Trusteeship and the Charitable Corporation

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Introduction

Charity in Canada is an uncharted resource. Each of us is conscious of its existence. None of us can describe its dimensions. It continually changes its boundaries and dimensions as people respond to perceived needs in our society. The response may come as a program undertaken by a business, as a new activity of a social agency, as an outreach program of a religious organization, or as the spare-time activity of a few individuals. Often the response becomes formalized and a new legal entity is formed. At that time it may be described and measured.

A few studies have been made of those charities which have achieved an identity and structure. Admittedly incomplete, they nonetheless show clearly that charity in Canada makes a significant contribution to our national life. A recent estimate for the year 1980 of the total revenue of the 39,965 charities (excluding hospitals and teaching institutions) registered with Revenue Canada is $5.85 billion.[1]

It is not surprising that even as the scope and importance of charitable activity have gone largely unrecognized and unrecorded, the questions of legal control and responsibility for the control of charities have gone unanswered. This lack of concern, demonstrated by all Canadian legislators and governments, reflects the lack of concern of their constituents. The lack of court cases to provide precedents and clarify the law that exists is an expression of the same attitude. Who is going to sue a charity?

Those who have done so are generally concerned with either or both of two issues. The first is determination of whether or not an activity or organization is, at law, charitable. The second is determination of an entitlement to receive property which has been given for charitable purposes by a will or by lifetime gift and the application of such property.

The legal doctrines that form the basis for decisions relating to these issues were first formulated hundreds of years ago. Marion R. Fremont-Smith observes that prior to the enactment of the *Statute of Charitable Uses* in England in 1601:

> The right to existence in perpetuity; the doctrine that a charitable trust will not fail for want of a trustee, because of uncertainty as to the precise object or mode of its application, or as the result of an imperfect trust provision; the legal meaning of charity; and the *cy-pres* doctrine all became part of the established law in the early days of the Court of Chancery, much of it being adopted from doctrines developed in the ecclesiastical courts.[2]

The development of the early law of charity by the Court of Chancery and its identification with the statement and development by the court of the law of trusts has persisted ever since.

The identification seems entirely relevant when the nature of the charitable organization is specifically that of a trust, i.e., when named persons receive property and agree to manage and apply it for charitable purposes. The relevance is not nearly so apparent when a corporation is organized for the purpose of carrying on charitable activities and raises funds from the general public to do so or, in many instances, earns the money by its own activities. The natural point of reference is to the law applicable to corporations rather than to the law applicable to trusts.

The most important effect of incorporation is to establish at law a new and separate legal entity. The corporation, like a person, can sue and be sued, can enter into its own contracts and carry on its own activities. It is a brilliant legal concept and has become the organizational basis for our present society. It has, however, one drawback. The corporation is a paper person with objects and structure, but no mind or will of its own. Its mind and will are provided by its directors, officers, shareholders and employees. In particular, by reason of the statutory provisions which govern the corporation, it is the directors who are considered responsible for that mind and will.

Directors have been held personally accountable for many actions taken in the name of a corporation—in general terms by the courts of law and in specific terms by various provisions of the laws governing corporations. They have always been required to act in the utmost good faith. The relationship of a director to a corporation has been compared to that of a trustee's relationship to the beneficiary of a trust, but the comparison is almost invariably made for the purpose of distinguishing between the roles and responsibilities of directors and those of trustees. This has at least been so in the cases dealing with commercial corporations. In cases dealing with charitable corporations, the distinction has been far less clearly drawn.

The application of both trust law and corporate law principles to the charitable corporation led one author to address the topic under the title, *Charitable Corporations: A Bastard Legal Form.*[3] Nevertheless it is of critical importance that the thousands of incorporated charities and their many thousands of directors know the answers to such questions as the extent to which corporate principles are to govern them or whether trust law is to be applied to such corporations and, if so, whether the directors of the corporation are trustees or whether the corporation itself is a trustee.

Is the Director of a Charitable Corporation a Trustee?

The *Ontario Corporations Act* and the *Canada Corporations Act*, under which the great majority of Ontario charities are incorporated, establish no standard of care for directors of charitable corporations. This omission must be contrasted with the care taken to include such standards in comparable acts dealing with directors of business corporations.[4]

For the most part, trustees are held to a stricter common law standard than are corporate directors. A trustee's conduct is measured by reference to what a reasonable and prudent man would do in managing his own affairs.[5] The corporate

director is judged, at common law, on the basis of what can reasonably be expected from someone of "his knowledge and experience".[6] The corporate-director test is thus a subjective appraisal of capabilities. As well, a corporate director is not required to give constant or, given the powers of delegation, even personal attention to the affairs of the corporation. For example, directors who take no active part in authorization of an *ultra vires* act or a negligent decision are not answerable for any loss or liability arising therefrom.[7] Trust law, by contrast, does not recognize an inactive trustee. Trustees who fail to carry out their responsibilities for supervision may be held liable for the result[8] unless the breach (as with other breaches by trustees) can be brought within the terms of section 35 of the *Trustee Act*.[9]

Decisions such as that in *Canadian Aero Service Ltd.* v. *O'Malley et al*[10] may be extending the scope of directors' responsibility, but the distinction between directors' and trustees' responsibilities is nonetheless real.

