

THE BUSINESS OF PURPOSE TRUSTS

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In an age of increased awareness around climate change, wealth inequality and employee well-being, many private business owners are rethinking the fundamentals of corporate ownership. This has prompted a rise in the popularity of long-term “purpose” trusts as an alternative ownership strategy, particularly in the US. The recent decision in Fletcher’s Fields Ltd. v Ontario Rugger Union has served as a timely review of the law of purpose trusts in Ontario. Meanwhile, the recognition of non-charitable purpose trusts in Alberta’s new Trustee Act could provide a pathway for other Canadian jurisdictions to follow.

In light of these developments, greater discussion about the opportunities and challenges of the law of purpose trusts is warranted. Part one of this paper considers the development of the purpose trust, a concept rooted in common law. Part two draws attention to Patagonia, Inc.’s conversion to a purpose trust, which is a high-profile example of the broader movement towards an emerging form of corporate ownership. Part three applies the current Canadian law to the concept of purpose trusts, highlighting the possibilities and conflicts. Part four considers alternative structures for purposeful business ownership in Canada, offering up two key structures: not-for-profit organizations and employee ownership trusts. Finally, in Part five, the author suggests how legislators in Canada’s provinces and territories can modernize their respective trust statutes to facilitate the use of non-charitable purpose trusts as a viable alternative business ownership strategy for socially minded founders.

À une époque où les questions liées aux changements climatiques, aux inégalités de richesse et au bien-être des travailleurs retiennent de plus en plus l’attention, de nombreux propriétaires d’entreprises privées remettent en question les principes fondamentaux de la propriété d’entreprise. Cette évolution a contribué à une hausse de la popularité des fiducies à long terme fondées sur une « mission », vues comme une stratégie de propriété différente, en particulier aux États-Unis. La récente affaire Fletcher’s Fields Ltd. v. Ontario Rugger Union est arrivée à point nommé comme occasion de réviser le droit des fiducies finalitaires en Ontario. Par ailleurs, la reconnaissance des fiducies finalitaires non caritatives dans la nouvelle Trustee Act de l’Alberta pourrait ouvrir la voie à d’autres provinces et territoires canadiens.

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Compte tenu de ces développements, il convient d’approfondir la réflexion sur les possibilités et les défis liés au droit des fiducies finalitaires. La première partie de cet article porte sur l’évolution de la fiducie finalitaire, un concept issu de la common law. La deuxième partie met en lumière la transformation de Patagonia, Inc. en fiducie finalitaire, un exemple très médiatisé de la tendance générale vers une nouvelle forme de propriété d’entreprise. Dans la troisième partie, l’auteur examine le droit canadien actuel au concept des fiducies finalitaires, et souligne les possibilités et les conflits qui en découlent. La quatrième partie traite des différentes formes de propriété d’entreprise axée sur une mission au Canada, en présentant deux structures clés : les organismes sans but lucratif et les fiducies collectives d’employés. Enfin, dans la cinquième partie, l’auteur propose des pistes de réforme aux législateurs des provinces et des territoires du Canada dans l’optique de moderniser leurs lois respectives sur les fiducies, et de faciliter ainsi le recours aux fiducies finalitaires non caritatives comme stratégie viable de propriété d’entreprise pour les fondateurs soucieux des enjeux sociaux.

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I. Introduction

The largest generational shift of assets has already begun, with trillions of dollars expected to pass to the next generation within just the next decade. With baby-boomers owning nearly half of all small businesses in Canada² succession planning for these businesses has become critically important. Historically, business owners have demanded tax-focused, transactional business succession plans designed to maximize wealth accumulation and preservation. But with increasing awareness around sustainability, wealth inequality and employee welfare, many business owners are looking beyond profits, focusing instead on preserving the *purpose* of their businesses. For these clients, the main goals of a business succession plan are to protect their company's mission, support employees and benefit the community. These objectives are also more likely to align with those of their socially minded millennial heirs. The challenge for advisors is finding workable solutions to meet these changing needs. One tool being utilized in many international jurisdictions, including the US, is the non-charitable business purpose trust. In this paper, the author considers the development of the law in this area, how this type of trust is being applied in the context of business succession planning, and the scope for its use in Canada. Finally, the author suggests how the law in Canada can modernize to facilitate the use of non-charitable purpose trusts in the context of private business ownership.

