Issues Arising from Mergers and Fusions of Charitable Organizations*

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I. Introduction

While informal "partnering" arrangements are quite common in the charitable and nonprofit sector, actual mergers or amalgamations of charities and nonprofit organizations are relatively rare.[1] However, involuntary mergers, particularly in the health care and social services sectors, are on the increase in Ontario, as elsewhere,[2] and voluntary mergers will likely become more common as organizations seek more cost-efficient and effective operational structures in an increasingly competitive environment.

This article is concerned with actual mergers or amalgamations as opposed to less permanent, flexible partnering relationships such as joint ventures. The word "merge" means, "to lose or cause to lose identity by being absorbed, combined, etc."[3] The dictionary defines "amalgamate" as "to unite, mix, combine".[4] "Amalgamate" also has a technical or legal meaning. In Ontario "amalgamation" in the legal sense refers to the blending of two or more corporations and their continuance as one corporation under the provisions of a corporate statute. In this article, the two words are used interchangeably except when referring to the amalgamation of corporations in the legal sense.

This article will provide an overview of the legal issues that may arise on the merger of one charitable organization with one or more other charitable organizations.

II. The Mechanics of Mergers

The merger process will be largely determined by the legal structure of the charities and the wording of the charities' constitutions[5] (e.g., trust deed, contract of association, letters patent, Special Act, bylaws, etc.). Trusts, unincorporated associations and corporations are therefore considered separately.

*This article was devloped from a presentation to "Fit to be Tithed II", a conference held under the auspices of the Continuing Education Committee of the Law Society of Upper Canada on November 26, 1998 in Toronto. The common law principles discussed in the article will likely be relevant in all Canadian jurisdictions but, because of the conference venue, the statutory law cited is that of Ontario.

Trusts

The use of a trust as the legal structure for a charity is not very common in Canada; it is much more common in England where a large body of case law on charitable trusts has grown up. The common law rule is that the terms of a charitable trust can be amended by the trustees only if the trust document includes a provision permitting the trustees to do so.

Where the trust document does not give the trustees the ability to make amendments to the terms of the trust, the trustees must seek approval to do so under the courts' *cy-près* jurisdiction. The *cy-près* doctrine permits the court to vary the terms of a charitable trust in circumstances where it is either impossible or impracticable to carry out the original purposes of the trust. [For recent information regarding *cy-près* applications see James Phillips, "Legal Developments", 14 *Philanthrop.* No. 3, pp. 58–60.]

The Ontario case of *Re Baker*[6] suggests that the courts may be reluctant to grant an application to vary the terms of a charitable trust unless it is absolutely necessary to do so. In *Baker*, the testator's will established a trust of the residue of his estate providing that the net income of that residue be paid to his widow until her death, when the remainder would be paid to a hospital for its general purposes. Before the wife died, the trustees and executors applied to the courts seeking to change the beneficiary from the hospital to the hospital's foundation and a health care centre associated with the hospital. The Court refused to sanction the change on the ground that there was a substantial difference between a hospital and a hospital foundation and that the inherent jurisdiction of the courts over charitable matters did not extend to "rewriting" the trust. In the course of the judgment, the judge canvassed a number of approaches to effecting changes in charitable trusts, including variations of trust legislation (held to be inapplicable to charitable trusts), the courts' *cy-près* jurisdiction, and the rule in *Saunders* v. *Vautier* which permits the termination of a trust if all the beneficiaries agree.

Unincorporated Associations

An unincorporated association was defined by an English judge as "an association of persons bound together by identifiable rules and having an identifiable membership".[7] It is the form used by many religious organizations, churches and nonprofit organizations (e.g., debating societies, social clubs, home and school associations and sports associations).

There are no statutes specifically dealing with unincorporated associations. The basic law of associations is the law of contracts. It follows from the contractual nature of the association that the procedure for effecting fundamental changes in the association's constitution is governed by the contract of association and, where the contract is silent, by general principles of contract law.

If the contract makes provision for the amendment of the association's constitution (for example, by providing that the contract of association may be varied or amended by a majority or special majority vote), the courts will expect the association to comply with the requirements laid out in the contract.

