THE PROTECTION OF CHARITIES IN ONTARIO

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The aim of this article is to consider where responsibility lies for the supervision of charity in the Province of Ontario, the nature of the statutory machinery established for this purpose and the extent to which such machinery is proving adequate to the task.

Quoting from Halsbury's Laws of England 3rd ed. Vol. 4 at page 407:

> "The Crown as parens patriae is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern. The Attorney General, who represents the Crown for all forensic purposes, is accordingly the proper person to take proceedings on behalf of and to protect charities."

Some of the common law jurisdiction of the Attorney General reposes in the office of the Public Trustee of Ontario under the Charities Accounting Act[1] which was first enacted in 1915. Under this statute[2] there is an obligation to give written notice to the Public Trustee, personally or by registered mail, of charitable bequests in wills. During the month of March 1970 the Public Trustee received 220 wills, 199 of which were sent in by the Surrogate Courts of the Province,[3] 13 by solicitors and 8 by trust companies. While there is no penalty for failure to meet the obligation imposed by the statute the executor, administrator or trustee may be liable to account at any time. He is not, of course, freed of the duty to account if he meets the obligation but he may be in less difficulty if the Public Trustee was at least given notice of the existence of the charitable bequest in the will. It seems that some Ontario solicitors are advising their clients against meeting this obligation because they are not convinced that their clients' interests are best served by notifying the Public Trustee. However, especially when a solicitor lacks expertise in charities accounting, he may find assistance from the Public Trustee helpful.

The Public Trustee has on file 55,747 wills which have been deposited in the office between January 1938 and December 1971. The number of wills which have come in during the last two years are as follows:

1970	2210
1971	2234

Charitable corporations, including federally incorporated corporations, are obliged to notify the Public Trustee of their incorporation and it may be that the obligation extends to some corporations that don't come within the definition of charity since the Charities Accounting Act[4] states:

> "Any corporation incorporated for a religious, educational, charitable or public purpose shall be deemed to be a trustee within the meaning of this Act . . . . . ."

In view of the presence of the word "public" it may be that the Public Trustee's jurisdiction is wider than the Attorney General's jurisdiction was at common law. Some charitable corporations notify the Public Trustee but many ignore the requirement.

The Department of Financial and Commercial Affairs, Companies Branch, submits applications for the incorporation of non-profit corporations for the Public Trustee's consideration. The number of applications submitted for the last two years are as follows:

1970	305
1971	323

The Public Trustee expresses opinions as to whether or not the objects are charitable and as to whether the letters patent should be subject to the Mortmain and Charitable Uses Act[5] and the Charitable Gifts Act.[6] The number of opinions expressed by the Public Trustee as to whether applications submitted were for the incorporation of charitable corporations in the years indicated were as follows:

1970	257
1971	291

The Public Trustee received issued letters patent of charitable corporations as follows:

1970	94
1971	161

This number will increase in the future as the Public Trustee now requests copies of all letters patent with respect to which he has expressed the opinion that the objects are charitable.

The obligation to notify the Public Trustee of gifts to charity under the Charities Accounting Act[7] is not, of course, restricted to wills and letters patent but extends also to charitable gifts under inter vivos trust deeds. Compliance in this area is exceedingly poor and, unlike wills a high proportion of which go through the Surrogate Court and are reported to the Public Trustee by Surrogate Courts, the Public Trustee has no way of knowing about them in the absence of co-operation by either the solicitor or the recipient charity if it is made aware of its interest.

Charities are notified of gifts and bequests to them by the Public Trustee when he is made aware of such gifts and bequests. No further action is taken by him after notification to the charity unless there is a court proceeding, complaint, a discretion in the executor to select a charity, a continuing trust, or a charitable uses problem. The Public Trustee responds to inquiries from the public about the availability of a charity's funds at the rate of about one inquiry per month, there being no other source of public information on this subject.

The number of occasions on which the Public Trustee has been notified of a passing of accounts as required by the Surrogate Courts Act[8] is set out for the years 1970 and 1971. The third figure is the number of times each year on

which the Public Trustee has been represented on the passing of accounts.

1970	319	173
1971	300	151

This does not in any way dispense with service upon the charity. With the co-operation of the profession and the Official Guardian, duplication of representation and costs is being avoided. The Public Trustee does not require accounts to be passed if receipts or cancelled cheques are produced to verify disbursement to specific charitable legatees and releases executed on the advice of their solicitors are produced to cover disbursements to residuary charitable legatees. However, this dispensation is not available when there is discretion in the executor as to the selection of the charitable legatee since such selection can be influenced by whether or not the charity will execute a release. In requesting that accounts be passed, consideration is given to court costs. Perhaps consideration should be given to conferring on the Public Trustee authority to make the findings when the only person to be served is the Public Trustee. This would avoid attendance before the Surrogate Court Judge and court costs. Usually it is reasonable to pass accounts for a 5 year period but the time may be longer or shorter depending on the circumstances.