II. Development of the Purpose Trust

When designing estate plans for clients, advisors generally consider the common law trust to be the most flexible and useful tool available. The concept and use of trusts have expanded and evolved over the years, providing planning solutions for a wide range of objectives. This is well demonstrated by the emergence of the purpose trust.

It is an established principle of common law that for a trust to be valid it must satisfy the “three certainties.” These are certainty of: (i) intention (of the settlor), (ii) subject matter (trust property), and (iii) objects (beneficiaries).³ Those familiar with drafting and interpreting trusts will know that the three certainties are the constituent elements that must be found before an express trust can be declared.

² See Tony Mahabir, “[Baby Boomers Own 42% of Small Businesses in Canada—What Happens When They Retire?](#)” (16 November 2022), online (Knowledge Bureau Report): <tinyurl.com/j62xe9tz> [perma.cc/3NS7-BTB7].

³ *Knight v Knight* (1840), 3 Beav 148 at 173, 49 ER 58 (Ct Ch).

It may be surprising, therefore, that certain types of trusts are permitted notwithstanding non-compliance with the third certainty (also known as the “beneficiary principle”).⁴ The most well-known of such trusts is the charitable purpose trust, which has been described in the *Restatement of Trusts* as “a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.”⁵ Since this type of trust is established exclusively for the benefit of a charitable purpose, it is in obvious violation of the beneficiary principle. That is to say that there are no definite objects (or persons) within its terms in whose favour performance of the trust may be decreed. This raises the interesting question of enforcement: In the absence of ascertainable beneficiaries, who is responsible for enforcing its terms? For a charitable purpose trust, it is the jurisdiction’s Attorney General (who represents the public) who assumes this role.

The accepted list of charitable purposes in Canada has its origins in the ancient English case of *Commissioners for Special Purposes of Income Tax v Pemsel*.⁶ In its decision, the House of Lords concluded there are four categories (also known as “heads”) of charitable purposes, namely: (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion, and (4) other purposes beneficial to the community not falling under any of the preceding heads. This is the definition adopted by the Canadian Revenue Agency to this day.

Another less well-known exception is the non-charitable purpose trust. Again, this type of trust is established not for the benefit of definite beneficiaries, but instead pursuant to a purpose beyond the traditional charitable purposes, meaning it too is non-compliant with the beneficiary principle as we know it. Historically, most non-charitable purpose trusts were found by the courts to be invalid for two reasons: (i) there were no ascertainable beneficiaries to enforce the trust, and (ii) such trusts violated the common law rule against perpetuities.⁷ In recent years, however, the law has developed and modernized to overcome these issues, enabling the non-charitable purpose trust to take hold across the world, including

⁴ See *Morice v Bishop of Durham* (1805), 10 Ves Jr 522 at 539, 32 ER 947 (Ct Ch).

⁵ American Law Institute, *Restatement (Second) of the Law of Trusts* (St Paul: American Law Institute Publishers, 1959) § 348.

⁶ *Commissioners for Special Purposes of Income Tax v Pemsel*, [1891] AC 531 at 583 (HL) [*Pemsel*].

⁷ The common law rule against perpetuities is a legal principle that prevents property from being tied up indefinitely, ensuring it can be freely transferred. It requires that a future property interest must “vest” (become certain) no later than 21 years after the death of all “lives in being” (people alive at the time the interest was created). If there is any possibility that an interest might vest beyond this period, it is rendered void from the start.

