Case Comment: *Re Centenary Hospital Association*

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Introduction

Those from other provinces who have no reason to follow particularly closely the decisions of the Ontario courts might conclude from a first and once-only impression of *Re Centenary Hospital Association*[1] that this case involved merely the interpretation and reconciliation of Ontario legislation and that nothing of general interest on the subject of charity law arose. That might be to judge too quickly.

Certainly there is a message in the case of Ontario residents that something is amiss. To an outsider it looks like yet another of the understandable efforts of the Ontario Public Trustee to determine the borders of his jurisdiction and responsibility within the province, both statutory and inherent on behalf of the Crown. Though Ontario has the most legislation of any province on the subject of charity law,[2] it is mostly the work of years long gone and it was drafted for a different social and economic order in the province. From time to time amendments have been made but the legislature does not appear to have benefitted from an attempt at amending in 1982. The amendments of that year to the *Charities Accounting Act*[3] were in question in two major reported Supreme Court cases between 1987 and 1989.[4] In all, the Public Trustee has been involved in no less than four significant reported cases concerning charities since 1987.[5] Neither the Public Trustee's Office nor the charities can be very pleased with the present state of affairs, for no clear answer in terms of principle has emerged from all this litigation.

A persuasive argument can be made that in Ontario the whole law concerning charity and charities needs overhauling and that the time has come for rethinking the entire governmental system for the definition, subsidization, regulation, and supervision of charitable activity in the province. What amount and type of regulation does Queen's Park believe appropriate in today's circumstances? How extensive and to what level of inquiry is supervision to be? Does the Province basically want a "hands-off" approach to the charities, as in the other provinces, or does it see a role for a commission, separate from the Public Trustee's Office, rather like the Charity Commissioners in England and Wales?[6] If it is the latter, how well is Ontario prepared to staff such a commission? In England it

is seriously understaffed, and in my opinion, though the Commissioners are willing and helpful enough, it consequently loses some of the effectiveness it might otherwise have with regard to the amount of close assistance and understanding of their problems it can give to the charities. It is also in the view of many a sad state of affairs, particularly for the charities involved, that Ottawa and Queen's Park and their officials see their respective relations with charitable activity in the province as separate and distinct. Neither appears to confer with the other when it is planning legislation (the basis of exemption from local property tax assessment for instance),[7] or in making rules affecting charities in the province. So the legislation and the governmental supervision of each go in different directions and, to borrow a phrase, the two solitudes are perpetuated and strengthened.

Those matters are for Ontario residents, it is true and, indeed, the implicit criticisms and the irritations arising out of the present state of the law and its consequences can be read between the lines of the case under discussion, as well as in the outcome as to costs. But for all of us in Canada interested in charity law there is in *Re Centenary Hospital Association* at least one matter of countrywide and general interest.

The Facts

The facts of the case are not complex. The Centenary Hospital of Scarborough in Metropolitan Toronto ("the Hospital") is a large, well-known hospital built in 1967. It serves a wide suburban area with ever-increasing demands upon its services. The Hospital has requirements such as the housing of X-ray facilities and provision of nurses' accommodation, which cannot be met within its own walls. Also the quality of care it provides makes it necessary for physicians, including specialists, to have office space near the Hospital. It is also necessary for privately operated health-care facilities and services to be able to locate close at hand.

The Hospital, like all health facilities in each province, is a significant charge upon the provincial exchequer and consequently the Ontario Minister of Health encourages all hospital authorities to generate their own funds to any extent they can. Owning adjacent land, the Hospital planned to build a medical arts centre in which 80 per cent of the space would be leased to physicians and to privately operating support health-care providers of various kinds. The remaining 20 per cent would be rented out to provide a restaurant, a hairdressing salon or beauty parlour and, perhaps, a bank. Consumer needs would thus be met and the Hospital would have the revenue from the rental income. Revenue Canada in

Ottawa had confirmed that it would regard the medical arts centre as an investment, not the conducting of a business by the Hospital (a charitable organization), tenders had been considered, and construction was ready to begin. The Minister of Health's conditions had been met, and only one obstacle remained. The Minister required "written confirmation that the Public Trustee of the Province of Ontario has no objection to this proposal under Provincial Charities and Trust Legislation". The Public Trustee, who had never before sought to exercise a supervisory power over public hospitals in the Province, then advised that such assurance could not be given and the whole project came to a halt. The Hospital thereupon applied to the court for a ruling as to whether its lands and funds were subject to the Public Trustee's supervision and whether its projected medical arts building was an interest in a business.

