Parallel Foundations and Crown Foundations*

E. BLAKE BROMLEY
Douglas, Symes, Brissenden, Barristers and Solicitors, Vancouver

Introduction

The terms "parallel foundation" and "Crown foundation" are not technical terms used in the *Income Tax Act* or any other statute dealing with charities. They are terms which have entered the vocabulary of philanthropy through repeated usage in the same way as "community foundation", "donor advised fund" or "program-related investment". A parallel foundation is a foundation set up by an operating charity to raise funds and hold investments primarily for that operating charity. The parallel foundation is often more important strategically when the objective is to raise planned gifts or endowments rather than annual operating funds. The classic example of a parallel foundation is the Balmoral Hospital Foundation which raises endowments and contributes the proceeds to the Balmoral Hospital. A Crown foundation is one created by statute which is stated to be "an agent of the Crown in the right of the Province" (Agent of the Crown) and has the purpose of providing funds to a particular institution or class of institutions. Crown foundations will be discussed later in the article.

No Technical Advantage To A Parallel Foundation

Until the major 1984 amendments to provisions governing charities in the *Income Tax Act*, there were technical tax reasons which made the parallel foundation a valuable and even necessary adjunct to an operating charity. Prior to 1984, a charity designated as a "charitable organization" could not exclude from its disbursement quota, gifts for which it had issued an official receipt except in some very unusual circumstances such as where the donor had not claimed the deduction or was a non-resident of the country. A "charitable foundation", on the other hand, could exclude "a gift received subject to a trust or direction to the effect that the property given, or property substituted therefor, is to be held by the foundation for a period of not less than 10 years".

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A gift with such a direction has come to be known in the vernacular of philanthropy as a "10-year directed gift".

The significance of the 10-year directed gift is that it enables a charity to accumulate endowments without running afoul of the disbursement quota requirement that it expend 80 per cent of the aggregate of all amounts for which it issued an official receipt in its immediately preceding fiscal year. For example, unless a charity received the majority of its income from sources other than receipted donations, a charitable organization could not issue a receipt for a $1-million donation for an endowment without distributing $800,000 the following year if it was to meet its disbursement quota. Therefore it was almost necessary to have a parallel foundation to receive, receipt and hold endowments.

The 1984 amendments extended the right to receive 10-year directed gifts to charitable organizations and thereby removed the only technical tax reason to have a parallel foundation. A parallel foundation designated as a public foundation is effectively prohibited from acquiring control of any corporation and incurring debts, other than debts for current operating expenses, the purchase and sale of investments and administering charitable activities. Since these restrictions do not apply to a charitable organization it is legitimate to ask why an operating charity would want to utilize a parallel foundation.

Marketing Reasons For A Parallel Foundation

A parallel foundation is useful from marketing and legal perspectives even if it has no tax advantages. A donor considering a major endowment gift is going to ask different questions than a donor giving to the annual campaign. Frequently annual campaign solicitations emphasize the budget deficit or funding shortfalls in ways designed to stress an immediate crisis so as to trigger an instantaneous cash response. The message which succeeds in generating an emergency response simultaneously communicates to a potential endowment donor that the charity may not be around in a decade and maybe the endowment will be lost in the process. In an era when the most prestigious museums and symphonies in our largest cities experience closures and periodic insolvency a donor is concerned that the endowment will be seized by creditors of the operating charity.

The solution is to place the endowment in a separate legal entity which does not incur liabilities for wages, materials and other operating expenses or the risk of being sued for negligence or accidents related to its operations. The most convenient and logical recipient of such gifts is a parallel foundation. In certain circumstances these gifts are placed in a dedicated fund in a community foundation or a separate trust but those are not the solutions of choice from the perspective of the operating charity. A donor is sometimes too polite or otherwise reticent to raise these issues with the operating charity as the donor

is usually a friend and admirer of both the institution and its senior staff. These concerns, however, are frequently raised with professional advisors. The charity is better to anticipate these concerns and respond to them by putting a parallel foundation in place before it approaches donors.