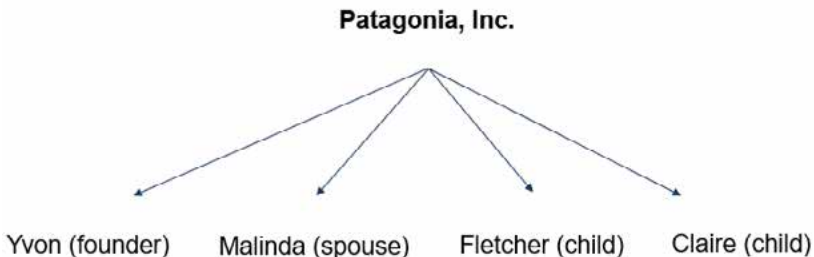
some offshore jurisdictions, parts of Europe and the US. Perhaps the most significant use of the non-charitable purpose trust, and the one that has caught the attention of the trust community, is the idea of holding a family business (or control of the family business) in a business purpose trust.

III. Case Study: Patagonia Inc

In 2022, the California-based outdoor apparel behemoth, Patagonia, Inc (“Patagonia”), was restructured. At the time of restructuring, the company’s founder, Yvon Chouinard, was 83 years old. In planning his succession, Mr. Chouinard’s instructions were clear: purpose before profit. Above all, he wanted to ensure the company he had built would continue its mission, that is, “to save our home planet.”⁸ With his two children unwilling to assume full responsibility of the company, Mr. Chouinard’s options were limited. The easiest paths, selling the company or taking it public, would have provided Mr. Chouinard ample financial resources to fund environmental initiatives. In both instances, however, Mr. Chouinard was concerned about loss of core values, employee welfare and long-term viability.⁹

Under the old structure, the Chouinard family—Yvon, his spouse, and their two children—were Patagonia’s only shareholders.

Figure 1: Before restructure



The company was restructured such that its shares were split into two classes, which were then vested in two newly established entities.

The first class of shares—the non-voting shares—represented 98% of the economic rights in the company. These shares were transferred to Holdfast Collective, a nonprofit organization for US tax purposes.¹⁰

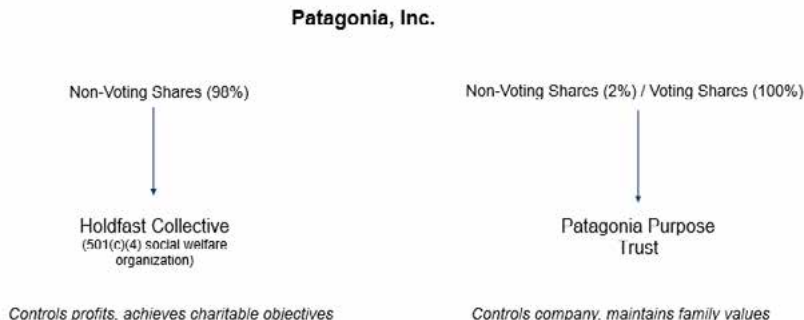
⁸ See Yvon Chouinard, “[A Letter from Yvon Chouinard](#)” (14 September 2022), online: <tinyurl.com/ym8kubr4> [perma.cc/HQ5G-ZSF2].

⁹ See Yvon Chouinard, “[Earth Is Now Our Only Shareholder](#)”, online: Patagonia <patagonia.ca/ownership/> [perma.cc/N4HN-BL7T].

¹⁰ The Holdfast Collective was established as a 501(c)(4) social welfare organization. This is one class of nonprofit organization according to Internal Revenue Code (26 USC

The second class of shares—the voting shares—held 100% of the voting rights and the remaining 2% non-voting shares. These shares were transferred to the Patagonia Purpose Trust.

