Legal Developments

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The Law Reform Commission of British Columbia has released its *Report on Conflicts of Interest: Directors and Societies* (1995). This follows its previous *Consultation Paper* on the subject, released in 1993 and discussed in (1994), 12 *Philanthrop.*, No. 2, pp. 34–36. The principal area of concern in both documents is the extent to which directors of societies should be allowed to contract with the society. The *Consultation Paper* had recommended a general rule that directors not be allowed to do so, but suggested some exceptions where they might do so with board approval. The final *Report* has been slightly modified as a result of public comment, especially the argument that, while the existing law was not ideal, alternatives were "unworkable" because they would bar transactions essential to the functioning of some societies, would discourage participation, and would create substantial administrative burdens for societies already overworked and short of funds.

In fact the rules suggested in the *Report* are not that different from those advocated in the *Consultation Paper*. The *Report* states that the general thrust of the rules is not to prohibit most conflicts but to "restrict the range of conflicts of interest that a board may consider to be acceptable". Yet it proposes that this be done through statutory guidelines (to be included in a new *Standards of Conduct Act*) which begin by stating: "As a general rule, the board should not accept or authorize transactions from which a director may benefit". The guidelines then list three kinds of exceptions to these rules: transactions that produce only a minimal benefit to the director; transactions where the benefit to the society is so great that the conflict "should be tolerated"; and transactions which produce a conflict but where the director involved is a member of a special group and the society needs representation from that group on its board. The guidelines also state that these are possible but not mandatory exceptions; further guidelines are provided about when a board should approve exceptions. The guidelines refer, *inter alia*, to the transaction being "fair and reasonable", "unquestionably in the best interests of the society", "in keeping with public expectations", and not likely to "impair public confidence in the administration of the society".

These guidelines probably represent an improvement over the current law, which rests simply on disclosure and ratification, for they are fairly restrictive and stress the importance of the appearance as well as the fact of ethical conduct. Some of the phrases used are imprecise, but rather unusually and

usefully, the guidelines provide a variety of examples to illustrate their meaning. It is also interesting to note that the *Report* recommends that the guidelines should generally apply to non-profit agencies, whether or not they are incorporated as societies.

The *Report* will not satisfy those who fear that any change in the rules will overburden voluntary agencies, but it, like the *Consultation Paper*, is based on the premise that societies and other nonprofit agencies are "public" bodies, carrying out public tasks and often partly funded, directly or indirectly, by public money. As a result there is a need for greater accountability than currently exists.

[Although the government of British Columbia has not yet responded to the *Report*, the Province's Commissioner on Conflict of Interest recommended in his annual report for 1995–96 that the government should revise the *Societies Act* to accommodate recommendations by the Law Reform Commission of British Columbia. A number of B.C. nonprofit corporations (societies) are either adopting the *Report's* guidelines on conflicts as a whole or using them as the basis for their own rules. Some of the other policies in the *Report* are receiving similar acceptance.]

Creation of Public Parks

Two recent cases on the creation of public parks, an accepted charitable purpose,[1] may be of interest. *O'Neill Community Ratepayers' Association* v. *Oshawa*[2] involved a claim by certain citizens and the Public Trustee that lands given to the City of Oshawa in the early part of this century, and used ever since as a park, were subject to a charitable trust requiring their use only as a public park. The City wanted to sell some of the land to Oshawa General Hospital for the building of a cancer treatment centre. At issue was whether the statement in the deed of sale to the city, which described the sale as being "for the purposes of a Park" created a charitable trust. D.S. Ferguson J. held that it did not, probably the correct conclusion given that the word "trust" was not used, that there was a general lack of imperative wording in the deed, and that the words in issue were placed in the description of the land rather than earlier, in the conveyance itself. On the whole these considerations seem to have been at the root of Ferguson J.'s conclusion, despite some strange references to "the intentions of the parties", as if both parties had to agree that a trust was being created; it is quite sufficient, of course, for one to do so.

