewed for the purpose of various provisions in the ITA. For example, the issue of whether a beneficiary may have a specific interest in trust property arose in the context of section 94.1, a provision dealing with interests in foreign investment entities. A question posed to the CCRA was this: does a beneficiary under a discretionary trust have an “interest” in the specific assets of the trust? In reply, the CCRA stated:

In theory there are two ways of viewing a beneficiary’s interest in a trust. One is that the interest is a chose in action, the other that it is in “substance”^[190] an interest in the

it. Since Mr. A also controlled A Ltd. in his personal capacity immediately before the amalgamation, there was no deemed change of control. See also CCRA document no. 9134785, March 23, 1992.

- 187 In this case, Mr. A controlled corporation A and was trustee of a family trust that sought to redeem its shares. The consequence of affiliation was the denial of the loss for tax purposes that was realized on the redemption. The family trust was disregarded as the actual controlling individual. See CCRA document no. 1999-0015705, March 2, 2000.
- 188 The fact pattern involved a corporation that was purified through the use of intercorporate dividends for the purposes of claiming the capital gains exemption. This transaction was followed by an estate freeze and the issuance of shares to a trust for the wife and children of the majority shareholder. The trustees of the trust were the majority shareholder, a lawyer, and an unrelated third party. Section 55 would operate to impose a penalty if the shares held by the trust were considered to be held by a person not related to the issuing corporation. If one looks to the majority of trustees, it is clear that they were not related to the corporation. The beneficiaries, however, were related to the corporation owing to their relationship as spouse and children of the majority shareholder. The CCRA concluded that as long as each of the beneficiaries did not deal at arm’s length with the corporation, the favourable exception would apply, notwithstanding that a majority of the trustees dealt at arm’s length with the corporation. A subsequent amendment to subparagraph 55(5)(e)(ii) will now ensure this result statutorily. *Advance Tax Ruling* ATR-47, February 24, 1992.
- 189 CCRA document no. 9824535, November 10, 1999. At issue was whether beneficiaries of a trust would be considered members of a partnership if the trust owned an interest in the partnership. The answer was no since “[t]here are no look-through provisions in the Act to permit the beneficiary of a trust to be the owner of the trust property comprising a partnership interest.”
- 190 This is the “substance” approach that Donovan Waters and other authorities point out in the discussion of the debate about whether a beneficiary has a right in personam or a right in

property of the trust. This latter view has in some cases been adopted in the drafting of legislation [reference made to subsection 74.4(4)].

The department has to-date not determined if the “substance” approach should be applied in the circumstances of section 94.1 of the Act. We have been examining this and similar issues and expect to be able to, provide a more definitive answer in the future.¹⁹¹

In this CCRA reply, we again see the challenge of interpreting and applying the concept of ownership or beneficial ownership to specific provisions in the ITA.

Disposition: Change in Beneficial Ownership

One of the more important challenges for the CCRA in the future will be determining whether there has been a change in beneficial ownership, particularly on a transfer of property to a trust. This determination is obviously critical to whether many of the rollover provisions under the 2001 amendments will apply. The following discusses first the CCRA’s views on when a change in beneficial ownership might have occurred before the amendments, and then the CCRA’s views as expressed in the context of some of the new provisions.

Pre-2001 Position

Revenue Canada (as the CCRA was formerly named) stated in 1991 that it is a question of fact whether a change of beneficial ownership occurs and then results in a “disposition” under former paragraph 54(c). On the basis of *Interpretation Bulletin* IT-437,¹⁹² Revenue Canada indicated that it would continue to look to such factors as the right to possession, the right to collect rents, the right to call for the mortgaging of the property, the right to transfer title by sale or by will, the obligation to repair, the obligation to pay property taxes, and other relevant rights and obligations.

This position is repeated in a 1995 technical interpretation:

The point in time at which a taxpayer can be considered to have acquired or reacquired beneficial ownership of property is a question of law which can only be determined based on a complete review of all the relevant circumstances. . . . Factors to be considered (some of which are discussed in paragraph 8 of IT-170R . . .) include the right to possession, the right to collect rents, the right to call for the mortgaging

rem. Those who view a beneficiary’s right as a right in rem argue that “in substance,” the trust beneficiary has an interest in the trust property in some contexts. This view is most often expressed in the context of tax cases. Canadian case law maintains an uneasy truce with this position but does support the view that, in some cases, a right exists in the underlying trust property for some tax purposes. See the discussion at notes 52 to 60, *supra*.