Figure 2: *After restructure*



Following the restructure, Patagonia remains privately held. Any profits generated by the non-voting shares are distributed as a dividend to the Holdfast Collective, which then uses these to achieve its charitable objectives.¹¹ The Patagonia Purpose Trust controls the company. The trustee is directed by an advisory committee comprising the Chouinard family and their closest advisors to ensure the trust follows its purposes.¹²

The result of this is that Patagonia will continue to operate as a business, with its profits being redirected from individual shareholders to the Holdfast Collective. Meanwhile, the Patagonia Purpose Trust ensures that management can continue to be held accountable pursuant to the values (purposes) of the Chouinard family.

In the US, the *Uniform Trust Code* (“UTC”) permits the creation of a trust for a non-charitable purpose even if the trust lacks an ascertainable beneficiary.¹³ The lack of a beneficiary is addressed by the requirement for an enforcer.¹⁴ But the recognition of non-charitable purpose trusts only gets us so far, and the requirement for a purpose trust to terminate after 21 years in compliance with the common law rule against perpetuities¹⁵ provides serious practical hurdles for business owners considering establishing a purpose trust to hold a business. Some US states have had the foresight to remove this hurdle, with Delaware, New Hampshire,

tit 26).

¹¹ *Supra* note 9.

¹² Susan N Gary, “The Changing Landscape of Business Succession: How and Why Purpose Trusts Matter” (2023) 18 Ohio State Business Law Journal 41 at 47.

¹³ Uniform Trust Code § 409(1) (2000).

¹⁴ *Ibid* at § 409(2).

¹⁵ *Ibid* at § 409(3).

Oregon and South Dakota all replacing the common law rule against perpetuities with their own statutory rules permitting such trusts to continue in perpetuity. Other US states have modified the rule against perpetuities by extending it. In California, the creation of a non-charitable purpose trust is permitted under the California Probate Code and the rule against perpetuities is extended to 90 years,¹⁶ making it a viable option for the creation of the Patagonia Purpose Trust. Better still, Utah's Uniform Statutory Rule Against Perpetuities allows for trusts to exist for a much longer period of up to 1,000 years.¹⁷ Accordingly, a business owner considering establishing a purpose trust to hold a business would look for a jurisdiction that has not only enacted specifically designed purpose trust legislation, but that has also abolished (or amended) the common law rule against perpetuities.

Some other international jurisdictions have been more intentional with their purpose trusts legislation. For example, Guernsey has a thorough purpose trust regime embedded in the *Trusts (Guernsey) Law*, 2007 which permits perpetual trusts with flexible non-charitable purposes.¹⁸ Similarly, Bermuda,¹⁹ the Cayman Islands,²⁰ the Bahamas²¹ and Gibraltar²² have all adopted specific purpose trust law. The efforts of these jurisdictions to develop the law of purpose trusts represent a deliberate attempt to address the potential uses of purpose trusts and perhaps attract business through their use. For the idea of purpose trust business ownership to be pushed from the margins to the mainstream, more jurisdictions should develop their (often dated) legislation on purpose trusts and follow the lead of certain US states and other jurisdictions pioneering this area of law.

IV. Canadian Legal Landscape

So, how does this structure hold up in Canada?

As the law currently stands, non-charitable purpose trusts are only permissible in the Provinces of Québec and, to a more limited degree, Alberta and Ontario.

By far the furthest ahead of all the common law provinces and territories in Canada, the Province of Alberta's *Trustee Act*²³ includes

¹⁶ Cal Prob Code §§ 15211, 15212 (West 1990).

¹⁷ Utah Code §75-2-1203 (1998).

¹⁸ *Trusts (Guernsey) Law* 2007 (Guernsey), s 12.

¹⁹ *Trusts (Special Provisions) Amendment Act* 1998 (Bermuda), s 12A.

²⁰ *Trusts Law (2011 Revision)* (Cayman Is), 2011, s 99.

²¹ *Purpose Trusts Act* 2004 (Bahamas).

²² *Purpose Trusts Act* 2015 (Gibraltar).

