Consultation Paper on Total-Return Investing by Trustees

COMMITTEE ON THE MODERNIZATION OF THE *TRUSTEE ACT*
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1. Investment Strategy and the Distinction Between Capital and Income

The purpose of all investment is to acquire gain. It is no different in the case of a trust. Trustees invest the trust property in order to bring about an increase in value to the trust estate. Where all beneficiaries of a trust are entitled at the same time to share in the same fund, the source of the gains flowing from investment of the trust property is generally immaterial. Where there are successive beneficial interests, such as the fairly common situation in which one beneficiary has a life interest that is followed by a gift of the trust capital to another beneficiary, the character of the different sources of revenue becomes significant. The governing principle is that the life tenant is only entitled to income and the capital beneficiary is only entitled to capital, unless the settlor has indicated a different intention in the terms of the trust.

"Capital" is the original trust property, enlarged by growth in its purchasing power over the course of time. "Income", in the trust sense, is made up of the periodic revenues from the use of the trust property. Into the category of income fall interest, rents, and cash dividends. In addition to these obvious cases, there are many kinds of receipts which are not so readily characterized. The many forms of corporate distributions to shareholders are classified according to whether they represent distributions out of current profits, or reflect the capitalization of profits.[1] Thus stock dividends, distributions of rights to purchase shares to existing shareholders, and payments made to redeem preferred shares are treated as capital.

Trustee's Duty of Evenhandedness

Unless the terms of the trust show that the settlor had a different intention, trustees are obliged to administer the trust so as not to favour one class of beneficiaries over another. This duty of evenhandedness requires the trustee to invest so as to maintain a careful balance between income and capital growth, a very difficult task. Trustees must consider the nature of returns that existing and proposed investments will bring in light of the conventional rules for allocating the returns to either the capital or income accounts. They must estimate the degree to which a proposed investment will enhance each account.

For example, common shares with excellent growth potential may bring little or no dividend income. When held for a substantial period, the entire gain in value would accrue to the beneficiary who gets the capital of the trust after the end of the life estate. Fixed rate bonds may provide a good rate of income, but their market value may be static or may decline and thus provide no prospect for any increase on the capital side. If the investment strategy pursued by a trustee results in gains to the value of the trust estate being skewed one way or the other in terms of capital and income, the trustee may be in breach of trust even though the overall return to the trust estate, in terms of absolute gain within an accounting period, is excellent.[2]

Incompatibility of Traditional Capital and Income-Based Investment with Modern Investment Practice

While the duty of evenhandedness retains its commonsense validity as a general principle, the way that present trust law requires it to be applied has been seriously out of keeping, at the very least, with the nature of the investment market for the last three decades. The long-term rate of return from equity investments has consistently been shown to outstrip that on bonds and other debt instruments. In other words, most of the opportunity to obtain a good level of return on investment lies with growth in the market values of shares and mutual funds, rather than the interest rates obtainable on high quality bonds. If trustees must invest with a view to balancing the capital and income returns, both categories of beneficiaries are likely to be dissatisfied. Neither will benefit from an optimal rate of return.

In Canada, most trusts in which there are successive interests are created to take advantage of the spousal rollover under the *Income Tax Act*,[3] under which capital gains tax arising on the death of the testator are deferred for the life of the testator's spouse as long as no distribution can take place to any other beneficiary while the spouse remains alive. The purpose of these trusts is clearly to benefit the life tenant primarily, and the duty of evenhandedness will usually be expressly overridden in some manner. This is often made clear by conferral of a power to encroach on capital in favour of the life tenant. The settlor's purpose in creating such a trust might be best achieved by removing altogether the need to distinguish between income and capital returns from investment.