While a parallel foundation may protect an endowment from creditors and other external hostile forces, the concern is that it simultaneously alienates the funds from the control of the operating charity. Achieving the correct level of control comes from careful legal drafting with attention to both the stated objects of the foundation and rules governing the election of members and boards. That, of course, assumes that the charity is in a jurisdiction that allows such freedom. It is sobering to remember that Alberta on March 29, 1985 gave Royal Assent to the *Hospitals and Medical Care Statutes Amendment Act, 1985*[1] which amended its *Hospital Act*[2] to read:

> 72(2) No person shall operate a hospital foundation established to benefit a general or auxiliary hospital, including any corporation established before the commencement of this section, to receive, hold, administer, and apply any property or the income from it for purposes or objects in connection with a hospital, unless exempted by the Minister subject to any terms and conditions he prescribes.

In the past several years I have been involved in the incorporation or amalgamation of more than 10 parallel foundations for hospitals. No other parallel foundations present such challenging political and policy considerations to those devising their role and the control structure which is the most appropriate. Amalgamations are, of course, more challenging than a single parallel foundation. The challenge is increased in situations where it is anticipated that two amalgamating foundations may later be joined by a third or even more foundations.

Control Issues In A Parallel Foundation

In my opinion, if the driving reason for the parallel foundation is marketing and attracting endowments rather than tax advantages, it is important that the ultimate control structure balance the concerns of the operating charity with the aspirations and apprehension of the donor. The charity wants to have iron-clad control to insure that it receives all the income while the donor is beset by a nagging suspicion that the charity's own management might be the enemy. It is a uniquely acute fear when dealing with hospital foundations as there is also the worry that the government may take over or amalgamate the parent hospitals. It is for this reason that I will discuss the issues involved by referring specifically to hospital foundations.

When advising on the legal purposes and structure of a parallel foundation I am frequently in the position of advocating the interests of the donor in opposition to the interests of the hospital administration. It is predictable and

prudent for the hospital to want all of the foundation's income to come to it and to have no administrative problems in controlling the foundation. The dilemma is that, if the control structure and stated purposes do not answer the donor's often unspoken apprehensions, then the gift will not be made and absolute control will be a Pyrrhic victory.

Donors give money to a hospital because it is perceived as a community institution as well as because of the medical services it provides. From a donor's perspective it is sometimes important that the hospital foundation be dedicated to serving a particular community. This is particularly important in suburban communities where a local hospital is competing for funds with a glamourous downtown hospital. The hospital itself is dedicated to the most effective and efficient delivery of health care and may recognize and support the rationale and benefits of having certain procedures done in regional facilities. The donor, however, may want his or her endowment restricted to services actually delivered in the community hospital. Considerable discussion therefore takes place on the issue of whether there should be a geographic restriction in the letters patent or constitution.

The geography debate takes on a different tone when a future amalgamation of the hospital is contemplated. If the hospital administration is hostile to such a possibility it will frequently advocate a geographic restriction. Having the proceeds of the Commutersville Community Hospital Foundation legally obligated to be paid to the Commutersville Community Hospital does not keep the money in Commutersville once that hospital is amalgamated with the Metropolitan Regional Hospital. The legal person of Commutersville Community Hospital is continued at law in the Metropolitan Regional Hospital and so the proceeds are now paid to the new legal entity. While it is not possible to stop the amalgamation of the hospitals, the hospital foundation can anticipate and prepare its defences against such a change. At the foundation level the question is less whether it is wise to amalgamate into Metropolitan Regional Hospital than whether potential donors will want their endowments to follow the amalgamation.

The control issue is even more interesting when the feared development is a radical move by the government to remove the hospital board elected by its members in the community and replace it with a single administrator or a new board appointed by the government. This has happened to such prominent hospitals as the Vancouver General Hospital which has a single government-appointed administrator instead of a board. A hospital foundation which has bylaws appointing the same directors as the parent hospital would not be very attractive to donors in that circumstance. At this stage in the discussion the hospital administration is often more enthusiastic than a potential donor about having a control structure which does not mirror that of the hospital.

