Philanthropy and the Natural Environment: Guarding the Guardian

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Let us suppose a philanthropist appears in your law office. A lifelong bird watcher, nature photographer and hiker, he wants to donate his country retreat, 200 acres of virgin wilderness near an area of the province that has become urban and industrial, to the provincial government to be preserved as a park. Your client's gift is graciously accepted by the province. No problems. Execute the deed and your client has preserved a piece of wilderness from the encroaching concrete.

Or has he?

Percy Hilborn thought so. In 1967, he donated 172 acres to the Province of Ontario as a park. The Premier of Ontario personally wrote to thank him "for your generosity in making this land available for recreational purpose". In 1971, the province turned it over to a conservation authority to manage. In 1979, the conservation authority, to the chagrin of Mr. Hilborn's daughter, said it had no objections to the Cambridge Municipal Council putting a road through it. According to the *Globe and Mail* of May 31, 1979, the Conservation Authority said it got the land "without any strings or conditions" and did not feel morally bound to defend the park.

Unfortunately, this is not an isolated incident, at least in Ontario, where public authorities seem to find it difficult to avoid the temptation to use parkland for public works. There are many other examples. In the 1800's, a group of local residents formed a company to acquire land surrounding the Elora Gorge, a breathtakingly beautiful setting unique to southern Ontario, where the Grand River winds its way along the base of 100-foot high limestone cliffs. The Elora Gorge Company donated this land to the Village of Elora to be preserved as parkland, and the Village turned it over to the Grand River Conservation Authority. In 1973, the County of Wellington, with the concurrence of the Conservation Authority and the Village of Elora, decided to put a highway through the Elora Gorge Conservation Area and a bridge across the deepest part of the Gorge.

A similar fate almost befell the Arthur Percy Nature Reserve near Oshawa, Ontario in 1975. One hundred acres had been given to the municipality to preserve as parkland and the municipality leased it to a conservation authority to manage. The conservation authority came up with a plan to dam a river flowing through the property which would flood most of it. They claimed it would still be a "nature reserve", because the newly-formed lake would attract waterfowl. This plan was abandoned when the Canadian Environmental Law Association ad-

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vised the municipal council of its opinion that this would constitute a breach of trust.

Philanthropists and their solicitors should not naively assume that public authorities who accept land to be preserved as parkland will carry out the donor's intentions. It is far too easy for a public authority to disregard the intentions of a donor, particularly after his death. Finding a way of binding a public authority to carry out the wishes of a donor over an appreciable length of time, however, is difficult because of the rule against perpetuities which limits the length of time a donor can prevent full ownership, and therefore the right to deal with and dispose of land freely, from vesting in the donee.

An awareness of the problems, however, may lead philanthropists and their lawyers to ensure that a beneficient intention, a gracious acceptance, and a straightforward conveyance do not result in disillusionment. While there is no such thing "forever", there are at least three possible ways of ensuring that a donor's intentions are honoured for as long as possible. These are the restrictive covenant, the determinable fee simple, and the charitable gift with a number of subsequent gifts over to charitable purposes, each subject to a contingency.

The Restrictive Covenant

Under a restrictive covenant the grantor would transfer the land, called the "servient tenement", to the government subject to a restrictive covenant against use of the land for purposes other than parkland in favour of a "dominant tenement" retained by the grantor. Because a restrictive covenant is enforceable both by the original owner and by subsequent owners of the servient tenement, the grantor's heirs would be in a position to ensure that the government respects the restrictive covenant. Consequently, such a provision has the potential for perpetual restriction on the government's use of the donated land.

Unfortunately, a number of general principles governing restrictive covenants contain potential pitfalls for the philanthropist. First, the grantor must retain a dominant tenement which benefits from the covenant. Although the dominant tenement need not be adjacent to the servient tenement, it must be sufficiently close that those who own it can argue persuasively that their land benefits from the covenant. In addition, if the land to be donated and the land to be retained are one parcel, the donor will have to obtain government consent to subdivide the parcel into a dominant and a servient tenement in those provinces with planning legislation that restricts the right to subdivide property.

