The Role of the Public Trustee

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The Public Trustee of Ontario appears to have been given a general supervisory role with regard to charities in Ontario that is unique in Canadian law. As far as I can determine, no other province of Canada has legislation similar to that of Ontario in the charities field and no other Public Trustee of any other province is charged with the same responsibilities as the Public Trustee of Ontario.

One of the fundamental problems that my office faces is that we simply do not know the identity of all of the charities in the province and, as a result, it is difficult for the Public Trustee to perform the tasks that the legislation imposes upon the office. As new charitable organizations are incorporated we have endeavoured, with the co-operation of the Ministry of Consumer and Commercial Relations, to bring to the attention of applicants the difference between a non-profit charitable organization and a non-profit non-charitable corporation. We have tried to make it quite clear that a charitable corporation is subject to the *Charitable Gifts Act* and the *Charities Accounting Act*. We have also tried to make it clear that the recognition by the Minister of National Revenue in Ottawa that an organization is entitled to charitable status does not necessarily mean that the organization is recognized as a valid charity within the Province of Ontario.

I regret to say that many applicants and their solicitors are not aware of the difference between a non-profit charitable corporation and a non-profit non-charitable corporation. In addition, many applicants are not aware that if one mixes charitable objects with non-charitable objects, one no longer has a charitable organization.

I note also a recurring difficulty arising from the fact that from time to time applicants for a proposed new charitable corporation address enquiries to our office in an effort to learn the identity of other organizations either in the same general field or in the same geographical area. In my view it would be helpful not only to charities but to our office if there was some requirement for the registration of charities by name, location and activity either with my office or with some other agency.

Until recently there were three principal Ontario statutes of which charitable organizations should have been aware: the *Charitable Gifts Act*, the *Charities Accounting Act* and the *Mortmain and Charitable Uses Act*. The *Mortmain and Charitable Uses Act* has now been repealed, but some of its provisions have been incorporated into the *Charities Accounting Act*. (See *The Philanthropist*, Winter 1982-83, 32–34.)

Apart from those three principal statutes, the Public Trustee has duties under the

Surrogate Courts Act. Under section 74(10) of that act it is provided:

> "Where by the terms of a will or other instrument in writing under which an executor, administrator or trustee acts, real or personal property or any right or interest therein, or proceeds therefrom have heretofore been given, or are hereafter to be vested in any person, executor, administrator or trustee for any religious, educational, charitable or other purpose, or are to be applied by him to or for any such purpose, notice of taking the accounts shall be served upon the Public Trustee."

As most charities are aware, it is the practice of executors periodically to submit accounts reflecting the receipts and disbursements of an estate to a Surrogate Judge so that those transactions may be approved and compensation to the executor fixed. This is desirable for the protection of both the beneficiary and the executor. If a charitable beneficiary notifies my office that it will be represented at such submission by its own solicitor, we do not attend. If there are several charitable beneficiaries in the same interest and I am aware that one or more of them will be represented by their own solicitors, we do not attend.

The costs on a passing of accounts are in the discretion of the presiding judge, but it has become a custom of the Surrogate Court to award solicitors of a charitable organization one-half of the fee awarded to the solicitor for the executor. I recognize that many lawyers or legal firms are of the opinion that as they often provide legal services to charitable organizations without remuneration, one of the ways that they can be compensated for this unpaid service is by being awarded costs on passings of accounts. A difficulty does arise, however, when a number of charitable organizations share in the same way in an estate. If all of those charities choose to be represented on a passing of accounts and each of their solicitors is awarded costs, there may be a financial drain on the estate. If the charities are residuary beneficiaries, there may be nothing wrong with this, for ultimately the costs are going to come out of the share of each individual charitable organization. I do, however, sense a growing concern among testators that too large a portion of their estates is going to legal costs and not for the charitable purpose intended. As a result, increasing numbers of testators endeavour to include some clause in the will that either restricts the number of solicitors attending on passings of accounts on behalf of charitable interests or restricts the cost to be awarded. I am glad to say that many of the legal firms who represent charitable organizations and frequently receive interests in estates, now work out arrangements that result in charitable organizations having the same interest being represented by only one lawyer.

A somewhat similar problem exists under the *Charities Accounting Act* where proceedings are taken to set aside, vary or construe a will. Again notice must be served on the Public Trustee. My office is represented only if the charitable beneficiary is not otherwise represented. The costs of litigation are high and if all charities in the same interest choose to be represented by their own counsel, then the estate may be substantially depleted. Again, it seems to me that when testators see this, they often have second thoughts about making bequests to charitable organizations or seek some way to minimize the costs.