The Argument

The Public Trustee, in "bringing his view of the law and fact involved to the attention of the Court",[8] based his case primarily on s. 6b(1) of the *Charities Accounting Act*, an amendment introduced in 1982:

> 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.[9]

The Hospital was incorporated by Letters Patent pursuant to the *Corporations Act*,[10] and was therefore a person. It owned, in its own name absolutely, the land upon which it was proposing to build the medical arts centre. The Hospital was admitted by both parties, the Hospital and the Public Trustee, to have purposes that are charitable, and both parties accepted that, so far as gifts and legacies to a public hospital are concerned, when such gifts are to be held on the terms of an express trust, the Attorney General (whose position in this respect is represented by the Public Trustee) exercises the *parens patriae* jurisdiction of the Crown to protect and supervise those funds.[11] Purportedly acting within this jurisdiction, the Public Trustee had informed the Hospital that in his opinion the Hospital would not be using and occupying the medical arts centre land for its own charitable purposes (supposedly, the relief of distress and suffering) as required by s. 6b(1) of the *Charities Accounting Act*, but for use and occupation by others who would pay a market rent to the Hospital for the opportunity. The Hospital also intended, said the Public Trustee, to commit to the medical centre, funds held for its charitable purposes and so risk their loss on an unauthorized purpose.

Counsel for the Hospital argued that the Public Trustee does not have all the common law powers and duties of the Attorney General, that charitable corporations are not trustees in the technical sense of the law of trusts and may own their own property beneficially, that the case law of charity can be overridden by statute, and that activities are charitable or non-charitable by reference only to the purpose or object which those activities are allegedly furthering.

The Result

The Court essentially decided the case on counsel's second argument. It held that the land owned by the incorporated Hospital on which it intended to build, was the property of the Hospital itself, and was not subject to any trust, charitable or otherwise. That was the first finding, i.e., that a charitable organization can own property outright towards which it has no trustee responsibility. Once a charitable property takes on that character, it is beyond the reach of the Public Trustee unless the charity has solicited or procured such property from the public. Secondly, the *Charities Accounting Act*, s. 1(2), may indeed provide that "any corporation incorporated for any religious, educational, charitable or public purpose shall be deemed to be a trustee within the meaning of this Act", and the Public Trustee drew attention to this, but the Court decided that this meant merely that whereas, prior to the introduction of this language the Act applied only to *inter vivos* and testamentary trusts for charitable purposes, it now also applies where the recipient of monies is an incorporated charity. In any event, said the Court, the *Charities Accounting Act* is expressly made subject to "any right or remedy" that a person may have under another Act,[12] and the *Corporations Act* is such an Act. Moreover, the *Public Hospitals Act*[13] is clearly intended to occupy the entire field so far as the regulation and supervision of public hospitals are concerned. The legislature had left only a very limited role for the *Charities Accounting Act* in relation to public hospitals; that Act makes provision for solicited funds, and such a situation was not relevant here.

The Court also held that the Public Trustee's Office is a creation of statute and has only the powers which statute confers upon it.[14] The *Charities Accounting Act* is the extent of that power in the present context and the Act, solicitation of funds from the public aside, gives way at every point to the predominant relevance of the *Public Hospitals Act* which precisely authorizes what the Hospital intended to do, i.e., build and rent a medical arts centre.

Later Osler J. awarded costs to the Hospital on the solicitor and client tariff.[15] The Hospital, he felt, had been the victim of governmental internal

differences of opinion, ministerial hesitation, and "inconsistency in legislation".[16] The Public Trustee's Office therefore paid dearly for "bringing [its] view of the law and fact involved to the attention of the court" in response to the Hospital's challenge to its opposition to the centre.

Nevertheless, though the Hospital succeeded so handsomely, and by this time no doubt its medical arts building is well under construction, the issue in which all common law jurisdictions in Canada are interested is whether the reasoning of the decision has given an answer to the problem in Canada of the incorporated charity. The Court's conclusion is that an incorporated charity can hold land absolutely, i.e., for itself and also hold land in trust for charitable purposes. The question that may remain unresolved, however, is when, like any other corporation, such a corporation simply holds real or personal property for its objects and when, if at all, it holds property registered or otherwise in its name on some kind of trust obligation for one or more of those objectives.

The Incorporated Charity and Trusteeship

The problem

The difficulty is a conceptual one which much legislation in the United States and in Canada has not fully recognized when providing structural and administrative rules for various non-profit organizations such as hospitals, nursing homes, and other health institutions that, in law, are charitable. Indeed, when statute has not dealt with the factors that cause the problem, all groups which are engaged in charitable activities and incorporate themselves will give occasion thereby for the same difficulty to arise.