The covenant must be negative rather than positive if it is to run with the land and therfore be enforceable by subsequent owners of the dominant tenement; that is, it must be "restrictive". For example, a covenant stating that the lands must be used as a park would impose a positive obligation on the owner, and therefore might fail to run with the title. It would be necessary to draft a covenant which states what the owner cannot do with his property. For example, a covenant to the effect that no buildings, road, structures, or human intervention in, or alteration of, a natural environment is to be permitted on the land would be much more likely to be interpreted as a negative covenant. The difficulty of drafting an adequate negative covenant, of course, is in anticipating and mak-

ing provisions for all contingencies that might arise, without the wording being so broad and vague that the courts will not give force to it. However, intelligent drafting should go a long way towards solving this problem.

The original grantor, of course, can have no assurances that his heirs and assigns, as subsequent owners of the dominant tenement, will take it upon themselves to enforce the covenant. Ultimately, one of them may sell the dominant tenement to the owner of the servient tenement or to some other person who has no interest in enforcing the covenant. Moreover, if the government agency which owns the servient tenement wants it badly enough, it might even expropriate the dominant tenement. Whether such an expropriation would be considered a valid use of public powers or an unconscionable abuse of authority would be an interesting question. Moreoever, in the event of a breach of covenant, there is no guarantee that a court would exercise its discretion to grant an injunction. The court might merely award damages in lieu of an injunction, which might be a satisfactory result for the owners of the dominant tenement, but would defeat the intention of the original grantor.

Finally, the courts may decline to enforce covenants which are highly unreasonable or against public policy. Where the character of an area changes over many years, or the needs of a public authority and its constituents change dramatically, a once reasonable covenant may become unduly onerous. Eventually, the owner of the servient might apply to the court successfully to have the covenant terminated. Thus, use of the restrictive covenant provides uncertain protection at best. Other techniques appear to provide greater certainty in the long run.

The Determinable Fee Simple

The best definition of a determinable fee simple is perhaps the shortest. Black's *Legal Dictionary* describes it as an interest that is "liable to come to an end upon the happening of a certain contingency". Thus, the philanthropist can grant to the government an interest in his land that will come to an end automatically upon the happening of the contingency which he provides for. The determinable fee simple is very similar to another interest, the fee simple with a condition subsequent. Without going into the subtle distinction between these two interests, the reason the determinable fee simple is suggested as a tool for preserving land rather than the fee simple with a condition subsequent is that the latter is clearly subject to the rule against perpetuities, which would curtail the length of time the grantor could retain any control over the use of the land, while the former may not be.

When a grantor conveys a fee simple on conditions subsequent, he retains a right of re-entry if a condition is broken or the right to terminate the interest of the person to whom he conveys the land. This right of re-entry is clearly subject to the rule against perpetuities. When the grantor conveys a determinable fee simple, he retains an interest called "the possibility of reverter". While the interest subject to the condition subsequent does not terminate automatically upon the happening of the condition, and requires some positive action by the conveyor, the interest subject to the possibility of reverter terminates automatically upon the happening of the event named in advance. Thus, upon the hap-

pening of a certain contingency provided for in advance, such as the government's using the land for some purpose incompatible with preservation of nature or recreation, its ownership would automatically terminate and ownership would revert to the grantor or his estate. It appears that this possibility of reverter is not subject to the rule against perpetuities under the common law. Therefore, in Canadian provinces that are subject to the common law in this area, it is arguable that a grantor can prevent the government from using the land in a manner contrary to his intention for a period longer than the period set out in the rule against perpetuities (21 years after the death of someone who was alive at the time of the creation of the interest).