Where the contract is silent (or there is no written constitution), the common law rule is that any changes must be agreed to by *all* of the members. The requirement for unanimity flows from the contractual principle of membership enunciated by the Supreme Court of Canada in a case concerning an unincorporated trade union:

> ... each member commits himself to a group on a foundation of specific terms governing individual and collective action... and made on both sides with the intent that the rules shall bind them in their relations to each other.[8]

The Ontario Court of Appeal applied this principle subsequently in a case dealing with a purported merger of two trade unions. The Court stated:

> There is no inherent power in [sic] voluntary association to merge with another and in view of the nature of the relationships one to another of the members of the Mine Mill Group, such an arrangement could have been accomplished only in one of two ways:
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> (1) by the unanimous concurrence of every member of the Mine Mill group as a person whose rights existing by virtue of his own contract were sought to be affected; or
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> (2) by some action which each of the contracting members of the Mine Mill group had expressly or impliedly agreed to be binding upon him for the purpose of terminating his existing contractual rights and obligations and to bind him to other contractors in a new contractual relationship.[9]

Laskin J.A. dissented; however he agreed with the majority that, if no provision is made in the contract of association, notice and unanimity are required to accomplish a fundamental change such as a merger.[10]

Incorporated Charities

The most common legal structure used by charities in Canada is the nonshare capital corporation. In Ontario charities may be incorporated under the *Corporations Act*, R.S.O. 1990, c. C.38, the *Canada Corporations Act*, R.S.C. 1970, c. C.32 and by Special Act. The options available with respect to amalgamation depend on the method of incorporation.

Mergers of federally incorporated charities can be dealt with relatively quickly. The amalgamation provision in the *Canada Corporations Act* is not applicable to nonshare capital corporations and there is no general continuance provision.[11] It is therefore not possible for federally incorporated charities to amalgamate with one another or with provincially incorporated charities.

When two federally incorporated charities (or a federally incorporated and a provincially incorporated charity) wish to merge, the typical procedure is to transfer the assets from one charity to the other, or to transfer the assets from both charities to a new charitable corporation incorporated for that purpose.[12]

The amalgamation of two or more Special Act corporations may be accomplished by statute or under the *Corporations Act*. In Toronto, the recent merger of The Toronto Hospital and Princess Margaret Hospital is an example of the first type of merger. If this method of amalgamation is selected, there may be a lengthy delay between the effective date of the amalgamation agreement and the enactment of the Special Act due to the unpredictability inherent in the legislative process. As a practical matter, it is advisable for the parties to deal with transition issues in the amalgamation agreement. Notwithstanding that the parties have executed an agreement, the amalgamation is not actually effected until the act receives Royal Assent.

The second option is to continue the Special Act corporations under section 312(1) of the *Corporations Act* and then amalgamate. Section 312 provides for continuances of both Special Act corporations and corporations from other jurisdictions:

> **312.** (1) A corporation incorporated otherwise than by letters patent and being at the time of its application a subsisting corporation may apply for letters patent under this Act, and the Lieutenant Governor may issue letters patent continuing it as if it had been incorporated under this Act.
>
> (2) Where a corporation applies for the issue of letters patent under subsection (1), the Lieutenant Governor may, by the letters patent, limit or extend the powers of the corporation, name its directors and change its corporate name, as the applicant desires.
>
> (3) A corporation incorporated under the laws of any jurisdiction other than Ontario may, if it appears to the Lieutenant Governor to be thereunto authorized by the laws of the jurisdiction in which it was incorporated, apply to the Lieutenant Governor for letters patent continuing it as if it had been incorporated under this Act, and the Lieutenant Governor may issue such letters patent on application supported by such material as appears satisfactory and such letters patent may be issued on such terms and subject to such limitations and conditions and contain such provisions as appear to the Lieutenant Governor to be fit and proper.

This method was used in the recent Toronto amalgamation of the Addiction Research Foundation, the Donwood Institute and the Clarke Institute of Psychiatry. Because the Addiction Research Foundation had been incorporated by Special Act, it had to be continued as a letters patent corporation under the *Corporations Act* before the amalgamation could be effected.