Apart from these negative reasons for having a different board structure for the hospital foundation there are positive advantages. The primary advantage is that it allows the hospital to bring new talent and energy to the fund-raising task rather than demanding that the already overextended members of the hospital board find additional time to raise funds. Not only does this spread the work load, it enables the foundation to bring in board members who are primarily interested in raising and investing money.

When designing the legal structure of the parallel foundation it is useful to differentiate between classes of directors and build a board with a combination of elected, appointed and *ex officio* directors. This allows for different terms and a different process of electing or selecting directors. The philosophy and culture of a particular parallel foundation will determine how general the bylaws should be when setting out matters such as the committee structure and titles and duties of different officers.

Directors Who Are Not Members

When dealing with control of the parallel foundation it is best to concentrate on the provisions governing the admission and removal of members rather than the rules relating to directors. Members ultimately control a foundation in the way that shareholders are the paramount authority in running a corporation. Directors manage the affairs of the corporation or foundation but it is the shareholders or members who appoint and remove those directors. The bylaws set out how many directors there should be and how they are elected and appointed. The members have the power to change those bylaws and thereby change the rules as to how and on what terms directors take and continue to hold office.

If a parallel foundation is incorporated under the Ontario *Corporations Act* there is a statutory requirement that the directors be (or shortly thereafter become) members of the corporation.[3] A corporation operating a hospital within the meaning of the *Public Hospitals Act*[4] is exempt from this provision[5] but that exemption would not extend to a hospital's parallel foundation. This legal requirement significantly reduces the flexibility available for designing the optimal control relationship between the operating charity and the parallel foundation. If the operating charity controls the process by which members of the parallel foundation are admitted and removed it has gone a long way towards removing concerns about ultimately losing control of the parallel foundation. If there is no requirement that a director of the parallel foundation be a member of the parallel foundation there is increased flexibility in utilizing the parallel foundation as a vehicle to bring new friends of the charity into a role restricted to raising funds. If these people prove their loyalty, commitment, and competence at that level they demonstrate their eligibility and suitability to serve as directors of the parent charity. There are significant public policy

reasons which recommend a system which allows prior service on the parallel foundation as a prerequisite for becoming a director of the parent charity rather than the other way around.

There are no requirements under the *Society Act*[6] in British Columbia or the *Canada Corporations Act*, the federal legislation under which foundations may be incorporated, which make it mandatory for directors to be members. It is my standard practice under both pieces of legislation to state explicitly in the bylaws that directors need not be members. While parallel foundations in Ontario may be reluctant to use the B.C. *Society Act* to incorporate and operate in Ontario, this is only one of many reasons to avoid using the Ontario legislation. The problem with the federal legislation is that it is significantly outdated and not likely to be amended in the near future.

Charities in Ontario are familiar with the problems resulting from the activist role taken by the Public Trustee of Ontario in scrutinizing and approving charities seeking to be incorporated in the Province. I have personal experience with charities wanting to incorporate and operate in Ontario which have abandoned the process after months of wrangling with the Public Trustee's office. They found it easier to incorporate in British Columbia and get registered with Revenue Canada and then operate in Ontario as an extra-provincial society. (This article, however, is not the forum in which to discuss the relative merits of selecting a different provincial jurisdiction as opposed to using the federal legislation when deciding which statute to use when incorporating.)

The most interesting aspect of the task of designing legal control with directors who are not members is to build in a mechanism to transfer control of a hospital foundation to independent community directors in the event that the government attempts to seize control of the foundation endowments for normal operational expenses. In the corporate world, cash-rich companies build in "poison pill" and "golden parachute" mechanisms to inhibit a hostile takeover.

In the world of philanthropy it is prudent for well-endowed foundations to concoct an "eleemosynary elixir" which creates a trauma-induced transmutation. The difference is that the good guys are parachuted in, rather than bailing out.[7]

Planning corporate control of the parallel foundation is only one way to protect the principle and principal of an endowment. A more effective way is to design specific trust terms with the donor at the time the gift is made and impress the endowment with those trusts. This is not always easy to do and may unduly restrict flexibility in the application of the funds so this mechanism is not necessarily recommended. (Again, this is not an appropriate forum in which to deal with application and protection provisions when negotiating an endowment.)