However, this does not necessarily mean that a determinable fee simple will allow a grantor to restrict the activities of a grantee indefinitely. It may be necessary to place specific time limits on a determinable fee simple. Osborne's *Concise Law Dictionary* defines a determinable interest as "an estate or interest which may come to an end before its natural termination or period limited upon the happening of some contingency; thus, where land is given for a defined or specified time of uncertain duration; for example, during widowhood". Furthermore, Burn defines a determinable interest as one that "may come to an end before the completion of the maximum period designated by the grantor".[1] These definitions contemplate that a determinable fee simple will include not only some contingency which would cause ownership to revert, but also some maximum period of time after which the determinable fee simple becomes an absolute fee simple and the contingency is no longer operative. Although there is a strong argument that the rule against perpetuities does not restrict the use of a determinable fee simple and that no specific time period must be set out to make a determinable fee simple effective, there is some disagreement about both these questions, and some question as to whether the determinable fee simple even exists.

The very existence of the determinable fee simple has been disputed. As Morris and Leach have observed:

> "Determinable fees have always been extremely rare. The English reports do not seem to furnish a single instance of one being recognized before the twentieth century. Some eminent authorities have even contended that no determinable fee simple could be created in England after the *Statute Quia Emptores 1290*, on the ground that the creation of such an interest would amount to the creation of a new tenure in fee simple between grantor and grantee, and the Statute expressly prohibited subinfeudation of this kind. But this theory is now generally regarded as exploded."[2]

Morris and Leach cite many authorities for this proposition. In essence, this particular controversy concerning the continued existence of determinable fees simple appears to have been resolved in favour of their existence.

The controversy concerning the applicability of the rule against perpetuities revolves around a consideration of whether the possibility of reverter is a vested interest or a contingent interest. The rule against perpetuities is concerned with

remoteness of vesting and not with how long an interest lasts. Therefore, if the possibility of a reverter is seen as a vested interest, it is not subject to the rule against perpetuities. However, if it is considered to be a contingent interest, like a fee simple with a condition subsequent, it is subject to the rule.

Much of the literature deals with the question of whether, on policy and conceptual grounds a determinable fee simple should be subject to the rule. For example, Hogg and Ford[3], Megarry and Wade[4], Gray[5], and Morris and Leach[6] all argue that a determinable fee simple should be subject to the rule against perpetuities. Challis[7], Sweet[8] and Jarman[9], all argue that a determinable fee simple should not be subject to the rule against perpetuities. Our concern, however, is not with whether it should or should not be subject to the rule, but whether the rule does, or does not, in fact apply. Many of the authors who expressed the view that the rule should apply acknowledge that on the weight of the authorities it does not.[10]

Much of the recent controversy has arisen because of *Hopper* v. *Corporation of Liverpool*.[11] In this English decision, the court did apply the rule against perpetuities to a possibility of reverter. However, Hogg[12] and Cheshire[13] both point out that this decision is not consistent with other leading authorities.[14] In Canada, the leading Canadian case is *Re Tilbury West Public School Board* v. *Hastie*,[15] where, after an extensive review of the literature and authorities, the court concluded:

> "I am not inclined to follow *Hopper* v. *Liverpool* inasmuch as I think the criticism referred to above by Cheshire and the view expressed by Romer, J. in *Re Chardon* are the proper conclusions. For this reason I therefore hold that the limitation in such grants whereby a right is reserved to the grantor and his heirs to have such land revert to them when the same was not used and needed for school purposes does not offend against the rule in perpetuities but is a valid reverter."[16]

Finally, although some definitions appear to contemplate that a determinable fee simple will refer to a specified time period, there does not appear to be any need to provide for a maximum period of time after which the determinable fee simple becomes an absolute fee simple and the contingency is no longer operative. A review of the literature and the cases establishes no necessity for a determinable fee simple to include a maximum period of time after which the contingency becomes inoperative and the fee simple becomes absolute.[17]

It appears therefore, that in provinces where the common law rule of perpetuities is still in force, the determinable fee simple may be the most effective means for a philanthropist to donate his land to the government for a specific purpose such as nature preservation and be assured that the government will be bound indefinitely by his wishes. The government, of course, may subsequently alter the law or the grantor's heirs may decline to enforce their rights, but these possibilities will arise regardless of the mechanism the grantor employs. In some Canadian jurisdictions, including Ontario and Alberta, statutes have been passed which make a determinable fee simple subject to a

statutory limitation.[18] Under section 15 of the Ontario Perpetuities Act, for example, a determinable interest will become an absolute interest if the contingency causing the fee simple to revert to the grantor or to his heirs does not occur within the perpetuities period.