For non-share capital corporations incorporated under the *Corporations Act* an amalgamation is effected under section 113 of that *Act* which provides that:

> **113.** (1) Any two or more companies, including a holding and subsidiary company, having the same or similar objects may amalgamate and continue as one company.
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> (2) The companies proposing to amalgamate may enter into an agreement for the amalgamation prescribing the terms and conditions of the amalgamation, the mode of carrying the amalgamation into effect and stating the name of the amalgamated company, the names, callings and places of residence of the first directors thereof and how and when the subsequent directors are to be elected with such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the amalgamated company, the authorized capital of the amalgamated company and the manner of converting the authorized capital of each of the companies into that of the amalgamated company.
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> (3) The agreement shall be submitted to the shareholders of each of the amalgamating companies at general meetings thereof called for the purpose of considering the agreement and, if two-thirds of the votes cast at each such meeting are in favour of the adoption of the agreement, that fact shall be certified upon the agreement by the secretary of each of the amalgamating companies under the corporate seal thereof.
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> (4) If the agreement is adopted in accordance with subsection (3), the amalgamating companies may apply jointly to the Lieutenant Governor for letters patent confirming the agreement and amalgamating the companies so applying, and on and from the date of the letters patent such companies are amalgamated and are continued as one company by the name in the letters patent provided, and the amalgamated company possesses all the property, rights, privileges and franchises and is subject to all liabilities, contracts, disabilities and debts of each of the amalgamating companies.

Section 113 requires that the amalgamating corporations have the same or similar objects before they can be amalgamated. As a threshold matter, if the objects do not meet this requirement, supplementary letters patent (bringing their objects in line) must be obtained by one or more of the amalgamating corporations.

The first step in the amalgamation process is for the amalgamating corporations to enter into an agreement that sets out the terms and conditions of the amalgamation. As part of this process, it is critical for the parties to focus on the corporate governance structure of the amalgamated corporation and, if necessary, to redraft and update the bylaws to reflect any changes in its structure. An amalgamation agreement typically sets out:

(a) the name of the amalgamated corporation;

(b) the objects of the amalgamated corporation;

(c) the composition of the amalgamated corporation (i.e., the membership);

(d) the location of the head office;

(e) the names, professions and addresses of the first directors;

(f) the procedure for electing the subsequent directors;

(g) whether or not the bylaws of the amalgamated corporation are to be those of one of the amalgamating corporations;

(h) any special provisions; and

(i) any other details that are necessary to effect the amalgamation and to provide for the subsequent management and working of the amalgamated company.

The *Act* requires that the agreement be submitted for consideration to the members of the amalgamating corporations at a general meeting called for that purpose and that it be approved by at least two-thirds of the votes cast by the members at that meeting. The secretaries of each amalgamating corporation are then required to certify that the agreement was adopted by the members of the amalgamating corporations.

Once the agreement is adopted, the amalgamating corporations may apply jointly for letters patent confirming the agreement. In Ontario the application must be filed with the Companies Branch of the Ministry of Consumer and Commercial Relations. Practice directions require that the application be reviewed and cleared by the Charitable Property Division of the Office of the Public Guardian and Trustee prior to being submitted to the Companies Branch. The amalgamation takes effect from the date of the letters patent.

Other Mergers

Mergers of charities may be effected in other ways. As noted above, they may be ordered by a court under its *cy-près* jurisdiction. Mergers may also be effected through statutory schemes. Notable examples of the latter include the nationalization and reorganization of the hospital system in England under the *National Health Service Act*, 1946 and, most recently, mergers of hospitals and other service providers ordered as part of the health care restructuring process in Ontario.

Approval Process is Critical

It is clear from this overview that there are no uniform rules governing mergers of charities. The critical question for those orchestrating the merger is to determine what process will be used to effect the merger and, in particular,

what approvals are necessary in order to accomplish it. The approval process may be relatively straightforward or very complicated, depending on the rules governing the organization. Where the charity is part of a larger organization, it may be necessary to obtain the approval of the parent organization. Mergers of charities which engage in activities that are regulated by statute (e.g., public hospitals) may require the approval of the applicable government department or ministry. From a planning point of view, it is prudent to determine what approvals are required as early in the process as possible so that there are no unanticipated delays.