Crown Foundations

Many people are interested in the emergence and impact of foundations which are designated as "Agents of the Crown" in the legislation incorporating them. I will refer to these as "Crown foundations" although it is important to remember that many institutions and entities are Agents of the Crown without being Crown foundations.

As you know, in Canada individuals receive a tax credit for 100 per cent of the aggregate amount of their charitable donations. In any one year an individual can only use those tax credits up to a maximum limit of 20 per cent of taxable income; however, any excess tax credit may be carried forward for an additional five years. The donor can only apply charitable donation tax credits retroactively in the year of death and can then only carry them back for one year. It does not matter whether the donor is giving cash or assets although gifting assets is a taxable disposition of property.

Canada has retained the old system of charitable deductions for donations from corporations. Corporations making charitable donations must follow substantially the same rules as individuals but receive tax deductions rather than tax credits. The same limitation of 20 per cent of the corporation's taxable income in any one year applies, and deductions can be carried forward for five years. There are no provisions permitting a corporation to carry a donation deduction back and apply it against the income of a previous year.

Donors receive the same tax benefit whether they give to a charitable organization, a public foundation or a private foundation. There is a significant advantage, however, in giving to an Agent of the Crown. An individual can use a tax credit for a donation to an Agent of the Crown up to a maximum limit of 100 per cent of taxable income. Again, the individual is able to carry forward any excess tax credit for an additional five years and carry it back one year in the event of his or her death. Similarly, a corporation's limitation on the deduction which can be claimed is raised to 100 per cent when the gift is to an Agent of the Crown.

Proposing An Umbrella Crown Foundation

The *Income Tax Act* has provided this enhanced incentive for gifts to "Her Majesty in right of Canada and Her Majesty in right of provinces" for decades. What was needed was a statutorily created mechanism to make it available to appropriate charities in a province. Consequently, I wrote then Premier W. R. Bennett on December 19, 1984, proposing that British Columbia pass legislation to create a "Province of British Columbia Endowment Agency" which would be designated as an Agent of the Crown. The proposal suggested that this would be an "umbrella" agency for all educational and medical institutions in the province designated as appropriate recipients by the Government.

I sent a copy of the letter and proposal to the Minister of Education, the Minister of Health and the Minister of Universities, Science and Communications. The Premier responded favourably and instructed the Economic Development Committee of Cabinet to meet with me to explore it further. The Minister of Universities also had me meet him in Victoria and asked me to provide him with a draft of what such legislation should look like. The universities in British Columbia were very interested in the concept with the primary impetus and energy coming from the University of British Columbia.

A meeting of the chief executive officers and chairs of the boards of the community colleges also discussed the proposal but they were not interested because the colleges themselves were already designated "Agents of the Crown" in their governing legislation.[8] The primary exception was the British Columbia Institute of Technology which was incorporated under a separate statute. Amendments to the *Institute of Technology Act*[9] were enacted in 1985[10] which made it an Agent of the Crown effective April 1, 1986.[11]

The proposal was circulated to a significant number of hospital boards and the written responses directed to me (with and without copies sent to the Minister of Health) were divided between optimism about the enhanced gift potential and concern about undue Government control as a consequence of Agent-of-the-Crown status. It was clear that considerable work would be required before the hospitals reached a consensus as to whether they wanted the Minister of Health to promote such a proposal. Consequently, the proposal ceased to be for an "umbrella" agency and was changed to create multiple stand-alone foundations dedicated to individual universities. This was conceptually and administratively a better proposal than that for a single umbrella foundation.

Gifts To The Universities Council Of British Columbia

These meetings began in 1985 with no realistic timetable or even any commitment from the Government that any Crown foundations would be created. Donors who were clients and knew of the proposal wanted a speedier and more certain solution. In 1985 I was retained by a potential donor who wanted to make a gift of real property to the University of British Columbia but was unwilling and unable to pay the taxes on the capital gains which would result from the disposition by way of gift. At that time it was possible under subsection 110(2.2) of the *Income Tax Act* to make a gift of tangible capital property at a value as low as its adjusted cost base provided that the property given "could, at that time, reasonably be regarded as being suitable for use by the donee directly in the course of carrying on its charitable, public service, or other similar activities". It was doubtful that the property met these conditions. I was told by the donor that if I could find a way for him to receive a receipt which was 100-per-cent deductible he would make the gift to UBC. Otherwise,

I was asked to arrange to make the gift to a specified department of the federal government.

