

## A GOOD FOUNDATION

*An Address delivered to the Wills and Trusts Section of the Canadian Bar Association at its Annual Meeting in Banff, August, 1971*

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The invitation to speak on this, the opening day of the Canadian Bar Association's 1971 Meeting in Banff, is a welcome and challenging one for me for two reasons: *firstly*, it is most gratifying to see members of the Bar turning their attention to the complex field of charity and private foundations, and, *secondly*, it forces me to re-examine my own principles and beliefs concerning the proper role of private foundations concerned with the betterment of society. I hope that my remarks today will provide you with something more than just random comments about foundations, and I will, of course, be pleased to try to answer any questions you may have at the conclusion of my talk. Needless to say, I have no mandate to speak for Canadian foundations generally, nor, for that matter, for our counterparts in other countries. What follows are some of my own thoughts on the role of foundations in Canada.

Might I say at the outset that I am particularly pleased to note the precise terms of the topic assigned to me today, for I remember very well the late senior partner of the law firm with which I practised taking great pride in the fact that, early in his career, he had been called as a witness in a case where he had prepared certain documents. In his Reasons therein, the Judge noted that the lawyer in question was "a careful solicitor", and, the latter always stated in a rather bemused way, it might some day come in handy to be able to claim that judicial notice had been taken of the fact that one was a "careful solicitor"! The best I can do is realize that it never does any harm to be able to claim that in today's programme listing the Canadian Bar Association has taken note, in at least a quasi-judicial way, that one's foundation is "a good foundation"! I hope that the Donner Canadian Foundation can always live up to that appellation!

Foundations have been with us for many centuries under a wide variety of names and reflect, to a large extent, the enduring characteristics of a belief that the state alone either cannot or should not be entrusted with sole responsibility for attaining a certain range of objectives that society deems desirable. Well after nation states curbed the power of the mediaeval church and assumed many of its functions there remained considerable need for private initiatives and frequently these were forthcoming, whether they involved almshouses, institutions of learning, public libraries or hospitals. As state efforts are affected by every fluctuation in the political life of a country as well as by a tendency towards centralization and bureaucratization many people and groups of people find strong reasons for the continuing existence of a "mixed" system in which state and private efforts operate side by side, sometimes harmoniously, but frequently with the tensions that lead to improvements and breakthroughs.

Today I would like to confine my remarks to the world of foundations, leaving aside the extremely important range of activities undertaken by individuals in their private capacities. While foundations may well have their roots in other cultures, it is in 20th Century United States that they have come to fruition with all the successes and concomitant problems with which most of us are familiar. Their successes have brought emulation elsewhere but never with the same intensity, the same fervour, or the same faith in the efficacy of private sector initiatives. This is a phenomenon to examine, a phenomenon that might sometimes be encouraged, and a phenomenon that should be subjected to periodic rigorous scrutiny for the potential for both good and ill is enormous.

The Donner Canadian Foundation came into existence in 1950 through the efforts of the late William Henry Donner, a remarkable industrialist who had had a long and successful career in the steel business as an associate of Henry Clay Frick and Andrew Mellon. His major undertaking was the creation of the Donner Steel Company of Buffalo which he sold to Republic Steel in the late 1920's. Mr. Donner spent part of his later life in Canada and was an early admirer of Dr. Wilder Penfield and his group of researchers in Montreal. On Mr. Donner's death in 1953 at the age of 89 a goodly portion of his estate went to the Donner Canadian Foundation and it is solely from these funds and the revenues they yield that the Foundation makes its grants. Mr. Donner's interest in, and expectations for, Canada have thus been the motivating factor for the continued operations of his Foundation in Canada.

Let us look for a few moments at the Foundation itself. It was federally established by letters patent in 1950 as a corporation without share capital and with a series of objects clauses that empower it to carry on a wide range of charitable activities. Naturally, there is a provision that if the Foundation should ever be dissolved its assets must go to the type of charity for which the Foundation was established. The Foundation's Board of Governors is elected annually and at the present time the Board consists of eight members who meet quarterly. They serve on a voluntary basis. The Foundation's funds are administered by professional investment advisers and the revenues are used for the making of grants and operating the Foundation. To date, no encroachments upon capital have been made. The staff of the Foundation consists of myself as President, a Programme Officer, and a Secretary.

