# "PUBLIC" CHARITABLE TRUSTS WHICH FAIL: AN APPEAL FOR JUDICIAL CONSISTENCY

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The ownership of funds raised by public appeal for charitable purposes which fail trouble Canadian courts only occasionally. This may reflect the scarcity of situations where charitable purposes fail in Canada. In any event, it is a cause for gratitude since the law which has developed to deal with ownership of funds, unused or incompletely used, is not susceptible of positive statement.

In the case of a "private" gift for charitable purposes it is said that if there is *initial* failure of the charitable purpose, there must be proof of a "general charitable intention" on the part of the donor before the court will order that the property be used for another charitable purpose as close as possible to that which failed. This is the doctrine of *cy-près*. In cases of supervening failure, there is no need to determine general charitable intention. What is "initial" and what is "supervening" failure will be discussed later in this article.

Cases which discuss the ownership of publicly subscribed funds have almost always revolved around the question of whether there was evidence of general charitable intention on the part of donors. Unfortunately this is true whether there is initial or supervening failure. Cases about public funds provide special problems: if a person pays a dollar admission to a dance organized to raise money for a particular charitable purpose (to build a church or a school or a hospital, to provide scholarships, to buy facilities for handicapped children, for example) and the purpose fails, what is the donor's intention as regards the dollar he paid? What is the intention of the man who sends a cheque to the organizers for the same purpose? Should they be treated differently because one can be identified whilst the other cannot? Does the fact that one or both of these can be said to have abandoned all interest in his gift establish a general charitable intention for the purposes of the *cy-près* rule? Is it relevant in determining the intention of identifiable donors to a fund to show that these identifiable donors knew or must have known their gifts would be aggregated with those of anonymous donors?

The courts have continually asked themselves these difficult questions and frequently have problems providing consistent answers. The purpose of this article is to argue, having set out the relevant cases, that the search for a general charitable intention in cases of public charities may not be necessary and that, therefore, determination of ownership of public funds is much simpler than many judgments would suggest.

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## THE CASES

In *Re Welsh Hospital (Netley) Fund,*[1] a hospital had been built from public subscriptions to provide for Welsh soldiers. In 1919, after the First World War, the hospital was disbanded and the property sold to the War Office. Over £9,000 remained in the hands of the trustees. The contributions to the fund had come both from known subscribers and from anonymous donors, some of whom made their contributions through street collections and entertainments. Lawrence J. had no difficulty in imputing a general charitable intention on the part of the anonymous donors on the basis that they had "parted with their money out-and-out".[2]

Lawrence J. then imputed to the known subscribers a general charitable intention. He did this largely on the basis that they must have known that the fund was being contributed to by anonymous donors and that all gifts would be aggregated.

This case raises two issues: one is the propriety of finding a general charitable intention on the part of anonymous donors from the making of out-and-out gifts. The other is the propriety of finding a general charitable intention on the part of known subscribers on the basis of the existence of anonymous donors to the same fund.

In *Re Wokingham Fire Brigade Trusts*[3] the question in issue was the ownership of a fund remaining after a voluntary fire brigade became defunct. The fire brigade had been equipped and maintained through private donations, as well as through the proceeds of an annual ball and fees paid for attending fires. Danckwerts J. (as he then was) decided in favour of a *cy-près* scheme. He said that the donations, when made, were made by the donors with the intention of parting with all interest in the donations. When the purpose ceased to be practicable, the charitable trusts did not fail. It was not necessary to consider whether there was any general charitable intention.

This decision has been discussed with approval.[4] It is however arguable that there are two possible rationales for the decision. Danckwerts J. may have regarded all cases of surpluses as being cases of supervening "failure", and in accordance with the general rule he did not require evidence of general charitable intention. Property once dedicated to charity would be applied to another similar charitable purpose. Alternatively, he may have been introducing a rule to the effect that, where a gift is made out-and-out, *cy-près* application of the gift will result without evidence of general charitable intention.