The best that can be done with a determinable fee simple in such jurisdictions, therefore, is to draft a grant in such a way as to maximize the length of the perpetuities period. In Ontario, for example, the length of the perpetuities period varies as follows:

1) If the determinable interest is based upon a relevant life in being (e.g., a determinable fee simple to the government for park purposes for a period of plus 21 years following the death of X) the perpetuity period is the lesser of the life in being plus 21 years or 40 years.
2. If the determinable interest is not based upon a relevant life in being (e.g., a determinable fee simple to the government for park purposes) the perpetuity period is simply 21 years.

To maximize the perpetuities period allowed under the Ontario legilsation, solicitors for the Nature Conservancy of Canada have drafted the following clause for use in grants of land made by the Conservancy to government agencies:

> "the grantor grants to the grantee in fee simple, determinable as hereinafter set out, all and singular the certain lands situate, lying and being in the (describe location) in the Province of Ontario, and more particularly described in Schedule A hereto annexed; for so long as the said lands shall be reserved, maintained, managed and protected as a nature reserve and natural area without alteration by humans and so that natural conditions and processes may take place without human intervention, save for such intervention as may be required to give effect to the purposes aforesaid as approved in writing by the grantor from time to time. The said fee simple determinable will be for a period of 21 years following the death of the last survivor of the lineal descendants of King George VI who are alive at the date of this conveyance."

This inclusion of a "royal lives clause" will ensure that the perpetuities period will not be confined to 21 years. However, where a relevant life in being has been provided in a grant, the perpetuities period is still limited to a maximum of 40 years.

In a Canadian common law jurisdiction where the determinable fee simple is not subject to the perpetuities rule, this model clause might be used without the "royal lives" provision to grant effectively a perpetual determinable fee simple. In provinces such as Ontario and Alberta, however, such a clause, with or without the "royal lives" provision, will bind the government only for a limited time. In such provinces, is there an alternative method for binding the government for a longer period of time? If the gift of land to be kept in its natural state can be considered a gift to a charity, there may well be.

The Charitable Gift with Subsequent Gifts Over to Charitable Purposes, Subject to Contingencies

In the *Law of Trusts in Canada*, Waters suggests a potential method for binding the government to carry out the philanthropist's intentions for a longer period of time than the perpetuities. The common law rule against perpetuities applies to charities, but it does not apply where there is a gift to a charity with a gift over to a subsequent charity on the happening of a certain contingency. Since perpetuities legislation like that of Ontario and Alberta is intended only to address problems arising with regard to matters which were subject to the rule against perpetuities, it is unlikely that anything in this legislation would affect a gift to a charity with a gift over to a subsequent charity on the happening of a certain contingency. In *Christ's Hospital* v. *Grainger*,[19] the court recognized as valid a limitation in a gift to the Corporation of Redding for the benefit of the poor of the city: if the corporation omitted or failed to perform the trust or misemployed the trust property for one year, then the property would go to the City of London in trust for Christ's Hospital. In the words of the court, "in this case there is a gift in trust for one charity, and on the happening of a certain contingency, a gift in trust for another charity. There is no more perpetuity created by giving to two charities in that form than by giving to one". Waters points out that:

> "This exception survives today; it has been recognized and followed in Ontario...and, as there is nothing in the perpetuity legislation of Ontario or Alberta which explicitly excludes it, it is presumably good law in all the common law jurisdictions of Canada...This (exemption from the perpetuities rule) appears to involve the proposition that any number of successive gifts over to charitable purposes or institutions would be valid (if total dedication to charity can be shown)."[20]

Consequently, it appears that a grantor in Ontario or Alberta can still avoid the perpetuities rule by giving a gift to the provincial government subject to a gift over, for example, to the regional government, subject to a gift over to the municipal government, etc., where each gift over becomes operative if the current holder fails to maintain the land for the designated purposes.