In a 1979 address on the liability of directors of charitable corporations, J.D. Gibson characterized charitable corporations as holding their assets in trust for charitable purposes such that the "real trustees" of those objects were the directors who managed the corporation's affairs. A characterization of directors as "trustees" was regarded as the corollary of a characterization of the corporation as itself a "trustee":

> If it were contended that a charitable corporation is itself the only trustee, and that therefore it is the corporation only which would be liable for breaches of trust, it would be impossible for it to effectually make good trust property which had been dissipated as it could only do so out of other trust property. It would be robbing Peter to pay Paul, while the directors who actually caused the dissipation were to hide behind the corporate veil.[11]

As desirable as a trustee standard may appear to be by this analysis, the current case law does not support the characterization of all charitable corporation directors as trustees. The decision of Danckwerts, J. in *Re French Protestant Hospital*[12] is the only recent case we are aware of which indicates that directors of charitable corporations are to be considered trustees for the charitable objects of the corporation. In *French Protestant Hospital* an incorporated charity proposed to amend its by-laws to provide specifically that directors of the corporation be able to receive fees for services rendered in their professional capacity to the charity. Under the corporate charter, directors had the authority to amend by-laws if the amendments were "reasonable and not repugnant to law".

Citing *Bray* v. *Ford* as authority for the view that directors of charitable corporations are fiduciaries and, as such, unable to accept remuneration for their services, Danckwerts, J. found that the French Protestant Hospital governors or directors occupied their position as "trustees". The result of this finding was to deny the by-law amendment as one "repugnant to law".

The decision in *Bray* v. *Ford* involved the question of whether a judge had misdirected a jury in a libel action by advising them that a solicitor who served as vice-chairman of a charitable corporation was entitled to receive remuneration for legal advice given to the corporation. That direction was held to

be wrong in law. Lord Herschell stated, at page 51:

> It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.[13]

In both *Bray* and *French Protestant Hospital*, the provision for remuneration was for the immediate benefit of those corporate officers effecting the change in the constitution. The fiduciary role of directors is sufficient justification for the decisions.

The primary authorities for the proposition that directors of charities are trustees are early cases dealing with corporate entities which have relatively little in common with corporations under the current legislation governing corporations. *Charitable Corporation* v. *Sutton,*[14] described as the first reported case of its kind, was decided over two centuries ago and related to a charity incorporated by Royal Charter. *A.G.* v. *Wilson,*[15] involved a municipal corporation established by letters patent of King Charles the Second. *French Protestant Hospital,* although the case was heard in 1951, involved a corporation established by Royal Charter in 1718.

L.S. Sealy in an extensive article entitled *The Director as Trustee* rejects the argument that the concept of director-trustee was based on the fact that in the earliest companies the director was a trustee in the full technical sense and that the concept was carried forward by analogy. Instead, the author argues (pp.85, 86) that the abandonment of the trustee label was the result of developments in the law of equity:

> It is submitted that there is no hidden mystery, no missing link lying undiscovered in the pre-history of company law, behind the trustee appellation: the real mystery is why the old label has survived in modern usage. In the limited legal vocabulary of the day, there was no other word which the judges would wish to use. It was sufficient for them to reason that the directors had accepted an appointment or "trust"; therefore, they were "trustees" and accountable for "breaches of trust". The "trustee" in a strict sense, in whom property is legally vested for the benefit of others, was not separately identified until well into the nineteenth century, when the expression "fiduciary" was eventually accepted to differentiate true trusts from those other relationships, like that between a director or a promoter and his company, which in some degree resemble them.[16]

The clear statement of this for commercial corporations was made by Romer, J. in *Re Equitable Fire Insurance Co. Ltd.*:

> It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement.[17]

In the United States the same approach has been followed for charitable corporations. In *Stern* v. *Lucy Webb Hayes, National Training School* the United States District Court for the District of Columbia, citing a number of United States authorities, stated, at page 1013:

> The charitable corporation is a relatively new legal entity which does not fit neatly into the established common law doctrines of corporation and trust. As the discussion below indicates, however, the modern trend is to apply corporate rather than trust principles in determining the liability of the directors of charitable corporations because their functions are virtually indistinguishable from those of their "pure" corporate counterparts.[18]

The legislation in Canada dealing with charitable corporations is now beginning to parallel the earlier development of the legislation for commercial corporations. A study paper published in 1974 by Peter A. Cumming summarized what should be the policy for federal regulation of charitable corporations:

> There would be a departure from the statutory provisions applicable to business corporations only to the extent necessary due to the functional distinctiveness of the not-for-profit corporation and due to the need for appropriate, non-commercial terminology.[19]

The pending federal legislation, Bill C–10 *An Act Respecting Canadian Non-Profit Corporations* reflects this policy. It received second reading on 17 December 1981 and is currently before the Standing Committee on Justice and Legal Affairs.

