Case Comment:
McGovern v. *Attorney General*

[1981], 3 All E.R. 493 (Ch.D.)

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Lawyers familiar with the law of charity generally fall into one of two groups. One group is in agreement with the historian F.W. Maitland that the law of trusts is the finest invention of the English legal profession and regards the law of charitable trusts as a particularly refined branch of the subject. The other, the cynics, believes that the law of charity as illustrated in the vast body of case law relating to the definition of charity, contains some of the oddest decisions as well as some of the silliest *dicta* to be found in the law reports.

The genesis of the legal concept of charity is to be found in the preamble of a statute enacted in 1601. Either directly or indirectly, the drafter of the statute derived his inspiration and, to a large extent, the words of the preamble, from a fourteenth century alliterative poem. From any point of view the use of that concept for determining the availability of income tax deductions and exemptions in Canada in 1983 is remarkable.

Moreover, the court's insistence that, before a purpose can be regarded as charitable, it must not only fall within the spirit and intendment of the preamble of the statute of 1601 but must also be proven to be for the public benefit makes it inevitable that the necessary process of reconciling decisions, particularly those from different periods, is difficult for all but the exceptionally alert.

It is necessary to remember that the law leans in favour of finding a charitable purpose and that it is established by decisions of the highest authority that instruments disposing of property for purposes beneficial to the community must be given a benignant construction so that such gifts will be upheld as charitable if at all possible. Only the cynics will find significance in the fact that the principle is most commonly affirmed in cases where judges feel unable to apply it.

The latitude shown by English courts in cases brought to determine whether or not a gift is charitable is not a modern phenomenon. In *Da Costa* v. *De Pas*[1], for example, Lord Chancellor Hardwicke held in 1754 that, although a substantial bequest for the purpose of instructing people in the Jewish religion was superstitious and could not be enforced, still it was charitable. In consequence, the gift did not fail completely and the Crown had power to ensure that the testator's intention was not (?) frustrated. The money was applied to the support of an Anglican minister and the instruction of children in the Christian religion.

Similarly, in *Thornton* v. *Howe*,[2] in the middle of the nineteenth century, a trust to

publish the religious writings of the testatrix, a lady who believed and wished to publicize the fact that, with the co-operation of the Holy Spirit, she would give birth to a second Messiah was upheld as charitable. The decision has been described by English judges and writers, with justifiable satisfaction, as the "high water mark of religious toleration". Again, only the most cynical would give more than passing attention to the fact that, once the trust was held to be charitable, it followed that it failed completely as, being charged on real estate, it fell within the prohibitions contained in the mortmain legislation.

While the uninitiated might feel that later decisions such as *Oxford Group* v. *Inland Revenue Commissioners*[3] and *Ellis* v. *Inland Revenue Commissioners*[4] are not altogether consistent with the generous attitude of the courts in *Da Costa* v. *De Pas* and *Thornton* v. *Howe*, the later cases are easily distinguishable. In *Oxford Group* v. *Inland Revenue Commissioners*, an association incorporated for the purpose of advancing the Christian religion in accordance with the principles of the Oxford Movement was held not to be charitable on the ground that, although it had been conceded by the Attorney General that its main purpose was exclusively charitable, the objects clause of the body included powers to do all things incidental, or in the opinion of the association, conducive to the attainment of the main purpose. The court made the obvious point that things conducive to the attainment of charitable objects will not necessarily themselves be charitable.

Similarly, in *Ellis* v. *Inland Revenue Commissioners*, a gift for "the promotion and aiding of the work of the Roman Catholic Church" was held not to be charitable although the court recognized that gifts to the Church of England absolutely or to the Roman Catholic Church "for the use thereof" had been, and presumably still would be, upheld as charitable.

