MUST THE TAX COURT OF CANADA RECOGNIZE THE VALIDITY OF A FOREIGN NON-CHARITABLE PURPOSE TRUST UNDER THE HAGUE CONVENTION ON TRUSTS? OR IS THE CONVENTION IRRELEVANT ANYWAY?

*Joel Nitikman**

Abstract

The 1984 Hague Convention on the Law of Trusts applies in eight of 10 Canadian provinces. The Convention requires those provinces to recognize the validity of a non-Canadian trust. This article discusses whether the Tax Court of Canada is required to apply the Convention to recognize the validity of a non-charitable purpose trust. It contains an in-depth discussion on Article 19, which deals with the application of the Convention to fiscal matters. This article further explores what conflict of laws rules require the Tax Court to do if the Convention does not apply.

1. Introduction

In 2001, Professor Catherine A. Brown wrote an article[1] in which she posed but did not answer this question:

> Consider the case of a non-charitable purpose trust, legitimate in the country of origin and expressly included within the description of a trust in Article 2 of the Convention. If the trust is non-resident for Canadian tax purposes, will Canadian fiscal authorities or courts recognize it, or would disapproval of non-charitable purpose trusts in Canada be sufficient to regard it as an invalid trust arrangement?

* Joel Nitikman, Tax Partner, Dentons Canada LLP, Vancouver. I owe a number of thanks in regards to this article: to Ms. Aubin Calvert, a summer student at Dentons Canada LLP, Vancouver, who assisted with research; to Mr. Cy Fien of the Winnipeg, Manitoba law firm Fillmore Riley, who edited earlier drafts of this article and made numerous perceptive comments; and to various experts around the world who have written previously on this subject and who took the time and trouble to exchange e-mails and telephone calls with me to discuss various issues. As always, all mistakes are mine and none of the views expressed herein should be attributed to anyone else.

1. "The Taxation of Trusts: Reconciling Fundamental Principles" (2001-2002), 21 E.T.P.J. 1, at pp. 8-9.

In this article I attempt to answer the same question but posed slightly differently: if a taxpayer is appealing a reassessment that involves a non-Canadian, non-charitable purpose trust, must the Tax Court of Canada recognize the validity of the trust pursuant to the Hague Convention on the Law Applicable to Trusts and on Their Recognition (the "Convention")? If the answer is no, will Canada's conflict of laws mean that the Tax Court of Canada must recognize the validity of the trust anyway?[2]

Before answering this question, several topics must first be introduced.

2. Non-Charitable Purpose Trusts

It most textbooks on the law of trusts, it is standard to say that to establish a trust, a person, known as the settlor, must either declare that he or she henceforth, in a capacity known as a trustee, holds certain property for the benefit of another person, known as the beneficiary, or transfer the property to another person to act as the trustee who will hold the property for the benefit either of the settlor or another beneficiary.

For purposes of this article, the key point is that standard textbooks say that almost every trust must be for the benefit of a definite person. This is known as the "beneficiary principle". The leading case is *Morice v. Bishop of Durham.*[3] A testator left property "in trust" to the Bishop. The language of the trust was unclear as to whether the property was left to the Bishop personally, or on trust for charity, or on trust for a purpose that was not charitable. The courts held that if the language was for a non-charitable purpose then it was void. The Court of Chancery said:

> If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of, and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. *Every other trust must have a definite object. There must be somebody, in whose favour the Court can decree performance.* But it is now settled, upon authority, which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object: but the particular mode of application will be directed by the King in some cases, in others by this Court. [emphasis added]

2. In the context of this article I do not consider trusts in Québec.
3. (1805), 32 E.R. 947, (1805) 10 Ves. Jr. 522 (U.K. C.A.), affirming (1804), 32 E.R. 656, 9 Ves. Jr. 399 (Ch. D.).

The Court of Appeal, affirming this decision, said:

> As it is a maxim, that the execution of a trust shall be under the controul of the Court, it must be of such a nature, that it can be under that controul; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of mal-administration could be reformed; and a due administration directed; and then, *unless* the subject and *the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration.* [emphasis added]

Thus, the court held that in the absence of certainty as to who the object (the beneficiary) of the trust is to be, there is no valid trust, the reason being that, in the absence of a specific beneficiary, the court cannot determine if the trust is being administered properly by the trustee.

Most textbooks state that the only exception to this rule is that a trust for a charitable purpose will be valid, with "charity" being limited to those purposes the law views as being charitable. The reason for this, as explained by the Court of Appeal in *Morice*, is as follows:

> With reference to those, in which the Court takes upon itself to say, it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode, or the objects, but it falls upon the King, as *parens patriæ*, to apply the property, it is enough at this day to say, the Court by long habitual construction of those general words has fixed the sense; and, where there is a gift to charity, in general, whether it is to be executed by individuals, selected by the testator himself, or the King, as parens patriæ, is to execute it (and I allude to the case in *Levinz* (*The Attorney-General v. Matthews*, 2 Lev. 167)), it is the duty of such trustees, on the one hand, and of the Crown, upon the other, to apply the money to charity, in the sense, which the determinations have affixed to that word in this Court: viz. either such charitable purposes as are expressed in the Statute (stat. 43 Eliz. c. 4), or to purposes having analogy to those.

Thus, for a charitable purpose trust, the King (and now, generally,[4] the Attorney General) has the jurisdiction to supervise and enforce the trustee's duties to carry out the trust or to carry out the trust himself in the absence of a trustee.

Thus, a non-charitable purpose trust, simply, is a trust that is

4. In some provinces the Public Guardian and Trustee has been given this power by statute, although even then the Attorney General may have a residual supervisory power. See *Stillman Estate, Re* (2003), 68 O.R. (3d) 777 (Ont. S.C.J.), at para. 5.

declared to be for the benefit of a non-charitable purpose. More will be said below about the validity of such trusts in light of *Morice*.

3. The Hague Conference on Private International Law ("HCCH")

The website of the HCCH[5] describes itself as follows:

> A WORLD ORGANISATION . . .
>
> With 76 Members (75 States and the European Union) representing all continents, the Hague Conference on Private International Law is a global inter-governmental organisation. A melting pot of different legal traditions, it develops and services multilateral legal instruments, which respond to global needs.
>
> An increasing number of non-Member States are also becoming Parties to the Hague Conventions. As a result, the work of the Conference encompasses more than 140 countries around the world.

Since 1893, the HCCH has been holding Plenary sessions, usually every four years, to draft international conventions on various topics relating to private international law, which countries around the world may then adopt as part of their country's laws. The website lists over 30 conventions that the HCCH has drafted, many of which have been widely adopted around the world.

Canada joined the HCCH in 1968.

4. The Hague Convention on the Law Applicable to Trusts and on Their Recognition[6]

A great deal has been written on the Convention; it is not necessary to describe in it detail here.[7] Very briefly, its history[8] is as

5. <http://www.hcch.net/index_en.php?act=text.display&tid=1>.
6. The Convention may be found in a number of places. See United Nations, Treaty Series, Vol. 1664, 311, multilateral treaty No. 28632, registered by the Netherlands on January 31, 1992; <http://www.hcch.net/index_en.php?act=conventions.text&cid=59> (Eng.), <http://www.hcch.net/index_fr.php?act=conventions.text&cid=59> (Fr.), or Canada Treaty Series 1993/2, 1, <http://dfait-aeci.canadiana.ca/view/ooe.b2521350/1?r=0&s=1>.
7. There is at least one textbook devoted to the Convention: J. Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Oxford, U.K., Hart Publishing, 2002). There are dozens of articles. Textbooks dealing with conflict of laws, especially U.K. textbooks, generally contain extensive discussions of the Convention. See for example A.V. Dicey, J.H.C. Morris and Lawrence Collins, *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (London, Sweet & Maxwell, 2012); G.C. Cheshire, P.M. North, J.J. Fawcett and J. Carruthers, *Private International Law*, 14th ed.

follows: the Convention was conceived initially in 1980 at the HCCH's 14th session.[9] In May 1982, Messrs. Adair Dyer and Hans van Loon issued the Report on Trusts and Analogous Institutions, which became the authority on which much of the Convention was based.[10] The HCCH created a Special Commission, which convened three sessions, from June 21 to 30, 1982, from February 28 to March 11, 1983 and from October 24 to 28, 1984. The HCCH's Fifteenth Session was held at The Hague from October 8 to 20, 1984. The final version of the Convention, written officially only in English and French, was adopted unanimously during the Plenary session of October 19, 1984 and the *Final Act*, containing the draft Convention, was signed on October 20, 1984. The Convention itself was signed (by Italy, Luxembourg and the Netherlands) on July 1, 1985 and is sometimes referred to by that date. Under Article 30 of the Convention, it entered into force on January 1, 1992, the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 27.

Much more will be said below about the terms of the Convention.

5. Signature, Ratification and Adoption of an International Convention in Canada

Under Canadian law, an international treaty agreement or convention must go through three steps to be enforceable here: Canada must sign the convention, which means exactly what it sounds like: a representative of Canada must, on behalf of Canada,

---

(Oxford, Oxford University Press, 2008) (hereafter "Cheshire"); Jean-Gabriel Castel and Janet Walker, *Canadian Conflict of Laws*, 6th ed. (Markham, Ontario, LexisNexis Butterworths, 2005), Vol. 2. Trust textbooks also deal extensively with the Convention. See in particular D. Hayton, "International Recognition of Trusts", ch. 3 of D. Hayton, ed., *The International Trust*, 3rd ed. (Bristol, U.K., Jordan Publishing, 2011), p. 161 (hereafter "Hayton 3rd").

8. For a historical review of trust law leading up to the convention, see A. Dyer, First Secretary at the Permanent Bureau, Hague Conference on Private International Law, "Introductory Note on the Hague Convention on the Law Applicable to Trusts and on Their Recognition" (1985), 1 Unif. L. Rev. 274.
9. See R.A. Hendrickson and N.R. Silverman, *Changing the Situs of a Trust* (New York, Law Journal Seminars-Press) (looseleaf), §11.09.
10. The Dyer-Van Loon Report was published in both English and French. For a comment on the significance of the terminology used in the two languages, see Hendrickson and Silverman, *id.*, at §11.09[1].

sign the convention to signify that Canada agrees that the signed document reflects accurately the terms of the convention; Canada must then ratify the convention, which means that Canada must pass an Order-in-Council declaring that it will be bound by the terms of the convention and notify the convention's other party or parties that Canada has done so by depositing articles of ratification in the manner set out in the convention; finally, Canada must pass a statute declaring that the convention will have the force of law in Canada.