If a gift of land to be kept as a park, wildlife, or nature preserve is a "charitable purpose", therefore, this technique should be available. At first glance, it may appear that this presents no problem. One would think that a dedication of land for such purposes would clearly be charitable. However, there are cases that suggest this is a charitable purpose and cases that suggest that it is not.[21]

The key to this common law exemption, therefore, would lie in establishing total dedication to charitable purposes. Charity in its legal sense is restricted primarily to the relief of poverty, the advancement of education, the advancement of religion, and other similar purposes that are beneficial to the community. If land is to be used as a public park, in which recreation and the use and enjoyment of the land by the public are paramount, there should be no problem. But consider the case of the kind of nature preserve that would be established under the clause used by the Nature Conservancy of Canada. As Pettit has noted, "to be charitable... the gift must be regarded as producing a benefit to mankind, and in this

sense, be for the public benefit."[22] In Grove-Grady,[23] a gift was held not to be charitable where its purpose was to provide a "refuge . . . for the preservation of all animals, birds, or other creatures not human . . . so that (they) shall there be safe from molestation or destruction by man". The purpose was held to not afford any advantage to animals that is useful to mankind in particular. In contrast, it appears that a trust to enclose the land as a breathing space or an air zone for a town would be a charitable gift.[24]

Therefore, if a client wants to use a series of charitable gifts over to bind the government beyond the perpetuities period, it may be necessary to ensure that access to the public is not so restricted that the primary purpose of the gift appears to benefit the flowers and the birds to the exclusion of mankind, and to expressly make reference to the benefits expected to accrue to mankind.

As social conditions and needs change, there may arise a need to allow the beneficiary of land to dispose of it or vary its use in a manner that is not consistent with the intention of the donor. However, this should not be quite so easy as it is today. One way of limiting the discretion of government agencies to bow to expediency at the expense of environmental concerns and the wishes of donors is to ensure that philanthropists are informed that a gracious acceptance of a gift is not a guarantee. If a philanthropist wants to ensure that the purposes of his gift are respected, he should at least consider giving the land with some strings attached.

Draftsmanship alone may not be the solution to the problem. According to Robin Fraser, solicitor for the Ontario Branch of the Nature Conservancy of Canada, many government agencies aren't eager to accept gifts of land with such strings attached. If it becomes costly to maintain the land in its natural state, they want the option of developing it. Deciding between a restrictive covenant and a determinable fee may only be the beginning of a negotiating process with various government and private environmental protection agencies, to find out which of them are serious about conservation. One approach is to donate land to a "broker" such as the Nature Conservancy of Canada, which is not subject to the inherent conflicts of interests that a municipality or provincial government faces. The Conservancy will then attempt to arrange with government authorities that they manage the land, and will negotiate terms to maximize the possibility of protection of the land. Even the Nature Conservancy, however, is subject to financial pressures, and may refuse a donation of land with strings attached, if it does not feel it can undertake the cost of managing it indefinitely or will not be able to attract a government agency to manage it. Although the problems are not susceptible to a simple solution, a more hard-headed approach to philanthropy might result in fewer donated parks being turned into public works yards and expressways.

FOOTNOTES

1. *Cheshire's Modern Law of Real Property*, E. H. Burn, Ed., 12th ed., London: Butterworths, 1976, 362.
2. *The Rule Against Perpetuities*, J.H.C. Morris & W. B. Leach, 2nd ed., London: Stevens & Sons, 1962, 209-10.