The next case of interest is the *Lynmouth Disaster Case.*[5] There a successful public appeal had been launched to provide for those who had suffered as a result of severe flooding in southwest England. After all claims which resulted from the flooding had been made, a large surplus remained. Again, funds had come from many different sources, including direct donations and indirectly through fund-raising projects and collecting boxes. Wynn-Parry J. felt com-

pelled, because of the similarity of the facts, to follow the reasoning of the decision in *Re Welsh Hospital Fund.*[6] The surplus was therefore applied *cy-près* according to a scheme.

In view of the total reliance on the *Welsh Hospital* case, the *Lynmouth Disaster Case* is open to the same criticisms. Furthermore, it appears that *Re Wokingham Fire Brigade Trusts*[7] was neither cited in argument nor referred to in judgment. Wynn-Parry J. was therefore not presented with any authority to help him avoid the thorny problem of having to investigate evidence of general charitable intention.

In *Re British School of Egyptian Archaeology*[8] a fund remained unexpended after the winding up of the affairs of the school. Contributions of varying size had been made to the school between 1905 and 1929, the smallest being a contribution of one guinea.The regulations of the school included the following:

> All contributors of one guinea or two guineas annually are members of the school, and shall receive the corresponding publications of work free. Those who contribute a large amount annually or at once shall receive a corresponding value of publications when such are issued, or antiquities may be allocated to such public museums as they desire.

Harman J. decided in favour of *cy-près*. He said that there was a partial contractual relationship between the school and certain contributors; the school would provide its publications free in proportion to contributions. He took the view that the contributors had parted with their money once and for all, and he distinguished between a general charitable intention on the one hand and a lack of intention to have money returned on the other. These were not necessarily the same thing.

> In my judgment, it is only necessary to be able to draw the inference that the contributor or donor cannot be supposed to have expected or to have contracted impliedly to have his money returned.[9]

On this basis, a scheme was approved for the establishment of a scholarship for the study of Egyptian archaeology.

This judgment seems to have laid the groundwork for the judgment of Denning L.J. in *Re Hillier*[10] a month later. *Re Hillier* is the first of the cases I have mentioned to be dealt with by the Court of Appeal. The Court consisted then of Evershed M.R., Denning L.J. and Romer L.J. There, funds had been contributed from a wide variety of sources for the building of an extension to the existing hospital, and for the building of a new hospital. The appeal was launched in 1938. The war made building impossible until 1945, and the *National Health Service Act (1946)*[11] made the projects impracticable.

The main question before the Court of Appeal was the ownership of funds which had been given for the limited purpose of building a new hospital at Slough. Donors could select among three purposes: building the new hospital, extension to the existing hospital, or to be used at the discretion of the organizing committee.

The Court of Appeal (Romer L.J. dissenting) decided in favour of *cy-près* application of these funds. Evershed M.R. relied to some extent on the fact that there were anonymous donors whose existence was known to the identifiable donors to the Slough Fund.

> But where, as, I think, in the present case, the circumstances affecting the presumed intention of the first donor are, at best, equivocal, then, as it seems to me, it is a relevant and admissible fact in determining his true intention that when he contributed to the fund he must be taken to have known that his contribution would be mingled with thousands of others, substantial numbers of whom were contributing in circumstances which negatived any right or expectation on their part to any return of their money in any circumstances. I am, indeed, stating in another form what I have said already, viz., that, if counsel for the Official Solicitor is right, then there emerges a class of contributors whose isolation from their fellow contributors appears (to my mind, at any rate) to be not only unreal and contrary to common sense, but also unjust, for whatever emphasis can legitimately be placed on particular passages in the brochure and on the use made of document 1, it is not in doubt that the appeal that brought in the whole of the £50,000 collected was a single appeal addressed to all who had lent their ears to it.[12]

Lord Denning took a different view which did not involve him in an attempt to discover the intention of indentifiable donors. He thought that as regards money raised by flag days, dances and other activites, it was useless to search out the intention of the contributors. Donors made their contributions "without reserve".

