

Some Implications of Charitable Trusts and Charitable Corporations

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The charitable corporation has some of the characteristics of a trustee not only for the purposes of *The Charities Accounting Act*,¹ but for other purposes at common law.² Moreover, in their dealings with the funds of the corporation, there is some authority for the proposition that the officers and directors are treated as trustees at common law and, to this extent, not only the corporation but also its officers and directors are subject to the same trust law as the trustees of charity under a trust agreement or declaration. The corporate form may be preferred because it allows responsible people to administer the charity within a formal structure to which they are accustomed. Whether the corporate or trust method is adopted, certain legal consequences follow from the charitable nature of the objects to be pursued.

Jurisdiction of the High Court in the case of charities is unusually extensive.³ For that reason the limits of the legal concept of charity are important and, in the case of a trust, the common law does not permit a mixture of charitable and non-charitable purposes.⁴ It is axiomatic that a validly constituted charitable trust will not be allowed to fail for lack of a trustee.⁵ The court is said to lean in favour of charity.⁶ The trust is forever charitable.⁷ A disposition can only be to charity.⁸ There is never a beneficial interest in any individual.⁹ Section 133(1)(5) of *The Corporations Act* is therefore not available to a charitable corporation because there are no members beneficially entitled to whom to restrict distribution.¹⁰ The doctrine of *cy près* is applicable if the letters patent, or the terms of the trust, do not provide for a disposition of the assets on dissolution, or in the event of impracticability.¹¹

In my view, *The Variation of Trusts Act*¹² is not applicable as it is confined to trusts for unascertained or incapable persons and does not extend to trusts for charitable purposes. The fact that, in Ontario, the Official Guardian rather than the Public Trustee is required to be served under the Rules when there are applications under the Act is consistent with this submission.¹³

Once it has been decided that a gift is for charitable purposes, uncertainty within that field does not invalidate it.¹⁴ The trust may be perpetual or for a limited period.¹⁵ With one exception,¹⁶ the rule against perpetuities, as amended by *The Perpetuities Act*, applies to gifts to charities. There are, however, no restrictions on the period for which a charitable trust can continue.¹⁷ At common law, the Attorney General had special responsibilities with respect to the protection and control of charities.¹⁸

“The Crown as *parens patriae* is the constitutional protector of all property subject to charitable trust, such trusts being essentially matters of public concern. The Attorney-General, who

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represents the Crown for all forensic purposes, is accordingly the proper person to take proceedings on behalf of and to protect charities".¹⁹

Some of these responsibilities have been delegated to the Public Trustee of Ontario under *The Charities Accounting Act* which was first enacted in 1915.²⁰ In addition, the Ministry of Consumer and Commercial Relations, Companies Branch, of the Province of Ontario considers applications for incorporation under *The Corporations Act*. In the past, the practice was for the Ministry of Consumer and Commercial Relations, Companies Branch, to submit applications for the incorporation of non-profit corporations so that the Public Trustee could express an opinion as to whether the objects were charitable and as to whether the letters patent should be subject to *The Mortmain and Charitable Uses Act* and *The Charitable Gifts Act*.²¹ In many cases it has been obvious that the difference between non-profit-not-charitable corporations and non-profit charitable corporations was not considered at the time that the decision was made to incorporate, and that the potential application of principles of trust law to the administration of charitable corporations was overlooked.

The practice of the Ministry of Consumer and Commercial Relations, Companies Branch, of submitting applications for the incorporation of non-profit incorporations to the Public Trustee for his consideration has now been discontinued. Instead, the Ministry of Consumer and Commercial Relations issues instructions which require an election to incorporate as a charitable corporation or otherwise. If the election is made to incorporate as a charitable corporation, certain clauses will appear in the letters patent. The Ministry of Consumer and Commercial Relations Companies Division notifies the Public Trustee of the incorporation.

There is an obligation under section one of *The Charities Accounting Act* to forward to the Public Trustee a copy of the instrument that brings the charity into being.²² The Public Trustee requests:

1. A notarial copy of the Letters Patent or Trust Agreement;
2. A list of the names and addresses of the directors and officers or trustees;
3. A summary of the assets and liabilities;
4. The date of the fiscal year-end;
5. The Registration Number given by the Department of National Revenue; and
6. For arrangements to be made to have a copy of the annual audited financial statements sent regularly each year.