²³ *Trustee Act*, SA 2022, c T-8.1.

new provisions specific to non-charitable purpose trusts and, crucially, permits such trusts to exist indefinitely. Notably, it opens up additional possibilities in which a valid non-charitable purpose trust can be created, including where it is already recognized by the common law as well as for a matter specified by regulation.²⁴ Both categories have potential as a source of new non-charitable purpose trusts in Alberta, though it is worth noting that at common law the few non-charitable purposes that are recognized as valid are “regarded as anomalous and exceptions”²⁵ and limited to a few categories of testamentary trusts.

The Province of Ontario’s *Perpetuities Act*²⁶ will save a non-charitable purpose trust provided it is for a “specific non-charitable purpose that creates no enforceable equitable interest in a specific person.”²⁷ However, the absence of specific provisions recognizing, validating and regulating non-charitable purpose trusts makes their use in the Province uncertain.

Fortunately, the recent decision of the Ontario Superior Court of Justice (the “Court”) in the case of *Fletcher’s Fields*²⁸ provides a useful summary of the key issues for these trusts from a Canadian perspective.

The question faced by the Court was whether a valid trust had been created. In its analysis, the Court examined whether the “three certainties” (as described at the beginning of this paper) required to create a valid trust at common law were present. The Court had no difficulty in concluding that there was enough evidence to demonstrate an *intention* to create the trust and that the *subject matter* of the trust was sufficiently clear, but it had trouble establishing certainty of *objects*.

With no ascertainable beneficiaries, the Court turned its attention to the law of purpose trusts. After noting that the promotion and development of the sport of rugby is not a charitable purpose, the Court considered whether a non-charitable purpose trust had been created.

Applying Ontario’s *Perpetuities Act* (“ON Act”), the Court concluded that the purpose of promoting and developing the game of rugby is sufficiently clear to be considered a “specific” non-charitable purpose. In doing so, it declared that a purpose trust can be charitable or non-

²⁴ *Ibid* at s 77(1).

²⁵ *Re Astor’s Settlement Trusts*, [1952] Ch 534 at 547.

²⁶ *Perpetuities Act*, RSO 1990, c P.9.

²⁷ *Ibid* at s 16.

²⁸ *Fletcher’s Fields Ltd v Ontario Rugger Union*, 2023 ONSC 373 at paras 20–21 [*Fletcher’s Fields*].

charitable, with the common feature of the two being the advancement of a purpose, as opposed to directly benefiting specific people.²⁹

On the issue of the rule against perpetuities, the Court noted that the ON Act will construe the trust as a power to appoint income or capital for a period of 21 years. If the income and capital is not fully appointed within this period, then the persons who would have been entitled to the property had the trust been invalid from the outset are entitled to the remaining income and capital.³⁰ In the case, the trust continued after the 21-year period, resulting in the application by the Court of the saving provision and the reversion of the trust property to the settlor.

Other notable developments can be seen in the Provinces of Manitoba,³¹ Nova Scotia³² and Saskatchewan.³³ All three have legislated to abolish the rule against perpetuities, meaning a trust may continue in perpetuity. Meanwhile, in the Provinces of British Columbia³⁴ and Prince Edward Island,³⁵ the period is extended to 80 years and 60 years respectively. Unfortunately, none currently permit the creation of a non-charitable purpose trust.

Notwithstanding the above-mentioned developments in Canada, the 21-year deemed disposition rule in the federal *Income Tax Act*³⁶ (“ITA”) is still a hurdle. This rule deems a trust’s capital property to have been disposed of for tax purposes on the 21st anniversary of the trust’s settlement, thereby giving rise, potentially, to a capital gain. To avoid the “21-year” rule, trusts will normally distribute their assets to the beneficiary in advance of that date. The practical challenge of this rule for business owners is obvious. Charitable purpose trusts are specifically exempted from the rule, but in the absence of a similar carve-out for non-charitable purpose trusts we can assume it would apply.