British Columbia has already introduced a revised *Society Act* which applies to charitable corporations. Blake Bromley has described it:

> Thus the *Society Act* now imposes substantially the same duties on directors as does the *Company Act* and incorporates, by reference, portions of provisions of the *Company Act* relating to borrowings.[20]

The definitive statement has not yet been made in Canada as to whether directors of a charitable corporation are trustees in the unqualified legal meaning of that word. We believe that the indications are sufficient to anticipate that the answer will be that they are not.

Is the Charitable Corporation a Trustee?

The authority that exists for holding directors of charitable corporations to a trustee standard of care suggests that the imposition of trustee duties on directors is the corollary of finding that the corporation they direct is a trustee of its assets for the charitable purposes expressed in its corporate constitution. The question of whether or not all charitable corporations can aptly be described as "trustees" has attracted considerable court attention.

In his review of the relevant case law, Professor Scott abstains from finding any judicial consensus on the characterization of charitable corporations as trustees. Rather, he regards the judicial trend as having been to subdivide the trustee role into a set of powers or incapacities. Certain of these powers and incapacities will be found to apply to charitable corporations; certain others will not. As Scott puts it:

> ... the truth is that it cannot be stated dogmatically either that a charitable corporation is or that it is not a trustee. The question is in each case whether a rule which is applicable to trustees is applicable to charitable corporations, with respect to unrestricted or restricted property. Ordinarily the rules which are applicable to charitable trusts are applicable to charitable corporations, as we have seen, although some are not. It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications.[21]

Gifts as Trusts for Corporate Objects

A significant qualification of any characterization of a charitable corporation as trustee is the ability of charitable corporations to accept gifts and bequests free of any trust obligation. It is within the capacity of a charitable corporation to take a beneficial interest in donations made to it.

The leading case dealing with the capacity of corporations generally to take a beneficial interest in donations or bequests is the decision of the House of Lords in *Bowman* v. *Secular Society*. The significance of the decision is the finding by no fewer than three Law Lords that the money bequeathed to the corporation was not stamped with any trust obligation. Analyzing the trust characterization of the corporation's interest, Lord Parker of Waddington stated, at page 440:

> The only possible argument in favour of the testator's intention to create a trust rests upon this: the Society is a body corporate to which the principle of your Lordship's decision in *Ashbury Railway Carriage and Iron Co.* v. *Riche* is applicable. Its funds can only be applied for purposes contemplated by the memorandum and articles as originally framed or as altered under its statutory powers. A gift to it must, it may be said, be considered as a gift for those purposes, and therefore the society as a trustee for those purposes of the subject matter of the gift. This argument is, in my opinion, quite fallacious. That fact that a donor has certain objects in view in making the gift does not, whether he gives them expression or otherwise, make the donee a trustee for those objects. The argument, in fact, involves the proposition that no limited company can take a gift otherwise than as trustee. I am of opinion, therefore, that the society, being capable of acquiring property by gift, takes whatever has been given to it in the present case, and takes it as absolute beneficial owner and not as trustee.[22]

In his discussion of the issue, Lord Buckmaster dismissed any trust characterization in the following terms:

> It is a mistake to treat the company as a trustee, for it has no beneficiaries, and there is no difference between the capacity in which it receives a gift and that in which it obtains payment of a debt. In either case the money can only be used for the purposes of the company, and in neither case is the money held on trust.[23]

Lord Sumner was also of the view that the bequest was not "an imperfect gift nor impressed with any trust in the donee's hands".[24]

Among *Bowman*'s progeny on the issue of a corporation's beneficial entitlement

to donations made to it is the decision of the Ontario High Court in *Re Knight.* In *Knight*, the court was called upon to decide whether a political and non-charitable corporation could take a beneficial and absolute interest in a bequest. At page 469 of his decision, Rose, CJHC rejected any suggestion that the bequest was taken on trust for the corporation's objects. Noting the lack of any testator reference to the purposes for which the money would be used, he stated:

> ... while the foundation will be unable to apply the fund to purposes other than such as are within its corporate powers, it cannot be said to be a trustee, and it cannot be said that any perpetual trust has been created or for any other reason the gift is invalid.[25]

Cited as authority is the opinion of Lord Parker of Waddington in *Bowman.*

The 1933 decision of the House of Lords in *H.J. Ogden, Brydon* v. *Samuel*[26] can also be taken as authority that a bequest to a corporation is not impressed with any trust for the purposes of that corporation unless the testator making the bequest has indicated an intention to create a trust.

In a string of cases dealing specifically with charitable corporations the *Bowman/ Ogden* gifting rules are for the most part adopted.

In *Roman Catholic Archiepiscopal Corporation of Winnipeg* v. *Ryan*[27] the British Columbia Court of Appeal considered an argument that gifts to a charitable corporation were akin to *virtute officii* gifts, i.e., gifts to an office holder which are deemed to be gifts to the office. In *Ryan* the Court of Appeal reviewed the terms of the bequest and found no intention manifested by those terms to impose a trust on the money given to the Archiepiscopal Corporation. What expression of purpose the testator had effected by the words of his bequest was regarded as precatory only. It was the unanimous finding of the court that the corporation took an absolute interest in the bequest.