These cases which rely on the significant distinction between gifts for the advancement or promotion of charity and gifts for purposes conducive to, connected with, or aiding or assisting charity, should give rise to no difficulty as long as donors and their lawyers exercise precision in the use of language and resolutely ignore the numerous other decisions in which gifts have been upheld as charitable notwithstanding the draftsman's use of the offending words.

In those rare cases where sufficient precision is not achieved, the courts will have no option but to withhold from gifts the benefits of charity: income tax concessions, the possibility of perpetual existence, relaxed rules relating to certainty and, in Ontario, wise and paternal guidance from the Public Trustee.

It is true, of course, that the cynics do not always view the reasoning in the cases which have been mentioned with unqualified respect and admiration. They may even attempt to justify their cynicism by reference to the many other cases in which it has been held that the existence of subsidiary or ancillary non-charitable objects does not prevent a gift from being exclusively charitable.

In a similar manner, law students have at times been puzzled by the fact that the courts have insisted upon the requirement that public benefit must be "proved" in some cases of trusts for "charitable" purposes while assuming its existence without question in others. Experience has shown that, as such students mature,

they either join the ranks of the cynics or take increasing delight in the fine and subtle distinctions drawn by Her Majesty's judges in their attempts to keep the law of charity coherent and consistent with sound and responsible community attitudes. Unfortunately, the two groups are rarely able to find much common ground in their assessment of particular cases and it is probably inevitable that this will be so with the recent decision of Slade, J. in *McGovern* v. *Attorney General.*

Amnesty International was founded as an unincorporated non-profitmaking organization in 1961 with the general object of securing throughout the world, observance of certain of the provisions of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948. The objects of the organization are directed at opposing the detention, and securing the release, of prisoners of conscience who have neither used nor advocated violence and at opposing the infliction of the death penalty, torture and other cruel, inhuman or degrading treatment of detained persons whether or not they have used or advocated violence.

In 1977, the year in which Amnesty International received the Nobel Peace Prize, its trustees in the United Kingdom executed a declaration of trust of which the material provisions were as follows:

> "The trustees shall hold the said sum of £100 and any further sums or assets transferred to them hereafter upon trust for the following purposes (hereinafter called 'the trust purposes') that is to say: A. The relief of needy persons within any of the following categories: (i) prisoners of conscience, (ii) persons who have recently been prisoners of conscience, (iii) persons who would in the opinion of the trustees be likely to become prisoners of conscience if they returned to their country of ordinary residence, (iv) relatives or dependants of the foregoing persons, by the provision of appropriate charitable (and in particular financial,educational or rehabilitational) assistance. B. Attempting to secure the release of prisoners of conscience. C. Procuring the abolition of torture or inhuman or degrading treatment or punishment. D. The undertaking,promotion and commission of research into the maintenance and observance of human rights. E. The dissemination of the results of such research by (a) the preparation and publication of the results of such research, (b) the institution and maintenance of a library accessible to the public for the study of matters connected with the objects of this trust and of the results of research already conducted into such matters, (c) the production and distribution of documentary films showing the results of such research. F. The doing of all such other things as shall further the charitable purposes set out above. Provided always that the foregoing objects shall be restricted to those which are charitable according to the law of the United Kingdom but subject thereto they may be carried out in all parts of the world."

In 1978, the Charity Commission declined to register the trust as a charity on the ground that its objects were not exclusively charitable. When the trustees appealed to the court, the Commissioners of Inland Revenue appeared and successfully opposed the claim that the trust was entitled to the status and privileges of a charity.