Moreover, Canadian-resident trusts are generally subject to tax on income at the top personal marginal rate applicable to individuals. Such trusts are able to deduct any trust income allocated and distributed to a

²⁹ See Jacqueline M Demczur & Esther SJ Oh, “[Ontario Court Finds Non-Charitable Trust for the Promotion of Rugby](#)” (23 February 2023), online: <tinyurl.com/mr3p5wp3> [perma.cc/6MGC-UM86].

³⁰ Darren G Lund, “[Can You Trust This Purpose? \(And Some Local Rugby History\)](#)” (26 July 2024), online (blog): <tinyurl.com/5ytz2h9x> [perma.cc/G65E-UNK7].

³¹ *Perpetuities and Accumulations Act*, RSM 1987, c P33, s 3.

³² *Perpetuities Act*, SNS 2011, c 42, s 3.

³³ *Trustee Act*, 2009, SS 2009, c T-23.01, s 58.

³⁴ *Perpetuity Act*, RSBC 1996, c 358, s 7.

³⁵ *Perpetuities Act*, RSPEI 1988, c P-3, s 1.

³⁶ *Income Tax Act*, RSC 1985, c 1 (5th Supp.), s 104(4).

beneficiary in the year, in which case it is reported and taxed in the hands of such beneficiary at their personal marginal tax rate.

Perhaps the closest we get to a common law non-charitable purpose trust in Canada is the “social trust” introduced with the adoption of the *Civil Code of Québec* (“CCQ”) in 1994.³⁷ Like a non-charitable purpose trust, a Québec social trust may be established for a purpose of public interest which goes beyond traditional charitable purposes, such as a cultural, educational, philanthropic, religious or scientific purpose. Additionally, the CCQ allows the creation of a private trust for any private purpose. Such a social or purpose trust can also be perpetual, unlike the common law, which permits perpetuity only for charitable trusts. Therefore, the CCQ contemplates a myriad of trusts which provide settlors with significant flexibility that is not possible under the common law.³⁸ However, a Québec social trust cannot make a profit or operate a business as its main object, and it would be subject to income tax under the *ITA* as described above.³⁹ These restrictions combined make the structure unviable for profit-oriented family businesses, notwithstanding such business’s social agenda.

V. Alternative Structures for Purposeful Business Ownership in Canada

Unfortunately, the law of purpose trusts remains too undeveloped in Canada for their use as a strategy in the private business context. Accordingly, Canadian business owners pursuing a strategy that puts social and community purposes at its core need to consider alternative available options. The author considers two such alternatives: (i) not-for-profit organization, and (ii) employee ownership trust. Each one is discussed in turn below.

A) Not-For-Profit Organization (“NPO”)

A NPO in Canada is a designation under the *ITA* that can apply to a variety of legal structures. In Canada, most non-profit organizations are incorporated as non-share capital corporations. To be a non-profit organization, certain conditions under the *ITA* must be met.⁴⁰ These are: (i) the organization is a club, society or association; (ii) in the opinion of

³⁷ *Civil Code of Québec*, 1991, art 1270 CCQ.

³⁸ For a detailed discussion of the use of Quebec social trusts see Troy McEachren & Christos Panagopoulos, “The Canada Not-for-Profit Corporations Act and Quebec Trust Law: A New Opportunity for Quebec Donors” (2016) 93:3 Can Bar Rev 793.

³⁹ A Quebec social trust would not be subject to the income tax rules generally applicable to trusts if it qualifies as a Not-For-Profit Organization.

⁴⁰ *Supra* note 39 at s 149(1)(l).

the Minister of National Revenue, it is not a charity within the meaning of subsection 149.1(1) of the Tax Act; (iii) it is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit; and (iv) its income is not distributed or otherwise made available for the personal benefit of a proprietor, member or shareholder (unless the proprietor, member or shareholder is an association which has as its primary purpose and function the promotion of amateur athletics in Canada). Like registered charities, non-profit organizations are generally exempt from income tax under the *ITA*.