In the absence of this final step, a treaty has no force of law in Canada. This was settled by the decision in *Francis v. The Queen*.[11] The taxpayer, a status Indian, claimed an exemption from taxation pursuant to the Jay Treaty.[12] The court held that no exemption was available because, although Canada had signed the Jay Treaty, no Canadian statute incorporated its provisions into domestic law:

> The Jay Treaty was not a Treaty of Peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation.

6. The Canadian Adoption of the Convention on Behalf of the Provinces

Canada signed the Convention on October 11, 1988 and ratified it on October 20, 1992. It was in force for Canada on January 1, 1993.

The original ratification extended the Convention to five provinces as follows:[13]

> Declarations Reservations
>
> Articles: 16, 20, 29
>
> 1. The Government of Canada declares, in accordance with Article 29 of the Convention, that the Convention shall extend to the following provinces: Alberta, British Columbia, New Brunswick, Newfoundland,

11. [1956] S.C.R. 618 (S.C.C.).
12. Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794.
13. Instrument deposited with the Government of the Netherlands on October 20, 1992, certified statement was registered by the Netherlands on October 29, 1992, Canada Treaty Series 1993/2, 1, <http://dfait-aeci.canadiana.ca/view/ooe.b2521350/1?r=0&s=1> or Commonwealth Law Bulletin, Vol. 19, Issue 1 (January 1993) 276 or United Nations, Treaty Series, Vol. 1694, 467.

Prince Edward Island, and that Canada may modify this declaration by submitting another declaration at any time.

2. The Government of Canada also declares, in accordance with Article 20 of the Convention, that the provisions of the Convention will be extended to trusts declared by judicial decisions in Alberta, British Columbia, New Brunswick, Newfoundland and Prince Edward Island.

The Government of Canada further declares, by way of reservation, in accordance with Article 26 of the Convention and pursuant to Article 16, that the Province of Alberta will not apply the second paragraph of Article 16.

On April, 14, 1994, Canada extended the Convention to Manitoba trusts arising from judicial decisions:[14]

(In respect of Manitoba. With effect from 1 July 1994.)

Declaration

In accordance with the provisions of Article 20, the Government of Canada declares that, in addition to trusts declared by judicial decisions in the Provinces of Alberta, British Columbia, New Brunswick, Newfoundland and Prince Edward Island, the provisions of the Convention shall extend to trusts declared by judicial decisions in the Province of Manitoba.

Other reservations and declarations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Article 29 of the Convention, with respect to other territorial units.

On June 8, 1994, Canada extended the Convention to Saskatchewan:[15]

Extension of the Convention

1. In accordance with the provisions of Article 29, the Government of Canada declares that, in addition to the Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Prince

14. Notification effected with the Government of the Netherlands on April 14, 1994, certified statement was registered by the Netherlands on May 10, 1994. United Nations, Treaty Series, Vol. 1776, 450.
It is somewhat strange that this declaration is limited to judicial decisions and not to all trusts. The opening words of the following declaration on June 8, 1994 suggests that the declaration applied to all trusts so far as Manitoba is concerned.

15. Notification received by the Government of the Netherlands on June 8, 1994, certified statement was registered by the Netherlands on July 12, 1994, United Nations, Treaty Series, Vol. 1788, 409 or Commonwealth Law Bulletin, Vol. 20, Issue 3 (July 1994), 1001.

Edward Island, the Convention shall extend to the Province of Saskatchewan.

Declaration

2. In accordance with the provisions of Article 20, the Government of Canada declares that, in addition to trusts declared by judicial decisions in the Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Prince Edward Island, the provisions of the Convention shall extend to trusts declared by judicial decisions in the Province of Saskatchewan.

Other reservations and declarations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Article 29 of the Convention, with respect to other territorial units.

Finally, on February 17, 2006, Canada extended the Convention to Nova Scotia:[16]

Declaration of 17 February 2006:

1. In accordance with the provisions of Article 29, the Government of Canada declares that, in addition to the Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Prince Edward Island and Saskatchewan, the Convention shall extend to the Province of Nova Scotia.

2. In accordance with the provisions of Article 20, the Government of Canada declares that, in addition to trusts declared by judicial decisions in the Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Prince Edward Island and Saskatchewan, the provisions of the Convention shall extend to trusts declared by judicial decisions in the Province of Nova Scotia.

3. The Government of Canada further declares that it may at any time submit other declarations or reservations pursuant to Article 29 of the Convention with respect to other territorial units.

Each of the above-named provinces has passed legislation incorporating all or most of the Convention.[17] Canada has not extended the Convention to Québec and Ontario and they have not adopted the Convention; the reasons why they have not have been recounted elsewhere.[18]

16. Notification effected with the Government of the Netherlands: February 17, 2006, date of effect: May 1, 2006, registration with the Secretariat of the United Nations: Netherlands, March 15, 2006, United Nations, Treaty Series, Vol. 2363, 505.
17. See for example the *International Trusts Act*, R.S.B.C. 1996, c. 237, as amended.

7. Conflict of Laws (Sometimes Called Private International Law)

The easiest way to explain what the subject of conflict of laws is about is with an example. Suppose two residents of Alberta meet for coffee in Alberta and agree that one person will perform services for the other, such services to be performed in Alberta and payment therefor to be made in Alberta. Even though they say nothing about which jurisdiction's laws will govern that contract, it is obviously Alberta law: the fact situation contains no elements relating to any jurisdiction outside Alberta.

Now suppose a resident of Alberta meets a resident of China for coffee in a Paris bistro and they agree that the Albertan will perform services for the other in the Unites States and the payment therefor will be deposited in an account in England. Now which country's law governs the contract? The answer is not self-evident.

Conflict (sometimes incorrectly called conflicts) of laws is the area of law that attempts to answer this and similar questions. Its goal is to lay down rules specifying which jurisdiction's laws will apply to any given matter where the fact situation includes elements from more than one jurisdiction. It should be noted that this is completely different from the issue of which jurisdiction's court will hear the dispute: a court in one country may hear a case and apply a different country's laws.[19]

More will be said below about the conflict of laws as it applies to trusts.

8. What Does the Convention Say?

The key provision in the Convention is Article 11, which requires a Contracting State to recognize a trust established in a different country as being valid.[20] Article 11 states:

18. Michael McAuley, "The Snack(-)Bar (Casse-Croûte?) – The Hague Convention and Canada", Paper presented at The International Academy of Estate and Trust Law (Istanbul), May 23, 2012, at p. 15 *ff.* My thanks to Professor Brown for making this paper available to me.
19. For a case that determined the law governing the essential validity of an alleged trust, the law governing its administration and the court having the jurisdiction to hear the case, see *Branco v. Veira* (1995), 8 E.T.R. (2d) 49 (Ont. Gen. Div.).
20. It appears that there was some disagreement as to whether Article 11 was necessary. See Dyer, "Introductory Note", *supra*, footnote 8, at p. 280.

chapter III - recognition	chapitre iii - reconnaissance
Article 11	Article 11
A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.	Un trust créé conformément à la loi déterminée par le chapitre précédent sera reconnu en tant que trust.
Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.	La reconnaissance implique au moins que les biens du trust soient distincts du patrimoine personnel du trustee et que letrustee puisse agir comme demandeur ou défendeur, ou comparaître en qualité de trustee devant un notaire ou toute personne exerçant une autorité publique.
In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular –	Dans la mesure où la loi applicable au trust le requiert ou le prévoit, cette reconnaissance implique notamment:
a) that personal creditors of the trustee shall have no recourse against the trust assets;	a) que les créanciers personnels du trustee ne puissent pas saisir les biens du trust;
b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;	b) que les biens du trust soient séparés du patrimoine du trustee en cas d'insolvabilité ou de faillite de celui-ci;
c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;	c) que les biens du trust ne fassent pas partie du régime matrimonial ni de la succession du trustee;
d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.	d) que la revendication des biens du trust soit permise, dans les cas où le trustee, en violation des obligations résultant du trust, a confondu les biens du trust avec ses biens personnels ou en a disposé. Toutefois, les droits et obligations d'un tiers détenteur des biens du trust demeurent régis par la loi déterminée par les règles de conflit du for.

The crucial part of this article is that is requires a Contracting State to recognize a trust as being a trust, even though that State's laws may not themselves provide for trusts or at least not for the particular kind of trust in issue and even though the State in which the trust is created is not a party to or has not adopted the Convention.[21] To the extent the Convention applies, it overrules the equitable rules relating to the validity and proper law of a trust.[22]

In short, under the Convention, a State that adopts the Convention must recognize the validity of a trust established in a foreign country if the trust is in writing and selects a proper law that allows for that kind of trust to be set up.

This may be contrasted with what might be called the tax law rule for recognizing a foreign entity. As set out in a Canada Revenue Agency Technical Interpretation,[23] the process is as follows:

> 1) Examine the characteristics of the foreign business association under foreign commercial law and any other relevant documents, such as the partnership agreement or other contracts; and
>
> 2) Compare these characteristics with those of recognized categories of business associations under Canadian commercial law in order to classify the foreign business association under one of those categories.

Under Article 11 this process is not required: a "trust" created under the law specified in Chapter II is to be recognized as a trust even if its characteristics do not match those under Canadian law.