> It is useless to ask what was their intention, for a situation has arisen which they did not contemplate, and for which they did not provide. They had formed no relevant intention. So the law must provide. The law must say what is to happen to the money. It does it by making presumptions in favour of charity. It presumes that those who gave the money would wish that any surplus should be devoted to a charitable purpose as near as may be to the original purpose.[13]

Denning L.J. went on to argue that the money was given out-and-out, and no donor expected to have his money back. Then, as regards the identifiable donors, these should be treated in exactly the same way as the anonymous donors.

> All know that their moneys are given for the same purpose . . . The law in all cases should make a presumption in favour of charity.[14]

It should be noted that both Evershed M.R. and Denning L.J. were of the view that a particular donor might make it clear at the time he made his donations, that if the main purpose failed he would want his money back, and that in such event he would be entitled to have his money back.[15]

A final English case is *Re Ulverston Hospital Fund.*[16] Once more, funds came

from a large variety of sources and again the project of building a hospital (to replace an existing one) became impracticable because sufficient funds were never raised and the *National Health Service Act* (1946) became law. The Court of Appeal dealt only with the question of contributions by known (as opposed to anonymous) donors. It decided that such contributions were to be held on a resulting trust for the donors. The main judgment was given by Jenkins L.J., who dealt with three arguments that were put forth by the Attorney-General. The first was that the Court should impute to all donors a general charitable intention to secure the improvement of the facilities for medical and surgical treatment in the districts served by the existing hospital. Building a new hospital was merely one mode of carrying out this general charitable intention. This argument was rejected on the basis that there was no evidence to support such an imputation. The second argument, that a general charitable intention to benefit the district was necessarily involved in the raising of the fund for the particular purpose, was dealt with in the same way as the first — there was again no evidence to support it.

> It is to my mind not open to doubt that a testator who bequeaths or a subscriber who gives money to a fund raised for the sole and exclusive purpose of building a new hospital at X, with nothing beyond the bare fact of the gift to indicate his intention, must be taken to have bequeathed or given the sum in question for that sole and exclusive purpose and nothing else.[17]

The third argument was to the effect that anonymous donors, those who paid an entrance fee for an entertainment or put the money in a collecting box, had parted with that money out-and-out. They must be taken to have done so with a general charitable intention. The argument proceeds, according to Jenkins L.J., in this way:

> If, however, that is the case as regards anonymous contributors, it follows that subscribers who gave their names and are aware that their subscriptions will be mixed with non-returnable contributions from anonymous sources must be taken to have contributed with a similar general charitable intention.[18]

Jenkins L.J. dealt with this argument in these words:

> Even if a general charitable intention is rightly to be attributed to the anonymous contributors to collection boxes neither the fact that they have chosen to contribute in that way, nor the named subscriber's knowledge that anonymous contributions have been made in that way seems to me to have any bearing on the intention of the named subscriber.[19]

Jenkins L.J. felt able to distinguish *Re Welsh Hospital Fund* and *Re Wokingham Fire Brigade Trusts* from the case in point on the basis that both were cases where there remained a surplus after the completion of the purpose. In

*Re Ulverston Hospital Fund* ownership of the fund itself was in issue. The purpose had not been carried out.

*Re Hillier* was distinguished on its facts. In that case the subscriber who donated for the building of the Slough Hospital need not necessarily have intended to limit his bounty to that one particular object, but might equally well have intended to indicate Slough Hospital as the preferred object of his bounty, without any intention of excluding the other objects listed in the event of the preferred object failing.

Jenkins L.J. discussed the judgment of Evershed M.R. in *Re Hillier.* The distinction which he made was between those cases where the intention of donors was equivocal and those cases where there was no evidence to support a finding of general charitable intention.