On the face of it, NPOs appear to be useful vehicles for pursuing non-charitable social purposes. Importantly, they require a non-profit purpose to be embedded into their corporate structure, conferring a high degree of legal protection on the pursuit of a social purpose. They are not subject to the onerous investment restrictions applicable to registered charities, making them potential shareholders in family businesses. Finally, NPOs that are incorporated will benefit from all the advantages that follow from incorporation, including being organized as a separate legal entity and limited liability for members, directors and officers. However, NPOs are generally restricted in their ability to generate a profit, making the structure inappropriate for profit-oriented family businesses. Nevertheless, NPOs remain an important vehicle in Canada to further non-charitable social purposes in a family business context.⁴¹

B) Employee Ownership Trust (“EOT”)

Initially introduced in the 2023 Federal Budget, the EOT is a notable alternative business ownership structure in Canada. The new rules facilitate the use of an EOT to acquire and hold shares of a Canadian small business. For a trust to be considered an EOT under the new rules, it must be an irrevocable Canadian resident trust where at all relevant times: (i) the beneficiaries are all of the employees (excluding individuals and related persons who are significant owners or who are connected to the selling business owners); (ii) the interests of beneficiaries are the same, subject to a reasonable application of any combination of hours worked, length of service and remuneration; (iii) the trust cannot act in the interest of one or more beneficiaries to the prejudice of one or more other beneficiaries; and (iv) the trustees are elected by the beneficiaries and meet certain independent criteria.

Notably, there are a number of tax incentives for the business owner and family facilitating the use of EOTs. These include the doubling of the

⁴¹ Pamela Cross, “Alternatives for Purposeful Stewardship and Wealth Planning in Canada” (2023) 29:8 *Trusts & Trustees* 709 at 712.

normal five-year capital gains reserve and, subject to certain conditions, a temporary capital gains exemption on the first \$10 million of capital gains realized on the sale of a business to an EOT. This incentive will be in effect for the 2024, 2025 and 2026 tax years.⁴² Crucially, EOTs are also exempted from the 21-year rule (as described in Part 3). Otherwise, the EOT would be a taxable trust and would therefore generally be subject to the same rules as other personal trusts, meaning any trust income allocated or distributed to a beneficiary would be deductible and taxed in the hands of such beneficiary at their personal marginal tax rate, with any undistributed trust income in the year being taxed in the EOT at the highest personal marginal tax rate. Importantly, dividends will retain their character, permitting employees to access the dividend tax credit. However, these tax incentives are widely considered to be outweighed by the significant legislative and capital-related barriers.⁴³

The above alternative business ownership structures, as well as others not discussed in this paper, such as private foundations, achieve a variety of different objectives, including business continuity, charitable activities and the pursuit of social and community goals. However, there is no one entity that meets all of the requirements.⁴⁴ In jurisdictions where they are permitted, the perpetual business purpose trust is likely a better tool for business owners looking to lock in their mission, protect their employees and achieve long-term viability.

VI. A Path Towards Modernization

The global trend towards business ownership structures that prioritize a purpose agenda over a tax-focussed transactional one demands practical solutions. Often, these purposes go beyond the traditional categories of charity, requiring new structures to be introduced to meet these needs. The COVID-19 pandemic has only exacerbated the realities of today's many social problems, not least wealth inequality. The planning vehicles currently available in Canada are not able to offer an equivalent solution to the perpetual business purpose trust as permitted in parts of the US and elsewhere. The Ontario Superior Court of Justice decision in *Fletcher's Fields*⁴⁵ is timely, highlighting the key issues for non-charitable purpose trusts in Canada. In light of the current circumstances, the author considers that an opportunity has presented itself to conduct a review of

⁴² The legislation relating to this temporary capital gains exemption was included in Bill C-69 which received Royal Assent on June 20, 2024. It is in force as of Jan. 1, 2024.