191 CCRA document no. RCT-0143, April 24, 1990.

192 *Interpretation Bulletin* IT-437, “Ownership of Dwelling Property,” September 10, 1979 (replaced by IT-437R, *supra* note 132), paragraph 2.

of the property, the right to transfer title by sale or will, the obligation to repair, the obligation to pay property taxes and other relevant rights and obligations.¹⁹³

This view is again repeated in a 1999 technical interpretation:

In each particular case, it is a question of fact whether there has been a change in the beneficial ownership. This determination must be made on the basis of the relevant law relating to property ownership. A statutory declaration or written agreement or the lack of such would not, in and by itself, be conclusive evidence as to whether beneficial ownership has changed.¹⁹⁴

The statements do little to guide us any closer to the answer of who the beneficial owner of property is in the context of a trust for purposes of the ITA, since a beneficiary would rarely have any of the enumerated rights; these rights belong to the trustee.

2001 Amendments

A number of technical interpretations have addressed whether a change in beneficial ownership occurs on a transfer of property to a trust in particular circumstances. Key points from two of these technical interpretations are provided here. In both, the CCRA appears to have either adopted the view that the words “no change in beneficial ownership,” mean “no change in beneficial enjoyment” or to have accepted the view that the beneficiary’s rights are in rem. In either case, the CCRA accurately interprets private law principles.

The first technical interpretation states:

In our opinion, the power to appoint beneficiaries would have to be a general power if the person is to have no change in beneficial ownership. As well, a power with a gift over to named heirs in default of the exercise of the power would mean that the person has not retained all of the beneficial ownership of the property as those who will take in default are contingent beneficiaries under the trust.¹⁹⁵

The second technical interpretation makes a similar technical point about when a change in beneficial ownership will occur:

Both 73(1.02)(b)(ii) and 107.4(1) require that there be no change in beneficial ownership in order for the provision to apply. A specific or hybrid power of appointment causes or results in a change in the beneficial ownership whereas a general power of

193 CCRA document no. 9518727, October 26, 1995.

194 CCRA document no. 9926885, November 18, 1999. This was an astute conclusion on the basis of the facts provided, since the matter of beneficial ownership may have been affected by a resulting trust.

195 CCRA document no. 9830105, February 26, 1999.

appointment does not. Notwithstanding 248(25), a general power of appointment retained by the individual who contributed the property to the trust which is exercisable only through the individual's will does not result in the creation of any absolute or contingent rights as a beneficiary for the purpose of 73(1.02)(b)(ii) or 107.4(1)(e) because of 104(1.1).¹⁹⁶

CONCLUSIONS

The expression "beneficial ownership" was coined as a colloquialism to refer to the rights of a beneficiary, as recognized in equity, to beneficial enjoyment of trust property. The expression is often employed in statutes and, either through definition or usage, conveys a meaning that strays far from that originally intended meaning. This is particularly apparent in the ITA. As a result, the search for meanings for the expressions "beneficial ownership," "beneficial owner," or "beneficially owned" in the context of the ITA is a difficult one. There may be multiple meanings, or the meaning may change depending on the provision at issue. These concepts also become important where the expressions are not expressly used but the determination of who is the owner underlies the tax result.

Two obvious factors point to why the meaning of beneficial ownership may be difficult to determine in the context of the ITA. The first is the largely unresolved debate about whether a beneficiary's rights are in personam or in rem and when a beneficiary might be considered to have a specific interest in trust assets. This debate has not been resolved in a non-tax context, and whether or not a clear stand has been adopted in the context of the ITA is not obvious. The second factor is the fiction that the trust is an individual for tax purposes. In consequence, the meaning of "beneficial ownership" for purposes of the ITA can often not be found in private law, nor can private law provide the solution to tax problems where beneficial ownership is the underlying issue. The reason is simple and obvious. For private law purposes, the trust is a relationship that imposes fiduciary obligations on the trustee; it is not an individual. As a result, expressions referring to beneficial ownership pose problems in both the civil law and common law, since the intended meaning is no longer obvious.

If the meaning of "beneficial ownership" is clarified in the ITA by language that more precisely conveys the meaning intended in the context in which the expression is used, it is my view that many of the current problems attributable to the use of this equitable concept, particularly as it relates to the taxation of trusts and their beneficiaries, will be resolved in both the civil law and common law.

To achieve this goal, the following steps should be considered:

1. The meaning of the expressions "beneficial owner," "beneficial ownership," and "beneficially owned" as used in each context in the ITA should be defined.

196 CCRA document no. 2000-0048735, May 24, 2001.

2. If a change in beneficial ownership is considered relevant to a tax result, the circumstances in which a change will occur should be specified. Examples of such deeming provisions are already included in the provisions affecting qualifying dispositions. Language such as “a disposition that does not result in a change in beneficial enjoyment of the property” might be considered to more precisely convey the meaning intended.
3. Where the word “owner” or “beneficial owner” is not used, but the tax result is based on who is or is considered to be the owner, the basis and reasoning should be made clear in the legislation.

In conclusion, if the goal is harmonization of legislative provisions in the ITA, the first task should be clarifying the intended meaning of certain expressions as currently used in the legislation, starting with “beneficial ownership.”