A disturbing aspect of the *Ryan* decision is the suggestion of Davey, J.A. that a court could imply a trust for purposes where the recipient charitable corporation's constitution does not provide a guarantee of the testator's precatory statements regarding the purpose of the gift. Mr. Justice Davey states:

> ... there is no reason to imply a trust to compel the Corporation to do that which its constitution requires it to do.[28]

The statement suggests that in the absence of a finding of an express trust, the courts will scrutinize the conformity between a donor's intentions and the constitution of the donee charitable corporation.

This restriction of the taking of a beneficial interest to cases where the testator's expressed purposes, through precatory, fall within the objects of the recipient corporation was raised again and expanded by Davey, J.A. in *Re Schechter.*[29] In *Schechter*, the British Columbia Court of Appeal was faced with a bequest to the Jewish National Fund for the purpose of purchasing lands in the United States, the British Dominions, and Palestine. The purchase of such lands was among the corporate objects of the Jewish National Fund in that the corporation had as its primary purpose the promotion of Jewish life in Palestine.

Davey, J.A. found that the objects of the Jewish National Fund were not charitable objects. He further found that there was an expression of trust intent by the testator to the extent that the money was to be given for the purpose of the purchase of the designated lands. This expression of a trust intent rebutted any characterization of the bequest as a gift. Accordingly, the bequest was characterized as a trust for non-charitable purposes and was void as violating the rule against perpetuities.

Davey, J.A. characterized the *Ryan* finding of no trust as restricted to cases where:

1) no words of restriction of purpose are used by the testator in his bequest;
2) there are no badges of testator intention to create a trust; and
3) the purposes of the donor are coextensive with the objects of the donee corporation.

In the Australian High Court decision in *Sydney Homeopathic Hospital and Turner and Others*,[30] Kitto, J. observed that the issue of the capacity in which a charitable corporation takes a bequest is to be determined according to whether or not the donor making the gift or bequest has considered the naming of the recipient corporation as a shorthand way of referring to the corporation's objects. Mr. Justice Kitto's observations that the issue is one to be resolved by determining the donor's intention is in keeping with the *Bowman/Ogden* line of authorities considered above. However, the greater likelihood that a bequest to a charitable corporation is a bequest to the corporation on trust for its objects is the subject of express comment. Mr. Justice Kitto states:

> Not, of course, that a trust arises in every case of a gift to a body established for limited objects. The nature of the objects may have provided the donor with the motive for his gift, and yet the gift may be a beneficial gift entitling the body to apply the property as it sees fit within the scope of its powers as they exist from time to time. Property given to a company, for example, is not necessarily held on trust for the objects stated in the company's memorandum of association. Nor is property which is given to a charter corporation necessarily held on trust for application in accordance with the charter. But if the objects of a body are limited to altruistic purposes, it is as an instrument of altruism that it is likely to attract benefactions. Very often, to say the least, it will be a proper inference, when a gift is made to such a body, that the donor intends the gift to operate as a devotion of the subject property to the relevant purposes, and that the donee accepts it as such. Where that is the case all the elements necessary for the creation of a binding trust are present. Accordingly a gift which would be invalid unless it operates to create a charitable trust may be upheld because, when the objects of the body which is the donee are taken into consideration, an inference arises that the gift is upon trust for the charitable purposes (or for charitable purposes and others which are no more than ancillary).[31]

A propensity to look that much harder for a trust intention in cases involving bequests or gifts to charitable corporations is reflected in the muddled state of authorities on the issue of what badges of trust intention will render a gift to a

charitable corporation a gift on trust for its corporate objects.

In the decision of the Court of Chancery (Ireland) *Incorporated Society* v. *Richards*,[32] it was held that where the words used to make a bequest to an incorporated society include a description of the society's objects, the donor will be taken to have implied that the devise is made to the incorporated society on trust for its objects. In *Richards* the bequest was to: "The Incorporated Society in Dublin for promoting English Protestant schools in Ireland".

In contrast is the Saskatchewan Queen's Bench decision in *Re Abbott*[33] where a bequest to the "Red Cross Hospital for Crippled Children of Regina" was regarded as an effective gift to the Red Cross Society even though the Society had long since abandoned its operation of a hospital for crippled children in the Regina area. In *Re Meyers (dec'd) London Life Association* v. *St. George's Hospital and Others*,[34] the fact that a testamentary bequest to a named incorporated hospital was in a section of a will devoted to bequests to unincorporated hospitals was taken as an indication of an intention to create a trust for the purposes of the named hospital rather than an absolute gift.

The gifting rules with respect to bequests or gifts to a charitable corporation do not differ from the rules applicable to the bequests or gifts to any other sort of corporation. Where there is no express intention to convey the property on trust for the corporation's objects, the corporation will be entitled to the gift as absolute owner thereof. The observations of Davey, J.A. in *Schechter* and *Ryan* suggest, however, that an expression of purpose by the donor will more readily be taken to create a trust for the objects of a recipient corporation where the testator's expressed but precatory choice of purpose is not coextensive with the objects of that corporation.