How, you may ask, does the Foundation actually operate? When I was first appointed President in the summer of 1968 I commenced a series of studies for our Board in an effort to introduce a series of priorities for our operations. After a great deal of study and discussion our Board decided to adopt on a trial basis the following as fields of activity:

1. Canadian foreign policy
2. Law reform and penology
3. French Canada
4. Canada's North
5. Native Peoples
6. Educational research
7. The Administration of the Arts

Subsequently, in 1971, it was decided to concentrate on the first five of these topics only. In each case an effort was made to consider national needs, other sources of funding available, our own expertise, etc. It was agreed that these topics would be kept under periodic review. In 1968, for the first time, the Foundation published an annual report listing all grants made plus the Foundation's new list of priorities and copies of the report were widely distributed across Canada.

While it is difficult to be precise, it would appear that the Foundation receives somewhat over five hundred applications for support per year. Of these, some are clearly ineligible for support either because they are not legally charitable or because they clearly fall well outside the Foundation's current list of priorities. The remainder are examined carefully by the Foundation, frequently to elicit further information. Applications are then individually considered on a confidential basis by experts in the various fields who offer the Foundation their opinions as to the excellence or otherwise of the applications. As many on-site visits to the projects are paid as possible since the written word is often insufficient to convey the full import of the application. Finally, the applications are considered at full meetings of our Board of Governors, meetings begin on a Friday evening and usually last well into Sunday. The decisions are difficult ones as they usually boil down to relating a limited amount of available money to a wide selection of excellent applications, a process in which some fine applications almost always have to be turned down. Subsequently, considerable attention must be paid to working out cash flows for payments, arranging periodic progress and financial reports, and, finally, making a critical evaluation of what has been accomplished as a result of the making of the grant.

In an effort to subject our work to the critical gaze of non-foundation people I was able to arrange a five-day meeting last summer at the Canada Council's seminar centre, Stanley House, and invited a dozen Canadians from across the country to join in a vigorous examination of (1) the grants we had made, (2) our seven priority areas, and (3) new directions they thought our Foundation should take. The sessions were very stimulating ones often lasting far into the night possibly because four of those present were members of the Bar although three of those were really there in other capacities. The questions raised, the advice offered, the challenges formulated, and the enormity of national needs enunciated, sent me reeling back to my office with my mind filled with new ideas, new concerns and new resolution. I hope that the results of our deliberations at Stanley House will ultimately be translated into an improved programme for the Foundation.

Legally, the Foundation comes under Section 62(1)(f) of the Income Tax Act and is exempted from taxation as:

- (i) it is constituted exclusively for charitable purposes
- (ii) no part of its income is payable to, or otherwise available for, the personal benefit of any member

- (iii) the corporation has not acquired control of any other corporation
- (iv) the corporation does not carry on any business
- (v) it has no debts other than those concerning rents, salaries and operating expenses
- (vi) it must expend an aggregate of not less than 90% of its income each year.

The last of these is particularly important as it compels foundations to pay out a very large portion of income each year, thereby preventing an undue ploughing back of revenues at the expense of prospective grantees.

The foregoing has provided a thumb-nail sketch of how one Canadian foundation operates and I would like now to pass on to some of the basic questions that occur to me as arising in connection with foundations *per se*.

Undoubtedly foundations occupy a somewhat privileged position in our society today as the government, presumably in an effort to encourage private philanthropy, has conferred upon foundations a tax exempt status. In return for that significant concession it would seem to me that an enormous responsibility is imposed on those who control and operate foundations and, if that responsibility is not lived up to, then steps should be taken either to correct the faulty operation or to terminate the privileged situation in society which the foundation occupies.