The truth is that capital and income accounting is closely linked to the classic model of trusteeship in which the first duty of the trustee is to preserve the value of capital through legally authorized "safe" investments paying a standard rate of return which is deemed by the court to be acceptable for all income beneficiaries. This essentially 19th-century model began to break down once the statutory list of authorized investments or "legal list" ceased to provide adequate protection against erosion of purchasing power, and the concept of a normative rate of return for the income beneficiary became untenable with rising inflation. For decades, increasing numbers of settlors have avoided the straitjacket that the "legal list" created for trustees by giving them wide powers of investment so that they could take advantage of better investment opportunities.

The almost universal trend of reform throughout the common law world is to abolish the "legal list" of authorized investments and permit trustees to employ the same techniques used by successful investors in the marketplace, always subject to the overriding duty of prudence. In a previous report, *Trustee Investment Powers,* this Committee recommended the repeal of the legal list in s. 15 of the *Trustee Act* and introduction of other changes to the *Act* to facilitate the application of the principles of modern portfolio theory in trustee investment.[5] We turn briefly to discuss these principles.

II. Portfolio Theory and Total Return Investment

Portfolio Theory: Risk and Return Analysis

Modern portfolio theory recognizes that investment decisions involve the assessment of two factors: the probable return and the level of risk. The investor strives to maximize return within an acceptable level of risk, regardless of whether it stems from interest, dividends or capital growth.

Risk is reduced over the whole of the portfolio by diversification of investment holdings. Diversification involves the acquisition of securities that are subject to different risk factors, i.e., different influences on market value, in order to offset potential losses with gains in other sectors.

Total Return Investment

The essential elements of portfolio theory are not completely incompatible with capital/income considerations, but the traditional strict distinction imposes additional constraints on the degree to which portfolio theory can be employed to advantage. Freed from the requirement to select investments with regard to the legal category of the returns they will bring, trustees would be free simply to maximize the gain to the trust portfolio within risk parameters dictated by the duty of prudence. This method of "total return" investment is successfully used by many charitable organizations,which are not usually burdened with income and capital remainder interests.[6] The Committee has been strongly urged to recommend amendments to the *Trustee Act* enabling all charitable trusts to invest on a total-return basis and to capitalize unspent returns.

A recent development in this area is the decision of the Supreme Court of Nova Scotia in *Re Killam Estate* where it was held that the inherent jurisdiction of the Court permitted it to approve an investment scheme that embodied total-return investment concepts for a group of charitable organizations.[7]

The advantages of total-return investment are reflected in the adoption by the National Conference of Commissioners on Uniform State Laws of the *Uniform*

Principle and Interest Act 1997. This statute, which has been enacted by eight U.S. states so far and is currently under consideration by 13 other state legislatures, is designed to allow investment decisions to be taken by trustees on a total-return basis, The *Act* also gives the power to allocate receipts between income and capital accounts to achieve even-hand objectives if:

(a) the "prudent investor" standard governs the investment duties of the trustee (i.e., investment is not restricted to certain categories of securities by the express terms of the instrument or by statute);

(b) the terms of the trust describe the amount of distributions that may or must be made by referring to the "income" of the trust;

(c) the trustee is otherwise unable to administer the trust impartially, based on what is fair and reasonable to all beneficiaries.[8]

Achieving a general change of this kind in Canada is not free of difficulty since the *Income Tax Act* taxes both trust income and capital gains and adopts the traditional categorization of trust revenues. This means that trustees of taxable trusts must maintain traditional income and capital accounting for tax purposes. Express powers to reallocate between the income and capital accounts are ineffective insofar as taxing legislation is concerned.[9] Trustees who have powers of reallocation must still distinguish between income and capital receipts in the internal administration of the trust so as not to lose sight of the effect of the tax burden in making adjustments to maintain evenhandedness. Reforms have been recommended by both the Ontario and Manitoba Law Reform Commissions to facilitate total-return investment to where it is possible under the existing tax structure, however. We turn now to consider them.