Corporations are required to have annual audited financial statements under *The Corporations Act*.²³ In appropriate cases, the Public Trustee enquires whether financial statements are submitted to any other government department. If a response is not received, a request to pass accounts pursuant to *The Charities Accounting Act* might be made.

An annual audited financial statement may be an adequate response. We recognize that it may be necessary for the certificate of the chartered accountant on the financial statements to include a qualification with respect to receipts where no official receipts were issued by the Corporation (for example, for cash collection received by a church) as supporting vouchers or other documentation would not be available, however, we do not permit any qualification in the certificate with respect to receipts on account of which there are official receipts showing the income tax registration number, the form of which is prescribed. Particulars of investments are required. We pay particular attention to administrative costs.²⁵ Administrative costs may vary according to circumstances: for example, the fact that the body is a foundation, an operating charity, or is in its first year of operation. The activities have to be consistent with the objects.²⁶ If the charity is an operating charity, wages will not necessarily be administrative costs. If a charity is in its first year, its administrative costs may well be higher than they will be in subsequent years. It is imperative for us to know the sense in which administrative expenses are used in the statement. When questions are being asked, it is important for the chartered accountant to remember that the corporation, its officers and directors, are in much the same position as trustees, that there is no beneficial ownership or use in them: that he is, in effect, reviewing and reporting on a trust account. The assets must be applied to the purposes for which they are designated. They are funds of a purpose trust. As the chartered accountant is performing his audit there are two questions that must be asked:

1. Was the disbursement made?
2. Was it made for the purposes intended?

The accountant must use his discretion and judgment in reviewing administrative costs in the light of the intended purposes. It would appear that most chartered accountants do not recognize the trust aspect of the charitable corporation, and do not recognize that there are legal implications of a charitable trust which are different from any profit or other non-profit corporation, or other trust. Chartered accountants are not usually trust oriented. It is submitted that consideration should be given to revising the chartered accountant's report form for charity. Explanatory notes assist as broad categories do not show what the situation is. Anything that gives insight into the activities of the charity helps. Non-arm's length transactions must be disclosed and, of course, they will be closely scrutinized, both by the accountants and by ourselves. Such transactions include all loans to directors, whether or not the charity takes back a mortgage. We also require sufficient particulars to enable us to determine whether the requirements of *The Mortmain and Charitable Uses Acts* and *The Charitable Gifts Act* have been complied with,²⁷ and whether full advantage has been taken of income tax deductions. The source of each grant received by the charity is required to be identified. We recognize that lawyers and chartered accountants do not use words like capital, income, improvements, repairs, disbursements, and expenses, in the same way. For example, an improvement to a lawyer may be a disbursement to a chartered accountant and a repair to

a lawyer may be an expense to a chartered accountant.²⁸ On that account care is required when financial statements are examined.

If the financial statements are not certified by a chartered accountant, needless to say, the person who makes the audit should be independent of the charity. A banker would be an example. In such case the certificate or the statement should also be signed by the president and secretary-treasurer, or, in the case of a trust, by the trustees.

If enquiries cannot be answered in a less expensive way, or if they are not answered satisfactorily, the Public Trustee requests that an appointment be taken out to pass accounts in the Surrogate Court. Because of the detail required, this procedure is the ultimate in disclosure accounting. Passing accounts in the Surrogate Court can be very expensive. If accounts are required to be passed, there can only be one of two starting points:

1. the date the trust came into being;
2. the date to which accounts were last passed.

At the end of the procedure the Court may issue an Order that can be the basis for a writ or a notice of motion under *The Trustee Act*. Principles relating to breach of trust, breach of contract, restitution or tort may be relied upon. The Order could also provide the basis for cancellation of a charter.

As the Public Trustee is not a *cestui que trust*, citation in the Surrogate Court is not available if accounts are not brought in. The Public Trustee can, however, proceed by way of originating notice of motion in Weekly Court Chambers under section 4 of *The Charities Accounting Act*.²⁹ This section also provides for the appointment of a new trustee in the appropriate circumstances. Attachment, sequestration or committal proceedings may follow.

Section 6 of *The Charities Accounting Act*³⁰ gives any member of the public the right to complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public, or as to the manner in which any funds have been dealt with or disposed of. In such cases, the complaint is made to a county court judge who may order the Public Trustee to make an investigation. This procedure has recently been used for the first time since 1962.