The observations of Kitto, J. argue for the view that charitable corporations are distinctive in that they attract donations or bequests which are intended for charitable purposes. This distinctive trait of charitable corporations is undoubtedly an inducement to courts to find a testator intention to create a trust for charitable purposes when analyzing a donation to a charitable corporation.

Failed Gifts and Disappearing Recipients—*Cy-Pres*

Where the consequence of finding no trust-for-objects is a lapse of a gift because the named corporation is dissolved or has disclaimed the gift, courts have looked for evidence of a general charitable intent. This search is an interesting wrinkle on the general rule respecting the beneficial interest charitable corporations have in donations made to them in that it emphasizes the objects of the corporation as the intended beneficiary not the corporation itself.

Re Hutchinson's Will Trust[35] involved a court finding no lapse of gift to a named hospital (whose address was given in the donor's will and which had amalgamated with another corporation subsequent to the date of the will) on the grounds that the bequest manifested a general charitable intent which was not to be frustrated by the subsequent disappearance of the incorporated hospital. Rather the court would impose a *cy-pres* scheme to salvage the charitable bequest.

In re Finger's Will Trust[36] and *In re Vernon's Will Trusts*[37] also apply a *cy-pres*

scheme to salvage a "gift" to a named charitable corporation on the grounds that the gift to the corporation (which had ceased to exist at the point of distribution in both cases) displayed a charitable intention on the part of the donor. *In re Stemson's Will Trusts Carpenter* v. *Treasury Solicitor and Another*[38] stands for the view that a finding of charitable intent such as would attract a *cy-pres* scheme is not possible where a particular charitable corporation is named by the donor as beneficiary. The *Finger* and *Vernon* decisions characterize the naming of a specific corporation as a mere hurdle to finding charitable intent.

In two Canadian cases involving the disclaimer of a gift by an incorporated charity, a *Stemson* view of the test for finding charitable intent is adopted. In *Re Roberts Estate*,[39] a bequest to the Ford Foundation made in the context of statements in a will that some of the funds be used to improve the lot of mental asylum inmates was regarded as manifesting a sufficient testator intention for charitable purposes to attract a *cy-pres* disposition of the bequest upon its being disclaimed by the foundation. In *Re Jung*[40] the British Columbia Supreme Court regarded the naming of a particular charitable corporation without indicating any purpose for which the funds were to be used by the corporation as rebutting any charitable intention on the part of the donor. A *cy-pres* proposal was rejected and the disclaimed gift was held to lapse.

In *Re Montreal Trust Co. and Boy Scouts of Canada (Edmonton Region) Foundation et al*[41] a legacy to a particular institution in a particular locality was regarded as too specific a designation to support the application of the *cy-pres* doctrine. *Re Jacobson*[42] saw the British Columbia Supreme Court apply the *cy-pres* doctrine to a residuary bequest to a charitable institution where the next of kin had already been taken care of and the other institutions named in the bequest were charitable institutions.

Re Mitchell[43] involved a *cy-pres* application of funds bequeathed to an incorporated charity which had dissolved prior to the point of distribution designated in the will. The naming of the incorporated charity was regarded as an expression of the "mode" not the "object" of the donor's benefactions. The funds were ordered to be paid to the parent organization of the dissolved corporation carrying on similar works in Canada.

A court search for evidence of a general charitable intention in a gift to a charitable corporation is of no prejudice to corporations disclaiming gifts, but such a search has serious consequences for a donee corporate charity which is willing to receive the gift but has changed its objects since the time the bequest was made. Why precatory statements should govern its entitlement is not clear.

Dealing with Assets

Related to the issue of whether a charitable corporation has the capacity to accept a beneficial interest in a bequest is the issue of whether any trustee-related restrictions are imposed on the holding or handling of property by the corporation. It would appear from the more recent authorities that the imposition of restrictions on the dealings of a corporate charity owes more to the expansion of the court's jurisdiction over charities than it does to any characterization of charitable corporations as trustees.

In the sixth edition of *Tudor on Charities*[44] the following line of authority, beginning with a case in 1610 and ending with a case in 1892, is cited for the view that charitable corporations hold their assets upon charitable trusts: *Thetford School Case,*[45] *Lydiatt* v. *Foach,*[46] *A.G.* v. *Whorwood,*[47] *Mayor of Colchester* v *Lowten,*[48] *Exp. Berkhampstead School,*[49] *A.G.* v. *Wyggeston's Hospital,*[50] *A.G.* v. *St. Cross Hospital,*[51] *Re Manchester Royal Infirmary*; *Manchester Royal Infirmary* v. *Attorney-General.*[52]

As impressive as is the list of authorities the editors of *Tudor on Charities* have been able to muster, closer scrutiny of these cases reduces their persuasiveness. With the exception of *Mayor of Colchester* and *Manchester Royal Infirmary*, these cases can be explained as breaches of express trust arrangements or breaches of statutory duties.