The Ontario Law Reform Commission Recommendations

In 1984 the Ontario Law Reform Commission proposed a means of separating investment strategy from even-hand considerations, so that both trustee functions could be fulfilled more effectively. The OLRC's mechanism for accomplishing this was the percentage trust, under which the assets of the trust are valued periodically and the life tenant is paid a percentage of that value corresponding to a fair rate of return for the period as measured by some external benchmark such as the yield obtainable on high quality bonds.[10] The Commission recommended that a "default" percentage and valuation frequency be fixed by regulation and kept under review. These would apply if the instrument was silent.[11]

While the duty of evenhandedness would continue to apply under a percentage trust, that duty would be much easier to perform because it would not matter if the proportions of income and capital receipts differed from what the trustees had predicted. The income and capital distinction would be effectively abolished insofar as the trust's internal administration was concerned.

The Commission recognized that the income tax system limited the usefulness of the percentage trust. It noted in particular that a spousal trust would lose its exemption if any excess income were credited to capital because of the income exceeding the percentage having to be paid to the life tenant. As there are many trusts in which the interests are not successive, and charitable trusts which are exempt from income tax, the Commission thought that the percentage trust should still be made readily available to those settlors who could use it. It accordingly recommended that the *Trustee Act* of Ontario contain a provision allowing settlors to adopt a percentage trust model by simply employing the phrase "on percentage trusts."[12]

The Commission also recommended that the *Trustee Act* contain a further optional power for trustees to allocate receipts and disbursements between the income and capital accounts on a basis the trustees consider just, subject to the duty of evenhandedness. This could be invoked by use of the term "on discretionary allocation trusts" in the trust instrument.[13]

Manitoba Law Reform Commission Recommendations

In a 1999 report,[14] the Manitoba Law Reform Commission also recommended amendments to Manitoba's *Trustee Act* to facilitate total-return investment but concluded that the income tax structure in Canada prevented the extension of total-return investment to private trusts generally. The Commission limited the scope of its recommendation to a provision enabling charitable and nonprofit institutions to invest their endowment funds on a total-return basis unless the governing documents or trust terms expressly withheld this power. The provision would apply to existing charitable trusts and foundations as well as to those formed after its enactment.

The Manitoba Law Reform Commission also agreed with the Ontario Law Reform Commission's recommendation that the *Act* should allow the percentage trust to be invoked by using the terms "on percentage trusts" in an instrument. Its report includes a recommendation to this effect as well.

III. The Committee's Proposals: Total Return Investment Under the British Columbia *Trustee Act*

Evenhandedness as between classes of beneficiaries in administrating trusts continues to be a valid principle but it should not be applied in a manner that forces trustees to invest inefficiently, Inefficiency in this context means the inability to obtain the maximum overall gain to the trust estate within risk levels dictated by the duty of prudence. Traditional income and capital allocation rules should not stand in the way of efficient investment either. If they do, then they are likely to have got in the way of the settlor's fundamental intention to confer benefits on an individual, a class of individuals, or a charitable object.

In our view, total-return investment is a corollary of modern portfolio theory. Total return is necessary for trustees to be in the best position to employ the risk/return analysis effectively to obtain the maximum advantage for the trust. If they are constrained by even-hand considerations that require estimates of probable "income"or "capital" receipts, trustees cannot make the kind of choices that other prudent investors would make. Investment decision-making needs to be separated from distributional issues.

We also agree with the Ontario Law Reform Commission that the percentage trust is a useful device through which the even-hand principle can be applied more readily, where it is relevant, without reducing the level of efficiency in investment.

A general reform of capital and income rules governing the allocation of revenues and expenses of trusts is still impractical as long as the federal *Income Tax Act* continued to require their application for tax purposes. However, until the general trust law is modified to facilitate total-return investment and vehicles allowing for its use such as the percentage trust, there will be no impetus for change in the income tax structure. We believe that settlors and testators should have the option to create a total-return or percentage trust in situations where taxation is not an obstacle. This could well be the case with discretionary trusts that are now extremely popular among estate planners. This is especially true, however, of the charitable and nonprofit sector, where the *Income Tax Act* does not, for the most part, interfere with the manner of investment. Charitable trusts and foundations should have full access to total-return investing in the absence of any express prohibitions in the governing instrument or statute. This is a change that is possible to accomplish even with the present tax legislation. Employee pension plans and health and welfare plans might also be considered in this same context.