The form of the accounting is laid down by the Surrogate Courts Act and Regulations thereto and it is important for the solicitor to instruct his executor or trustee client as to this. It is more difficult for the solicitor to instruct a corporate trustee. It is astonishing how many times a director, when questioned, states that he has no knowledge of where the money came from, where it went, and, in any event, he resigned yesterday. Many executors and trustees and corporations employ chartered accountants and it is useful for the client, solicitor, and chartered accountant to meet so that the accounts can be prepared in the proper form and entries made in the proper account as required by the Surrogate Courts Act and Regulations. It is the lawyer's duty to emphasize the importance of evidentiary material-vouchers (receipted bills) or, if they are not available, to explain what is being produced and why it should be relied on. Account can be difficult for a private charitable corporation and, even more so, for a public charitable corporation. A detailed review of the accounting problem is required by lawyers and chartered accountants working together and the advent of the computer has added to the urgency. The Public Trustee is asked to approve or disapprove the disposition of hundreds of thousands of dollars very shortly after material is submitted. In this kind of accounting chartered accountants must understand the findings that the Surrogate Court is required to make and the Public Trustee's responsibilities to the court.

Any review of accounting procedure should probably start with a consideration of the form of the accounting, the meaning of such terms as capital receipts, the presentation of material that is as brief as it can be (there is nothing the matter with grouping) while it doesn't overlook the necessity of checking evidentiary material against the entries. The accounts must make the operation

understood. While the Public Trustee is certainly not averse to profit, he requires it to be demonstrated that the funds have been disbursed for the purposes designated. The exemption of charitable funds from tax liability is sound policy but the trustee of those charitable funds must be made accountable.

The accounts of a charitable corporation will show whether Section 62 of the Income Tax Act[9] has been complied with. A charitable corporation or trust qualifies for tax exemption in its first year even if it did not distribute 90% of its income in that year. However, in order to do so, it must elect to have the whole or any part of the amount expended in the second year deemed to have been expended in the first and not the second year.

The Charitable Gifts Act[10] requires the disposition of any interest in a business in excess of 10% unless the interest in the business is given to or vested in an organization of any religious denomination. Where the interest is given or vested pursuant to an instrument other than a will, disposition must be made within 7 years of the date of the instrument. Where the gift is by will time runs from the date of death of the testator. The time may be extended by a judge of the Supreme Court if he is satisfied that the extension is for the benefit of the charity. So long as the interest represents more than 50%, the Public Trustee in conjunction with the charity and those managing the business must determine the profits once a year. The profits are then distributed.

Administration costs must be considered. Is it appropriate to conclude that administrative costs for a private charitable corporation are not too high if they don't exceed the amount that the Surrogate Court would award for compensation if compensation were requested? How high should administration costs be for a community fund? Is 10% reasonable? Are there times, for example, when a community fund is getting under way, when reasonable administrative costs will exceed 10%? Surrogate Court accounting is cash accounting. Should these percentages be applied on an accrual basis?

A passing of accounts is in substance in the nature of a reference and His Honour is a fact finder. It is the duty of the Public Trustee to bring to His Honour's attention anything that is in the accounts that ought not to be and anything that is not in the accounts that ought to be. The Public Trustee has surcharged and falsified when accounts disclose a series of transactions through a firm of which one of the trustees had been a member involving non-trustee securities to the loss of the estate. To surcharge is to show an omission of something for which credit ought to have been given and to falsify is to prove an item to have been wrongly inserted. Usually the accounts and the supporting affidavit and the will or trust document will evidence these facts. While a statement of law and fact is not provided for in the Surrogate Courts Act and Regulations, this may be a convenient form of memorandum to file with the Surrogate Court judge when there is a notice of surcharge and falsification. As there is no provision for filing, the document should be handed to His Honour on the return of the appointment. Section 35 of the Trustee Act,[11] which

provides for the relief of trustees committing technical breach of trust, should not be overlooked.