Manchester Royal Infirmary involved a determination by the court of whether a charitable corporation fell within the definition of charitable trust in the *English Trusts Investments Act* so as to validate the making of certain investments by the corporation. The incorporated charity in *Manchester* was a hospital whose existence was preceded by a trust fund. The bulk of the hospital's assets had been vested in the corporation by the execution of a trust deed, involving the hospital's directors as trustees, at the time the hospital was incorporated. The court found that the corporate structure had been adopted solely to facilitate dealing with the trust funds. The capacity in which the corporation held the assets was that of trustee and the corporation was held to fall within the *Trusts Investment Act.* Arguably, the fact of a pre-existing trust coloured the court's views.

Perhaps the most strongly worded, if vaguest of these decisions, is *Mayor of Colchester* v. *Lowten* wherein Lord Chancellor Eldon observed that the court will intervene to enforce the charitable purposes of a charitable corporation, but not the purposes of commercial corporations. No authority is cited for the proposition.

The more recent authorities on the charitable-corporation-as-trustee question are: *French Protestant Hospital,*[53] *Abbey Malvern Wells Ld.* v. *Ministry of Local Government and Planning,*[54] and *Construction Training Board* v. *A.G.*[55] While these cases may be cited as authority for a trustee characterization of certain charitable corporations, they do not present a uniform perspective indicating why the trustee characterization is appropriate.

In *Abbey Malvern Wells Ld.* v. *Ministry of Local Government Planning* it was the view of Danckwerts, J. that a corporation whose governing directors were bound by a trust deed to apply the assets of the corporation to charitable purposes was, notwithstanding any power in the corporate constitution to apply assets to non-charitable purposes, to be regarded as holding property on trust for charitable purposes. This finding of a *de facto* trust obligation on a corporation does not, of course, assist us in determining the character of a charitable corporation whose governing officers are not bound by a trust deed. The court refused even to consider the consequences if the directors were to breach their trust duties.

Abbey was decided by Danckwerts, J. shortly after the decision by the same judge in *Re French Protestant Hospital. Re French Protestant* is characterized by Danckwerts, J. in *Abbey* in the following terms:

> A similar question arose in a case before me a short time ago: *In Re French Protestant Hospital*. That case was concerned with the remuneration of trustees; technically the trustee was a corporation formed by Royal Charter, but I found that it was controlled by a body of persons called the governor and directors, and when considering whether the governor and directors ought to receive remuneration, I held that I must look at the substance of the matter, and see who really controlled the situation. I held, accordingly, that the governor and directors were just as much in a fiduciary position and in the position of trustees as the corporation itself.[56]

In *Abbey*, the trust character of the corporation directors was held to "rub off" on the character of the corporation itself. In *French Hospital*, the corporation's presumed (no reasons were given for the characterization) trustee status was regarded as stamping the corporate directors with trustee obligations. Interestingly, Danckwerts, J. does not resort to some general rule about charitable corporations being trustees in his *Abbey* decision. He employs the more roundabout method of the *de facto* control-by-trustees test. This suggests that *French Hospital* cannot be taken as authority that all (non-charter) charitable corporations are automatically to be considered trustees of their assets.

The decision of Mr. Justice Cross in *Soldier's, Sailor's and Airmen's Families Association* v. *Attorney General*[57] is cited as authority that a charitable corporation is trustee of its assets and Cross, J. uses that very phrase at page 317 of his decision. However, in the *Soldier's* case the court was not called upon to decide whether the charitable corporation was to be regarded as a trustee. Both counsel had agreed that it was.

What is significant about the *Soldier's* decision is the finding by Cross, J. that the corporate constitution is analogous to a trust deed in that a power of investment not normally ascribed to trustees could be granted to a corporate charity under the terms of its corporate constitution. Whether the corporate constitution can override, by express provision, other trust obligations of the corporation, were it to be considered a trustee, is not clear.

The argument that charitable corporations are trustees for their charitable objects receives support from the views of Buckley, J. and Plowman, J. in *Construction Training Board* v. *A.G.* a decision of the English Court of Appeal. In *Construction Training Board*, the charitable corporation was a corporate body established by statute and under the administrative supervision of the Minister of Labour. Regarding the power of the court to supervise the affairs of such a statutory corporation, Buckley, J. stated:

> The Court could, for instance, restrain trustees from applying charitable funds in breach of trust by means of an injunction. In the case of a charity incorporated by statute this might, as was suggested in the present case, be explained as an application of the doctrine of *ultra vires*, but I do not think that this would be a satisfactory explanation, for a similar order upon unincorporated trustees could not be so explained. . . . In every such case the Court would be acting upon the basis that the property affected is not in the beneficial ownership of the persons or body in whom its legal ownership is

rested but is devoted to charitable purposes, that is to say, is held upon charitable trusts.[58]

In his supporting opinion, Plowman, J. echoes Buckley, J.'s reasoning, stating: " . . . it is not, I think, a question of *ultra vires*, because the jurisdication cannot depend on the question whether the trustees are incorporated or not . . .".[59]

As Buckley, J. later makes clear in *Von Ernst & Cie S.A. and Others* v. *Inland Revenue Commissioners* the corporate constitution's commitment to charitable objects is, in his view, what establishes the trust for charitable objects by which the charitable corporation will be bound. As Buckley, J. puts it, at page 480:

> In my judgement a corporation which is by its constitution debarred from using or acquiring assets for the purpose of making or obtaining profit for itself or its corporations, and which serves the purpose only of machinery for carrying on exclusively charitable activities, is not an object for whose benefit settled property or income from it can be applied or which might become beneficially entitled to an interest in possession in settled property. . .[60]

In *Von Ernst* the court considered whether securities were "beneficially" or absolutely held by a charitable corporation upon whom legal title to the securities had been settled.