In order to simplify the creation and operation of percentage trusts, the basic principles of periodic valuation and annual payment to the life tenant or income beneficiary of a percentage of the value of the portfolio should be capable of being invoked simply by the use of the phrase "on percentage trusts" in a trust instrument or will. The *Trustee Act* should specify a standard interval for the valuation of the trust property and a means of determining the percentage of that value to be paid annually. Settlors could vary the statutory standards by express terms.

The statutory "default" interval should neither be so short as to make periodic valuation overly costly and impractical, nor so long that the movement in value between the valuations shortchanges either the capital or "income" beneficiaries. The choice of valuation intervals has to be arbitrary to some extent. In our view, three years is an appropriate interval. As a safeguard, the statutory "default" interval should be made variable by regulation.

Setting a statutory "default" percentage is a more complicated matter. The appropriate formula could be debated at great length by economists. We see a logical basis for using the estimated real rate of return (i.e., the rate of return obtainable on a long-term basis after inflation is taken into account) combined with a conservative estimate of inflation during the interval since the last valuation. One readily available benchmark for the long-term real rate of return is the discount rate fixed under section 56(2)(b) of the *Law and Equity Act*[15] for calculating the present value of future damages. That rate is based on the estimated future difference between the rate of interest on investment less the rate of general price inflation.

The Consumer Price Index provides a fairly well-accepted means of gauging the rate of price inflation (and in some cases, deflation) during the valuation period. We favour a formula for the statutory default percentage consisting of the discount rate fixed under section 56(2)(b) of the *Law and Equity Act* plus half the average of the percentage rates of price inflation or deflation in each 12-month interval during the valuation period, as determined from the all-item Consumer Price Index. This formula should divide the benefit of the portfolio growth between the income and capital beneficiaries in a relatively even way.

As the governing documents of charitable trusts and charitable organizations often refer to payment of "income," this term needs to be redefined to enable those bodies to take advantage of total-return investment techniques. In the context of charitable gifts in trust, the term "income" should be deemed to include funds reflecting a portion of the total value of the trust or endowment fund.

A considerable number of charitable organizations formed outside British Columbia are active within this province. Some of these are formed under, or governed by, the laws of other provinces and some are formed under federal law. A question arises concerning the extent to which these must or should be governed by a British Columbia law that permits investment on a total-return basis.

It is our view that, whether structured as trusts, societies or nonshare corporations, these nonprofit bodies must comply with their governing legislation. There may be constitutional limitations on the extent to which extraprovincial nonprofit bodies could take advantage of British Columbia legislation allowing total-return investment, insofar as their activities in British Columbia are concerned. In order to avoid overreaching constitutional bounds, the amendments to the *Trustee Act* permitting total-return investment by charitable bodies should be drafted so as to be capable of being "read down" to apply only to trusts and charitable bodies corporate governed by the law of British Columbia.

We note, however that the Manitoba Law Reform Commission, in its report, has arguably arrived at a different conclusion. Its recommendations concerning total-return investing (limited to charitable organizations) may be subject to a recommendation that:

> [R]egistered charities and non-profit institutions, whether organized by incorporation or trust, which are engaged in investment decision-taking within Manitoba, whether at a head office or branch office, shall be subject to the investment law of Manitoba, subject to the expression of a contrary intent in a statute of another jurisdiction or the organizations's documentation.[16]

Comment is invited on this issue.