9. What is a "Trust"?

Article 11 says that a "trust" created under the law specified in chapter II is to be recognized as a trust. Article 2 in Chapter I states:

---

21. See *Hiralal v. Hiralal*, [2013] NSWSC 984 (N.S.W. S.C.), at para. 180; Mark Hicken and Elaine Reynolds, "Trusts and the Conflict of Laws" (Continuing Legal Education Society of British Columbia, April 2006), p. 2, available online: <http://online.cle.bc.ca/CourseMaterial/pdfs/2006/737_4_1.pdf>; A. Underhill, D. Hayton, P. Matthews and C. Mitchell, *Law relating to Trust and Trustees*, 18th ed. (London, LexisNexis, 2010), at para. 100.48.
22. See *Manitoba (Public Trustee) v. Dukelow; Vak Estate v. Dukelow* (1994), 117 D.L.R. (4th) 122 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. S. (A.S.)* (2004), 7 E.T.R. (3d) 213 (Alta. Q.B.), at para. 13; *Kelemen v. Alberta (Public Trustee)* (2007), 32 E.T.R. (3d) 255 (Alta. Q.B.), at para. 23.
23. 2014-0523041C6, "LLLP", June 16, 2014, taken from *Backman v. R.*, 2001 D.T.C. 5149 (S.C.C.), at para. 17 *ff.*

Article 2 For the purposes of this Convention, the term "trust" refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics– a) the assets constitute a separate fund and are not a part of the trustee's own estate; b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.	Article 2 Aux fins de la présente Convention, le terme « trust » vise les relations juridiques créées par une personne, le constituant – par acte entre vifs ou à cause de mort- lorsque des biens ont été placés sous le contrôle d'un trustee dans l'intérêt d'un bénéficiaire ou dans un but déterminé. Le trust présente les caractéristiques suivantes: a) les biens du trust constituent une masse distincte et ne font pas partie du patrimoine du trustee; b) le titre relatif aux biens du trust est établi au nom du trustee ou d'une autre personne pour le compte du trustee; c) le trustee est investi du pouvoir et chargé de l'obligation, dont il doit rendre compte, d'administrer, de gérer ou de disposer des biens selon les termes du trust et les règles particulières imposées au trustee par la loi. Le fait que le constituant conserve certaines prérogatives ou que le *trustee* possède certains droits en qualité de bénéficiaire ne s'oppose pas nécessairement à l'existence d'un trust.

Article 2 does not define a trust.[24] Rather, it sets out the minimum characteristics a relationship must have before it will be viewed as being a "trust" entitled to recognition under Article 11.

For purposes of this paper, the key point of Article 2 is that the relationship that may be called a trust may be for the benefit of a

24. Dyer, "introductory Note", *supra*, footnote 8, at p. 279, states: "The text, which is set out in article 2 of the Convention, has been described as a 'gateway' definition, in the sense that it is not comprehensive but rather descriptive and indicative."

beneficiary or a purpose. While the word "purpose" in Article 2 was meant to include charitable purposes trust,[25] it is not limited to that,[26] so that a non-charitable purpose trust is a trust for purposes of Article 2, and hence entitled to recognition under Article 11. The unrestricted scope of Article 2 means that the Convention can apply to non-charitable purpose trusts, even if such trusts were invalid under Canadian law.[27]

10. To What Law does Article 11 Refer?

Article 11 refers to a trust created by the law specified in Chapter II. The key provision in that chapter is Article 6, the first article of Chapter II, which states:

chapter ii - applicable law	chapitre ii - loi applicable
Article 6	Article 6
A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instru-	Le trust est régi par la loi choisie par le constituant. Le choix doit être exprès ou résulter des dispositions de l'acte créant le trust ou en

25. Overbeck Report, para. 39. Professor Alfred E. von Overbeck was the Reporter for the Fifteenth Session of the Hague Conference on Private International law at which the Convention was approved and was a member of the drafting committee for the Convention. Following the adoption of the Convention he wrote an "Explanatory Report on the 1985 Hague Trusts Convention", International Legal Materials, Vol. 25, No. 3, May 1986, 593 (the "Overbeck Report"), available at <http://hcch.e-vision.nl/upload/expl30.pdf>. The Overbeck Report was considered to be relevant in interpreting the Convention in various cases. See for example *Tod v. Barton; Barton (Deceased), Re*, [2002] EWHC 264 (Ch) (Ch. D.), at para. 30; *Akers v. Samba Financial Group*, [2014] EWHC 540 (Ch) (Ch. D.), at para. 75. I am informed that the Overbeck Report was written in French and translated by Mr. Dyer as a member of the Permanent Bureau of the Hague Conference on Private International Law into English. The final version of the Overbeck Report superseded his previous report as rapporteur to the Special Commission's first draft of the Convention.

So far as I can determine, the various Contracting States that agreed to the terms of the Convention never voted on or otherwise "officially" approved the Overbeck Report. However, the fact that it appears on the HCCH's website as well as in the HCCH's official Convention material (see *Proceedings of the Fifteenth Session (1984), Tomes I and II, Trusts – applicable law and recognition* (HCCH Publications, 1985), Tome II at p. 370) perhaps gives it some implicit "official" status.

26. Antony G.D. Duckworth, "The Trust Offshore" (1999), 32 Vand. J. Transnat'l L. 879, at pp. 935-936, note 130 and text.
27. Underhill and Hayton, *et al.*, *supra*, footnote 21, at paras. 102.53 and 102.59.

ment creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case. Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.	apportant la preuve, interprétées au besoin à l'aide des circonstances de la cause. Lorsque la loi choisie en application de l'alinéa précédent ne connaît pas l'institution du trust ou la catégorie de trust en cause, ce choix est sans effet et la loi déterminée par l'article 7 est applicable.

Thus, subject to the various limitations discussed below, a settlor has the freedom to choose any country's laws to govern the trust.[28] Moreover, by Article 9, the settlor may choose different countries' laws to govern different aspects of the trust.

If a settlor does not choose a law, expressly or implicitly, to govern the trust, then by Article 7 the trust is governed by the law with which it is most closely connected:

Article 7 Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected reference shall be made in particular to – a) the place of administration of the trust designated by the settlor; b) the situs of the assets of the trust; c) the place of residence or business of the trustee;	Article 7 Lorsqu'il n'a pas été choisi de loi, le trust est régi par la loi avec laquelle il présente les liens les plus étroits. Pour déterminer la loi avec laquelle le trust présente les liens les plus étroits, il est tenu compte notamment: a) du lieu d'administration du trust désigné par le constituant; b) de la situation des biens du trust; c) de la résidence ou du lieu d'établissement du trustee;

28. The following is the rule for proving foreign law in the Tax Court: where foreign law is relevant to a case, it is a question of fact which must be specifically pleaded and proved to the satisfaction of the court. If foreign law is not pleaded and proved or is insufficiently proved, it is assumed to be the same as the *lex fori*. This seems to include statutes as well as the law established by judicial decision. *Oloya v. R.*, 2011 D.T.C. 1233 (Eng.) (T.C.C. [Informal Procedure]), at para. 20.

d) the objects of the trust and the places where they are to be fulfilled.	d) des objectifs du trust et des lieux où ils doivent être accomplis.

Whether the law is determined under Article 6 or 7, Article 8 provides that that law shall govern the validity of the trust, its construction, its effects, and the administration of the trust:

Article 8	Article 8
The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.	La loi déterminée par les articles 6 ou 7 régit la validité du trust, son interprétation, ses effets ainsi que l'administration du trust.
In particular that law shall govern –	Cette loi régit notamment:
a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;	a) la désignation, la démission et la révocation du trustee, l'aptitude particulière à exercer les attributions d'untrustee ainsi que la transmission des fonctions de trustee;
b) the rights and duties of trustees among themselves;	b) les droits et obligations des trustees entre eux;
c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;	c) le droit du trustee de déléguer en tout ou en partie l'exécution de ses obligations ou l'exercice de ses pouvoirs;
d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;	d) les pouvoirs du trustee d'administrer et de disposer des biens du trust, de les constituer en sûretés et d'acquérir des biens nouveaux;
e) the powers of investment of trustees;	e) les pouvoirs du trustee de faire des investissements;
f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;	f) les restrictions relatives à la durée du trust et aux pouvoirs de mettre en réserve les revenus du trust;
g) the relationships between the trustees and the beneficiaries including the personal liability of the	g) les relations entre le trustee et les bénéficiaires, y compris la responsabilité personnelle du trustee envers les bénéficiaires;

trustees to the beneficiaries. h) the variation or termination of the trust; i) the distribution of the trust assets; j) the duty of trustees to account for their administration.	h) la modification ou la cessation du trust; i) la répartition des biens du trust; j) l'obligation du trustee de rendre compte de sa gestion.

Article 4 of the Convention states that the Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee. The Overbeck Report at paragraph 55 famously distinguished Article 4 from Article 8 by saying that the former dealt with the rocket launcher while the latter dealt with the rocket.[29] That is, the issue of whether a certain property was effectively transferred to the trustee to be held in trust is governed by the law applicable to that transfer — the Convention has nothing to say on that subject. If, however, all the steps necessary to create a trust have been effected under the laws governing those steps, then the Convention applies to the trust so created. In other words, Article 4 of the Convention states that it does not apply to "preliminary issues" relating to the validity of a trust,[30] while Article 8 provides that the law designated by a trust deed as governing the trust, once it is established, governs "the validity of the trust, its construction, its effects, and the administration of the trust."[31] So the issue of whether the trust is itself a type of trust recognizable by law and validly created under the proper law of the trust is governed by the Convention, which defers to the proper law of the trust.[32]

29. Although it appears that that imagery arose during the Special Commission's discussions. See Dyer, "Introductory Note", *supra*, footnote 8, at p. 279.
30. See the extensive judgment on Article 4 in *Dervan and MD Events Ltd v. Concept Fiduciaries Ltd.* (November 30, 2012) (Guernsey Royal Court). See also its explanation by A. Dyer, "International Recognition of the Trust Concept" (1996), 2 Trusts & Trustees 5, at p. 8 and para. 53 of the Overbeck Report.
31. *Hiralal v. Hiralal*, *supra*, footnote 21, at para. 185; *Gomez v. Gomez-Monche Vives*, [2008] EWCA Civ 1065 (U.K. C.A. (Civ. Div.), at para. 53; *Dervan*, *supra*, footnote 30.
32. See *Clark & Whitehouse (Joint Administrators of Rangers Football Club Plc), Re Directions*, 2012 SLT 599 (Scot. Ct. Sess.), at para. 20 *ff.*; D. Waters, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto, Carswell, 2012), ch. 29, "Trusts and the Conflict of Laws", pp. 1460-1461 (hereafter "Waters on

11. Must the Tax Court of Canada Apply the Convention?

It will be noted from Canada's ratifications of the Convention that they are aimed at the various provinces, but that the Federal government has not incorporated the Convention into any Federal statute.[33] An immediate answer to this question might be, therefore, that the Tax Court is not required to apply the Convention.