Before examining the objects of the trust in detail, Slade, J. considered the proviso which followed immediately after clause F but which in its terms applied to all of the objects in the clauses which preceded it. The learned judge found the wording of the proviso to be neither clear nor satisfactory. On balance, he decided that it was:

> "merely intended to make it clear that the trustees, though entitled to carry out the trust purposes in any part of the world, should, even when operating outside the United Kingdom, be restricted to purposes which are charitable according to the law of the United Kingdom."[5a]

In his view, it followed:

> " . . . that if any one of the trust purposes set out [in the relevant part of the trust deed] is of a non-charitable nature, the proviso . . . cannot enable the trusts declared by the deed to escape total invalidity."[5b]

The most likely explanation of the learned judge's conclusion would appear to be that the proviso was, in his view, not intended to limit the generality of the purposes set out in the particular clauses but merely to ensure that English law would continue to govern the construction and application of those clauses. Presumably, any other interpretation of the proviso would have strained the principle of a "benignant" construction beyond all permissible limits. Having disposed of this preliminary question, Slade, J. then turned his attention to the particular objects for which the trust has been constituted.

Given that the preamble to the statute of 1601 specifically includes the relief of "Poor People" and that gifts for the relief of poverty are generally assumed to be for the public benefit, it would have been difficult to argue that the objects set out in clause A of the declaration of trust were not of a charitable nature and, apparently, no attempt was made to do this. The attack was directed at clauses B, C, D and E.

Slade, J. held that although, viewed in isolation, the objects in clauses D and E would have been exclusively educational and, therefore, charitable, they were in their context merely adjuncts to those in clauses B and C. Whether or not these clauses fell within the spirit of the preamble to the Statute of 1601, they were found to be political rather than charitable and, as such, they infected the objects in the remaining clauses.

To the learned judge, it was obvious that the primary activity contemplated by clause B was the imposition of "moral pressure on governments or governmental authorities" outside the United Kingdom. Although he recognized that a trust to be executed outside the United Kingdom could be charitable, a trust to exert pressure on foreign governments was not, because the court had no sufficient means of "satisfactorily judging as a matter of evidence whether the proposed reversal would be beneficial to the community in the relevant sense, after all its consequences, local and international, had been taken into account".[5c] Despite the learned judge's reference to "judging as a matter of evidence", his reasoning suggests that the problem is as much one of standards as of evidence. In his view, a trust of which a direct and main object is to secure a change in the law of a foreign

country (or of England) can never be regarded as charitable under English law for, following the words of Lord Parker of Waddington in an earlier case, "the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit".[6]

The court can, of course, judge whether a trust to promote the performance of the works of the composer Frederick Delius[7] or to assist in the search for the "Bacon-Shakespeare manuscripts"[8] is for the public benefit. In such cases, experts could be found to testify — no doubt, with some force — on either side. But, in the case of changes in the law or in administrative practice in England, who are the courts to recognize as the experts? Moreover, when changes in the law of the forum are in question, the problem is exacerbated by the accepted principle that "the law could not stultify itself by holding that the law itself should be changed".[9]

However, when changes in the law or in the administrative practices of other countries — such as execution without trial, execution by stoning, mutilation or the use of electrical generating equipment for the purpose of gathering information from individuals — are advocated, no question of legal self-stultification will arise. Still, what standards are the courts to apply and to whom should they listen? If the reasoning of Slade, J. is to be accepted in Canada, no satisfactory answer can be given to that question and accordingly:

> "a trust of which a main purpose is to procure a change in the laws of a foreign country is a trust for the attainment of political objects within the spirit of Lord Parker of Waddington's pronouncement and, as such, is non-charitable."[10]

As suggested above, it seems quite likely that not everyone will regard his Lordship's reasoning as absolutely compelling. The cynics, in particular, may well prefer Professor L. A. Sheridan's comment on the dictum of Lord Parker of Waddington:

> "That is true pathos. It is also a strain on credulity. There are few people better qualified than judges to assess whether a change in the law would be for the public benefit."[11]

Although such persons will regard the decision in *McGovern* v. *Attorney General* as unfortunate, they and others who believe in private philanthropy and are not entirely convinced that the law has achieved perfection in all of its facets, may find a grain of comfort in the learned judge's summary of his conclusions with respect to trusts for political purposes:

> "(1) Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes falling within the spirit of Lord Parker's pronouncement in *Bowman's* case can never be regarded as being for the public benefit in the manner which the law regards as charitable. (2) Trusts for political purposes falling within the spirit of this pronouncement include, *inter alia*, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the law of this country; or (iii) to procure changes in the law of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in

this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

"This characterization is not intended to be an exhaustive one but I think it will suffice for the purposes of this judgment; I would further emphasize that it is directed to trusts of which the *purposes* are political. As will appear later, the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable."[12]

Is it true then that advocacy of legislation which is merely a means to the accomplishment of a direct and principal charitable purpose may still be acceptable?[13] Authority for such a conclusion is not entirely lacking.[14] If that door has been left open, the condemnation of trusts for political purposes in *McGovern* v. *Attorney General* and earlier cases may not deny the benefits of charity to all trusts, corporations and associations which advocate a change in the law.

As far as the *Income Tax Act* is concerned, a contrary view appears to have been advanced by Arthur B. C. Drache:

"If a charity is to be registered as a charitable organization, it must devote all its resources to charitable activities. If it is to be a foundation, it must be 'operated exclusively for charitable purposes'. In other words, it would appear that to be registered initially and to retain its registration, both charitable organizations and foundations must refrain from all forms of political activities."[15]

As far as charitable foundations are concerned, it is at least arguable that the words "operated exclusively for charitable purposes" in paragraph 149.1(1)(a) should not be construed more narrowly than the words of subsection 360(3) of the *Income and Corporation Taxes Act* 1970 (U.K.) which refer to "any body of persons or trust established for charitable purposes only". In numerous cases, these words have been construed as requiring merely that the objects of a charity must be exclusively charitable and, for this purpose, the distinction between the purposes of the trust and the means by which such purposes are to be accomplished is supported by a respectable body of English and Canadian decisions.[16]

FOOTNOTES

1. (1754), 1 Amb. 228; 27 E.R. 150 (L.C.).

2. (1862), 31 Beav. 14; 54 E.R. 1042 (M.R.).

3. [1949] 2 All E.R. 537 (C.A.).

4. (1949), 31 T.C. 178 (C.A.).

5a. [1981] 3 All E.R. 493 (Ch.D.), 511.

5b. [1981] 3 All E.R. 493 (Ch.D.), 512.

5c. [1981] 3 All E.R. 493 (Ch.D.), 508.

6. *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406 (H.L.), 442.

7. *Re Delius*, [1957] Ch. 299 (Ch.D.).

8. *Re Hopkins' Will Trusts*, [1965] Ch. 669 (Ch.D.).

9. *Tyssen on Charitable Bequests* (London); Stevens, (1898), 176, cited with approval by Lord Simonds and Lord Wright in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*, [1948] A.C. 31 (H.L.), 50 and 62: "Now this is in reality nothing more than a rather elementary game with words. Granted that a judge must decide cases on the basis of the law as it stands, he does not have to approve the eternal correctness of all our law": Sheridan, L.A., "Charitable Causes, Political Causes and Involvement", *The Philanthropist*, Fall 1980, 5, 12.

10. [1981] 3 All E.R. 493 (Ch.D.), 507-508.

11. Sheridan, L.A., *op. cit., supra,* (footnote 9), 12.

12. [1981] 3 All E.R. 493 (Ch.D.), 508-509.

13. See *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31 (H.L.), 61 *per* Lord Simonds and 78 *per* Lord Normand; Cullity, M.C., "Charities- The Incidental Question" (1967), 6 *Melb. Univ. Law Rev.*, 35, 43.

14. *Re Inman*, [1965] V.R. 238 (Vic. S.C.).

15. Drache, Arthur B.C., "Political Activities: A Charitable Dilemma", *The Philanthropist,* Fall 1980, 21.

16. The cases are discussed in Cullity, M.C., *op. cit., supra,* (footnote 13), *passim;* Picarda, Hubert, *The Law and Practice Relating to Charities* (London: Butterworths, 1977), 152-157.