The Committee therefore proposes:

1. *The* Trustee Act *should be amended to provide that a trustee, where expressly authorized to do so by the settlor, may invest the trust property prudently so as to obtain the maximum return without regard to whether the return is of an income or capital nature.*

2. *(a)* The Trustee Act *should be amended to provide that where the settlor or testator employs the term "on percentage trusts," the trustee shall cause the trust assets to be evaluated at intervals specified by the settlor or testator and pay a percentage of the value so obtained annually to the person who would otherwise be entitled to receive the income of the trust.*

   (b) If the settlor or testator does not specify the intervals at which the assets are to be valued or the percentage to be paid annually, the valuation interval and the percentage shall be those fixed by the Trustee Act.

   (c) The Trustee Act *should be amended to provide that the valuation interval shall be three years unless another interval is specified by the settlor or testator.*

   (d) The three-year valuation interval fixed by the Trustee Act *should be variable by regulation.*

   (e) The Trustee Act *should be amended to provide that unless the settlor or testator specifies a different percentage, the percentage of the value of trust assets to be paid to the person who would otherwise be entitled to receive the income of the trust shall be the sum of the discount rate fixed under section 56(2)(b) of the* Law and Equity Act *plus half the average of the percentage rates of price inflation or deflation in each 12-month interval during the valuation period, as determined from the all-item Consumer Price Index.*

   (f) The percentage should be paid from revenue received by the trust during each year and if revenues are insufficient to pay the percentage, the balance should be drawn from the corpus of the trust.

   (g) Where revenues of the trust are in excess of the percentage payable in a given year, the balance shall be added to the corpus of the trust.

3. (a) *The* Trustee Act *should be amended to provide that the property of a charitable trust or the endowment fund of a charitable or non-profit organization may be invested prudently so as to obtain the maximum return, without regard to the income or capital nature of the return, unless the terms of the trust or the document or legislation governing the use of the endowment fund provide otherwise.*
   (b) *The amendment described in proposal 3(a) should apply to all charitable trusts and charitable or non-profit organizations, whenever created.*
4. *The* Trustee Act *should be amended to provide that unless the terms of a charitable gift provide otherwise, the income from the gift and the word "income" in the terms of the gift are deemed to include a percentage of the total value of the trust assets.*

IV. The *Howe* v. *Lord Dartmouth* Rules Under A Total -Return Regime

Several legal rules pertaining to the application of the "even-hand" principle require examination in light of Proposals 1 to 4. These rules, sometimes referred to collectively as the rule in *Howe* v. *Lord Dartmouth*, impose requirements to convert particular forms of assets to authorized trustee investments and to apportion income or deemed income from them between the income and capital beneficiaries. They apply during the period of administration of a deceased person's estate. The rules are summarized below:[17]

1. The first branch of the rule in *Howe* v. *Lord Dartmouth*:[18] Where a will contains a residuary gift of personal property, or a future or reversionary property interest for persons in succession, the trustee must convert all wasting, hazardous and speculative assets to authorized trustee investments. The rule applies only to testamentary trusts. It does not apply to residuary gifts of real property. Any securities that are not included in the "legal list" of authorized investments in s. 15 of the *Trustee Act* are considered "hazardous" for the purposes of this rule.[19]

2. The second branch of the rule in *Howe* v. *Lord Dartmouth*, or the rule of apportionment pending conversion: Whenever original assets of the estate other than authorized trustee investments in the legal list are to be converted under an express or implied trust for sale, the income from those assets must be apportioned between the capital and income beneficiaries until conversion to the authorized investments actually takes place. The income beneficiary receives the income that the assets would yield if they had already been converted. The balance of the actual income from the unauthorized assets, if any, is added to capital.

3. The rule in *Re Chesterfield's Trusts:*[20] If future or reversionary property is included in a residuary gift under a will, and it is not yielding income

prior to the time it is sold, the proceeds of sale after it comes into possession must be apportioned between the income and capital beneficiaries. The amount that would be equivalent to the sale proceeds, if invested at the testator's death at the rate payable on the legal list investments, compounded annually or semiannually before income tax, is treated as capital and the rest is treated as income.