In my view, the counter-argument lies in s. 8.1 of the *Interpretation Act*,[34] which states:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

In *Canada 3000 Inc.*[35] the court referred to s. 8.1 and stated: "If it were necessary to resort to provincial law, then the provincial law to be used is that of the province in which the provision is being applied."[36]

Trusts"). See also K.T. Grozinger, "Conflict of Laws and Trusts of Movables in Canada: Determining the Applicable Law of Essential Validity and Administration" (2004), 23 E.T.P.J. 301.

33. Article 23 of the Convention states: "For the purpose of identifying the law applicable under the Convention, where a State comprises several territorial units each of which has its own rules of law in respect of trusts, any reference to the law of that State is to be construed as referring to the law in force in the territorial unit in question." Thus, Canada would have to ratify the Convention federally to have to be in force federally.
34. R.S.C. 1985, c. I-21, as amended.
35. *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865 (S.C.C.), at para. 80.
36. One presumes that the mere fact that the case is being heard in a particular province is not really what the court was relying on. In some situations, for reasons of pure administrative convenience, the Tax Court might hear a case in a province that has no connection to the taxpayer (*e.g.*, the taxpayer lives

Section 8.1 is the statutory embodiment of the rule in *Will-Kare Paving & Contracting Ltd. v. Canada*,[37] where the court said:

> [31] To apply a "plain meaning" interpretation of the concept of a sale in the case at bar would assume that the Act operates in a vacuum, oblivious to the legal characterization of the broader commercial relationships it affects. It is not a commercial code in addition to a taxation statute. Previous jurisprudence of this Court has assumed that reference must be given to the broader commercial law to give meaning to words that, outside of the Act, are well-defined. See *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298. See also P.W. Hogg, J.E. Magee and T. Cook, Principles of Canadian Tax Law (3rd ed. 1999), at p. 2, where the authors note:
>
> The Income Tax Act relies implicitly on the general law, especially the law of contract and property. . . . Whether a person is an employee, independent contractor, partner, agent, beneficiary of a trust or shareholder of a corporation will usually have an effect on tax liability and will turn on concepts contained in the general law, usually provincial law.

Thus, where the Tax Court is determining whether a particular legal relationship is a "trust" within the meaning of the *Income Tax Act*,[38] it is required to apply the law of the province in which the case is being heard.[39] If that law incorporates the Convention, then the Tax Court will necessarily apply that incorporating statute and hence the Convention.

Where the case is being heard, for example, in Ontario, which as noted above has not incorporated the Convention, or if the case involves a non-resident of Canada who is not subject to any provincial law, then it would seem that the Convention has no application. But in that case, as noted below, Canada's conflict of laws may be applied to reach the same result.

---

in British Columbia, but retains counsel in Ontario and flies to Ontario for the hearing there). Presumably, in that situation, s. 8.1 would apply to the law of British Columbia. See *Travel Just v. Canada (Revenue Agency)*, 2007 D.T.C. 5012 (Eng.) (F.C.A.) at para. 14, leave to appeal refused (2007), 370 N.R. 396 (note) (S.C.C.).

37. 2000 D.T.C. 6467 (Eng.) (S.C.C.).
38. R.S.C. 1985, c. 1 (5th Supp.), as amended.
39. See for example *I.M.P. Group Ltd. v. Dobbin*, 2008 CarswellOnt 5381 (Ont. S.C.J.), at paras. 160 and 204 where the court interpreted an undefined term in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 by referring to the definition of that term in the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16.

12. When Will the Tax Court Apply the Convention to Ignore a Foreign Trust?

The Convention contains a number of limiting provisions that entitle a court to disregard what would otherwise be a valid trust. The three relevant exceptions appear to be Articles 13, 18 and 19.

(a) Article 13

Article 13 states:

No State shall be bound to recognize a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.	Aucun Etat n'est tenu de reconnaître un trust dont les éléments significatifs, à l'exception du choix de la loi applicable, du lieu d'administration et de la résidence habituelle du *trustee*, sont rattachés plus étroitement à des Etats qui ne connaissent pas l'institution du trust ou la catégorie de trust en cause.

Article 13 means that, if a trust is more closely associated with a country which does not recognize a particular kind of trust than it is with the country the law of which has been chosen as the trust's proper law, then no State is bound to recognize it as being a valid trust.[40] This Article was designed to protect the interests of States that do not recognize trusts.[41]

In my view, Article 13 should not result in the Tax Court not recognizing a foreign non-charitable purpose trust established in, say, the Cayman Islands. While, as discussed in the next section of this article, there is no case in Canada that has stated definitively that a non-charitable purpose trust is valid in Canada, essentially the cases that touch on that topic have reached that conclusion. Furthermore, as discussed below, various provincial *Perpetuities Acts* deem such a trust to be valid, and Canada's leading commentator on trusts has expressed the view that such trusts should be valid. Accordingly, my view is that Article 13 should not be the basis for refusing to recognize such trusts in Canada.

40. See the Overbeck Report, para. 122.
41. Cheshire, *supra*, footnote 7, at p. 1321.

13. The Beneficiary Principle

As noted above, many textbooks suggest that if a trust has no beneficiaries, then it cannot meet one of the three certainties normally thought of as being required by Canadian law for being a trust.[42] It has been said that among the three certainties of a trust is the certainty of objects — the beneficiaries of the trust must be identified and ascertained. That is, no trust (other than a charitable purpose trust) could exist without beneficiaries. The idea was that a trust is a relationship whereby a person (the trustee) holds property given to him by himself or another person (the settlor) for the benefit of a third person (the beneficiary).[43]

However, the thinking on the "beneficiary principle" has evolved over time.[44] Current academic thinking by some on this point now appears to recognize that the important element of the beneficiary principle is not so much that there must be a beneficiary who has an interest in the trust, as that there must be some person with sufficient standing to sue the trustees if they fail to carry out their duties under the trust.[45] In other words, the "beneficiary principle" is really aimed at ensuring that someone can hold the trustees to account.[46] Several authors[47] and cases[48]

42. *Knight v. Knight* (1840), 49 E.R. 58 (Eng. Ch. Div.), affirmed (*sub nom.* Knight v. Boughton (1844), 8 E.R. 1195 (U.K. H.L.).

43. *Sommerer v. R.*, 2011 D.T.C. 1162 (Eng.) (T.C.C. [General Procedure]), at para. 66, additional reasons 2011 CarswellNat 6998 (T.C.C. [General Procedure]), affirmed 2012 D.T.C. 5126 (F.C.A.), at para. 42. A non-charitable purpose trust was declared invalid on this basis in *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2004), [2005] 3 W.W.R. 97, 29 Alta. L.R. (4th) 269 (Alta. Q.B.), though the decision was reversed on appeal on other grounds: 2006 ABCA 337 (Alta. C.A.), leave to appeal refused (2007), 424 W.A.C. 397 (note), [2007] S.C.C.A. No. 9 (S.C.C.).

44. Even going back many years, it was recognized that non-charitable purpose trusts may be valid. See R.M. Eggleston, "Purpose Trusts" (1939-1941), 2 Res Judicatae 118; L.A. Sheridan, "Purpose Trusts and Powers" (1958), 4 U. W. Aus. L. Rev. 235; P. Baxendale-Walker, *Purpose Trusts*, 2nd ed. (Haywards Heath, U.K., Tottel Publishing, 2008).

45. See D. Hayton, "Developing the Obligation Characteristic of the Trust" (2001), 117 L.Q.R. 96; D. Hayton, "Developing the Obligation Characteristic of the Trust", in D. Hayton, ed., *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (The Hague, New York, Kluwer Law International, 2002), p. 189 and following.

46. D.V.M. Waters, "Non-Charitable Purpose Trusts in Common Law Canada" (2008), 28 E.T.P.J. 16. See also Eileen Gillese, "Pension Plans and the Law of Trusts" (1996), 75 Can. Bar Rev. 221, at p. 237, note 31; ch. 4(c) of Eileen E. Gillese, and Martha Milczynski, *The Law of Trusts*, 2nd ed. (Toronto, Irwin Law, 2005). See most recently James Goodwin, "Purpose trusts: Doctrine and policy" (2013), 24 King's L.J. 102.

and have suggested that it is irrelevant whether that someone is a person who will benefit from the trust funds under the trust or merely someone else who is, under the trust deed or by statute, given the power to enforce the trust.[49] Even in *Morice*, the

47. See J. Hilliard, "On the irreducible core content of trusteeship – a reply to Professors Matthews and Parkinson" (2003), 17 Trust L. Int'l 144; G. Thomas, "Purpose Trusts", in J. Glasson, ed., *International Trust Laws* (Bristol, U.K., Jordan Publishing) (looseleaf), Vol. 2, ch. 4; C. McKenzie, "VISTA Trusts", in Glasson, *ibid.*, ch. 12, para. B12.59 and following; D.W.M. Waters, "The Concept Called 'The Trust'" (1999), 53 Bull. Int'l Fiscal Doc. 118; "Waters on Trusts", *supra*, footnote 32, ch. 14.II, "Non-Charitable Purpose Trusts"; See also Duckworth, "Second Generation Purpose Trusts – and More – We Hope" (unpublished paper delivered at the Eleventh Annual Transcontinental Trusts Conference 1997, June 30, July 1-2, 1997), at pp. 25-26, cited by G. Fortin, "Strangers in Strange Lands: The Hidden Traps of Offshore Trusts", in *1999 Canadian Tax Foundation 51st Annual Conference Report*, p. 40:1 at p. 40:11, note 44; Baxendale-Walker, *supra*, footnote 44.