> I think his (Evershed M.R.'s) observations as to the effect of the inclusion in the fund of contributions from anonymous sources were intended to be confined to cases comparable to the one then in hand, that is to say cases in which the circumstances in which the fund is raised are such as to leave it open to doubt whether the named subscribers did or did not contribute with a general, as distinct from a particular, charitable intention.[20]
>
> Evershed M.R. in his judgment in the Ulverston case reinforced this view of what had been said in *Re Hillier.* The language which I use . . . and which Jenkins L.J. has quoted in his judgment . . . should be read in the context of the supposition which I was making, that is, that, the language of the brochure being equivocal, it was legitimate to assist this construction and effect by the inference to be drawn from the stated circumstances that contributions were being sought at the same time both from persons responding to the brochure appeal by using the form supplied and from persons whom Jenkins L.J. has called anonymous donors.[21]

Finally, in dealing with Denning L.J.'s judgment in *Re Hillier,* Jenkins L.J. thought that the judgment went a good deal further than was necessary for the decision of that case and that it could not be regarded as representing the opinion of the Court.

In addition to these English cases, mention should be made of two cases decided in Canada and one in Australia.

*Re YWCA Extension Campaign Fund*[22] is only marginally illustrative. A fund had been raised by public appeal for an extension to the YWCA building in Regina. Insufficient funds were raised for this purpose and at the date of trial "due no doubt to the general depression" the main building was not filled to capacity and the need for increased accommodation facilities had abated. The YWCA applied for diversion of the fund to other purposes, including swimming pool repairs and the payment of an existing and an anticipated bud-

get deficit. The decision was to reject the application on the basis that, whatever the intention of donors, their intention did not stretch to cover purposes entirely different in nature from those expressed in the appeal and on cards signed by the donors.

In *Halifax School for the Blind v. A-G*[23] as a result of the Halifax Disaster in 1917 a fund was collected to build a school for the blind. It was thought that a large number of children had lost their sight in the disaster and it was with these particularly in mind that the project was started. A large part of the fund came in the form of 10-cent contributions from children across Canada. An insufficient amount was raised for the purpose of building the school. The existing Halifax School for the Blind then sought that the fund be applied in providing clothing for blind children attending the school who needed such assistance. The Court made an order accordingly.

Doull J. of the Nova Scotia Supreme Court said in his judgment,

> Much of the money was collected in schools and most of it came in small amounts. It was in my opinion clearly given by the donors for the purpose of charity and with the intention of it being wholly applied for such a purpose.[24]

These words appear to describe an argument that once money is given out-and-out "to charity" it may be applied *cy-près*. It is not clear therefore that Lawrence J.'s judgment in the Welsh Hospital case is significant, since that judgment, as far as it concerned anonymous donors, took the view that those donations were made out-and-out and that it was absurd to consider that in any circumstances there should be a return of money to the donors. It is here submitted that money abandoned as in the Welsh Hospital case need not be treated in the same way as money given out-and-out "to charity". Prima facie abandoned property is *bona vacantia* and belongs to the Crown. On the other hand, property dedicated to charity will be used for a charitable purpose by means of a *cy-près* scheme.

The Australian case, *Beggs v. Kirkpatrick*,[25] was yet another appeal for the building of a new hospital. Again, contributions came from a number of sources; the project later became impracticable. Anonymous donors were held to have made their donations out-and-out on the basis of the evidence. The Attorney-General and the Solicitor-General had expressly waived any claim of *bona vacantia*, and therefore the Court felt no need to direct a scheme, but only to authorize the trustees to use the part of the fund represented by anonymous donations for the building of a new wing on an existing hospital.

As to the question of whether the known existence of anonymous donors was relevant to determine whether identifiable subscribers had a general charitable intention, Adam J. was persuaded by the judgments in *Re Ulverston Hospital Fund* rather than by Denning L.J. in *Re Hillier*. He said that the Court must find general charitable intention before it could order a

scheme, and the known existence of anonymous donors was not necessarily relevant in determining this. Furthermore, he said *Beggs v. Kirkpatrick* was akin to *Re Ulverston* on its facts since the evidence suggested that the identifiable donors had a particular or special charitable intention, that of building a new hospital. This was not a case where the evidence of intention was equivocal.