3. P. W. Hogg & H. J. Ford, "Victorian Perpetuities in a Nutshell", (1969) 7 Melbourne University Law Review 155, 175.
4. *The Law of Real Property*, R. E. Megarry & H.W.R. Wade, 3rd ed., London: Stevens & Sons, 1966, 250.
5. *Gray's, The Rule Against Perpetuities*, Roland Gray, Ed., 4th ed., Sections 299 and 304.
6. Morris & Leach, *supra*, 213.
7. *Challis' The Law of Real Property*, 3rd ed., Charles Sweet, Ed. London: Butterworths, 1911, 187–190.
8. *Challis, supra,* 207–213.
9. *Jarman – A Treatise on Wills*, R. Jennings, Ed., 8th ed., London: Sweet and Maxwell, 1951, 388–390.
10. Megarry & Wade, *supra*, 250, go on to assert, "But weightier authorities indicate that there can be a valid reverter or resulting trust after an interest which terminates, even where an expressed gift after that interest would be void for perpetuity."
    Similarly, Morris & Leach *supra*, 211, have pointed out that:
    "In England, Ireland and some of the American States, it has been held that the rule against perpetuities does not apply to the possibility of reverter".
11. *Hopper et al* v. *Corporation of Liverpool* (1944), 88 S.J. 213.
12. Hogg & Ford, *supra*, 174.
13. *Cheshire*, Ninth Edition, 28.
14. For example, *Re Chardon*, [1928] Ch. 464. *Re Chardon* was considered and not challenged in *Re Wightwick's Will Trusts*, [1950] Ch. 260 and was followed in *Chambers' Will Trusts*, [1950] Ch. 267, which was subsequent to the *Hopper* case, *supra*. Furthermore, the Ontario Law Reform Commission Report No. 1, 1965, 32, states: "It has been argued and it is held in most American States as well as in some English and Irish authorities, that as the rule against perpetuities is concerned with 'vesting and is not concerned with the duration of an interest, the possibility of reverter which arises under the original limitation is deemed a vested interest and therefore does not offend the rules'".
15. *Re Tilbury West Public School Board and Hastie* (1966), 55 D.L.R. (2d) 407.
16. *Ibid*, 416-17.
17. Amongst other authorities, we may note the following:
    (a) A possibility of reverter is the interest left in the grantor after he has conveyed the determinable fee simple, e.g., to the tennis club in fee simple so long as the premises are used for club purposes (Hogg & Ford, *supra*, 173).
    (b) *Handbook of the Law of Future Interests*, L. S. Simes, St. Paul: West Publishing Co., 1966, 9, cites the following example:
    "Each type of fee simple was determinable on a specified event. In the case of the fee simple on condition subsequent, the estate did not terminate automatically on the happening of the condition. Entry of the conveyor, or the equivalent, was necessary to terminate the estate conveyed. Thus, A, might convey 'to B, and his heirs, but this conveyance is upon the express condition that the fences be kept in repair'. If the

fences should fall into disrepair and the condition thus be broken, A had the power to enter and terminate B's estate. If he did so enter, the fee simple revested in him. The determinable fee differed from the fee simple on condition subsequent in that the former terminated automatically on the happening of the event named in the conveyance. Thus, A might convey to B and his heirs, so long as the fences are kept in repair. If the fences should fall into disrepair, B's estate automatically terminated and the fee revested in A."

(c) *Re Tilbury West Public School Board and Hastie, supra.*

(d) The many examples and authorities cited in Powell: e.g., "so long as the land is used for county purposes"; "so long as the land is used for burial purposes"; "so long as the land is devoted to school purposes". R.R.B. Powell, "Determinable Fees", 1923, 23 *Columbia Law Review* 207, 209.

(e) The examples contained in R. Gosse, *Ontario's Perpetuities Legislation* Toronto: Carswell, 1967, 56 – 57 clearly indicate that a determinable fee simple may be based upon a contingency which is perpetual.

18. *Perpetuities Act*, R.S.O. 1980 c. 374, s. 15; R.S.A. 1980, P-4.
19. *Christ's Hospital* v. *Grainger*, [1848] 60 E.R. 804.
20. D.W.M. Waters, *Law of Trusts in Canada*, Toronto: Carswell, 1974, 437.
21. Generally. see P.H. Pettit, *Equity and the Law of Trusts*, London: Butterworths, 1974, 167–193 and Waters, *supra*, 465–493.
22. Pettit, *supra*, 174.
23. *Re Grove-Grady*, [1929] 1 Ch. 557.
24. Pettit, *supra*, 177, citing *Re Corelli*, [1943] 2 All E.R. 519.