If accounts are not passed voluntarily by a charity the Public Trustee will consider requesting a passing. The authority for requiring accounts to be passed is contained in Section 3 of the Charities Accounting Act.[12] Usually three letters are sent out prior to a formal notice requiring an accounting. The proceeding is by way of originating notice of motion in the Supreme Court under Section 4 of the Act and not by way of citation in the Surrogate Court as might be expected. The notice of motion asks for an order requiring accounts to be passed, trustees to be removed and assets to be turned over. When that order is not complied with, the Public Trustee may ask for committal and/or sequestration and attachment. Committal has not been obtained yet, nor has attachment of the person, although there have been attachment and sequestration orders against corporations. When the assets are in the sheriff's hands they have to be examined and arrangements made for administration. The Public Trustee requests the Department of Financial and Commercial Affairs and the Secretary of State not to cancel the charter until he has completed the work he has undertaken because there would be no one to proceed against in the case of corporations if the corporation ceased to exist.

What about the disposition of assets of a charitable corporation on dissolution? Ideally, the letters patent have a clause providing that on dissolution the assets of the corporation are to be distributed to charitable organizations in Ontario. But what if there is no provision for disposition on dissolution? Is this an appropriate occasion for application cy-pres?

The charitable corporation is itself a trustee under the Charities Accounting Act.[13] Where property is given in trust for a particular charitable purpose, and it is impossible or impractical to carry out that purpose, the trust does not fail if there is a general charitable intent. It may be applied cy-pres. Where a charitable corporation is dissolved and its letters patent are silent, should its property be applied under the direction of the court to some charitable purpose falling within the purposes of the letters patent? Mr. Justice Cartwright, in a dissenting judgment concurred in by Mr. Justice Judson in Guaranty Trust Co. of Canada v. Minister of National Revenue,[14] said

> "It is axiomatic that a validly constituted charitable trust will not be allowed to fail for lack of a trustee. In Jewish National Fund, Inc. v. Royal Trust Co. and Richter, 53 D.L.R. (2d) 577 at 584, (1965) S.C.R. 784, 52 W.W.R. 410, the majority of this Court cited with approval the following sentence from the judgment of Lord Macnaghten in Dunne v. Byrne, (1912) A.C. 407 at p. 410:
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> > 'It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.' "

The same principle is expressed by Mr. Justice Judson in Re Ogilvy:[15]

> "So there is no lapse where an institution which has ceased to exist was named merely as the channel for carrying out a charitable intention."

There is another approach to this problem. The question before the court in Guaranty Trust Co. of Canada v. Minister of National Revenue[16] was whether a gift to a medical alumni was deductible under Section 7 (1) (d) of the Estate Tax Act.[17] Mr. Justice Ritchie, in a judgment concurred in by Mr. Justice Hall and Mr. Justice Spence, said in discussing Section 115 of The Corporations Act:[18]

> "It seems to me that a corporation with exclusively charitable objects, the letters patent of which expressly provide that 'any objects or other accretions to the corporation shall be used in promoting its objects', cannot be one to which the provisions of s.115 were intended to apply. On the dissolution of such a corporation 'its remaining property' is in my opinion, under the terms of its letters patent, required to be used in promoting objects 'beneficial to the community' and the enactment of any such by-law as is contemplated by s.115 would therefore be redundant."

Section 115 (1) of The Corporations Act reads as follows:

> "A corporation may pass by-laws providing that, upon its dissolution and after the payment of all debts and liabilities, its remaining property or part thereof shall be distributed or disposed of to charitable organizations or to organizations whose objects are beneficial to the community."

Subsection (5) reads as follows:

> "In the absence of such by-law and upon the dissolution of the corporation, the whole of its remaining property shall be distributed equally among the members or, if the letters patent, supplementary letters patent or by-laws so provide, among the members of a class or classes of members."

Section 101 of the Act reads:

> "A corporation may be incorporated to which Part V or Part VI applies or that has objects that are of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic nature or that are of any other useful nature."

Section 109 (1) reads:

> "A corporation, except a corporation to which Part V (co-operative corporations) or VI (insurance corporations) applies, shall be carried on without the purpose of gain for its members and any profits or other accretions to the corporation shall be used in promoting its objects and the letters patent shall so provide."

Mr. Justice Ritchie seems to be saying that Section 115 has no application to a charitable corporation because there are no members beneficially entitled to whom to restrict distribution. The dissolution of a charitable corporation would seem therefore to be an appropriate circumstance for the application of the cy-pres doctrine.

The number of times notification has been given to the Public Trustee of actions or other proceedings to set aside, vary or construe wills or other instruments as required by Section 5 (4) of the Charities Accounting Act[19] is set out for each of the years 1970 and 1971. The third figure identifies the number of times each year the Public Trustee has been represented on such proceedings:

1970	67	38
1971	48	32

Once again, every effort is made to avoid duplication of costs and representation. In these cases, the Public Trustee does not undertake factual investigations but relies on the facts presented to the Court. Often charities, through a misguided concern about their "image", are reluctant to instruct their solicitors, make investigations and take a firm position. They forget that they are themselves accountable and have a responsibility to get the assets in and disburse them for the purposes for which they were designated.