## CONCLUSION

The search for general charitable intention has consumed much time and space in this series of cases. In *Re Welsh Hospital Fund,*[26] *The Lynmouth Disaster Case,*[27] *Re British School of Archaeology,*[28] *and Halifax School for the Blind v. A.G.*[29] there were decisions in favour of cy-près based on findings of general charitable intention. In *Re Ulverston Hospital Fund* [30] and *Beggs v Kirkpatrick*[31] the courts decided against *cy-près* on the basis of the absence of general charitable intention. In *Re Wokingham Fire Brigade Trust*[32] the Court expressly decided that there was no need to find a general charitable intention in order to justify an order. *Re Hillier*[33] is not so easy to categorize. Evershed M.R. and Denning L.J. based their decisions on different reasoning: Denning L.J. favoured an approach which did not involve discovery of general charitable intention, while Evershed M.R. felt obliged to pay regard — even though this may have been "scant regard"[34] — to the requirement of finding general charitable intention (*Re Y.W.C.A.*[35] has been dealt with but does not properly form part of this discussion.)

It is now convenient to return to the general rules which give rise to *cy-près.* It was pointed out earlier that a general charitable intention must be found in cases of initial failure, whether due to impossibility or impracticability. The rule governing failure which is subsequent (or supervening) is stated in various ways:

> On *cy-près* occasions other than initial impossibility, it is not necessary to show a paramount intention of charity. Once money is effectually dedicated to charity in perpetuity whether in pursuance of a general or a particular charitable intention, the testator's next of kin or residuary legatees are forever excluded and no question of subsequent failure can affect the matter so far as they are concerned. It is a case for *cy-près* application.[36]
>
> If a trust is possible at first, but later becomes impossible, the *cy-près* doctrine is not excluded by the absence of any paramount intention of charity.[37]
>
> In such cases, therefore, (of subsequent impossibility) there is no need to show a general charitable intention. If the purpose was practicable, at the date of the gift, but later becomes impracticable, then assuming there was an out-and-out gift, it will be applied *cy-près.*[38]

The test for determining failure was that laid down in *Re White*.[39]

> Whether at the date of the death of the testatrix it was practicable to carry the intentions of the testatrix into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time.[40]

The relevant time for determining whether a purpose is initially impossible or impracticable is the date on which the gift is effective. Thus, in the case of a bequest, the date would be the date of death; in the case of a deed, the date of execution; and in the case of an *inter vivos* gift other than by deed, the date of delivery.[41] If at that time the purpose cannot be said to be impossible and impracticable, there is no failure *ab initio*. If, then, there is impossibility or impracticability after that time such failure is subsequent failure, and, therefore, there is no need to discover a general charitable intention in order to apply the property *cy-près*.

This logic has not been applied to the public subscription cases. It is submitted there that the proper time to decide whether there is initial failure of the purpose for which a gift is made is the time when the gift becomes effective. The time for judging whether there was an initial failure where, for example, money is placed in a collecting box is the time when the money is so placed. In the case of a donation by cheque the time is the time of delivery of the cheque.

Assuming this, an entirely new argument is raised on behalf of *cy-près*. This argument is that, at the time when contributions were made towards a charitable purpose which eventually becomes impracticable, the charitable purpose was possible and practicable. A subsequent failure is sufficient of itself to allow *cy-près* application of these contributions. There is no requirement of proof of a general charitable intention on the part of contributors.

On the basis of this argument, *Re Ulverston Hospital Fund* and *Beggs v. Kirkpatrick* would have resulted in decisions in favour of *cy-près*, but, perhaps more important, in cases where insufficient funds are raised for a charitable purpose there would be no need to search for general charitable intention nor would there be need to discover general charitable intention through artificial means, for example, by attributing intentions to identifiable donors on the basis of the existence of anonymous donors.

This is not what has happened. One distinction which has been used divides those cases where charitable purposes have failed from those cases where surplus funds remain after completion of the charitable purpose. *Re Wokingham Fire Brigade Trust* and *Re British School of Archaeology* are the only cases among those discussed where courts found in favour of *cy-près* application of surplus funds without finding evidence of a general charitable intention on the part of contributors. But even this distinction has not applied consistently. In the *Lymouth Disaster* case and in *Re Welsh Hospital (Netley)*

*Fund* courts regarded the central issue as being the existence of a general charitable intention.