III. The Legal Effect of Amalgamation

The legal effect of a merger again depends on the legal structure of the amalgamating organizations. "Amalgamation" in corporate law means the fusion of two or more corporations and their continuance as one corporation. The concept of amalgamation was described by the Supreme Court of Canada as follows:

> The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be.[13]

Applying this principle in a more recent case, the Ontario Court (General Division) said:

> This principle is clearly stated by the court, and in my opinion is equally valid in determining that civil rights and obligations of the amalgamating companies can be enforced against the amalgamated company. In this respect no words of transfer or assignment were found by the court in the CCA – by a sort of legal legerdemain Parliament has simply said that the amalgamated company *possesses* the property, rights and assets, and is *subject* to the contracts, liabilities and obligations of each of the amalgamating companies. As Kelly J.A. said in *Stanward* at p. 592 O.R., p. 681 D.L.R., in relation to the same principle in the Ontario Act:
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> > "While it may be difficult to comprehend the exact metamorphosis which takes place, it is within the Legislature's competence to provide that what were hitherto two shall continue as one."[14]
>
> [Emphasis original.]

The *Act* states that the amalgamated corporation possesses all the property, rights, privileges and franchises and is subject to all liabilities, including civil, criminal and quasi-criminal, and all contracts, disabilities and debts of each of the amalgamating corporations. Thus, a ruling, order or judgment in favour of or against, or conviction against an amalgamating corporation may be enforced by or against the amalgamated corporation.

Clearly, when an amalgamation is contemplated, the boards of each of the amalgamating charities ought to be particularly concerned about the potential liabilities to which the amalgamated corporation may be subject by virtue of the amalgamation. It is advisable to consider roughly the same items as would be considered in the case of a share capital corporation on an acquisition of a business.

The complexities that can result in the case of mergers of unincorporated charities are illustrated in two Canadian cases involving mergers of national religious organizations. In the case of *United Church of Canada* v. *Anderson*[15] the Ontario Court (General Division) was asked to determine the ownership of church property after three United Church congregations broke with the United Church as a result of a disagreement over church policy. The Court began by examining the statutory framework governing the United Church:

> In order to decide this matter it is necessary to look at the formation of the United Church of Canada. In 1925 the Methodist Church, the Presbyterian Church and the Congregational Churches in Canada (the negotiating churches) united to form the United Church of Canada. This was done by means of federal legislation: see the *United Church of Canada Act*, S.C. 1924, c. 100. In addition, provincial legislation was enacted to deal with matters falling under provincial jurisdiction such as property rights. In Ontario the *United Church of Canada Act* was passed and it is to be found in S.O. 1925, c. 125.

On the basis of the property provisions in the applicable federal and provincial statutes, the Court held that the property of the denominations and congregations forming or joining the United Church had become the property of the United Church. The only exceptions were (a) any property held "in trust for any special use of any congregation" of the United Church; and (b) any property held in trust for the use of any congregation "solely for its own benefit". The Court then examined the history of the three churches which had withdrawn, ultimately concluding that the property in question did not fall into either exception.[16]

The Ukrainian Greek Orthodox Church of Canada et al. v. *The Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary The Protectress et al.*[17] concerned a dispute over the refusal of a congregation to recognize an order of the parent church expelling its priest. The parent church had been incorporated by a Special Act of the Parliament of Canada in 1929[18] under the name of "The Ukrainian Greek Orthodox Church of Canada" for the purposes of "administering the property and other temporal affairs connected with the spiritual jurisdiction of the said Corporation". The *Act* constituted all the congregations of the Ukrainian Greek Orthodox Church of Canada "which are now included and are a part thereof, and which may at any time in the future become a part thereof" as the corporation. The local church was structured as an unincorporated association and its property was held by trustees registered under the

Manitoba *Church Lands Act*. One of the questions before the Court was whether the effect of the federal statute was to vest the property of the local churches in the parent. On the basis of the relevant statutory provisions and church record, the Supreme Court of Canada concluded that the property belonged to the local church:

> For my part I have no hesitation in holding that it was never intended by the federal statute that the unincorporated church organization with all its congregations, priests and missions, together with their trustees as incorporated under provincial laws, should be merged in or absorbed by the corporate plaintiff, and that the latter's so-called statutory charter has not deprived the Trustees of the Cathedral property as trustees for the congregation, or the congregation of its right to manage its own temporal affairs.[19]

As these two cases illustrate, it is impossible to generalize about the legal implications of mergers of unincorporated associations, statutory corporations or combinations thereof; recourse must be had to the particular statute or contract effecting the merger.