Section 6 of The Charities Accounting Act[20] gives any member of the public the right to complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public or as to the manner in which any funds have been dealt with or disposed of. The complaint is to the County Court judge who may order the Public Trustee to make an investigation. This procedure is rarely used and has not been used at all since 1962.

Where there may be a charitable uses problem the charity is put on notice by letter from the Public Trustee. Not only the charities, but frequently their solicitors seem unaware of the relevant provisions of the Mortmain and Charitable Uses Act.[21] Lands assured otherwise than by will are dealt with in Section 7 and lands devised by will in Sections 10 and 12. The same pattern isn't used in drafting the section dealing with lands assured otherwise than by will and the sections dealing with lands devised by will and the question arises as to whether this is significant.

Under Section 7 (1) lands assured otherwise than by will must be sold within 2 years from the date of the assurance or within such extended period as may be determined by a judge of the Supreme Court. The only ground on which the judge can sanction the retention of the land is that he is satisfied that the land is required for actual occupation for the purposes of the charity and not as an investment.[22] The application has to be made by the charity within the 2 year period because at the expiration of such period the land vests in the Public Trustee and he must sell it "with all reasonable speed" and pay the proceeds to the trustees for the charity. It is an open question in Ontario whether the Public Trustee can bring an application for the advice and direction of the court under the Trustee Act[23] after the expiration of the 2 years. There is dictum in England in the case of Re Ryland, Roper v. Ryland[24] which would support his right to do so:

> "Then there is one other point which I may mention, although it is not now before me for decision. I am not prepared to say that when property

is in the hands of the Official Trustee of Charity Lands there is not power, either in the Charity Commissioners or in the Court, as the case may be, to enlarge the time for sale of the land, notwithstanding the fact that the year has elapsed and the land has vested. I do not, however, decide that point, as it is not before me."[25]

Certain public bodies, namely the Government of Ontario, a municipal corporation, a school board, a public library board or association, a public hospital, and trustees empowered to administer or hold property for charitable uses are not bound by Section 7 (3). Section 13 (3) provides that land not required for actual use and occupation can be the subject of an application for any reason.

Lands devised by will must be sold within 2 years from the death of the testator under Section 10 (1) "or such extended period as may be determined by a judge of the Supreme Court." Is it significant that in a separate section, namely Section 12, the judge can make an order for the retention of the land by the charity if it is required for actual occupation and not as an investment? Is the implication that an executor or trustee of an estate may ask for an extension of time for some other reason? The case of In re Sidebottom, Beeley v. Sidebottom[26] seems to rule out this possibility. The decision in that case was based on an English statute worded a little differently from the Ontario Act but it indicates that the reason for an extension of time must be found in the Act itself. The reason for extending the time in that case was to bring about a speedy sale so that the sale could be made by the trustee rather than the public authority. To illustrate that he would not go beyond the Act for a reason for sale, the judge said he would not extend the time to benefit the charity on account of an anticipated enhancement in value beyond the 2 year period. The concluding words of Section 13 (3) "and the provisions of subsection 2 of section 10 and of section 12 apply" suggest that the subsection does not apply in the case of lands devised by will. Nevertheless, a judge of the Supreme Court with the consent of the Public Trustee on an application brought within the 2 year period extended the period during which the trustee could sell to 2 years after the death of a 96 year old life tenant where the devise was to mother for life and then to a church.[27]

There are exemptions from both Sections 7 and 10. They are public parks, schools, schoolhouses, and public museums, all of which are defined in very broad terms in Section 8. For example, "school" means a school, or department of a school, at which education is given in literature, art, science or mathematics, or a vocational or technical school. However, land assured for the purpose of a school or schoolhouse, if it is devised by will, may not be in a preferred position if the view expressed earlier as to the effect of the concluding words of subsection (3) is sound. If land assured for the purpose of a school or schoolhouse is assured by conveyance, application may apparently be made for reasons other than those specified in Section 7.

The property which must be sold under the Mortmain and Charitable Uses Act is, of course, the estate or interest in the land which is given to the charity

and not necessarily the fee simple or the entire interest of the testator or grantor.[28] However, the sale of a remainder interest is seldom either practical or economic.