The Public Trustee is required to be notified of actions or other proceedings to set aside, vary or construe instruments as required by section 5(4)³¹ of *The Charities Accounting Act*. Every effort is made to avoid duplication of costs and representation.

Besides *The Charities Accounting Act*, *The Mortmain and Charitable Uses Act* and *The Charitable Gifts Act*³² may be relevant. *The Mortmain and Charitable Uses Act* deals with the matter of holding land.³³ Under Section 7(1) lands assured otherwise than by will must be sold within 2 years from the date of the assurance or within such extended period as may be determined by a judge of the Supreme Court. This applies to leases but not to mortgages to a charity.

The title to property conveyed to a charity on account of which a mortgage is given by a charity is affected. Where there is a will, time runs from the date of death or the later expiration of a life interest. The only ground on which a judge can sanction the retention of land is that he is satisfied that it is required for actual occupation for the purposes of the charity and is not an investment. Although it had been thought the application for an order approving a retention of the land would have to be made before it vested in the Public Trustee, it has been held recently that there is no

reason or prohibition in s.7 or in s.10(2) of *The Mortmain and Charitable Uses Act* which limits the power of the court to order retention or revestment at any time prior to the sale by the Public Trustee. In my view, so long as I am persuaded by the requirements under s.7(3) of the said act — that the land is required for actual occupation for the purposes of the charity and not as an investment — I am empowered to sanction the retention of the land.^{33a}

This decision is presently under appeal.

The Mortmain and Charitable Uses Act is the particular Act as it relates to *The Corporations Act*.³⁴ It is the general Act as it relates to *The Religious Institutions Act*.³⁵ In one situation where there had been a vesting of one part of land that had been assembled, it seemed that when application was made within the two year period on account of the land that had not vested, it would be appropriate for the Public Trustee to make an application on account of the land that had vested, and the Supreme Court agreed that the proceeding was a proper one. The Public Trustee was ordered to make a conveyance and the charity was put on terms which it was pleased to accept. However in its *Report on Mortmain and Charitable Uses and Religious Institutions* in 1976, the Ontario Law Reform Commission noted “Directing a sale by the Public Trustee to the charity for a nominal consideration as the order did evades the act”.³⁶ Note that the word used was “evades” not even “abuses”. This solution seemed to me to be rather a good one as the Public Trustee can only own the lands as a trustee and the Public Trustee proceeded on this basis. While *The Mortmain and Charitable Uses Act*³⁷ is directed to keeping the land in circulation, the matter of the title to lands registered in a charity requires attention on account of the implications of the vesting in the Public Trustee. Perhaps sections 6 to 13 of *The Mortmain and Charitable Uses Act* should be repealed and a new statute should be passed to deal with land held by charities. The wording in *The Corporations Act*, sections 305 and 306(1)³⁸ may be satisfactory but two years is a long enough period. Perhaps the onus should be on the Public Trustee upon notifying the charity to make the application for an extension of time.

Reasons for restrictions on charities holding land include a desire to keep land in circulation and the fact that charities enjoy tax advantages. *The Charitable Gifts Act*³⁹ deals with interests in businesses that are carried on for gain or profit. It does not apply to an interest in a business given to or vested in any organization of any religious denomination. A person is deemed to have an

interest in a business if he holds, or controls directly or indirectly, one or more shares in a corporation that owns or controls or partly owns or controls the business, or one or more bonds, debentures, mortgages or other securities upon any asset of the business. Where the interest is given or vested pursuant to an instrument other than a will, any part in excess of ten *per cent* must be disposed of within seven years of the date of the instrument. Where the gift was made by will, time runs from the date of death. The time may be extended by a judge of the Supreme Court if he is satisfied that the extension is for the benefit of the charity. So long as the interest represents more than 50%, the Public Trustee in conjunction with the charity and those managing the business must determine the profits once a year. The profits are then distributed to the charity. Earlier articles have dealt with the rules and requirements of the *Income Tax Act* as they affect charities.⁴⁰ One should note the possible tax implications contained in *The Corporations Tax Amendment* (No. 2) of 1977.⁴¹