48. *Keewatin Tribal Council Inc. v. Thompson (City)*, [1989] 2 C.T.C. 206 (Man. Q.B.), at para. 72: "[T]here should be no problem with a non-charitable purpose trust where there are any number of persons with standing to enforce it." *Cooper & Anor v. Pretty Nominees Pty Ltd.*, [2013] SADC 75 (S. Aus. Dist. Ct.), especially at para. 184:

> [I]n the context of a discussion about *Re Denley* and the beneficiary principle, it was necessary for there to be an identifiable class of persons having standing to enforce the trust who are capable of ascertainment at any given time. His Honour reiterated the principle dating back to *Morice v. Bishop of Durham* that there must be somebody in whose favour the Court can decree specific performance.
>
> A number of cases have suggested that the rule in *Re Denley* (*Re Denley's Trust Deed*, [1969] 1 Ch. 373 (Ch. D.)) is confined to situations where there is at least one person who, although not technically a beneficiary of a trust in a direct sense, may benefit indirectly from the trust and therefore would have standing to enforce the trust. See for example: *Doherty v. Doherty*, [2006] QSC 257 (Qld. S.C.), at para. 28; *In re Horley Town Football Club*, [2006] EWHC 2386, [2006] WTLR 1817 (Ch. D.), at para. 99; *Yazbek v. Federal Commissioner of Taxation*, 2013 ATC 20-371 (Aus. F.C.), at para. 20; *L.I.U.N.A., Local 527 Members' Training Trust Fund v. Canada* (1992), 92 D.T.C. 2365 (T.C.C.), at p. 2371.
>
> However, it is difficult to see why the beneficiary principle should be so confined; if an enforcer or protector can enforce the trustee's duty, the policy requiring that the trustee must be held to account by someone is just as much fulfilled as if that enforcer were somehow an indirect beneficiary. In fact, that is all an indirect beneficiary is — merely someone who has standing to ensure that the trustee fulfills his duty so that the person ultimately may receive his indirect benefits.

49. Keith Robinson, "Purpose Trusts: A Perplexing Ruling" (2014), 22 *STEP Journal* 57, discusses a Bermuda case involving a non-charitable purpose trust, *Trustees 1-4 v. The Attorney-General*, [2014] SC (Bda) 24 Comm. (26 February 2014). In that interlocutory decision, the court held that the trustees could not assert solicitor-client privilege over legal advice obtained by them and paid for with trust funds against a respondent named to present the settlor's estate and heirs. The court noted that while there are no

Chancery Court stated that "There must be somebody, in whose favour the Court can decree performance." The fact that that someone is not a beneficiary of the trust seems to be irrelevant to the court's underlying concern that there must be a way to hold the trustee to account.

If one may be so bold as to voice an opinion on which so many other learned authors have written, in my view this debate comes down to fundamental issue in trust law: does a trustee have merely a bare legal title to the trust fund, while the beneficiary has an *in rem* (*i.e.*, equitable or proprietary) interest in the trust property, or does the trustee own the trust property both legally and equitably (that is, totally), with the beneficiary having merely an *in personam* right to sue the trustee to ensure that he follows the terms of the trust? If it is the former, one can see the argument that a non-charitable purpose trust fails for lack of a beneficiary, as there would be no person with any beneficial interest in the trust fund, an obvious impossibility. If it is the latter, so that the trustee owns both the legal and beneficial interest in the trust property but has a personal, equitable duty to apply such property for the beneficiary's use, then one can see the argument that there need not be a beneficiary at all; so long as the trustee has a duty to apply the trust fund in some way, and there is someone to enforce that duty, then there is a valid trust.

Much has been written on this issue and I would not pretend to be able to answer it here. I can only say that I am in the *in personam* camp, and so in my view non-charitable purpose trusts do no fail for lack of a beneficiary. Assuming the trust deed appoints a protector[50] who will be given standing to enforce the trust,[51] the case law[52] and provincial legislation[53] should not

---

beneficiaries to a purpose trust, the respondent stood in the shoes of the settlor and "was a person with sufficient interest in the enforcement of the trust." This suggests that the beneficiary principle is really about enforcement, not entitlement.

50. Called an "authorized applicant" in the Bahamian legislation. See Thomas, "Purpose Trusts", *supra*, footnote 47, at para. B4.34/20.

51. See Robert Ham, "Protectors", in Glasson, *supra*, footnote 47, ch. 3, section 6, p. B3-15.

52. See *Peace Hills Trust Co. v. Canada Deposit Insurance Corp.* (2007), 288 D.L.R. (4th) 237 (Alta. Q.B.).

53. British Columbia, Alberta, Ontario, the Yukon, the Northwest Territories and Nunavut each have a *Perpetuities Act* that permits the establishment of a non-charitable purpose trust: R.S.B.C. 1996, c. 358, s. 24; R.S.A. 2000, c. P-5, s. 20; R.S.O. 1990, c. P.9, s. 16; R.S.Y. 2002, c. 168, s. 20; R.S.N.W.T. 1988, c. P-3, s. 17 (duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28), as amended by the *Miscellaneous Statutes*

permit the Tax Court to rely on Article 13 to ignore the trust. Canada's leading commentator on trust law has discussed Article 13 in the context of non-charitable purpose trusts and has concluded that none of the policy arguments that could be made under Articles 13, 15, 16 or 19 are sufficiently strong to justify a Canadian court refusing to recognize a non-charitable purpose trust established under a foreign law:[54]

> However, none of these further limits seem strong enough to prevent the choice of a law which, for example, allows non-charitable purpose trusts, even though the forum would not allow them. Such non-recognition is a rule of trust law that represents a concern about enforceability, rather than a fundamental value protected by the legal system.

The CRA's views are not legally binding. Nevertheless, it is helpful to note that the CRA has determined that a U.S. non-charitable purpose trust was a valid trust for Canadian tax purposes, and specifically that having a perpetual trust or a trust that is for a purpose which ultimately benefits persons is not contrary to the Canadian concept of a trust.[55]

Amendment Act, 2010, s. 25. While those Acts deem the trust to be a power, they also deem the trust to be valid. This has been recognized for tax purposes. See *Local 527*, *supra*, footnote 48. *Local 527* appears to have been accepted by the CRA: see Technical Interpretation 9727005, "Non-profit Organization", June 30, 1998. See also "Waters on Trusts", *supra*, footnote 32, at p. 673 and the Law Reform Commission of British Columbia, *Report on Non-Charitable Purpose Trusts* (Vancouver, The Commission, 1992), section III(E)(2). See further on the various *Perpetuities Acts* at footnote 58 below.

54. "Waters on Trusts", *supra*, footnote 32, at p. 1468. See also D. Hayton, "Future trends in International Trust Planning" (2006), 13 J. Int'l Trust and Corp. Planning 55 (hereafter "Hayton 2006"), at pp. 56-57.

55. District Office Memo 2007-0236981I7, October 11, 2007. The citation of the Waters article in the Memo is incorrect; it should be D.W.M. Waters, "The Concept Called 'The Trust'" (1999), 53 Bull. Int'l Fiscal Doc. 118. Unlike the purpose trust considered in District Memo 2004-006028117, "94 Vs. Health & Welfare Type Trusts", August 26, 2004, where the trust was interwoven with a plan under which beneficiaries could obtain distributions, I assume that non-charitable purpose trust in question will have no connection to any other agreement under which a person may benefit.

(a) Article 18

This Article states:

The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy *(ordre public)*.	Les dispositions de la Convention peuvent être écartées si leur application est manifestement incompatible avec l'ordre public.

There is no detailed explanation of Article 18 other than that it is the "customary" public policy clause.[56] It has been suggested that "manifestly" means that Article 18 will be applied only in extreme cases.[57] Given that a number of other countries now allow for non-charitable purpose trusts, that several provinces' *Perpetuities Acts* recognize a non-charitable purpose trust[58] and that the Tax Court

56. Overbeck Report, para. 164.

57. Hayton 3rd, *supra*, footnote 7, at p. 176. See also para. 3.83 at p. 189 (an "extreme" case).

58. The B.C. *Perpetuity Act*, *supra*, footnote 53, is typical (except for spelling the term "noncharitable" instead of "non-charitable"). Subsections 24(1) and (2) state:

> 24(1) A trust for a specific noncharitable purpose that creates no enforceable equitable interest in a specific person must be construed as a power to appoint the income or the capital, as the case may be.
>
> (2) Unless a trust described in subsection (1) is created for an illegal purpose or a purpose contrary to public policy, *the trust is valid* so long as and to the extent that it is exercised either by the original trustee or the original trustee's successor within a period of 21 years, even if the disposition creating the trust showed an intention, either expressly or by implication, that the trust should or might continue for a period longer than that period. [emphasis added]

In *Local 527*, *supra*, footnote 48, at p. 2373 the court noted that it is somewhat contradictory for s. 24(1) to deem the trust to be a power, while s. 24(2) deems the trust to be valid. A similar conclusion is reached in "Waters on Trusts", *supra*, footnote 32, ch. 8.IV.B, at note 21 and text.

In *Dionisio v. Mancinelli* (2004), 12 E.T.R. (3d) 296 (Ont. S.C.J.), the court held that the word "specific" in the phrase "a specific non-charitable purpose" in s. 16(1) of the *Perpetuities Act*, R.S.O. 1990, c. P.9 meant that the purpose must be "definite and precise" and held that the trust in that case did not meet that test. In *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.), the court held that the trust in that case did meet that test. The word "specific" comes from the Ontario Law Reform Commission, *Report No. 1 [to the Attorney General of Ontario, Recommending Legislation to Amend the Law Relating to Perpetuities and Accumulations]* (Toronto, The Commission, 1965) on perpetuities, at p. 36. It seems all that the Commission had in mind by the use of that word was that the purpose as stated not give the trustee an unlimited power to dispose of the trust fund as he wished.

recognized such a trust in at least one case,[59] Article 18 should not apply.[60]

Some non-charitable purpose trusts are set up merely to hold certain investments. It has been suggested that such a purpose creates a trust that is contrary to public policy, so that a court in England (and presumably Canada) could strike it down under Article 18.[61] No authority is cited for this suggestion and it appears to contradict the wording of Article 2, which refers to a "specified purpose". It has been suggested that a trust for this kind of "inward or self-serving purpose does not result in a disposition of the beneficial interest in the shares", and "amounts to no more than a directed investment clause, and the beneficial interest remains undisposed of."[62] I do not agree. Even if a non-charitable purpose trust is not valid at common law in Canada, the fact that the purpose of the trust is merely to hold or manage an investment is not contrary to Canada's fundamental policy underlying trusts.[63]

59. *Local 527*, *supra*, footnote 48.