Dealing with a potential seven-figure gift always has the effect of increasing my attention and focusing my mind. I knew that there was some expectation that subsection 110(2.2) would be amended to solve the tax penalty problem of triggering capital gains but the stakes had been raised since the donor now wanted a 100-per-cent deductible receipt. In fact, subsection 110(2.2) was amended in 1986 by removing the word "tangible" as a qualifier for capital property so that shares could be gifted under this provision. This necessitated removing the suitable-for-use qualification as shares in a corporation would, almost by definition, be impossible to use directly in charitable activities. Although the amendment was made retroactive to apply to gifts made after 1984, it came too late for the gift in question.

I researched several alternatives which proved to be too complicated or too political to interest either the donor or the university. More importantly, as they were variations of the plan by which the gift is given to a provincial ministry and then transferred to the university, there was too much risk that the gift would be deemed to be to the university and the Crown would be ruled to be simply a conduit. The Tax Review Board case of *Murdoch* v. *MNR*[12], in which a gift to The National Second Century Fund of British Columbia was ruled to be a gift to charity rather than to an Agent of the Crown, was a very real disincentive to attempting any such plan.

During my research I reread the *University Act*[13] and noticed that the Universities Council of British Columbia (UCBC) was named as an Agent of the Crown.[14] The statutory role given to UCBC was to be the agency which funded the three public universities and determined how much money was to be given to the universities and how it was to be allocated. As such, receiving money from private donors rather than government and allocating it to a specific university was a reasonable and acceptable extension of its role. Although UCBC had been created in 1974[15] and had had Agent-of-the-Crown status since its inception, no private donor had ever made a gift to it.

The Chairman of UCBC at the time was George L. Morfitt, a sophisticated businessman who was an accountant by training. He was careful to obtain independent legal advice confirming that this was a proper course of action for UCBC but was extremely helpful in facilitating the necessary approval. It is somewhat ironic that today he is the Auditor General of the Legislative Assembly of the Province of British Columbia and as such has been appointed auditor of several of the university Crown foundations.

In British Columbia we are blessed with a Lieutenant-Governor, the Honourable David See-Chai Lam, who is personally committed to promoting philanthropy and leads by example. In 1985 Dr. Lam was a private citizen who

habitually donated more than the 20-per-cent limit and wanted to increase his giving even more. As my friend and client he was aware of the work I was doing to open up the possibility of Crown gifts. He agreed to be the test case with regard to a gift he was making to the University of Victoria. On November 29, 1985 Dr. and Mrs. Lam made a gift of $1 million to UCBC and the gift was subsequently allocated to the University of Victoria.

The Lam gift was the first one to be made to UCBC. The following day another client who had been waiting for Dr. Lam to lead the way made a gift in excess of $5 million which was also allocated to the University of Victoria. The fact that the donor had just moved to Vancouver from Alberta and made the gift from an Alberta company demonstrated the attractiveness of a Crown gift. The originally proposed gift, in excess of $1 million, which was allocated to UBC was not made until December so was not the pioneering gift.

Creation of Crown Foundations for the Universities

These gifts demonstrated the importance of Agent-of-the-Crown status in triggering large gifts to universities. The primary impetus for moving ahead came from UBC which appreciated the significance which this could have in fund raising. Meetings continued with the Government in 1986 and increasingly were confined to the officials responsible for universities and tax policy officials from Treasury Board.