In *Re Whitworth Art Gallery Trust* the policing of the affairs of charitable corporations was held to fall within the jurisdiction the courts have to direct *cy-pres* schemes. In *Whitworth*, the rule was laid down by Vaisey, J. in the following terms:

> . . . a charitable corporation founded by royal charter cannot be re-founded or re-established by the court, but can be regulated and controlled by the court especially on financial grounds, and in that case the court is entitled to have regard to altered circumstances.[61]

In *Re Dominion Students' Hall Trust*[62] an incorporated charity applied to the court to direct a *cy-pres* scheme validating a change in the terms of its corporate constitution. The corporation had been dedicated to the education of white males; the change in the constitution was to have the school embrace the education of foreign-born students as one of its aims. For the sake of conformity to public policy on racism, the court granted the request.

Whitworth and *Dominion* invite the view that charitable corporations are trustees since *cy-pres* schemes are generally directed only where assets are earmarked for charitable purposes, the holder of those assets being regarded as the "mode" by which the purposes were to be effected, not the beneficial holder thereof. As with the lapse cases reviewed above, there is a disregard for the separate legal personality of the charitable corporation evident in these cases. That the charitable corporation holds its assets in trust is what may be inferred.

However, to say that, is to assume that *cy-pres* schemes are reserved only to cases involving bequests to, or assets held by, persons occupying trustee positions. As the recent decision of Slade, J. in *Liverpool and District Hospital for Diseases of*

the Heart v. *Attorney General*[63] makes clear, however, a new *cy-pres* doctrine divorced from strict trust principles may be developing.

The *Liverpool* decision offers a thorough discussion of the charitable-corporation-as-trustee issue. Reviewing the *Bowman*, *French Hospital* and *Construction Industry* authorities, Mr. Justice Slade concludes that a charitable corporation is not to be considered a trustee of its assets as the term trustee is ordinarily used and understood. However, he also observes that the courts will exercise supervisory jurisdiction over the affairs of charitable corporations whose corporate constitutions impose some obligation that the assets of the corporation be devoted to charitable purposes.

Mr. Justice Slade considers that the obligation to apply assets for charitable purposes is analogous to, but not identical to, that owed by trustees of charitable trusts:

> In a broad sense a corporate body may no doubt aptly be said to hold its assets as a "trustee" for charitable purposes in any sense where the terms of its constitution place a legally binding restriction upon it which obliges it to apply its assets for exclusively charitable purposes. In a broad sense it may even be said, in such a case, that the company is not the "beneficial owner" of its assets. In my judgment, however, none of the authorities . . . establish that a company formed under the *Companies Act 1948* for charitable purposes is a trustee in the strict sense . . . They do, in my opinion, clearly establish that such a company is in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs; but that is quite a different matter.[64]

Conclusions

A review of the Canadian and English authorities subsequent to *Scott on Trusts*[65] does not dispel the view expressed there (and quoted earlier) that it cannot be stated dogmatically either that a corporation is, or that it is not, a trustee.

Nonetheless Canadian courts accept that charitable corporations may receive donations in full beneficial ownership unless it is found that the donor has expressed a purpose for the donation amounting to a trust declaration. They also seem to accept that a donation to an incorporated charity is not a gift in trust for the charitable objects of the corporation.

There is also a pragmatic consideration. If courts should find it necessary to review the operations of corporations carrying out direct charitable activities, they are likely to find the corporations to be singularly uncharacteristic trustees. Their primary role is not the guardianship of property for the benefit of present and future beneficiaries but the organization and delivery of services. There is no obligation to preserve *corpus* and maintain an even hand. They are free to realize profits from one aspect of their work and apply these for the benefit of altogether different constituencies. Their duty of care is to hazard their resources to carry out their objectives. The accepted concepts of true trusteeship will certainly suffer if they are to be applied to these organizations.

One aspect of the case law which has effectively muddied the waters is the uncertainty as to whether the *cy-pres* doctrine is necessarily associated with the law of trusts. If, as is indicated in *Liverpool*, the court has jurisdiction over charities independent of any finding of a strict trust, there is a greater prospect of clarifying the charitable-corporation-as-trustee issue. When a court regards its jurisdiction as one based upon the application of trust principles, its judgments will inevitably be expressed in trust terms.

Maurice C. Cullity has pointed out in a case comment (in the matter of the application of *The Canadian Foundation for Youth* action) that there is an independent basis divorced from trusteeship law from which the courts could act to supervise charities:

> . . . there seems no reason to doubt that courts which have inherited the ancient jurisdiction of of the Court of Chancery retain the residual powers to call directors of charitable corporations to account at the instance of the Attorney General.[66]

If there is no jurisdictional necessity to consider the corporate charity as a trustee, the way is open to deal with the basic question, not on the basis of trustee law or corporate law as exclusive alternatives, but by determining what law provides effective control of incorporated charities while at the same time neither unduly impeding nor disrupting the carrying out of their charitable activities.