⁴³ See Pamela L Cross, "[Employee Ownership Trusts: Business Succession Alternative for Private Businesses in Canada](#)" (12 July 2024), online (blog): <tinyurl.com/4y242cj6> [perma.cc/4USC-F6TA].

⁴⁴ *Supra* note 41.

⁴⁵ *Supra* note 29.

the law of non-charitable purpose trusts in Canada as it presently stands and think about how it can be modernized to facilitate their use as a viable alternative business ownership strategy for socially minded founders. The author suggests the following reforms as a starting point:

A) Recognition of Non-Charitable Purpose Trusts

Legislators should work towards recognizing purpose trusts in their respective trusts statutes. Many US states have modeled their respective statutes on the UTC, introducing different requirements for different types of purpose trusts, including stewardship trusts and general non-charitable purpose trusts. This would be a good place to start for others. In Canada, the Province of Alberta is the only jurisdiction to introduce specific purpose trust provisions into their provincial trusts legislation. It will be interesting to see how the law develops in the Province as more non-charitable purpose trusts become legally recognized and a specific list of acceptable non-charitable purposes is introduced under its newly anticipated regulation.

B) Modify the Common Law Rule Against Perpetuities

The common law rule against perpetuities is problematic for a trust holding a business. To avoid this, legislators in Canada should modify the rule in their own respective provincial legislation. At the date of this paper, the Provinces of Manitoba, Nova Scotia and Saskatchewan have already introduced provisions into their perpetuities legislation abolishing the rule. Meanwhile, the Provinces of British Columbia and Prince Edward Island have extended the perpetuity period to 80 and 60 years respectively. However, the Provinces of New Brunswick and Newfoundland and Labrador have retained the original common law rule, as has the Province of Ontario, notwithstanding the introduction of certain saving techniques to be applied in cases where a perpetuity problem remains after the expiry of the perpetuity period. For those Provinces and Territories where the perpetuity period for trusts is still defined by the original common law rule, consideration should be given to either extending the perpetuity period or, better still, abolishing it.

C) Exempt Non-Charitable Purpose Trusts from the “21-Year Rule”

For a non-charitable purpose trust to be used in a practical private-business ownership strategy, it must be exempt from the federal 21-year tax rule. This could be achieved by including a carve-out for valid non-charitable purpose trusts in the ITA. This will enable non-charitable purpose trusts

to hold businesses indefinitely. A similar carve-out already exists for charitable trusts and EOTs, so this should not be difficult to achieve.

D) Tax Incentives

Tax incentives, similar to those introduced for EOTs (discussed in Part 4), could be introduced to solve certain issues and barriers, most obviously the present difficulty of financing a non-charitable purpose trust. In practice, it is likely that most business owners will want some financial return in exchange for transferring the business they built, particularly when done as part of a succession plan and funds are required for their retirement.

VII. Conclusion

There is a steadily increasing number of business owners who wish to engage in purposeful business succession planning. Such individuals cite sustainability, fair treatment of employees and long-term viability as the most important factors when considering transitioning their business. In Canada, there is likely no one entity that meets all of these requirements. The rise in popularity of perpetual business purpose trusts in the US and beyond is noticeable, legally empowering many businesses to organize themselves around a specific purpose, rather than just profits. This is by no means a new phenomenon: businesses have been operating successfully under this structure for many years.⁴⁶ The author hopes the decision in *Fletcher's Fields*⁴⁷ serves as a timely review of the law in Canada. To push the idea of purpose trust ownership from the margins to the mainstream, legislators will need to commit to innovation. There are many jurisdictions with well-developed non-charitable purpose trust law to look to, all offering workable solutions for these trusts. With growing calls for a more equitable and sustainable economy, making the purpose trust a new and attractive legal form of business ownership in Canada can only be a good thing.

⁴⁶ An early illustration of this is the Bosch Corporation, which has been held in a purpose trust for over 60 years.

⁴⁷ *Supra* note 29.