Recent Legal Developments

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The last issue of the *Philanthropist* contained a brief discussion of the Manitoba Law Reform Commission's *Report on Non-Charitable Purpose Trusts* (1992). British Columbia's Law Reform Commission has also produced a *Report* on the subject and, like Manitoba it recommends substantial reform of the current law. There already exists some reform in this area, through the case law and statutory provisions, but the Commission argues that these are partial and unnecessarily technical. It suggests that trusts could be devoted to almost any purpose, provided that it was certain, and that the court also be given a variation power in the case of trust purposes that become impossible or impracticable. Unlike Manitoba, British Columbia's proposals do not include the requirement that every such trust have a nominated "enforcer", although they do allow for such a person to be nominated by the settlor. Indeed the "enforcement problem", one of the traditional objections to non-charitable purpose trusts, is dealt with by permitting a wide range of persons to apply to court for enforcement—the settlor, his or her enforcer or personal representative, a trustee, the Attorney-General, or "any person appearing to the Court to have a sufficient interest in the enforcement of the trust" (Draft Legislation, s. 44 (10)). As with the Manitoba *Report*, an effective assimilation of charitable and non-charitable trusts law is proposed.

The principal rationale offered for these reforms is one that should particularly interest readers of *The Philanthropist*—the narrowness of the current definition of charity and the concomitant principle that "philanthropy" in fact does not necessarily equal "charity" in law. The *Report* argues that, particularly in an era of cutbacks in government funding, increasing numbers of activities are financed by private groups and many of these are "cause-oriented...directed primarily towards social and legal change" and therefore not charitable. Denying trust status to gifts given for such purposes and to the organizations formed to carry them out places non-charitable purposes at a disadvantage compared to charitable ones at a time when it is becoming "increasingly difficult" to justify aspects of the charitable/non-charitable distinction, particularly the rule that charitable purposes cannot be "political" (p. 30). Indeed the Commission "expect[s] that the non-charitable purpose trust would chiefly be used as a funding device for activities that are seen by at least a segment of popular opinion as serving socially desirable goals" (p. 39).

While non-charitable purposes can, of course, be pursued through non-profit corporations or unincorporated associations, and while donors can contribute to such organizations, the law does not guarantee that the objects of those organiza-

tions will not change. If the trust device were available for non-charitable purposes, argues the *Report*, they might do better in competing for donors because organizations could offer an assurance of long-term adherence to the original objects. The *Report* concedes that charities would retain the substantial tax advantages that they now enjoy, but for the most part that is a matter outside of provincial jurisdiction. The Commission is probably right about the need to regularize the law here, and about the small advantages that will accrue to non-charitable purposes as a result. Certainly the advantages will be small until a more systematic approach is taken to the whole issue of support for some philanthropic purposes and not others through tax deductions, and those that receive such benefits will probably continue to enjoy a privileged position.

British Columbia's law reformers have also been busy in an area they term "Informal Public Appeal Funds" which is the subject of a 1993 *Report*. By "informal" they do not mean the appeals conducted on a regular basis by organizations devoted to charitable or other purposes but "spontaneous appeals", those that follow "a disaster like a fire or a flood" or respond to "publication of a news item about a family or individual in some sort of distress" (p. 1). Increasingly common are campaigns for causes such as individual children in need of specialized medical treatment. Such an appeal is not a charitable purpose because it conveys no public benefit. Of particular concern is the common law rule that if there is a surplus in such a fund—either because the purpose is completed or because the money cannot be used for the stated purpose—and that purpose is not charitable, the fund belongs in law to the subscribers. While superficially attractive, this rule creates absurdities when the contributions are made anonymously, as acts of spontaneous generosity through public collections or fund-raising events, as they usually are. If the donors are not known, the money cannot be returned, nor put to any other purpose—except in Nova Scotia. The general law in this area was reviewed and critiqued in a recent issue of this journal.[1]

The British Columbia *Report* provides a comprehensive review of existing law, and then advocates that surpluses in non-charitable appeal funds "should be available to meet other valid needs". Thus it rejects the proposed Ontario solution (*Report on the Law of Trusts*, 1984) that the surplus funds be given only to charitable purposes, arguing that "there are many worthwhile purposes that do not fit into the legal concept of charity", and that "not all charities enjoy an equal measure of support from all elements of the public". The funds should go to a purpose "similar enough to the original one for the donors to think their intentions are being respected", whether or not that purpose is charitable (p. 20). An exception is made in the case of a fund raised for a particular individual: "if the general law would hold that a private trust has been created for that person, we do not see a reason to deprive him or her of the right to assert a claim to a surplus in the fund" (p. 20).

The proposed mechanisms by which variation would be carried out in most cases are interesting. Trustees should not be given the power to act unilaterally. Instead, court approval would be required for variation of all funds of $10,000 or more. For smaller surpluses which would be substantially reduced by the costs of going to court, the Commission recommends distribution according to the trustees' wishes but "only ... among designated charities having uncontroversial aims and enjoying a broad base of support from the donating public" (p. 22). These approved charities would be prescribed by the legislation or regulations, and examples offered in the *Report* include the Hospitals Foundation of British Columbia or a foundation established under the *University Foundations Act.* Interestingly, the report recommends that donors should have the right to appear and make representations in any variation application, as should a specific person for whom the fund was originally collected and the Attorney-General as a representative of the public interest. Donors should only be able to claim a return of what they gave if they state that preference at the time of making the donation and if the amount given is at least $100.

Finally, the interaction of these two *Reports* should be noted. The adoption of the *Report on Non-Charitable Purpose Trusts* would remove any lingering doubt about the validity of trust funds raised by public appeals and allow them to continue more or less indefinitely. It would also provide for variation of such trusts, but the effect of the *Report on Informal Public Appeal Funds* would appear to be that variation in these particular cases must follow a different route.

FOOTNOTE

1. J. Phillips, "The Problem of Surpluses in Funds Raised by Public Appeal" (1990), 9 *Philanthrop.* No. 3. See also "Spontaneous Disaster Funds" (1983), 132 *New L.J.* 223.

Notice to Ontario Charities

The Companies Branch of the Ministry of Consumer and Commercial Relations has, since late 1993, been sending out notices to Ontario corporations, including not-for-profit corporations, asking for an updated list of officers and directors. The notice says that failure to respond "may" result in dissolution of the corporation. The Ministry is in fact taking a harder line and treating failure to respond as fatal to the corporation. Since October, 1993, intermittent issues of the *Ontairo Gazette* has contained supplements listing corporations to be dissolved for failure to respond. (Not-for-profit corporations have a separate section at the back of each list). All Ontario corporations should ensure that their names are not on those lists and contact the Companies Branch immediately if they are: (416) 314-8880 or 1-800-361-3223.

To add insult to injury, the Companies Branch form requires a filing fee of $25, which is said to be the same fee as in 1992. However, in 1992, not-for profit corportations were not required to pay any fee at all.