The problem is particularly noticeable where the same problem of interpretation

arises in several different estates. For example, if a bequest is made to a hospital affiliated with a particular fraternal order, organization or religious group, and the particular hospital referred to in the will is closed but the society or organization operates another hospital in a different geographical location, the question of whether the bequest fails, is paid to another specific hospital, or to the parent organization, or is applied *cy pres* may arise in several estates. Once that question has been decided in one estate, it does not make sense that the same question should have to be interpreted at high cost for a second. To avoid this type of problem it has been suggested that in the interests of economy and efficiency the Public Trustee or some other individual should be appointed a superintendent of charities to administer and adjudicate upon charitable problems.

Until last year the act which caused a problem for the greatest number of charities was the *Mortmain and Charitable Uses Act*. Under section 7(1) of that act it was provided that:

> "Where land is assured otherwise than by will, to or for the benefit of any charitable use, the land was, notwithstanding anything contained in the deed or other instrument of assurance, to be sold within two years from the date of assurance or within such extended period as may be determined by an order of the Supreme Court".

Under section 7(2) if the land was not sold within the two years or within such extended period, it vested in the Public Trustee.

The Province of Ontario, through the Public Trustee, was not seeking to seize charitable lands, but three types of problems arose with great frequency:

(1) A charitable organization having owned the property for more than two years, without any order, disposed of the property without regard to the provisions of the *Mortmain and Charitable Uses Act*. In a subsequent transaction a solicitor for a new purchaser submitted a requisition on the point. An effort then had to be made to clear the title. In order to deal with the situation I did agree to grant a quit claim if I could be satisfied that a resolution had been passed by the charitable organization authorizing the sale, that the sale had been at market value and that the proceeds were in fact paid to the charity.

(2) The charitable organization owned lands for years and continued to require them for its own use and occupation. Unfortunately, based on a decision in the 1946 case in *Re Goreham's Trust*, the court had taken the position that once the two-year time limit had expired the court had no jurisdiction to grant an extension. In May of 1978 by a decision of Mr. Justice O'Driscoll in the case of *Palmer* v. *Marmon*, it was held that the court could extend the time after the expiration of the two years at least up until the time the property was sold by the Public Trustee pursuant to the provisions of section 10. This judgment afforded needed relief in this particular area.

(3) The third situation was a case where the charitable organization had owned the lands for more than two years, had never obtained an order

extending the time, but no longer needing the lands for its own use and occupation, wished to, or had already entered, an agreement to sell the property. The problem arising from the *Mortmain and Charitable Uses Act* would then be raised by the purchaser's solicitor. Unfortunately it did not seem that the decision of Mr. Justice O'Driscoll helped because the charitable owner could not say that it required the lands for its own use and occupation and this seemed to be the prerequisite of an application of an order extending time.

In 1982 the *Mortmain and Charitable Uses Act* was repealed but some similar provisions were incorporated in the *Charities Accounting Act.*

Paragraph 6b (1) provides,

> "A person who holds land for a charitable purpose shall hold the land only for the purpose of actual use or occupation of the land for the charitable purpose".

Section 6(2) allows the Public Trustee to serve a Notice of Divestment where he is satisfied that the land has not been in actual use or occupation for the charitable purpose for a period of three years, is not required for actual use or occupation and will not be required for actual use or occupation for the charitable purpose in the immediate future.

From a practical point of view I find this section far from satisfactory for if I do not know the identity of the charitable organization in Ontario, even less do I know what lands are owned by the various charitable corporations. To make the act useful at all, I feel that there should be some requirement that charitable organizations file somewhere a statement of their land holdings and the purpose for which lands are held.

One of the problems of interpretation may be what is meant by the phrase "required for actual use or occupation in the immediate future". I am already aware of several situations where charitable organizations desiring to purchase office space have located what they consider to be desirable property at a fair price but which is subject to a long-term lease. While the proposed purchase may make sense from a business real estate point of view, a problem may be created under the *Charities Accounting Act.* I point out that under section 6(5) there is provision for an application to the Supreme Court for an order revesting in the charity any land that has vested in the Public Trustee if the court is satisfied that the land was in fact used or occupied for the charitable purpose within the preceding three years, is required for actual use and occupation, or will be required for actual use and occupation in the immediate future.