- 1 *The Charities Accounting Act*, R.S.O. 1970 c.63
- 2 Case Comment on Canadian Foundation for Youth Action by Maurice Cullity, *The Philanthropist*, Vol. 2, No. 1, Spring, 1977.
Re French Protestant Hospital, [1951] Ch. 567
Attorney-General v. The Dedham School (1857), 23 Beav. 350.
Attorney-General v. The Sherborne Grammar School (1854), 18 Beav. 256
Attorney-General v. St. Cross Hospital (1835), 17 Beav. 435
Attorney-General v. The Governors of the Founding Hospital (1793), 2 Ves. Sec. 42
- 3 *Halsbury's Laws of England* 4th ed., Vol., 5, para. 890, p. 516
Re Robinson (1977), 15 O.R. (2d) 286
- 4 *Halsbury's Laws of England* 4th ed., Vol., 5, para. 504, p. 309
Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson, [1944] A.C. 341, [1944] 2 All E.R. 60; the same case in the Court of Appeal, *sub. nom.*, *Re Diplock, Wintle v. Diplock*, [1941] Ch. 253, [1941] 1 All E.R. 193
Morice v. Bishop of Durham (1804), 9 Ves. 399; on appeal (1805) 10 Ves. 522
- 5 *Attorney-General of Nova Scotia v. Axford* (1885), 13 S.C.R. 294
Guaranty Trust Co. of Canada v. Minister of National Revenue (1967), 60 D.L.R. (2d) 481
Re Finger's Will Trust, [1971] 3 All E.R. 1050.
- 6 *Re Robinson* (1977), 15 O.R. (2d) 286
Re Edwards (1911), 2 O.W.N. 765
C.E.D. (Ont.) 3rd ed., Vol. 4, s.12, p. 24-13
- 7 *Halsbury's Laws of England* 4th ed., Vol., 5, para 660, p. 411
Re Wokingham Fire Brigade Trusts, Martin v. Hawkins, [1951] Ch. 373; [1951] 1 All E.R. 454
Re Brougham, [1977] Ont. H.C.J. unreported 14 Oct.
Scott on Trusts, 3rd ed., Vol., 4, S339.3, p. 3112, S374.1, p. 2930
- 8 *Re Wokingham Fire Brigade, Martin v. Hawkins*, [1951] Ch. 373, [1951] 1 All E.R. 454
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Guaranty Trust Co. of Canada v. Minister of National Revenue (1967), 60 D.L.R. (2d) 481
- 9 *Guaranty Trust Co. of Canada v. Minister of National Revenue* (1967), 60 D.L.R. (2d) 481
- 10 *Guaranty Trust Co. of Canada v. Minister of National Revenue* (1967, 60 D.L.R. (2d) 491
- 11 *Re Brougham*, [1977] Ont. H.C.J. unreported, 14 Oct.
Weatherby v. Weatherby (1927), 53 N.B.R. 403
- 12 *The Variation of Trusts Act*. R.S.O. 1970, c.477
- 13 *Rules of Practice* R.S.R. 1970 Reg. 545 R 608 (1) 3(a)
- 14 *Re Eades*, [1920] 2 Ch. 353
Moorcroft v. Simpson (1921), 50 O.L.R. 148 C.E.D. (Ont.) 3rd ed., Vol., 4, S. 21, pp. 24-17
Re Robinson (1977), 15 O.R. (2d) 286
- 15 *Re Robinson* (1977), 15 O.R. (2d) 286