In the interest of consistency the courts should treat cases arising out of public appeals in the same way as they treat bequests and settlements for charitable purposes. A great benefit of this consistent approach is that it would avoid some peculiarly inconsistent judgments and statements in judgments on the appropriate methods for determining general charitable intention. A last comment in favour of this treatment of public charitable appeals for purposes which fail originates with Professor L. Sheridan in a recent article.

> Where a fund is subscribed for a lawful purpose which eventually cannot be carried out, for example because the total collected is too low or because the purpose becomes unnecessary or illegal, the case would in fact appear to be one of supervening impracticability because the charitable trust attaches immediately to the sums as subscribed. The alternative of viewing the case as one of initial possiblity seems to necessitate regarding all subscriptions as conditional on it being possible on some future date to carry out the purpose and if carried to its logical conclusion, seems to result in all charitable collections being void for perpetuity except in jurisdictions which have enacted "wait and see" or some other modification of the rule against perpetuities.[42]

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## FOOTNOTES

1 (1921) 1 Ch. 655.
2 *Ibid.*, at 660.
3 (1951) 1 All E.R. 454.
4 Tudor on Charities, 6th ed., at 274-279.
5 Re North Devon and Somerset Relief Fund Trusts, (1953) 2 All E.R. 1032; (1953) 1 W.L.R. 1260; 97 S.J. 728.
6 *Supra,* footnote 1.
7 *Supra,* n. 3.
8 (1954) 1 All E.R. 887; (1954) 1 W.L.R. 546; 98 S.J. 216.
9 *Ibid.*, at 892.
10 (1954) 2 All E.R. 59; (1954) 1 W.L.R. 700; 98 S.J. 319.
11 9 and 10 Geo. VI C. 81.
12 *Supra,* n. 10 at 68.
13 *Surpa,* n. 10 at 70.
14 *Ibid.*
15 It should also be noted that both Evershed M.R. and Denning L.J. were impressed by the fact that no donor to the fund in *Re Hiller* had come

forward seeking return of his donation, although many advertisements inviting donors to come forward had been placed in local papers. In this connection, Romer L.J. said, "I am not greatly impressed by this, for it needs some moral courage to ask for the return of money already subscribed, and still more to play the role of Shylock (for some people might so regard it) in litigation which is of considerable local interest."

16 (1956) 3 All E.R. 164; (1956) 3 W.L.R. 559; (1956) Ch. 622; 100 S.J. 603.

17 Ibid., at 169.

18 Ibid.

19 *Surpa,* n. 16 at 170.

20 *Supra,* n. 16 at 174.

21 *Supra,* n. 16 at 175.

22 In (1934) 3 W.W.R. 49.

23 (1953) 2 D.L.R. 347.

24 *Ibid.,* at 348.

25 (1961)

25 (1961) V.R. 764.

26 *Supra,* n. 1.

27 *Supra,* n 5.

28 *Supra,* n. 8.

29 *Supra,* n. 23.

30 *Supra,* n. 16.

31 *Supra,* n. 25.

32 *Supra,* n. 3.

33 *Supra,* n. 10.

34 J. C. Hall — "Recent Developments in the *Cy-Près* Doctrine" (1957) *Camb. L.J.* 87 at 93.

35 *Supra,* n. 22.

36 Pettit, "Equity and the Law of Trusts", 2nd ed. at 203.

37 Snell, "The Principles of Equity", 26th ed. at 179.

38 Keaton, "The Mondern Law of Charities" at 141.

39 (1955) Ch. 188 at 193; (1954) 2 All E.R. 620 at 622.

40 E.G. *Re Tacon,* (1958) Ch. 447; (1958) 2 W.L.R. 66; 102 S.J. 53; (1958) 1 All E.R. 163.

41 *Re Slevin,* (1891) 2 Ch. 236. Even if the purpose fails prior to transfer of the property to trustees, property may pass *cy-près* provided that, at the date the gift is effective, the purpose is possible or practicable.

42 Sheridan, *"Cy-près* in the Sixties: Judicial Activity" (1968) *Alta. L.R.* 16 at 24.