One of the problems that the amendments to the *Charities Accounting Act* may have created is that it would seem that because of the wording that was used, a charity may not now be able to hold a mortgage. I think a mortgage is a holding in land. It is not, however, a holding which can be used or occupied for the charitable purpose and, therefore, indirectly may not be permitted under section 6b. I do not think this result was intended and I think it is probable that some further amendment will be made to clarify the meaning.

The second act which applies to charities in this province is the *Charitable Gifts Act*. Again I think the act is ignored more than it is observed. Section 2 provides:

> "Notwithstanding the provisions of any general or special Act, letters patent by law, will, codicil, trust deed, agreement or other instrument, wherever an interest in a business that is carried on for gain or profit is given to or vested in a person in any capacity for any religious, charitable, educational or public purpose, such person has power to dispose of and shall dispose of such portion thereof that represents more than a 10 per cent interest in such business."

Because section 4 of the *Charitable Gifts Act* requires an accounting to the Public Trustee where the charitable interest is more than 50 per cent of a business, it is assumed by many that the Public Trustee supervises this act. That may be so, but I do not feel the legislation is clear on that point. In practice we receive only about one enquiry each year about this statute.

The *Charitable Gifts Act* was first enacted in 1949. There are really no reported cases of significance. The major thrust of the act requires that whenever an interest in a business that is carried on for gain or profit is given to, or vested in, a person in any capacity for any religious, charitable, educational or public purpose, such person has the right to, and shall, dispose of such portion that represents more than a 10 per cent interest in such business.

When introducing the bill to the legislature on March 25, 1949 the then Treasurer of the province, Leslie Frost, stated the government's commitment to the "high purpose of charity" and then continued, "the principle of the charitable foundation in business is thoroughly bad". Summarized, his arguments were:

1. The succession duty exemption granted to charitable bequests was in fact a contribution by the taxpayers of Ontario to charity.
2. The tax-free status of a charitable institution gives it an unfair advantage over a business competitor which must conduct its affairs efficiently, pay taxes and earn dividends for its investors.
3. A business owned by a charitable institution is not responsible to its shareholders in the same way as is a public company, and therefore lacks the incentive to make a profit.
4. Regulation is not a sufficient answer to the problem as no government or public officer could possibly undertake to exercise the discretion which would be involved in passing upon the operations of various businesses.

On March 30th, 1949 the Treasurer said, "As I explained on Friday, trustees appoint themselves or their nominees as the directors and officers of the companies they control. There is the situation, the foundation is set up, the trustees are appointed. Trustees have the power to name their successors in perpetuity. They can appoint their successors in perpetuity as managers, as officers and directors of these companies. This process can be carried on *ad infinitum*. The trustees become careless and are not interested in the strain and stress of competitive business and become more interested in perpetuating the business from the standpoint

of assuring their own interests because they receive fees and salaries than earning the profits which should be available for the unnamed charities whom they are supposed to benefit".

On the same day Frost said, about charitable foundations, "their place is not in the competitive business world where they can do incalculable harm to legitimate and competitive business".

This bill received its third reading on April 7, 1949. In introducing it, Frost said, "In other words no trust or foundation may hereafter own more than 10 per centum of the capital stock of any company".

The definition of interest has now been expanded, for by paragraph 2(4) a person shall be deemed to have an interest in a business:

(a) if he is a part owner of the business;

(b) if he holds or controls directly or indirectly through a combination or series of two or more persons, one or more shares in a corporation that owns or controls or partly owns or controls the business; or

(c) if he holds or controls directly or indirectly through a combination or series of two or more persons, one or more bonds, debentures, mortgages or other securities upon any asset of the business.

I am troubled by such situations as arise when hospitals operate gift stores or parking lots for profit; medical foundations raise part of their funds by providing medical services for a fee; physical fitness organizations operate summer camps; and political or religious groups operate learning centres where guests pay a fee and are entitled to use a gymnasium, sauna baths or sailboats while they are attending seminars. Examples of the type of thing that comes before our office are:

1. A European foundation transfers substantial sums of money to an Ontario subsidiary which then uses it to purchase 100 per cent of the capital stock of a commercial enterprise.

2. A manufacturing firm makes substantial contributions to a family charitable foundation, which in turn lends the entire sum back to the firm at an interest rate much below the prevailing rate. (See *New Tax Proposals for Charities* p. 38.)