The first proposal brought forward by the Province was one designed to accomplish this Agent-of-the-Crown status with a foundation incorporated under the *Society Act* rather than by statute. In March 1987 I received a draft constitution and bylaws of such a foundation to benefit universities prepared by the Legal Services Branch of the Ministry of the Attorney General. This proposed foundation had an unalterable provision in its constitution denoting it as an Agent of the Crown and a control structure which would be likely to satisfy a common law test as to whether it was an Agent of the Crown. I was opposed to anything less certain than a statute naming the foundation as an Agent of the Crown as Revenue Canada had published several Interpretation Bulletins which stated that the test was satisfied if the incorporating statute made the designation.

By 1987 the Province was in the process of disbanding UCBC completely for reasons unrelated to gifting but which would necessarily end its role as a receiver of gifts. President David Strangway of UBC put considerable pressure on the Province to enact legislation creating a university foundation designed to take over this gifting ability. The *University Foundations Act*[16] received Royal Assent on July 16, 1987 and on the very same day, the *University Amendment Act, 1987*[17] which repealed the provisions constituting UCBC, received Royal Assent. The University Foundations came into being on December 11 of that year pursuant to B.C. Regulation 437/87. Again, Dr. Lam

was the pioneer employer of this gifting vehicle as he made the first donation to the University of British Columbia Foundation to fund his $1-million commitment to create the Asian Gardens at UBC.

The *University Foundations Act* created separate foundations for the three public universities in British Columbia and was subsequently amended[18] to create a similar foundation for the University of Northern British Columbia when it was created. My role in advising on the final legislation was somewhat ambiguous as officially I was not part of the process. The first draft substantially followed the draft I proposed to the Minister of Universities in 1985 but the drafting was officially done by the Legislative Counsel. In addition, the Province hired an Ontario accounting firm to advise it on tax issues. I was regularly consulted unofficially on issues by Victoria but not by the Ontario consultants. The result was a Crown foundation which had more government control and fewer powers in the planned giving field than I had hope to see.

Control Of The Board Of A Crown Foundation

The first area of dispute was whether, for Revenue Canada's purposes, one could simply rely on the words in the statute that said the foundation was an Agent of the Crown or whether it was necessary to give the government a level of control which would pass a common law test as to whether it was an Agent of the Crown. The result was a board of five members all of whom are appointed by the Lieutenant Governor in Council (LGIC). Two of the five, however, are appointed from a list of five members of the university's own board which is submitted to the government. As legal counsel to The University of British Columbia Foundation I know that in practice to date, all of its members have been appointed in consultation with the university and have been appointments supported by the university. The university's legal right to influence appointments, however, is limited to this extent and it does not have as much autonomy as originally proposed.

This is quite different from the 1992 Ontario legislation, Bill 68, *An Act respecting University Foundations* which was enacted and then given Royal Assent on November 5, 1992. All of the members of the board of the Ontario university foundation are appointed by the LGIC with the statute providing for no input from the universities. I do not know whether in practice the universities in Ontario are accorded significant involvement in the selection process.

It is interesting to note that the *Universities Foundations Act*[19] in Alberta which was given Royal Assent on June 25, 1991 and proclaimed in force December 5, 1991, follows the B.C. model in requiring that "at least" two of the board members "must be appointed from a list of nominees submitted by the appropriate university". The Alberta legislation effectively permits the university to appoint two of the five board members since it could submit a list of nominees with only two names on it. Nothing precludes the other three

appointees from coming from such a list of nominees. Further, the nominees are not required to be on the board of the university.

On July 17, 1989 the *Hospital Amendment Act, 1989*[20] in British Columbia received Royal Assent and amended the *Hospital Act*[21] to create a Crown foundation, known as the Hospitals Foundation of British Columbia, which serves as an umbrella foundation for hospitals in the province. The Hospitals Foundation board has 11 members with six appointed outright by the LGIC and the remaining five appointed by the LGIC from a list of not less than 10 persons nominated by the British Columbia Health Association. Thus, the hospitals' flexibility is marginally greater than that provided by the universities' foundation as there is no requirement that those nominees be from the board of the British Columbia Health Association. On the other hand, that flexibility gives the hospitals less control than the universities enjoy.