For example, one might ask at the outset why the state's strategy should involve the encouragement of private philanthropy at all? Is there evidence to demonstrate clearly that from a societal point of view more is accomplished through a system that involves private efforts than would be the case if the state itself undertook the full range of charitable activities now carried out by the private sector? Are foundations only duplicating on a small scale what government does on a large scale? It is my view that a very strong argument can be made in support of the contention that a strong, parallel, private-sector effort can not only accomplish desirable ends itself but it can also stimulate the state to improve the quantity and quality of its undertakings as well. Why is this so? Obviously there are many situations which arise where a high risk approach is needed because the social returns may be enormous. Perhaps it is that some of these risks can be undertaken by private foundations whose future does not ride on the immediate political criticism that so often accompanies the failure of a governmental experiment. Then, too, foundations can often act more flexibly and, for that matter, more quickly, than their governmental counterparts. Needs in our rapidly changing society arise quickly and the state's response is often very slow because of the very nature of governmental machinery. To a certain extent foundations provide a counter to the centralizing tendencies of big government and can cope with certain problems that the government cannot deal with because of the latter's need to apply generalized rules equally to all. In short, the foundation can, and at its best, does provide alternatives, does provide a multiplicity of choices that are so important in dealing with the complex problems that confront us today.

I used the phrase a moment ago that foundations can, "at their best", do certain things. The question immediately arises as to how the public can judge whether foundations are in fact "at their best". This leads directly to the vexed question of public accountability. Many foundations, for whatever reason, act with anonymity and no record is available of their work. The reasons for this policy are many and varied: sometimes the donor left instructions to that effect; sometimes foundations may want to avoid public debate over their grants; and sometimes, critics say, they wish to conceal what they are doing. As I mentioned earlier, the Donner Canadian Foundation publishes an annual report, listing all its grants with a brief note on each, and we welcome, (and get!) critical comment on many of them. We feel this is a healthy arrangement and we have frequently been assisted by unsolicited comments that have been sent to us. Legally, however, we appear to be under no obligation to report our grants publicly and many foundations appear not to do so.

To give one example from each of our priority areas, I could mention the following:

- (1) Canadian Foreign Policy – the establishment of the Commission on Strategic Studies by the Canadian Institute of International Affairs.
- (2) Law Reform and Penology – assistance with the launching of the new Master's programme at the Centre of Criminology at the University of Toronto.
- (3) French Canada – support which led to the establishment at Laval of the cooperative programme in oceanography amongst the French language universities.
- (4) Canada's North – the establishment of the University of Saskatchewan's Arctic Research and Training Centre at Rankin Inlet, Northwest Territories.
- (5) Native Peoples of Canada – organizational support for the Eskimo-run Committee on Original Peoples' Entitlement, in Inuvik, Northwest Territories.
- (6) Educational Research – support for the pioneering Fogo Island project of Memorial University's Extension service.
- (7) The Administration of the Arts – the establishment of a Master's programme in museum administration at the Royal Ontario Museum.

There are probably as many reasons for anonymity as there are foundations. As you know, the process of *giving* is commonly assumed to redound to the credit of the donor and undoubtedly this principle is the basis for commemorating gifts by various methods of public recognition, such as the naming of buildings, the granting of honorary degrees, etc. In some respects this subtly sets the stage for the traditional scene with the benefactor distributing his largesse to an appropriately grateful recipient, who is obliged to comment, in predictable terms, about the inherent *goodness* of the donor's action. Some older civilizations than ours, however, have been more discerning in their analysis of the

*giving* process than we have in that they have both recognized and emphasized the essential role which the recipient plays in the whole situation — the setting of the stage for the gift-giving function. Surprisingly enough, it is the *Koran* which pinpoints so accurately what is involved, when it stresses so forcefully the righteousness of the *recipient* who, in the very *taking* of the gift, performs a service by providing the rich man with the opportunity to be generous! There it is stated: “Of their good take alms, so that thou mightest purify and sanctify them”. Interestingly, the Moslem faith sets great store by the proposition that the more secret the donor keeps the donation the more holy the gift is and thus the Moslem custom of anonymous giving. I, however, cannot defend the secrecy in twentieth century Canada in an era where openness is a by-word.