3. A charitable organization in the fitness field considers incorporating a squash club in the adjoining premises with the intention that the club will be operated for profit.

4. A charitable organization promotes as ancillary to its charitable purpose an enterprise that becomes profitable and then seeks to separate that enterprise from the charitable purpose but with the charitable organization having 100 per cent of the issued capital stock.

5. A charitable organization finding that one of its ancillary businesses turns out to be profitable, wishes to sell that business and take back a promissory note for the full amount or a large part of the purchase price.

It is my opinion that the act requires clarification and requires more direct and meaningful enforcement provisions.

It has been suggested that the provisions of the *Charitable Gifts Act* might be avoided by setting up two foundations so that every six years one foundation could convey all of its assets to the other. Another suggestion is that 11 charitable foundations could each own less than 10 per cent of the issued common stock of the company. In any case, I wish to emphasize that satisfactory compliance with the *Income Tax Act* does not mean that you can ignore the *Charitable Gifts Act* or the *Charities Accounting Act.*

The *Charities Accounting Act* provides in paragraph 1:

> "Where under the terms of a will or an instrument in writing real or personal property or any right or interest therein or proceeds therefrom are given to or vested in a person as executor or trustee for a religious, educational, charitable or public purpose, or are to be applied by him to or for any such purpose, such person shall give written notice thereof, personally or by registered letter, to the Public Trustee and to the person, if any, designated in the will or instrument as the beneficiary under the bequest or gift or as the person to receive the bequest or gift from the executor or trustee."

As I have already indicated, as new charitable corporations are incorporated, my office, with the co-operation of the Consumer and Commercial Relations Ministry, endeavours to draw the attention of applicants to both this act and the *Charitable Gifts Act.* Too often they are ignored.

We also endeavour to get financial statements from charities so that we, as far as we are able, can see that the funds raised for charitable purposes, do in fact, go to those purposes and not to fund-raising or administrative expenses. We are handicapped because we do not know the identity of all the charities and really do not have sufficient staff to check thoroughly all of their financial statements. Fortunately, most charitable organizations maintain a high standard of service, honesty and integrity but it is difficult for us to ferret out those who choose to perform otherwise.

Normally it is as a result of some complaint to our office that demands are made for financial information and if that information is not forthcoming, a motion is brought before a Justice of the Supreme Court pursuant to the provisions under section 4 of the act. If an accounting is directed to take place before a Surrogate Judge under the provisions of that section, I warn you that the costs can be horrendous. Surrogate Court accounting is the ultimate in detailed accounting. It requires the production of vouchers for disbursements and not the type of accounting that is done or audited by, chartered accountants. When we do bring a motion before the courts under Section 4, and I must say we do so only as a last resort, we all too frequently find that the charity has been using slipshod bookkeeping methods for many years and has retained few records. In my view such a charity should not be allowed to continue in business and there should be an immediate cancellation of its charitable incorporation.

There is also some question about the liability of directors of charitable organizations for defaults. (See *Duties and Responsibilities of Directors*, p. 3). Fern Levis, the solicitor in my office who is primarily responsible for this area of our

work, is very strongly of the view that there should be penalties which can be imposed upon directors and officers of charitable organizations which do not maintain adequate accounts.

As I have indicated, prior to the repeal of the *Mortmain and Charitable Uses Act* most charitable organizations had contact with my office as a result of real estate title problems. We did consider the possibility that before consenting to any order under section 7 of the *Mortmain and Charitable Uses Act* or before executing any quit claim deed we should demand that the charity submit its financial records to us, but my ministry expressed some concern that a request for co-operation under one statute should not be used as a lever to force compliance with an entirely different statute.

It occurs to me, however, that under present legislation, if a charitable organization does not provide the financial information required by the *Charities Accounting Act*, it might be reasonable for the Public Trustee to look very carefully at the real estate holdings of that organization with a view to filing a Notice of Divestment.

It is my hope that before long the Policy Development Division of the Ministry of the Attorney General and/or the Law Reform Commission will again review the charitable legislation existing in Ontario so that no hardship is imposed on those who act properly but effective controls are instituted for those corporations, or the individuals who control them, who do not comply with the law. To this end I would hope that some provision can be made for keeping more complete records of charitable organizations including their location and purpose. I would also hope the legislation would be further clarified and consolidated and that where charities do not fulfill their obligations, their officers and directors should be held more directly responsible while the charters of the organizations themselves should be subject to cancellation.