In cases where there has been a vesting in the Public Trustee, and this comes to his attention, the charity is requested to find a suitable purchaser and submit for the Public Trustee's consideration:

1. A draft deed with the Public Trustee as Grantor and the charity as party of the third part, duly executed by the charity.
2. A copy of the license in mortmain, the Act of incorporation or letters patent, and resolution authorizing sale in the case of an incorporated charity, or of the will or other instrument under which the property is held.
3. A notarial copy of the agreement of purchase and sale.
4. A sworn declaration of a realtor setting out his qualifications for making the valuation and expressing his opinion as to the cash market value.
5. A photo copy of the solicitor's abstract of title.

If the material is satisfactory, the Public Trustee will execute the deed and pay the proceeds over to the charity.

The Honourable Allan F. Lawrence, Q.C., points out in the 1967 Interim Report of The Select Committee on Company Law[29] that "The Province of Quebec is the only other jurisdiction in Canada with legislation comparable to the Ontario Mortmain and Charitable Uses Act." He concludes:

> "The repeal of the English Acts in 1960 implemented the recommendations of the committee on the Law and Practice Relating to Charitable Trusts under the Chairmanship of the Rt. Hon. Lord Chatham. The following extract from that Report summarizes, it is submitted, not only the position in England at the time of the Report but the position which prevails in Ontario today:
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> > '. . . . . mortmain and charitable uses have a long history behind them and now apply, in a highly illogical manner, only to trusts having from time to time been exempted from them. They are in any case an anachronism in the conditions of the twentieth century and we recommend their repeal . . . . . '
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> It is truly an anachronism that contemporary educational institutions and other investors whose form or function falls into the category of a 'charitable use' should be prevented from investing any part of the substantial funds at their disposal in real property in Ontario, for what may best be described as a feudal fear that such property might thereby become inalienable. It is known that the funds of modern universities, for example, are invested by skilled investment committees similar to those of corporate investors of financial institutions. The business community of this province could benefit by the removal of other present restrictions so that the substantial funds of such institutions and other similar investors

could be made available for the development of real property. It is equally an anachronism that the law should prohibit or restrict deathbed gifts or devises of land to charitable, educational or religious objects . . . . . The Committee recommends that Section 6 to 13 inclusive of The Mortmain and Charitable Uses Act be repealed and that any land held by any charitable institutions at the date of such amendment may continue to be so held by any such institution without restrictions as to time and without risk of forfeiture or vesting in any public authority, and that any land so held by any such institution which at the date of such amendment has by virtue of Section 7 (2) of the Act vested in the Public Trustee but in respect of which the Public Trustee has not caused any steps to be taken for its sale as required by Section 10 (2) of the Act shall be immediately revested in such institution."

These may be the last words ever spoken on the subject of the charitable uses sections of the Ontario Mortmain and Charitable Uses Act.[30] Nevertheless, solicitors with clients who are charitable corporations must have regard to its provisions until such time as they are removed from the statute books.

In summary, it would appear that we have in the Province of Ontario the machinery for the protection of charity although it may be rather rusty in parts. Greater efficiency would unquestionably result from a higher degree of co-operation between the legal profession and the office of the Public Trustee. A review should be undertaken of all charities legislation to eliminate the obsolete and archaic and to introduce a flexibility into the laws which will take account of the more sophisticated forms by which social concern is expressed in the life styles of a technological society.

Footnotes

1. R.S.O. 1970 ch.63
2. ibid. s.1
3. ibid. s.5 (3)
4. ibid. s.1 (2)
5. R.S.O. 1970 ch.280
6. R.S.O. 1970 ch.61
7. R.S.O. 1970 ch.63
8. R.S.O. 1970 ch.451 s.73 (10)
9. R.S.C. 1952 ch.148
10. R.S.O. 1970 ch.61 s.2
11. R.S.O. 1970 ch.470
12. R.S.O. 1970 ch.63
13. R.S.O. 1970 ch.63 s.1 (2)
14. (1967) D.L.R. (2d) 481 at 483

15. (1952) O.W.N. 625 at 626
16. (1967) 60 D.L.R. (2d) 481
17. S. of C. 1958 ch.29 s.7 (1) (d)
18. R.S.O. 1960 ch.71
19. R.S.O. 1970 ch.63
20. ibid. s.6
21. R.S.O. 1970 ch.280
22. ibid. s.7 (3)
23. R.S.O. 1970 ch.470
24. (1903) 1 Ch. D. 467
25. ibid. p. 474
26. (1901) 2 Ch. D. 1 (reversed on other grounds (1902) 2 Ch. D. 389)
27. Unreported.
28. Re Hume, Forbes v. Hume (1895) 1 Ch. D. 422; Re Ryland, Roper v. Ryland (1903) 1 Ch. D. 467
29. p. 108
30. R.S.O. 1970 ch. 280