60. See Underhill and Hayton, *et al.*, *supra*, footnote 21, at para. 100.205; Hayton 2006, *supra*, footnote 54, at pp. 63-65; Harris, *supra*, footnote 7, at p. 395, note 1536 and text; McKenzie, in Glasson, *supra*, footnote 47, ch. 12, para. 12.82, note 39 and text.

    The fact that the trust's home jurisdiction's law allows for an indefinite perpetuity period should not create a public policy problem, as Manitoba and several other countries and States in the United States allows for the same thing. As a safety measure, however, the trust's term could be limited to the period set out in the various provincial *Perpetuity Acts* that recognize non-charitable purposes trusts. See Hayton 2006, *supra*, footnote 54, at pp. 60-62. This would also ensure that Articles 15 and 16 do not invalidate the trust on that basis. See Emmanuel Gaillard and Donald T. Trautman, "Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts" (1987), 35 Am. J. Comp. L. 307, at p. 331. The authors were involved in the drafting of the Convention on behalf of France and the United States, respectively.

    Also, the fact that no beneficiary is permitted to enforce the trust should not make Article 18 apply. See Harris, *supra*, footnote 7, ch. 8 of P.M. North and J.J. Fawcett, eds., *Reform and development of private international law: essays in honour of Sir Peter North* (Oxford, Oxford University Press, 2002), p. 187 at pp. 200-201: "if a foreign law allows a non-charitable purpose trust to be enforced by a non-beneficiary, Article 18 of the Hague Convention should not apply to disregard the trust." See also Harris, *ibid.*, at pp. 295-296.

    Trying to avoid Canadian tax should not engage Article 18. Grozinger, *supra*, footnote 32, at p. 373, note 193 and text.

    Given that Canada entered certain reservations when it ratified the Convention but not for non-charitable purpose trusts, no such reservation should be found.

61. See Underhill and Hayton, *et al.*, *supra*, footnote 21, at para. 100.210; D. Birnie, "Offshore Trusts – Myth vs. Reality", *1998 British Columbia Tax Conference Report* (Toronto, Canadian Tax Foundation, 1998), pp. 21:12.

62. P. Matthews, "Trusting On Purpose: The Trusts (Amendment no: 3) (Jersey) Law 1996" (1997), 1 Jersey L. Rev.

63. Underhill and Hayton, *et al.*, *supra*, footnote 21, at para. 100.205:

As to the more fundamental issue of whether Canadian public policy against non-charitable purpose trusts (if such a policy did exist), is so strong as to permit a Canadian court to disregard such a trust, the answer has been given as follows:[64]

> The question has been raised whether the English Court might use Article 18 as a reason not to recognise a foreign law trust which would not be valid in England and Wales, such as a non-charitable purpose trusts enforceable by enforcers rather than beneficiaries. Whilst the position is far from clear, we would suggest that such a trust, if in fact enforceable, would be recognised in England and Wales, as no fundamental principle of justice is involved. The fact that the English law on purpose trusts is different in not enough to render the recognition of such a trust as manifestly incompatible with English public policy.

(b) Article 19

Article 19 states:

Nothing in the Convention shall prejudice the powers of States in fiscal matters.	La Convention ne porte pas atteinte à la compétence des Etats en matière fiscale.

Overbeck's Report mentions Article 19 in only two paragraphs:

22 Chapter IV on general clauses contains rules of several types. Articles 15 and 16 allow the application of the mandatory rules of laws which are applicable to matters other than trusts under the	22 Le chapitre IV sur les dispositions generales contient des regies de plusieurs ordres. Les articles 15 et 16 reservent les dispositions imperatives de lois applicables a d'autres matieres que le trust selon

It is likely that Article 18 will be interpreted restrictively, in order not to undermine the other provisions of the Convention. In particular, the fact that a technique necessitated by the trust is unfamiliar in a given State is not in itself grounds to invoke public policy. Thus one would expect Article 18 to be confined to rules which are discriminatory, oppressive, infringe basic human rights, or are impossible to give effect to or contravene the irreducible core content of ownership right, but, otherwise, it is better to utilise articles 15 or 16 or rules that apply to preliminary issues which fall outside the Convention by virtue of Article 4.

64. John Mowbray, Thomas L.L. Tucker, N. Le Poidevin, E. Simpson, J. Brightwell, eds., *Lewin on Trusts*, 18th ed. (London, Sweet & Maxwell, 2008) with supp., p. 416, paras. 11-84, footnotes omitted. This topic is also discussed in A. Doyle and M. Carn, "Purpose Trusts", ch. 5 of Hayton 3rd, *supra*, footnote 7, p. 213 at p. 341, section 5.319 and following.

conflict rules of the forum and under laws of immediate application. *Articles* 17, 18 and *19* exclude renvoi, provide for the public policy exception and *exclude all effects of the Convention in fiscal matters*. Articles 20, 21 and 22 respectively permit the Convention's provisions to be extended to trusts declared by judicial decisions or, to the contrary, permit the application of Chapter III to be limited to trusts connected with Contracting States and to those created after the entry into force of the Convention. Articles 23 and 24 concern States comprised of several territorial units while article 25 gives priority to other existing or future conventions dealing with the same matters. 165 It was necessary to state in the Convention that tax law would not be affected; indeed, if the Convention appeared to allow, through means of trusts, the evasion of certain taxes, its chances for ratification would be seriously compromised. Article 17 of the preliminary draft was adopted without discussion by the Fifteenth Session.	les regies de conflit du for et selon les lois d'application immediate. *Les articles* 17, 18 et *19* excluent le renvoi, prevoient l'ex-ception d'ordre public *et excluent tout effet de la Convention en matiere fiscale.* Les articles 20, 21 et 22 permettent d'6tendre les dispositions de la Convention aux trusts crees par decision de justice ou, au contraire, de restreindre l'application du chapitre III aux trusts lies aux Etats contractants et a ceux crees apres l'entree en vigueur de la Convention. Les articles 23 et 24 concer-nent les Etats comprenant plusieurs unites territoriales, tandis que l'article 25 donne priorite a d'autres conventions existantes ou futures sur la meme matiere. 165 Il était nécessaire de préciser dans la Convention que le droit fiscal ne serait pas touché; en effet, si celleci apparaissait comme permettant, au moyen de trust, d'échaper à certains impôts, sa ratification serait gravement compromise. L'article 17 de l'avant-project a été repris sanas discussion par la Quinzième session.

It is not clear exactly what Article 19 means. It seems there are two possible interpretations. The first is simple that a State may, without breaching the Convention, draft its tax laws to ignore a trust that is otherwise valid under the Convention (*i.e.*, the use of GAAR to refuse to recognize a trust would not breach the Convention). However, in the absence of a law stating specifically that the trust must not be recognized for tax purposes, a State must recognize it under the Convention, even for tax purposes.[65] In other words, Article 19 could mean that in the absence of any specific tax

65. Harris, *supra*, footnote 7, at pp. 398-399.

law to the contrary, a State must apply the Convention to recognize a trust for tax matters.[66] This is the interpretation apparently applied in Switzerland by one author who states: "The Swiss Article 19 of the Hague Trusts Convention preserves the contracting states'. unfettered authority on fiscal matters."[67] Another author, also writing on Switzerland, has the same view:[68]

> III. Reservation of Fiscal Sovereignty
>
> Pursuant to Article 19 thereof, "Nothing in the Convention shall prejudice the powers of States in fiscal matters."
>
> The tax treatment of trusts in Switzerland is the subject of a flourishing administrative practice. More and more frequently, the issue arises when a foreign citizen – or a Swiss citizen formerly domiciled abroad – comes or returns to reside in Switzerland having previously constituted a trust. The cantons seem to have varying tax practices, a natural though somewhat unfortunate consequence of the substantial powers they retain, particularly with regard to income tax (together with the Confederation), as well as wealth, gift and inheritance tax.
>
> Switzerland's ratification of the Convention *would not remove any tax powers from the cantons or the Confederation.* It would not require any amendment of existing rules, but would probably increase the frequency with which these questions are submitted to the tax authorities. This new situation might well incite our tax authorities to co-ordinate their practice to a greater extent. However, it would be neither conceivable nor desirable to adopt legislative measures to harmonise these practices on ratification of the Convention. [emphasis added]

See similarly Dyer's comment:[69]

> 5. Article 19 of the Convention, however, states that: "Nothing in the convention shall prejudice the powers of are not yet familiar with it, and secondly Netherlands states in fiscal matters". This was included because the Hague Conference, being a Conference on private international law, has no jurisdiction to draw up treaties dealing with tax questions.

---

66. Underhill and Hayton, *et al.*, *supra*, footnote 21, at para. 100.51.
67. Paolo Panico, "Switzerland" (2007), 13 Trusts & Trustees 534, at p. 535.
68. L. Thévenoz, "Trusts in Switzerland: Ratification of the Hague Convention on Trusts and Codification of Fiduciary Transfers", Publication de Centre d'études juridiques européennes, Genève (Zurich, Schulthess, 2001), at pp. 303-304, translated into English by M. Tschanz-Norton, available online: <http://www.cdbf.ch/site/wp-content/uploads/2013/08/Trusts_in_Switzerland_EN_.pdf, p. 177>.
69. "International Recognition of the Trust Concept" (1997), 3 Trusts & Trustees 23. Dyer was, among other things, the U.K. representative for the drafting of the Hague Convention.