FOOTNOTES

1. David P. Ross, *Some Financial and Economic Dimensions of Registered Charities and Volunteer Activity in Canada*, Ottawa, Secretary of State, Government of Canada, February, 1983.
2. Marion R. Fremont-Smith, *Foundations and Government*, Russell Sage Foundation, 1965, p.31.
3. E.J. Mockler, "Charitable Corporations: A Bastard Legal Form", *Papers Presented at the Annual Meeting of the Canadian Bar Association, Winnipeg, Manitoba, 1966*, C.C.H. Canadian Ltd., 1967, p.229.
4. *Ontario Business Corporations Act,* S.O. 1982, c.4, section 134; *Canada Business Corporations Act, S.C. 1974–75, c.33, as am., section 117.*
5. *Re Bangham*, [1933] O.W.N. 399; aff'd. [1933] O.W.N. 785 (C.A.).
6. *Re City Equity Fire Insurance Co. Ltd.*, [1925] Ch.407 at p.428, per Romer, J.
7. *Re Dominion Trust Company* (1917), 32 D.L.R. 63 (B.C.C.A.).
8. *Mickleburgh* v. *Parker* (1870), 17 Gr. 503.
9. R.S.O. 1980, c. 512.
10. [1973] 40 D.L.R. (3d) 371, [1974] 1 S.C.R. 592.
11. J.D. Gibson, *Liability of Directors of Charitable Corporations*, (1979-81), 5 E.T.Q. 71 at 77.

12. (1951), 1 All E.R. 938.

13. [1896] A.C. 44 (H.L.).

14. (1742), 2 Atk. 400, 26 E.R. 642.

15. (1842), Cr. & P.H.3; 41 E.R. 389 (Ch.D.).

16. L.S. Sealy, "The Director as Trustee", (1967) *Cambridge Law Journal*, London, England, pp.83-103.

17. Footnote 6, *supra*, at p.426.

18. (1974), 318 F. Supp. 1003.

19. Peter A. Cumming, "Corporate Law Reform and Canadian Not-for-Profit Corporations", *The Philanthropist*, 1974, Vol.1 No.3, p.41.

20. Blake Bromley, "Duties and Responsibilities of Directors", *The Philanthropist*, Summer (August) 1983, p.3.

21. *Scott on Trusts*, Vol.IV, 3rd ed., Boston and Toronto, Little, Brown and Company, 1967, at p.2778.

22. [1917] A.C. 406.

23. *Ibid.*, at p.478.

24. *Ibid.*, at p.453.

25. [1937] O.R. 462.

26. [1933] 1 Ch. 678.

27. (1957), 12 D.L.R. (2nd) 23.

28. *Ibid.*, at p.29.

29. (1964), 43 D.L.R. (2d) 417; aff'd. (1965), 53 D.L.R. (2d) 577 (S.C.C.).

30. [1958-1959] 102 C.L.R. 188.

31. *Ibid.*, at p.221.

32. (1841), 1. Dr. & W. 258.

33. (1974), 45 D.L.R. (3d) 478.

34. [1951] 1 All E.R. 538.

35. [1953] 1 All E.R. 996.

36. [1972] 1 Ch. 286.

37. [1972] 1 Ch. 300.

38. 1970] 1 Ch. 16.

39. (1958), 26 W.W.R. 196 (S.C. Alta.-App. Div.).

40. (1979), 99 D.L.R. (3d) 65.

41. (1978), 88 D.L.R. (3d) 99 (B.C.S.C.).
42. (1977), 80 D.L.R. (3d) 122.
43. (1977), 1 ETR 54.
44. *Tudor on Charities*, London, Sweet & Maxwell, 1967, p.318.
45. (1610), 8 Co. Rep. 131a.
46. (1700), 2 Vern. 412.
47. (1750), 1 Ves. S. 537.
48. (1813), 1 V&B 226.
49. (1813), 2 V&B 245.
50. (1852), 12 Beav. 113.
51. (1853), 17 Beav. 435.
52. (1890), 43 Ch.D. 420.
53. [1951] Ch. 567; [1951] 1 All E.R. 938.
54. [1951] 1 Ch. 728.
55. [1973] 1 Ch. 173 (C.A.).
56. Footnote 54 *supra*, at p.738.
57. [1968] 1 W.L.R. 313.
58. Footnote 55 *supra*, at pp.186-187.
59. *Ibid.*, at p.189.
60. [1980] 1 W.L.R. 468 (C.A.).
61. [1958] Ch. 461, at p.467.
62. [1947] Ch. 183, [1947] L.J.R. 371.
63. [1981] 1 Ch. 193.
64. *Ibid.*, at p.209.
65. Footnote 21, *supra*.
66. Maurice C. Cullity, "Case Comment", *The Philanthropist*, Vol.2, No.1, Spring 1977, p.48.