IV. Charities in Law Issues

There are two other issues of which the directors of charitable corporations in particular must be cognizant. These are : (1) the effect of an amalgamation on property held in trust by the charity; and (2) the effect of an amalgamation on bequests.

"Trust" Property

In the context of an amalgamation, the main concern is ensuring that any property held in trust remains subject to the trust. If it is impossible or impracticable to carry out the purposes of the trust, the amalgamated corporation must apply to the courts for a *cy-près* order.

The difficulty that frequently arises is determining when property is held in trust. This issue was considered in the recent decision of Blair J. in *Re Christian Brothers of Ireland in Canada*.[20] The main issue before the Court in that case was whether the assets of a charitable corporation were exigible to satisfy tort claims. In its recital of the factual background, the Court noted that, until 1960, title to the Christian Brothers' assets in Canada was most often held by individual Brothers "in trust". In 1962, as part of a reorganization of the Canadian Province, the Christian Brothers of Ireland in Canada was incorporated as a federal nonshare capital corporation with objects paralleling the purposes and activities of the international "parent" (referred to as the "Congregation"). Property held in the names of individual Brothers or groups of Brothers was transferred to the new corporation (in essence, effecting a "merger" of charitable trusts).

One of the questions before the Court was whether the assets of the Christian Brothers of Ireland in Canada were shielded from exigibility on the ground that those assets are held in trust for its charitable purposes or objects, as opposed to being owned beneficially by the corporation. Blair J. resolved the much-debated question of how a charitable corporation holds its assets by holding that a charitable corporation holds its assets (including gifts or bequests made to the corporation generally for its charitable purposes or objects) beneficially, like any other corporation:

> In the end, while it may be said that for some purposes a charitable corporation is in a position analogous to that of a trustee with respect to the use and disposition of its property – at least with respect to the court's power to exercise its "ancient supervisory equitable jurisdiction" over it – the weight of authority supports the conclusion that its assets are not held by it "as trustee" for its charitable objects, but are owned beneficially to be used by the corporation in a fashion consistent with its objects.[21]

Blair J.'s treatment of gifts and bequests which are "earmarked" for some specific charitable purpose is perhaps more controversial. He divided this category of property into "precatory" gifts or bequests and specific charitable purpose trusts. A "precatory" gift or bequest imposes a "moral obligation" but is unenforceable as a trust. As he explains:

> A "precatory trust" is not a trust at all. Where the donor gives or bequeaths the property to the charitable corporation absolutely and merely imposes some sort of moral obligation on the corporation to use the property in a certain way – using words of expectation or desire or purpose, but not words indicating that the donee is not to take the property beneficially but only for the objects or purposes described – no charitable purpose trust is established. The charitable corporation takes the gift or bequest and holds it – and any property derived from it – for the general charitable purposes and objects of the corporation. The asset is therefore exigible on the rationale explained above with respect to contributions made to a charitable corporation for its general charitable purposes.[22]

Blair J. used contributions solicited through fundraising campaigns as an example of a "precatory" trust.

In Blair J.'s view, only property that is subject to an express trust is held by the corporation as a trustee. This includes property that is transferred to the corporation subject to a trust. As he says: "Property which is held as trust property cannot be deprived of that characteristic by the simple expedient of transferring it to a corporation."[23]

It is fair to say that Blair J.'s approach represents a departure from English and Canadian authorities on the subject of donor-restricted gifts. These have held that where a donor directly or indirectly restricts how the donation is to be used, the monies received by the charity will be impressed with trust restrictions and

can only be used in accordance with those terms as a separate charitable trust. Funds solicited for a special project established by the charity, for example, are generally considered to be "trust" property. If the *Christian Brothers* decision is upheld on appeal, the effect may be to narrow the circumstances in which the board of a charitable corporation needs to be concerned with complying with donor restrictions.

Gifts and Bequests

The general principle is that the amalgamation of an institution intended to receive a gift does not affect the validity of that gift. The gift will be paid to the amalgamated charity.[24] The leading English authority in this area concerned an amalgamation effected by the court under its scheme-making power.[25] The English Court of Appeal held that the amalgamation did not destroy the charity named in the will (a trust for the benefit of poor widows). In the words of Farwell L.J.:

> What is said is this: the Commissioners have in fact destroyed this trust because in the scheme which they have issued dealing with the amalgamation of the several charities the objects are stated to be poor persons of good character resident in Rotherhithe, not mentioning widows in particular – not of course excluding them, but not giving them that preference which I agree with the Master of the Rolls in thinking ought to have been given. But to say that this omission has incidentally destroyed the Bayly Trust is a very strained construction of the language and one that entirely fails, because the Charity Commissioners had no jurisdiction whatever to destroy the charity... *In all these cases one has to consider not so much the means to the end as the charitable end which is in view, and so long as that charitable end is well-established the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided.*[26]
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> [Emphasis added.]