- 16 A gift over from one charity to another is not subject to the rule: *Christ's Hospital v. Grainger* (1849), 1 Mac. & G. 460
- 17 *Re Levy*, [1960] 1 All E.R. 42
- 18 *Halifax School for the Blind v. Attorney-General* [1937] S.C.R. 196; [1937] 3 D.L.R. 9
- 19 *Weatherby v. Weatherby* (1972), 53 N.B.R. 405
- 20 *The Perpetuities Act*, R.S.O. 1970, c.343, s.2
- 21 *Halsbury's Laws of England* 4th ed., Vol., 5, para 870, p. 508
- 22 *The Charities Accounting Act* R.S.O. 1970, c.63
- 23 The Protection of Charities in Ontario by Fern Levis, *The Philanthropist* Vol., 1, No. 1, Fall 1972
- 24 The Protection of Charities in Ontario by Fern Levis, *The Philanthropist* Vol., 1, No. 1, Fall 1972.
- 25 *The Mortmain and Charitable Uses Act*, R.S.O. 1970, c.280
- 26 *The Charitable Gifts Act* R.S.O. 1970, c.61
- 27 *The Charities Accounting Act* R.S.O. 1970, c.63, s.1
- 28 *The Corporations Act* R.S.O. 1970, c.89
- 29 *The Charities Accounting Act* R.S.O. 1970, c. 63
- 30 *People v. Stone*, [1959] N.Y.S. 2nd 380
- 31 *Kefkowitz v. Burden* (1974), 22 A.D. 2d 881
- 32 *Rose v. Rose* (1914), 32 O.L.R. 481
- 33 *In the matter of Canadian Foundation for Youth Action*, [1977] (S.C.J.D.Y.) Reasons dated January 25, 1977
- 34 *In the matter of Etobicoke Olympic Facilities Fund Inc.*, [1977] (S.C.J.D.Y.) Reasons dated June 3, 1977. Unreported.
- 35 *Christian Homes for Children v. Minister of National Revenue* 66 D.T.C. 736
- 36 *Stothers v. Toronto General Trusts* (1917-18) 44 O.L.R. 432
- 37 *Widdifield on Executors' Accounts* 5th ed., F. D. Baker, pp. 285, 270
- 38 *The Mortmain and Charitable Uses Act*, R.S.O. 1970, c.280
- 39 *The Charitable Gifts Act*, R.S.O. 1970, c.61
- 40 *Re Stekl* (1974), 40 D.L.R. 3d 407
- 41 *Widdifield on Executors' Accounts* 5th ed., F. D. Baker, pp. 233-234
- 42 *Milltown v. Trench* (1837), 4 Cl. and F. 276
- 43 *Johnston v. Minister of National Revenue* (1950), 3 Tax A.B.C. 89
- 44 *Widdifield on Executors' Accounts* 5th ed., F. D. Baker, pp. 124-130
- 45 *Re Reynolds*, [1950] O.W.N. 664
- 46 *Leonard v. Crown Trust*, [1949] O.R. 678
- 47 *Re Davis Estate*, [1942] O.W.N. 26
- 48 *Re Cunningham* (1917), 12 O.W.N. 268
- 49 *Widdifield on Executors' Accounts* 5th ed., F. D. Baker, pp. 132, 133, 134
- 50 *Widdifield on Executors' Accounts* 5th ed., F. D. Baker, p. 230
- 51 *Re Dennison* (1894), 24 O.R. 197
- 52 *Re Armstrong* (1904), 4 O.W.R. 627
- 53 *Gray v. Hatch* (1871), 18 Gr. 72
- 54 *The Charities Accounting Act* R.S.O. 1970, c.63, s.4
- 55 *The Charities Accounting Act* R.S.O. 1970, c.63, s.6
- 56 *The Charities Accounting Act* R.S.O. 1970, c.63, s.5(4)
- 57 *The Charitable Gifts Act* R.S.O. 1970, c. 61
- 58 *The Mortmain and Charitable Uses Act* R.S.O. 1970, c.280, s.7
- 59 *Palmer and others v. Marmon and others*, Ont. S.C., O'Driscoll, J. Reasons, May 30, 1978
- 60 *The Corporations Act* R.S.O. 1970, c.59
- 61 *The Religious Institutions Act* R.S.O. 1970, c.411
- 62 Ontario Law Reform Commission Report on The Mortmain and Charitable Uses and Religious Institutions Acts, 1976.
- 63 *The Mortmain and Charitable Uses Act* R.S.O. 1970, c.280, ss.6-13
- 64 *The Corporations Act* R.S.O. 1970, c.89, ss.305-306
- 65 *The Charitable Gifts Act* R.S.O. 1970, c.61
- 66 The Tax Treatment of Charities by D. C. Brown and A Kaleidoscopic View of the Charity Amendments, by D. C. Brown and Mary Louise Dickson -- *The Philanthropist*, Vol., 2, No. 2, Winter, 1977
- 67 *Canadian Tax Treatment of Charities and Charitable Donations* -- A.B.C. Drache (Richard De Boo Ltd., 1977)
- 68 S.O. 1977, c.58, s.s.49 (1)(b), 49 (2)(a)