Another possible interpretation is that a State may completely ignore the Convention in tax matters. This is more strongly suggested by paragraph 22 than 165 of the Overbeck Report. This appears to have been the holding in the only case on point.[70] In 1998, the Netherlands Supreme Court decided a series of four cases involving non-Netherlands trusts. In paragraphs 3.4 and 3.5 of the decisions, the court states (unofficial translation):[71]

> Article 19 of the Convention entails that the Netherlands tax legislation can be applied *as if the Convention does not exist.* On the one hand, even if the conditions for non-recognition of the trust as set out in Article 13 are not met, the Convention does not preclude ignoring the existence of a trust if the application of the Netherlands legislation so requires. On the other hand, if that is the case, invoking application of Article 13 and the civil-law consequences attached thereto is not necessary, and this would violate the intent of the Convention in regard to promoting the recognition of trusts. Given this situation, it would be most in accordance with the Intent of the Convention and according to

70. The cases are reported in several articles:
   (i) F. Sonneveldt, *What's Going On In. . . . European Taxation*, Vol. 39, No. 4, p. 190 (May 1999) (much of this article appears to be reproduced in F. Sonneveldt, "Trusts in the Netherlands", ch. 11 of M. Cadesky and R. Pease, *Trusts and International Tax Treaties* (Haywards Heath, U.K., Tottel Publishing, 2006), p. 108 at p. 119 *ff*);
   (ii) J. van Haaren, "The Netherlands: Decree on Tax Treatment of Trusts" (2000), 40 *European Taxation - Amsterdam* 245;
   (iii) A. Dyer, "International Recognition and Adaptation of Trusts: The Influence of the Hague Convention" (1999), 32 Vand. J. Transnat'l L. 989, at p. 1017, note 119 and text;
   (iv) D. Waters, "The Trust in Civil Law Jurisdictions – The Dutch Experience" (1999), 7 J. Int'l Trust and Corp. L. 131, cited in D. Waters, "The Hague Convention Twenty Years On", ch. 3 of Michele Graziadei, Ugo Mattei, Lionel Smith, eds., *Commercial Trusts in European Private Law* (Cambridge, U.K., Cambridge University Press, 2005), p. 56 at p. 91, note 41.

71. This translation is taken from Xavier Auerbach, "Taxation of Trusts in the Netherlands", in Robert Danon, Jean-Luc Chenaux and Nathalie Tissot, eds., *Taxation of Trusts in Civil Law Countries: 2nd Symposium of International Tax Law* (Zurich, Schulthess, 2010), p. 223 at p. 236. At p. 225, Mr. Auerbach does not go so far as to say that Article 19 allows a State to ignore the Convention completely. He says, and I agree, that Article 19 leaves the State unaffected so far as its tax legislation is concerned. He describes the Convention as a "recognition convention", on the basis of which the State commits to attaching certain legal consequences to certain legal concepts described in the Convention.
   Essentially the same comment is made by Professor Florence Guillaume, "The Hague Trusts Convention and Selected Questions in Swiss Private International Law" (2010), *Taxation of Trusts in Civil Law Countries* 1, at p. 4: "Nor does the Convention have an effect on the tax law of the contracting States (Article 19 HTC). Each contracting State can thus adopt its own regulation as regards trusts; the fiscal competence of the contracting States remains unchanged."

> the information given in the annex to the Conclusion of the Advocate General under 3.2 in accordance with the interpretations prevailing in tax law practice prior to the effective date of the Convention, for the answer to the question of how the existence of a trust legally established under foreign law should be taken into account for tax purposes, to first examine what legal consequences should be attached to the trust according to the law applicable to that trust, and then to consider how Netherlands tax law should be applied to those legal consequences. [emphasis added]

This appears to say that Article 19 means that the Hague Convention is ignored completely for tax purposes, but in policy the Dutch court should determine the system of law to which the trust is most closely connected and then apply that law to see if the trust is valid and then if it is, it will be valid for Dutch tax purposes. However, there is no authority cited for this decision and no reference to Overbeck's Report or any other material.

Given that Article 19 simply says that it does not "prejudice" a State's powers in fiscal matters, rather than saying that the Convention does not apply in fiscal matters, and that it was inserted only to ensure the neutrality of the Convention in tax matters,[72] the first interpretation seems more reasonable.[73] I agree with the following comment:[74]

> While the above rules may be useful in resolving conflicts of law issues, they may not be used to frustrate a state's jurisdiction to tax a given trust. Article 19 of the Hague Convention provides that nothing in the convention shall prejudice the power of states in fiscal matters. It is unclear whether article 19 is aimed at preventing the use of the Hague Convention in fiscal matters generally, or only in those circumstances where it could be used to negate a state's jurisdiction to tax. We suggest that the latter interpretation of article 19 better conforms with the wording of article 19, and therefore that the application of the Hague Convention should not be generally dismissed in analyzing tax issues.

In other words, a state that has ratified the Convention is obliged to recognize the trust *qua* trust for all purposes. It cannot treat the trust as invalid for taxation purposes. But what tax consequences it attaches to a trust which it is required to recognize by virtue of the

---

72. Harris, *supra*, footnote 7, at p. 397.
73. Given that Canada entered certain reservations when it ratified the Convention but not for tax matters, no such reservation should be found.
74. P.A. Lessard, C.A. Kyres, and C.C. Gagnon, "Treaty Benefit Entitlements of Trusts, Partnerships, and Hybrid Entities" in *1997 Canadian Tax Foundation Conference Report* (Toronto, Canadian Tax Foundation, 1998), p. 33:1 at p. 33:10.

Convention is entirely a matter for the local law jurisdiction and is not regulated by the Convention. "Waters on Trusts" states:

> There are other limits in the Convention that the trust creator must note. It is a general principle of the conflict of laws that a court will not enforce a foreign legal system to the extent that a provision of that system is contrary to the public policy or ordre public of the forum's legal order. This provision is enshrined in the Convention and the Acts. This, however, *is a stringent test* because the value of international polity must also be weighed. It is a strong statement to say that a foreign norm is so unconscionable that it must be disregarded. It is relevant to violations of fundamental values, such as human dignity. By art. 15, the Convention allows the court to apply the mandatory provisions of another system. Let us assume that the settlor is domiciled in State A, and the law of State A restricts the freedom of a person to dispose of his property with absolute freedom. Even if the settlor chose the law of State B, which imposes no such restriction, the forum could enforce the rules of State A. Article 16 provides that regardless of the settlor's choice, the forum may apply its own mandatory rules, if those rules apply "irrespective of the conflict of laws." Paragraph two of art. 16 provides that the forum can, in exceptional circumstances, apply such mandatory rules even of another state. *Article 19 codifies the universal principle that conflict of law rules for private law do not extend to fiscal matters; a court will not enforce the taxation laws of another system, and a taxpayer cannot avoid taxation in the forum by choosing another law.*
>
> However, *none of these further limits seem strong enough to prevent the choice of a law which, for example, allows non-charitable purpose trusts*, even though the forum would not allow them. Such non-recognition is a rule of trust law that represents a concern about enforceability, rather than a fundamental value protected by the legal system. Many have argued, even within the common law, that such trusts are or should be enforceable. And the same is true of the law governing perpetuities. This suggests that in both of the examples above — a choice of Wisconsin law to govern what is otherwise a Prince Edward Island trust, and a choice of Jersey law to govern what is otherwise an Alberta trust — the choice could well be effective because in both cases the Convention governs. In the latter case, as we have seen, it may be that art. 13 would permit the court to deny recognition. [footnotes omitted, emphasis added]

That the first interpretation of Article 19 is the better one appears from comparing that Article to Articles 15 and 16 of the Convention, which state:

> 15. *The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those*

provisions cannot be derogated from by voluntary act, relating in particular to the following matters –

a) the protection of minors and incapable parties;
b) the personal and proprietary effects of marriage;
c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
d) the transfer of title to property and security interests in property;
e) the protection of creditors in matters of insolvency;
f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

16. *The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations*, irrespective of rules of conflict of laws.

If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that State which have the same character as mentioned in the preceding paragraph.

Any Contracting State may, by way of reservation, declare that it will not apply the second paragraph of this Article.

As emphasized by the underlined portions, Article 15 states that local law (*lex fori*), in various areas of law, will override the Convention.[75] The list in Article 15 is not exhaustive,[76] but tax is likely not included because it is dealt with in Article 19. Article 16

75. One author has noted "the effectiveness of a choice of law provision under the Convention is subject to the provisions of Article 15 . . . under which the Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum" — in other words, the rules of law that the forum would apply for public policy reasons regardless of the choice of law that would otherwise apply under Articles 6 or 7 — "in so far as those provisions [of the law designated by the conflicts rules of the forum] cannot be derogated from by voluntary act . . . " See Michael W. Galligan, "The Hague Convention on Trusts and the Uniform Trust Code", paper presented on Wednesday, May 23, 2012 at the session entitled "The Effect of the Hague Convention on the Law of Trusts Domestically and Internationally", presented by the International Academy of Estate and Trust Law (Istanbul), at p. 8. Article 6 is also subject to Article 13. M.W. Galligan, "United States Trust Law and the Hague Convention on Trusts" (Fall 2000), 33 NYSBA Trusts and Estates Law Section Newsletter 37, at p. 39; L. Smith, ed., *The Worlds of the Trust* (Cambridge, U.K., Cambridge University Press, 2013), at ch. 5, p. 89 and following.

76. *Charalambous v. Charalambous*, [2005] 2 W.L.R. 241 (U.K. C.A.), at para. 32.

says the Convention does not apply to areas of local law that are required by the *lex fori* in international situations. Therefore, the Convention cannot overrule an international tax law of the *lex fori*. By comparison, Article 19 does not say that the Convention does not prevent the application of the tax law of the *lex fori*; it *permits* the State to pass a law to that effect. Canada has not done so.

The first interpretation is confirmed specifically by the following passage:[77]

> 3. Subject Matter Covered. As to subject matter, the Convention specifies that "[n]othing in the Convention shall prejudice the powers of States in fiscal matters." (Article 19) Even though this provision is traditional for the Hague Conference, the exclusion is worth noting, fiscal considerations holding an important place in the concerns of trust law specialists. To take only one example, a trust set up by the deceased for the benefit of the deceased's grandchildren may offer the advantage of "skipping a generation". In countries which know the institution of trust, these techniques *generally occasion appropriate tax regulations.* But there are not necessarily such rules in non-trust countries. However, the growing importance of trusts with assets in civil-law countries call for the development of appropriate tax rules in those countries. Although the Convention *could not undertake to resolve such problems*, it will serve to provide civil-law countries with a better understanding of the institution of trust and *thus assist in the development of appropriate tax provisions in non-trust countries.* [emphasis added, footnotes omitted]

Thus, the better interpretation is simply that the Convention was to be "tax-neutral": it does not change how a country taxes an offshore trust, but it requires that trust to be recognized for tax purposes.