This principle was applied by the Ontario courts in a case concerning the effect on a gift to "The Methodist Church" of the merger which resulted in, the United Church.[27] Counsel for the next-of-kin and the Official Guardian argued that a legacy lapses where the institution named in the will ceases to exist during the testator's lifetime. The United Church relied on the line of English authorities referred to above "to show that in the case of a bequest to a charitable institution which existed during the testator's lifetime and has amalgamated with another institution, so that there is a continuity of objectives and work, the gift does not lapse but goes to the amalgamated institution."[28] The test is whether the institution to which the gift was made continued to exist notwithstanding the merger.

After reviewing the provisions of *The United Church of Canada Act*, the Court concluded that the amalgamation had not caused The Methodist Church to cease to exist:

> It will be observed that this statute does not end the existence of the corporate entity known as The Methodist Church in express terms and for all purposes, but merges The Methodist Church in a larger body, and the evidence shows and the statute declares that the work and the administration of the funds by The Methodist Church in respect of home and foreign missions is to be continued in that larger organization. Although not decisive, the words of the preamble to the statute are of some importance. I have therefore come to the conclusion that the case falls within the principle of the cases relied on by counsel for The United Church, that The Methodist Church did not altogether cease to exist...[29]

The same principle was applied in a case concerning a gift to a high school that had merged with another school.[30] After reviewing the English authorities, the Court concluded that the gift had not lapsed because the work of the school was still being carried on:

> Applying these principles to the present case, it is quite clear that the work of the secondary education of the young people, hitherto carried on in a particular building in the municipality of Morrisburg, is still being carried on in a larger more modern school, in which students from other areas are also served.[31]

The Court required, however, that the funds be used for the benefit of the students from the area which had formerly been served by the Morrisburg Collegiate:

> In my judgment the gifts have not failed, but are to be paid and delivered to the Stormont, Dundas and Glengarry Board of Education for the benefit of the Seaway High School and with respect to the gift of moneys, for the specific benefit of pupils coming to that high school from the area served by the Morrisburg Collegiate Institute or High School in the last year of its separate existence.[32]

V. Liability of Trustees and Directors

There are numerous cases in which mergers of charities (particularly religious organizations) have been challenged by disaffected members. To a great extent, the degree of risk of a director or trustee incurring personal liability as a result of his or her role in an amalgamation depends on the legal structure of the charity, i.e., whether he or she is a trustee of a charitable trust, a director of a corporation or a member of the management committee of an unincorporated association.

Trustees

A trustee of a charitable trust may be made personally liable if he or she commits a breach of trust and as a result the charity suffers loss. Breaches of trust cover a wide variety of improper conduct. Trustees will be in breach of trust, for example, if they fall short of the standard of care required of them in administering the trust funds. The standard of care required of trustees generally in their dealings with the trust assets is that of ordinary prudent business

people in relation to their own affairs. A breach of trust will also be committed if payments are made in furtherance of purposes which are outside the objects for which the trust was established or where the trustee acts in a way which is not authorized by the terms of the trust. A serious breach of trust will occur if a trustee deals with the trust assets in such a way as to obtain some personal benefit.

Since a trust has no independent existence apart from the individuals who make up the body of trustees, a trustee is also personally responsible for all liabilities arising under contracts with third parties. A trustee may also be liable in tort for damages in respect of any breach of duty on the part of the trustee as an occupier of land, as an employer, or for the negligence of employees or agents for whom the trustee is vicariously liable.

Unincorporated Associations

As indicated above, the rules of an unincorporated association constitute a contract among the members. If a member or officer of an association breaches the rules of the association by applying its funds to purposes which are outside the scope of the association's (charity's) objects, he or she may be liable for reimbursement of such funds to the association.