In the late 1960s increasingly strident voices in the United States attacked the role of foundations in American society. Most of us are familiar with the specifics of the attack: tax evasion, political involvement, economic power, and generally, the too clever exploitation of an advantageous legal position. Undoubtedly there was some justification for these attacks although I would like to suggest that the debate became extremely confused, at times, when genuine abuses were lumped in with the mere failure of projects which had been undertaken. Eventually the Treasury Department undertook a study of foundations and Rep. Wright Patman, a populist and long-time foe of the Eastern liberal establishment, launched hearings into the activities of such organizations as ABC, Americans Building Constitutionally, which for a fee undertook patriotically to guide its subscribers in the organizing of foundations in rather dubious ways. These centred on the over-valuation of assets given to private foundations, the deriving of personal benefits from foundations, the controlling of companies via foundations, etc. Almost simultaneously the Congress undertook a major step in formulating the *Tax Reform Bill of 1969* and John D. Rockefeller III invited Peter Peterson, then Chairman of Bell and Howell, to undertake a detailed unofficial study of the role of foundations in the United States.

After an extremely difficult debate the Congress finally passed a series of clauses concerning foundations that many Americans feel has severely damaged the ability of foundations to perform their traditional functions. I watched the dispute with great interest from my Canadian vantage point and was interested to note that, with a few major exceptions, the final result was to leave American foundations in a legal position that is not all that different than the Canadian position has been all along. Some of the major exceptions are (1) the obligation to issue annual reports, (2) the obligation to pay out annually a fixed percentage of the assets of the foundation, whether that return has, in fact, been earned or not, and (3) the only one that I would object to, the imposition of a 4% excise tax on the annual net investment income. Net investment income is defined as being gross investment income plus net capital gain minus the ordinary expenses paid or incurred in earning such income and gain. As was vigorously pointed out, mainly by university presidents, the effect of this tax is really nil as far as the

foundations are concerned: they merely have 4% less money to grant to charities.

The effect of the new legislation generally has, as I noted, been to make the American situation more similar to the existing Canadian one than it had previously been. Anyone advocating changes in the current Canadian system would need to study very carefully the evidence given in the tax hearings in Washington in 1969 and to examine the very perceptive recommendations set out by the Peterson Commission in its report entitled *Foundations, Private Giving and Public Policy*.

To me at least it was somewhat gratifying to note this unintentional, indirect compliment to the Canadian position. The American legislation was written in unbelievable haste, based on scanty evidence, and in some ways it penalizes the innocent and guilty alike. It was, however, a response to a situation that had developed over the years as a result of too great faith in the basic honesty of people when it comes to tax matters. Loopholes existed and occasionally abuses had crept in and public opinion believed that they had to be corrected.

What of the current situation in Canada? As all of us know, giving does not necessarily inspire affection and, while there would seem to be very limited evidence of abuses by foundations in Canada, it is equally clear that Canadian foundations have little or no popular base or constituency partially because they have been so reluctant to discuss publicly what they are doing.

Boswell quotes Dr. Johnson as saying "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully". Last week I read Mr. Benson's speech to the Law Society of Upper Canada's seminar in which the Minister alluded to Departmental studies that were to be undertaken into, inter alia, charitable giving. This would seem to me to be an excellent time for Canadian foundations to take stock of their work and, I am glad to say, there are some signs of this occurring even now.

Such a review, while valuable, will be difficult for each foundation is different, each has its own characteristics, its own problems. Pressures on the foundations are massive, especially upon their executives who must cope with enormous demands on their time. They sometimes feel that Carl Sandburg, in his *Prayers of Steel*, was his most successful in describing the executive, and possibly the process for influencing the choice of a foundation's priorities, when he wrote:

"Lay me on an anvil, O God.  
Beat me and hammer me into a crowbar.  
Let me pry loose old walls.  
Let me lift and loosen old foundations."

The task is a difficult one but one that really is worth trying as it is so important that procedures and priorities reflect current needs and thinking. Without such efforts foundations will be passed by and left as quaint reminders of a by-gone age. Of this we may have warning, for even Psalms, 82, v.5 says:

**“They will not be learned nor understood, but walk on still in darkness: all the foundations of the earth are out of course.”  
Can I do more than add my plea to that Biblical injunction?**