The strongest evidence that Article 19 means simply that the Convention is tax-neutral, rather than that a State may disregard the Convention for tax purposes, comes from the discussion on, and the reflection on the discussion, of the Special Commission.

In June 1982, 21 delegates from various countries, including Canada, met as a Special Commission to prepare for the Fifteenth Session of the Hague Conference on Private International Law (the actual conference that developed the final Convention had 32 delegates). The Special Commission's mandate was to draft a Convention for consideration by the delegates as a whole.[78]

In its report, the Special Commission concluded: "The tax

77. Gaillard and Trautman, *supra*, footnote 60, at pp. 321-322. Both authors were involved in the drafting of the Convention on behalf of France and the United States, respectively.

78. See Waters, "Twenty Years On", *supra*, footnote 70, at p. 56.

treatment of trusts should not be dealt with directly in the Convention."[79] Thus, the Convention did not require that a court ignore the Convention when dealing with the tax aspects of a trust, merely that the Convention did not contain any tax rules. At no point in the subsequent voting on Article 19 did any State contradict or suggest that this comment was incorrect.[80]

Dyer, in commenting on Article 19, states:[81]

> Care was taken to assure the tax authorities of the various States that they would not in any way be bound by the provisions of this Convention, which are directed to the effects of trusts in civil law but not in public law. Article 19 provides: "Nothing in the Convention shall prejudice the powers of States in fiscal matters". It is to be hoped, however, that the effort towards analysis of the trust device and its relationships which has been involved in the preparation of the Hague Convention will be of some assitance [*sic*] to the fiscal authorities of States which do not have trusts in their own law, in determining appropriate ways to approach trust interests for tax purposes.

Thus, for private law purposes, the Convention applies to recognize a trust. What the tax consequences are of such a trust is left entirely to the public tax law of the State involved.

14. Conclusion on Article 19

If Article 19 said: "This Convention does not apply to trusts in

---

79. Conclusions drawn from the discussions of the Special Commission of June 1982, published in A.E. von Overbeck, *Proceedings of the Fifteenth Session (1984), Tome II, Trusts – applicable law and recognition* (The Hague, Netherlands, HCCH Publications, 1985), pp. 136 at 140, para. 13. See similarly Dyer, "Introductory Note", *supra*, footnote 8, at p. 278 and Dyer and Van Loon, "Report on Trusts and Analogous Institutions", *Proceedings of the Fifteenth Session (1984), Tome II, Trusts – applicable law and recognition, ibid.*, p. 10 at pp. 101-102, paras. 201-202. Note the reference to this article in the Overbeck Report at para. 2, note 2.

80. It follows, with all due respect, that I disagree with Waters, "Twenty Years On", *supra*, footnote 70, at p. 69, when he says that a State may "ignore" the Convention when it comes to tax issues. Waters makes the same comment in "The Dutch Experience", at p. 151, note 57. Waters in "Twenty Years On" cites D. Hayton, "The Hague Convention on the Law Applicable to Trusts and on Their Recognition" (1987), 36 Int'l and Comp. L.Q. 260, but at p. 280 of that article Hayton says nothing about States ignoring the Convention in tax matters. He merely quotes Article 19 but draws no conclusion as to its effect.

    Waters in "Dutch" at note 57 also suggests that the Netherlands Supreme Court did *not* invoke Article 19 to ignore the trust at issue. That suggestion also appears to be incorrect.

81. Dyer, "Introductory Note", *supra*, footnote 8, at p. 281.

relation to fiscal matters", its meaning would be clear. On the other hand, if said: "This Convention applies in fiscal matters but does not determine the fiscal consequences relating to a trust", its meaning also be clear. As worded ("Nothing in the Convention shall prejudice the powers of States in fiscal matters"; "La Convention ne porte pas atteinte à la compétence des Etats en matière fiscal"), its meaning is somewhat ambiguous. Based on Article 19's wording, a comparison of it to other Convention Articles, its purpose, the Overbeck Report and other writings on Article 19, and based particularly on the Special Commission's comments, my view is that it means simply that the Convention is neutral as far as fiscal matters go in relation to trusts: the Convention (assuming it otherwise applies) requires a State to recognize a trust as being valid, but the fiscal consequences of such validity is determined solely by the State's internal fiscal laws (and any tax treaties to which it may be a party).

15. Is the Convention Irrelevant Anyway? Canada's Conflict of Laws Rules

Assuming that the Tax Court is sitting in Ontario, Québec, or one of the Territories, none of which have adopted the Convention, or assuming that for whatever other reason the Convention does not apply, would the Tax Court be required to recognize the validity of a foreign non-charitable purpose trust anyway? In my view the answer is yes. The Tax Court would be required to apply Canada's common-law conflict of laws or private international law rules to the trust.[82]

The Tax Court will first have to decide which system of law to look to in determining whether a particular trust was created validly. Under Canada's rules of conflict of laws, the answer is as follows:[83]

> A trust *inter vivos* of interests in movables should be considered valid if it complies with the internal law of a place expressly or impliedly designated by the settlor to govern the validity of the trust, provided that this place has *a* significant relationship to the trust and provided that the application of its law does not violate a strong public policy of the place

82. Article 14 of the Convention states that "The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts". Thus, a taxpayer would have the choice of citing the Convention of conflict of laws, whichever is more favourable.

83. Castel and Walker, *supra*, footnote 7, Vol. 2, section 28.2.b.

with which, as to the matter at issue, the trust has its *most* significant relationship.

Accordingly, the settlor may designate expressly the proper law of the trust, and in most cases he or she will do that, so that the Tax Court will be required to apply that law in evaluating the essential validity of the trust.

If no law is chosen expressly or implicitly, then the applicable law will be that to which the trust is most closely connected. In deciding which law that is, following statement has been made:[84]

> 166. By Article 7 of the Hague Convention, in the absence of a choice of the applicable law, a trust is governed by the law with which it is most closely connected. In ascertaining that law reference is to be made "in particular" to (a) the place of administration designated by the settlor – no such place was designated; (b) the situs of the assets of the trust – this was Bermuda if account only is taken of the shares in Kaycee and Chellsons which were settled, but many other countries (especially in Asia and Africa) if the underlying assets are taken into account; (c) the place of residence or business of the trustees – Mr Rupchand and Mr Bharwani were resident in London at the date of the settlements, and the evidence of Ram's residence was inconclusive, although he then had substantial London connections; (d) the objects of the trust and the places where they were to be fulfilled – there was no one place to which these factors could point. In the light of the paucity of authority at common law, *I doubt if there is any significant difference between the Article 7 and the likely approach at the common law.*
>
> 167. Because the approach to this question was not the subject of argument (and, in view of my other holdings, further argument would serve little point) I will simply indicate that in my judgment it is likely that Indian law was the law with which the trusts were most closely connected. They were drafted in India by Indian lawyers for a family of Indian origin with strong Indian ties, but with international interests, and it is very doubtful that the fact that at least two of the trustees were in London, and that it was contemplated (but not required) that administration would (at least initially) take place in London would have made English law the law with the closest connection. [emphasis added]

This reflects the law in Canada[85] and Australia.[86]

Accordingly, whether under the Convention or common-law

84. *Chellaram v. Chellaram (No. 2)*, [2002] EWHC 632 (Ch), [2002] 3 All E.R. 17 (Ch. D.).

85. Grozinger, *supra*, footnote 32; Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007), 52 McGill L.J. 555, at p. 564.

86. Anne Wallace, "Choice of Law for Trusts in Australia and the United Kingdom" (1987), 36 Int'l & Comp. L.Q. 459.

conflict of laws rules, the Tax Court would be required to recognize as essentially valid any trust that is valid under the law of the country with which it is most closely connected. Assuming a settlor established a non-charitable purpose trust in say, the Cayman Islands, with Cayman trustees, a Cayman bank account, and that the administration of the trust took place in the Cayman Islands, the proper law of the trust would clearly be the Cayman Islands, even if the settlor were from Canada or another country.

As noted above, Article 13 states that no State shall be bound to recognize a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.[87] Thus, if the settlor were from a non-trust country or a country that did not have a non-charitable purpose trust, and if the settlor's residence were the only other factor (apart from the choice of law, the administration of the trust and the residence of the trustees) that was a significant element of the trust, then the Tax Court would have the right (but not the obligation) to refuse to recognize the trust under the Convention. But in that case conflict of laws rules would apply to make the proper law of the trust the Cayman Island laws anyway, so the net result would be to recognize the trust as being valid in either case.

The conflict of law rule set out above states that the law expressly or implicitly chosen by the settlor prevails, provided that this place has *a* significant relationship to the trust and provided that the application of its law does not violate a strong public policy of the place with which, as to the matter at issue, the trust has its *most* significant relationship.

This seems to mirror Article 13: provided the trustees resident in the country the law of which is chose to govern the trust, the first test will be met, in that that place will have *a* significant relationship to the trust. And even assuming the trust has its most significant relationship with another place, such as Canada, the use of a non-charitable purpose trust would not seem to violate any strong public policy rule: the question should always be: can a court enforce the trustee's duties under the trust? If so, public policy is satisfied.

87. To some extent this seems to duplicate Article 5, which provides that: "The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved."

16. Conclusion

There has not yet been a clear, definitive statement in Canada to the effect that a non-charitable purpose trust is valid in Canada, although some cases have come tantalizing close.[88] But such trusts are permitted statutorily in many countries. Under the Convention or Canada's conflict of laws, such trusts should be recognized as being valid for Canadian tax purposes.

88. For a similar conclusion in English law, see Doyle and Carn, "Purpose Trusts", *supra*, footnote 64, at p. 259, section 5.88. This chapter contains an in-depth analysis of the issue of whether non-charitable purpose trusts are valid in the English law of equity.