The property of an unincorporated association is typically held by trustees. In the case of religious organizations, the manner in which land is held by the organization is regulated by statute.[33] As indicated, the trustees may be personally liable if they fail to ensure that the trust property is dealt with in accordance with the terms of the trust or if they are guilty of other breaches of trust. Like trustees of charitable trusts, the trustees will be personally liable under any covenants contained in a lease or conveyance.

Accordingly, an unincorporated association has no legal existence apart from its members and cannot be liable under a contract or for damage to third parties. Liability could potentially fall upon the individual members, upon particular individuals or officers, or upon the members of the management committee according to the general law of agency.

Corporations

Directors of charitable corporations are not as a rule personally liable for the actions of the corporation. Indeed, one of the principal reasons for establishing a charity as a corporation is that incorporation is considered to give protection from personal liability to those responsible for running the charity. There are exceptions to the general rule, however. First, since directors stand in a fiduciary relationship to the corporation that they serve, the law imposes on them duties of loyalty and good faith that are virtually identical to those imposed on trustees. Second, the law imposes upon directors a duty to act with the degree of reasonable prudence that might be expected of persons with their knowledge and experience. Although the traditional common law test imposed

a fairly low standard of care, it seems probable that the courts would now impose a standard more in line with the statutory standards applicable to business corporations. In the case of charitable corporations, directors may also be personally liable where they carry out an unauthorized transaction or act outside the scope of their authority.

In order to minimize the risk of incurring personal liability in the context of an amalgamation, the directors/trustees/management committee should ensure that they do the necessary "due diligence". To minimize the risk of challenges based on procedural irregularities it is particularly important to ensure that the constitutions of the merging charities are strictly complied with. In this regard, a thorough review of the constating documents of all the charities involved should be undertaken as early as possible so that potential problems can be resolved.

VI. Regulatory Issues

In Ontario, after an amalgamation motion has been adopted, the application for letters patent in the prescribed form executed in duplicate must be sent to the Companies Branch of the Ministry of Consumer and Commercial Relations, together with a cheque for the current fee made payable to the Minister of Finance. If the name of the amalgamated corporation is not the same as one of the amalgamating corporations, the application must be accompanied by an original Ontario-biased NUANS search report dated not more than 90 days prior to the submission of articles.

Because of the Public Guardian and Trustee's (PGT's) role in supervising the application of charitable property, applications for continuations, amalgamations, etc. must be approved by the PGT before being submitted to the Companies Branch. *The Not-for Profit Incorporator's Handbook* published jointly by the Office of the PGT and the Companies Branch advises that duplicate original signed copies of such applications (or a draft) should be submitted to the Office of the PGT, directed to the attention of the Charitable Property Division at 595 Bay Street, Suite 800, Toronto, Ontario M5G 2M6, together with a cheque or money order made payable to the PGT for the review fee of $150. PGT account 999-999, GL 515-10 and, if known, the charity's PGT file number, should be noted on the face of the cheque or money order. If a draft application is submitted for review, an additional fee is not required to be paid on submission of the final application. Upon the PGT's approving an application, the duplicate signed copies will be returned to the applicant marked "approved", to be filed with the Companies Branch. The whole process can take up to 12 weeks or even longer.

Revenue Canada requires that a copy of the documentation effecting the amalgamation be sent to the Charities Division of Revenue Canada with a letter outlining the nature of the amalgamation and designating which of the chari-

table registration numbers will be used in the future. One number only will be used; the other charitable number is discontinued. Revenue Canada can be reached at:

Revenue Canada
Charities Division
400 Cumberland Street
5th Floor
Ottawa, Ontario K1A 0L5
Telephone No.: (613) 954-1263
Fax No.: (613) 952-6020
Toll-Free No.: 1-800-267-2384

There are no statutory formalities associated with the establishment of an unincorporated association other than the requirement that the constating documents be filed with the PGT.

Conclusion

The legal issues facing amalgamating charities are frequently unique to the charities involved. It is therefore critical for those operating charities considering amalgamation to obtain legal advice at an early stage in the planning process so that potential legal impediments can be dealt with on a timely basis.