In a total-return environment, the income/capital distinction on which the application of these rules depends is essentially irrelevant. In addition, if a required percentage of the value of the estate, supplemented by drawings on the capital of the trust estate if the investment returns are not sufficient to meet it, is being paid to a life tenant, this is by definition a proper allocation. There is no need to go through an exercise of apportionment when assets are converted from one form to another.

There is a further reason why the rules should not be maintained, even outside the context of a total-return trust. They are based on the concept of a legal list of authorized trustee investments and the level of income the authorized investments would generate. Once the legal list in section 15 of the *Trustee Act* is repealed and replaced by a general duty of prudence, as we recommended in our report *Trustee Investment Powers,* the rules cannot be applied in a consistent manner.[21] In a regime of trust law which focuses on diversification of the portfolio as a means of reducing the risk rather than classifying investments either as "authorized" and "unauthorized," the rules lose their meaning.

The general duty of evenhandedness should remain entrenched. It is relevant after all not only when there are income and capital beneficiaries but whenever there is more than one beneficiary. As crystallized expressions of that duty, however, the rule in *Howe* v. *Lord Dartmouth* and the rules requiring apportionment pending conversion should not be retained.

We therefore propose:

> 5. *The rules known as the first and second branches of the rule in* Howe *v.* Lord Dartmouth, *and the rule in* Re Chesterfield's Trust *should be abrogated, subject to the retention of a general duty of evenhandedness with respect to different classes of beneficiaries in the administration of a trust.*

Conclusion

We believe the reforms we have proposed in this *Consultation Paper* will assist trustees to achieve maximum investment returns consistent with their overriding obligation of prudence. We also believe they are necessary to complete the reforms we recommended in our earlier *Report on Trustee Investment Powers.* The proposals nevertheless reflect tentative rather than final conclusions and we invite comment on them. We will give all comments full consideration in forming our final recommendations.

Summary of Proposals

1. The Trustee Act *should be amended to provide that a trustee, where expressly authorized to do so by the settlor, may invest the trust property prudently so as to obtain the maximum return without regard to whether the return is of an income or capital nature.*

2. *(a) The* Trustee Act *should be amended to provide that where the settlor or testator employs the term "on percentage trusts," the trustee shall cause the trust assets to be evaluated at intervals specified by the settlor or testator and pay a percentage of the value so obtained annually to the person who would otherwise be entitled to receive the income of the trust.*

(b) If the settlor or testator does not specify the intervals at which the assets are to be valued or the percentage to be paid annually, the valuation interval and the percentage shall be those fixed by the Trustee Act.

(c) The Trustee Act *should be amended to provide that the valuation interval shall be three years unless another interval is specified by the settlor or testator.*

(d) The three-year valuation interval fixed by the Trustee Act *should be variable by regulation.*

(e) The Trustee Act *should be amended to provide that unless the settlor or testator specifies a different percentage, the percentage of the value of trust assets to be paid to the person who would otherwise be entitled to receive the income of the trust shall be the sum of the discount rate fixed under section 56(2)(b) of the* Law and Equity Act *plus half the average of the percentage rates of price inflation or deflation in each 12-month interval during the valuation period, as determined from the all-item Consumer Price Index.*

(f) The percentage should be paid from revenue received by the trust during each year and if revenues are insufficient to pay the percentage, the balance should be drawn from the corpus of the trust.

(g) Where revenues of the trust are in excess of the percentage payable in a given year, the balance shall be added to the corpus of the trust.

3. *(a) The* Trustee Act *should be amended to provide that the property of a charitable trust or the endowment fund of a charitable or non-profit organization may be invested prudently so as to obtain the maximum return without regard to the income or capital nature of the* *return, unless the terms of the trust or the document or legislation governing the use of the endowment fund provide otherwise.*

(b) The amendment described in proposal 3(a) should apply to all charitable trusts and charitable or nonprofit organizations, whenever created.