The other, and more troubling, case is *Muir Estate* v. *Muir*.[3] It involved a typically poorly-drafted holograph will. Two bequests in particular caused problems. One was "Income from Estate: = 10% to go to Cancer Society of Grey County". There is no Cancer Society of Grey County and thus the bequest, while clearly charitable, was on its face an impossibility. McKay J. held that the bequest "indicates a specific charitable intent and...should be payable to

the Canadian Cancer Society by the cy-près doctrine". While the Court undoubtedly got it right in interpreting this as a gift to the Canadian Cancer Society, the reasoning is confused. If it is possible to construe the will as evincing an intention to give to the Canadian Cancer Society, which in this case it was, no question of cy-près arises. The bequest is simply a poorly-worded gift to the Society, with the Court able to cure any uncertainties caused by the drafting.[4] In the alternative, if errors cannot be cured and the purported gift is impossible because its recipient does not exist, cy-près doctrine may allow the Court to give the bequest to a similar cause. However, where that impossibility occurs at the time the will takes effect, before the gift is vested in charity, the law requires that the Court find a *general* charitable intent before applying the money elsewhere. McKay J's reference to *specific* charitable intent should have resulted in the gift failing. The specific/general distinction in the law of cy-près has been the subject of some criticism and suggestions for reform,[5] but it remains a crucial one.

The second bequest that caused difficulties in *Muir* was the mention in various places in the will of a "foundation" or a "foundation of the Estate", which "will eventually build a nice park E of Hamilton Creek in honour of Alexander Muir & or James Beachell...Could be Maple Leaf Park...Lot 31 Holland Twp. 31 sideroad Holland Centre". The testator had not created any such foundation during his lifetime, but the Public Trustee argued that the language created a trust for the charitable purpose of building a park.

McKay J. rejected this argument, although the grounds on which he did so are unclear. The body of the judgment refers to the principle that the court should look favourably on purported bequests to charity and to cases on whether the provision of public parks is a charitable purpose, although neither is related to the will before the court, and no clear decision is reached on whether any trust was created. Despite this, McKay J. states in his conclusion that he had found no trust to have been created! That conclusion also asserts, as an alternative ground of invalidity and one which is dealt with in the body of the judgment, that the purpose of the bequest was not exclusively charitable because of the naming of Muir and Beachell, i.e., the "honour" bestowed on these men by the construction of the park was one of the purposes of the bequest.

One can attack both of these findings. The conclusion that no trust was created should have been supported by some reasoning, particularly as it does not appear to be a very reasonable result from the language of the will. Whether or not a foundation was in existence, it is not difficult to find a direction to executors to create a trust for the building of a park. Perhaps, depending on how much money was involved, it would be impracticable to do so, but that is another question not addressed here. The second conclusion, while supported by reasoning, seems no less unreasonable. There are a host of cases, one or two cited by McKay J.,[6] in which a trust is established for charitable purposes in

some person's name or to honour a person, and the courts have rightly seen this honouring as a corollary to the charitable purpose, not as a separate non-charitable purpose that invalidates the principal one. This was a very different situation from that in *Re Endacott*,[7] cited by McKay J., where a bequest "for purposes of providing some useful memorial to myself" was self-evidently held not to be charitable.

All in all *Muir* is not a satisfactory judgment. It is probably wrong in the result even if one thinks the testator should have left all his money to his family and not for the purpose of building a park. Perhaps more important, one might wish for a better understanding of the principles of charities law from the judiciary.

FOOTNOTES

1. *Brisbane City Council* v. *Attorney-General*, [1979] A.C. 411 (P.C.).
2. (1995), 46 R.P.R. (2d) 92 (Ont. G.D.).
3. (1995), 7 E.T.R. (2d) 58 (Ont. G.D.).
4. For a similar case see *Re Spence* [1979] Ch. 483 and the recent decision of Donnelly J. in *National Trust* v. *Northside United Church et al* (1994), 5 E.T.R. (2d) 193 (Ont. G.D.). In the latter case a testator left a gift to "the Institute for Crippled Children", which did not exist. The judge found from extrinsic evidence that the testator had intended to benefit a local charity, the Ontario Society for Crippled Children.
5. The Ontario Law Reform Commission's 1984 *Report on the Law of Trusts* proposed a draft *Trustee Act* which would have done away with the general charitable intent requirement for the application of cy-près: see s. 76 at p. 519 of the *Report*.
6. *Re Levy Estate* (1989), 68 O.R. (2d) 385 (C.A.).
7. [1960] Ch. 232.