FOOTNOTES

1. A notable exception is the legislated merger of The Presbyterian Church in Canada, The Methodist Church and The Congregational Church of Canada in 1925 pursuant to *The United Church of Canada Act*, S.C. 1925, c. 125.
2. In Ontario, perhaps the most dramatic examples are the mergers ordered by the Health Care Restructuring Commission created under the *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1, but there are many less celebrated mergers being effected as a result of the present restructuring of the health care and social services sectors. A comprehensive discussion of the effect of health care restructuring from the perspective of charities law may be found in Whitaker and Shushelski, "The Effects of Health Care Restructuring on Hospital Foundations in Ontario" (1997), 14 *Philanthrop.* No. 2, p. 3.
3. *Webster's New World Dictionary*, Compact School and Office Edition (1967), at 270.
4. *Ibid.*, at 13.
5. [A number of articles dealing with both the history and particulars of trusts have appeared in *The Philanthropist*, most recently in "Comparison of the Tax Treatment of Charitable Remainder Trusts in Canada and the United States" by Carole Choinard, 14 *Philanthrop.* No. 3, pp. 3-16.]
6. (1984), 11 D.L.R. (4th) 430 (Ont. H.C.J.).
7. *Re Koeppler's Will Trusts* (1985), 2 All E.R. 869 at 874 *per* Slade L.J.
8. *Orchard* v. *Tunney*, [1957] S.C.R. 436 at 445.

9. *Astgen* v. *Smith* (1970), 1 O.R. 129 (C.A.) at 136. See also *Re Recher's Will Trusts*, [1972] Ch. 526 at 539.
10. *Ibid.*, *Astgen*, at 155.
11. There is provision for amalgamation in section 137 of the *Canada Corporations Act*. However, section 137 is not listed in section 157(1) in Part II which sets out the provisions of Part I that apply to non-share capital corporations. The only continuance provision in the *Canada Corporations Act* is found in section 5.4. This provision is limited to companies engaged in constructing pipelines or incorporated by the Parliament of Canada by Special Act.
12. It is not possible for charitable corporations to transfer their assets to nonprofit corporations.
13. *R.* v. *Black & Decker Manufacturing Co. Ltd.* (1974), 43 D.L.R. (3d) 393, at 400-01.
14. *Loeb Inc.* v. *Cooper*, [1991] 5 O.R. (3d) 259 at 278-279 (Ont. Gen.Div.).
15. [1991] 2 O.R. (3d) 304 (Gen.Div.).
16. It is to be noted that this is just one of the most recent in a long line of cases concerning the legal effects of the United Church merger, some of which went all the way to the Supreme Court of Canada. (See, for example, *Trustees of St. Luke's Presbyterian Congregation of Saltsprings et al.*, v. *Cameron et al.*, [1929] S.C.R. 425 and *Ferguson* v. *MacLean*, [1930] S.C.R. 630.) A recent example arose in the Ontario health care sector with the issuance of "Directions" to hospitals by the Health Services Restructuring Commission under the *Public Hospitals Act*.
17. [1940] S.C.R. 586.
18. 19-20 Geo. B., ch. 98.
19. *Supra*, footnote 17, at 593.
20. [1998] 37 O.R. (3d) 367 (Gen.Div.). The decision is under appeal. For a thorough analysis of *Christian Brothers* and the issues associated with donor-restricted gifts, see Terrance A. Carter's article "Donor Restricted Charitable Gifts – A Practical Overview" presented at "Fit to be Tithed", a Canadian Bar Association – Ontario Continuing Legal Education event held Friday, April 24, 1998 in Toronto.
21. *Ibid.*, at 392.
22. *Ibid.*, at 396.
23. *Ibid.*, at 390.
24. See, for example, *William on Wills*, 7th ed. (1995), Vol. 1, at 922.
25. *In re Faraker*, [1912] 2 Ch. 488.
26. *Ibid.*, at 495.
27. *Re Kappele*, [1954] O.R. 456 (Weekly Court). For other cases involving bequests to the churches which formed the United Church, see also *Re Patriquin*, [1930] S.C.R. 344 and *Re Kelley*, [1933] 4 D.L.R. 416 (N.S. T.D.), aff'd [1934] 3 D.L.R. 379 (N.S. C.A.).
28. *Ibid.*, at 459.
29. *Ibid.*, at 461.

30. *Re Boyd*, [1969] 2 O.R. 562.
31. *Ibid.*, at 568.
32. *Ibid.*
33. See, for example, the *Religious Organizations' Lands Act*, R.S.O. 1990 c.R.23.