4. *The* Trustee Act *should be amended to provide that unless the terms of a charitable gift provide otherwise, the income from the gift and the word "income" in the terms of the gift are deemed to include a percentage of the total value of the trust assets.*

5. *The rules known as the first and second branches of the rule in* Howe v. Lord Dartmouth, *and the rule in* Re Chesterfield's Trust *should be abrogated, subject to the retention of a general duty of evenhandedness with respect to different classes of beneficiaries in the administration of a trust.*

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FOOTNOTES

a. [*Editor's Note:*

The British Columbia Law Institute was created in January 1997 by incorporation under the provincial *Society Act*. It is the successor to the Law Reform Commission of British Columbia.

Members of the *Trustee Act* Modernization Committee are:
Dr. Donovan Waters, Q.C. (chair), Kathleen Cunningham, Margaret Mason, Professor J.M. MacIntyre, Q.C. Arthur L. Close, Q.C. (Executive Director of the Law Institute) and Greg Blue (reporter).

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1. *Hill* v. *Permanent Trustee Company of New South Wales Ltd.*, [1930] A.C. 720 (P.C.) (Aus.).

2. See, for example *Re Smith*, [1971] 2 O.R. 541 (CA.); varying [1971] 1 O.R. 584 (H.C.). Here the oil shares that formed the corpus of the trust appreciated enormously in value but paid only two-and-one-half per cent dividends, leaving the life tenant with an inadequate income. The trustee had clearly failed to maintain an even hand and was removed by the Court.
3. R.S.C. 1985 (5th Supplement), c. 1.
4. See *Trustee Act,* R.S.B.C., c. 464, s. 15.
5. British Columbia Law Institute, *Report* No. 6 (1999).
6. In 1998 the statutes governing the Vancouver and Victoria Foundations were amended to clarify the ability of those bodies to invest on a total-return basis. See *Vancouver Foundation Amendment Act, 1998,* S.B.C. 1998, c. 48, s. 3; *Victoria Foundation Amendment Act, 1998,* S.B.C. 1998, c., ss. I (definition of "returns"), 4.
7. *Re Killam Estate,* unreported, Halifax Docket S.C. 14903, decision Oct. 12, 1999, reasons June 14, 2000.
8. See section 104 of the *Uniform Principal and Interest Act, 1997* and Comment following.
9. *Riddell* v. *Minister of National Revenue,* [1938] Ex. C.R. 135 at 141.
10. The percentage trust is referred to in the U.S. as the "unitrust." It was first proposed in Lovell, *The Unitrust – A New Concept to Meet an Old Problem* (1966), 105 Tr. & Est. J. 215.
11. Ontario Law Reform Commission, *Report on the Law of Trusts,* [1984] 301–304.
12. *Ibid.,* 304, Recommendation 65; *Draft Trustee Act,* s. 42.
13. *Ibid.,* 298–300, Recommendation 60; *Draft Trustee Act,* s. 41.
14. Manitoba Law Reform Commission, *Trustee Investments; The Modern Portfolio Theory* (Report 101, June 1999).
15. R.S.B.C. 1996, c. 253.
16. *Supra,* footnote 14 at 27, recommendation 15. This recommendation came at the conclusion of a discussion of the prudent investor rule and it is not wholly clear whether it was intended to extend to total-return investing.
17. (A fourth rule, the rule in *Allhusen* v. *Whittell* (1867), 4 Eq. 295 was abrogated by s. 10 of the *Trustee Act.*)
18. *Howe* v. *Earl of Dartmouth,* [1802] 7 Ves. Jun. 137, 32 E.R. 56.
19. *Re Lloyd,* [1949] 4 D.L.R. 99, at 102 (Ont. H.C.).
20. (1883), 24 Ch.D. 643.
21. Fixing an acceptable percentage to be paid to life tenants under a percentage trust by regulation might afford a benchmark for the rate of notional income pending conversion, but this does not really detract from the argument that these rules are too closely connected with the concept of "authorized" investments to be easily applied once the legal list is repealed.