Government Guidelines To The Board

Another aspect of the control debate was the degree of control which would arise from the board's discretion to accept and dispose of a gift, a provision which was necessary to avoid the argument that the Crown foundation was simply a conduit. In the vernacular of the debate, it was necessary to "stop the train" in the "station" of the university foundation and then have the board, rather than the donor, direct the train to proceed to the university. Detailed guidelines were developed regarding procedures for accepting and distributing gifts which required the university foundation board in British Columbia to have an active and determinative involvement prior to gifts being transferred to the university and were submitted for approval to Revenue Canada by the Ontario consultants.

Section 6 of the Ontario legislation explicitly provides in the statute for "policy directives that have been approved by the LGIC". This is much more than the non-binding guidelines developed in the B.C. environment, especially when subsection 6(5) says:

> The members of the board of directors shall ensure that policy directives are implemented promptly and efficiently.

There are no similar provisions in the B.C. or Alberta legislation. Having opposed non-binding guidelines designed primarily to address a potential problem with Revenue Canada, it follows that I am somewhat uncomfortable with section 6 of the Ontario legislation which contemplates and facilitates direct interference from the Province.

B.C. Crown Foundations Limit Government Interference

The B.C. legislation was drafted so that the university foundation would serve the interests of the related university and to minimize the possibility of a government appointed board interfering with, and changing, the terms imposed by either the donor or the university. This is illustrated by subsection 4(3) which explicitly authorizes a university to transfer an endowment to the university foundation and have it vest in the university foundation "subject to such conditions as the board of governors may specify at the time of transfer". That "subject to" clause was drafted with the express intention of reassuring the university that it could make such transfers on terms of its own choosing.

Subsection 4(4) provides reassurance to the donor that any conditions which he or she imposes on the university at the time of the gift or bequests will continue and are imposed on the university foundation after the endowment is transferred. The board is directed in subsection 10(1), when determining how funds shall be used in any year, to be governed by any conditions imposed in a transfer under section 4(3). Subsection 4(5) removes any doubt that the university can make it a condition that an endowment be reconveyed to it by explicitly stating that the university foundation "may transfer the capital back to the university from which it was received".

The aggregate effect of these provisions is to make it abundantly clear that the university foundation in B.C. is to carry out the wishes of donors and the university and not to carry out policy directives of the LGIC. The statute may specify that the majority of board members be appointed by the LGIC but dictates that they then carry out donors' wishes. This is good policy from the government's point of view as the point of enacting the legislation was to encourage donors to contribute to universities. If the legislation has provisions which obstruct that objective by heightening a donors' concerns that the government will interfere with the application of their endowments there is no reason to create a Crown foundation for a university.

It is, therefore, counter-productive in my opinion for Alberta to have passed the *Universities Foundations Amendment Act, 1992*[22] which repealed the former provision governing directions of donors and substituted the following section:

> When providing grants or real or personal property to an advanced education institution, a foundation may consider the directions of persons who have made gifts to the foundation, including a direction that a particular advanced education institution is to benefit from a gift, *but a foundation is not bound by the directions*. [emphasis added]

Another example of how university-friendly the B.C. legislation is, is found in section 10 which excludes the university foundation from the very restrictive

trustee investment provisions of section 15 of the *Trustee Act* and authorizes the board to make investments that a prudent person would make. This was particularly important in B.C. because the *University Act* restricts a university to trustee investments unless a donor or bequest expressly authorizes a broader investment standard. Utilizing the transfer powers in section 4 the university could vest its endowments in the university foundation and allow it to pursue an investment program based on a prudent-person rule. Should there be any concern for the legal principle that a principal can not give an agent more powers than the principal has, subsection 10(2) explicitly applies the prudent-person rule to money transferred to the university foundation by a university.

Amendments To The Bylaws

Comparing the provisions of the Ontario legislation with those of B.C. legislation shows that the primary advantage in Ontario is that the board may pass bylaws without LGIC approval. The LGIC approves the bylaws in B.C. and a board can make only procedural bylaws without requiring the approval of the LGIC. This again flows from the concern about the LGIC having control over an Agent of the Crown and was not in the originally proposed bylaws I drafted. When the Hospitals Foundation of British Columbia was incorporated I was retained as its legal counsel and drafted its bylaws. The LGIC approved bylaws which gave the board significantly more power than boards enjoyed under the bylaws of the university foundations.

There is no doubt in my mind that the university foundations are a significant advantage when universities are attempting to attract large donations. The donations described earlier which were made to UCBC seemed large at the time. Since then, press reports have identified the gift of $10 million to UBC from Tom and Caleb Chan who formerly lived in Hong Kong. Last year Peter Wall whom I had acted for when he made an earlier gift of $1 million to UCBC has made a gift of $15 million to UBC Foundation. There are additional seven-figure gifts in which I know from personal knowledge that the ability to give to a Crown foundation was a factor in completing the gifts.

Planned Giving Not Adequately Contemplated

The major power which is missing in the B.C. legislation is the explicit authority to act as a trustee of charitable remainder and other types of trusts which benefit the university and as the personal representative of an estate which makes the university a primary beneficiary. Those enabling powers as well as exemption from statutes which govern those activities were in the original draft. Unfortunately, a Crown foundation is thought of almost exclusively in terms of *inter vivos* gifts. As very few donors are over their 20-per-cent deductible limit on an annual basis I believe that there is more potential for Crown foundations in estates than in annual giving as those donations cannot be carried forward. Also, those whose estates are primarily

composed of their principal residence and bank deposits have very few capital gains on death and so the 100-per-cent limit is very important.

The Ontario legislation does not encourage testamentary gifts as subsection 11(2) states that if a regulation prescribing an institution is revoked, the university foundation ceases to exist. While the assets and liabilities of the university foundation become assets and liabilities of the university the foundation itself ceases to exist so any testamentary gifts to it would fail. This would be a major concern at UBC where more and more testamentary gifts name the foundation rather than the university. On the other hand, it is infinitely better than section 17 of the Alberta legislation which states:

> This Act expires on March 21, 1996 unless it is continued for one or more periods by the Lieutenant Governor in Council.

Conclusion

The creation of Crown foundations has significantly enhanced the ability of related institutions to attract large gifts. It is important that Crown foundations be managed responsibly so that the privileges which result from their creation will not be attacked and withdrawn by Revenue Canada. It is also critical that governments allow them to function with autonomy because donors will not give to them if there is any suspicion that the government is going to interfere with the ownership and use of their capital.

FOOTNOTES

1. S.A. 1985, c. 32, s. 11.
2. R.S.A. 1980, c. H-11.
3. R.S.O. 1990, c. C. 38, s. 286.
4. R.S.O. 1990, c. P. 40.
5. R.S.O. 1990, c. C. 38, s. 286(3)(a).
6. R.S.B.C. 1979, c. 390.
7. Subsequent to the presentation on December 2, 1992, a hospital foundation for whose bylaws I had drafted such "eleemosynary elixir" membership provisions several years ago had the opportunity actually to experience how they work. The Minister of Health called a meeting on a Sunday night and told the hospital's trustees that they were all being removed immediately. Radical-membership-change provisions in the hospital foundation's bylaws were immediately activated the following day when an Order-in-Council was signed formally removing the trustees and appointing a single Public Administrator to replace them. The directors of the hospital foundation remained in place.
8. *College and Institute Act*, RSBC 1979, c. 59, s. 53(1).
9. R.S.B.C 1979, c. 199.
10. S.B.C. 1985, c. 81, s. 15.
11. B.C. Regulation 54/86.

12. 1979 D.T.C. 206.
13. R.S.B.C. 1979, c. 419.
14. R.S.B.C. 1979, c. 419, s. 65(1).
15. S.B.C. 1974, c. 100, s. 66(1).
16. S.B.C. 1987, c. 50.
17. S.B.C. 1987, c. 491.
18. S.B.C. 1990, c. 28, s. 20.
19. S.A. 1991, c. U-6.5.
20. S.B.C. 1989, c. 49.
21. R.S.B.C. 1979, c. 176.
22. S.A. 1992, c. 34 which received Royal Assent on June 26, 1992 and was proclaimed in force on September 3, 1992.