The trust emerged in the seventeenth century as a legal device for splitting the title-holding and the enjoyment of property. The passive (or estate planner's) *use* had been killed off by the Statute of Uses, 1535, and the trust was to hold the centre of the stage for some 200 years after the mid-seventeenth century as the way in which property could be held and administered by one for the benefit of another. The charter companies such as the East India Company and the Hudson's Bay Company demonstrated that another legal form was possible which split the administrative tasks of property and the investor's enjoyment, but it was not until the first half of the nineteenth century that the statutory limited liability company would provide a trading device of incomparable value. Thereafter the so-called "artificial legal personality" of the corporation would ultimately become a phenomenon known to the humblest player in the market.

In Canada the incorporation device quietly became popular as the provinces opened up during the nineteenth century. (In England and Wales, by contrast, the vast majority of charities were, and would remain, trusts as a result of the long history in those jurisdictions of the trust as a property device.[17]) Canadians were less familiar with trust law because in the early centuries of the country the necessary aggregations of funds were at most few and far between. The trading incorporation device was familiar, so it was that device that was more frequently adopted when substantial charitable giving, other than to church groups, became legally significant in the twentieth century. For the same reason, though long familiar in England as charter corporations, ecclesiastical dioceses in Canada were frequently incorporated by private statutes.[18] There is of course a substantial body of charitable trust law in Canada, little heard of though it may be, but it is becoming dated now that securing the approval of Revenue Canada is the abiding concern. Tax relief is sought from the federal authorities for the donor and the charitable association alike.

The result has been that, while the English texts on charity law continue to be concerned with charitable *trusts*, and the amount of English case law on incorporated charities is small (surprisingly little is reported, at least), charitable corporations in Canada probably outweigh the number of trust organizations by a comfortable margin. How the law of charity applies in the event of an association being incorporated under a general incorporation Act is therefore of considerable significance in the Canadian provinces. And it is the provinces for whom this is a matter of concern. For the purposes of the federal *Income Tax Act*,[19] while a foundation must be a trust or a corporation (nearly all are, in fact, incorporations), an operating charity (a "charitable organization") need be neither. Revenue Canada is authorized by the Act to recognize a group of persons together pursuing charitable activities who have no legal association at all. The Department is merely concerned with what a registered or would-be registered "charitable organization" says it is formed to accomplish and what it is in fact doing.

Since favourable tax treatment is by far the first concern of all Canadian charitable groups today, it comes as something of a surprise to many people that it matters in other contexts whether a charity is a trust or is incorporated. I have several times been told that the chapter on the "Charitable Trust" in my *Law of Trusts in Canada* should be made the subject matter of a separate book on "Charities". "Then we will all know that a book on the Canadian case law about the legal meaning of 'charity' actually exists", the comment usually concludes. In other words, many of

us think simply of a "charity", and do not necessarily connect it with the law of trusts at all.

Why it matters

When then *does* it matter whether a "charity" is a trust or a corporation (or for that matter has no legal status at all)? The answer, one is compelled to reply, springs from the fact that the law has different rules for different legal concepts and no rules at all when no legal concept has been invoked. It matters because a trust and a corporation are quite different concepts of property management for the benefit of others. Different legislation applies to each concept (e.g., in Ontario the *Corporations Act*, and the *Trustee Act*)[20] and the question may arise as to which Act is relevant in a particular instance. Unless provincial legislation prohibits the corporation from acting as a trustee, there is no problem when property is conveyed to a charitable corporation on express trust for charitable purposes. The problem arises when a corporation is formed for charitable purposes and assets are then transferred to the general funds of the corporation (necessarily for its purposes) without mention of, or any intention to create, a trust. For example, are the corporate directors restrained by, or can they invoke, the investment powers of the provincial *Trust Act*?[21] Secondly, there are case law questions. Are the "trustee" obligations, broadly based on good faith, applicable to directors of charitable corporations?[22] For instance, can a director be paid fees for exceptional amounts of work undertaken, as a director, on behalf of the corporation? Can a director who also fills the post of a paid employee be paid the going rate for the job? Finally, if a Public Trustee has jurisdiction over charitable trusts and trustees, does that extend to charitable corporations and their directors?

A trust is a separation of title holding and enjoyment where the trustee merely holds and administers property for the benefit of another, while a corporation is a legal personality that itself has the capacity to hold and enjoy its own property. A trustee is vested with title for the purposes of that holding and administration; a corporate director has no title and is only an agent of the company. First and last, a trust is the holding of property for the benefit of others; a corporation as a person will be vested with property for the advancement of its own corporate objects and it may also be an express (or constructive) trustee of property held in its name for trust beneficiaries. A trust company, for instance, will own its own assets just like any human legal person but it will also hold other assets on specific trusts for others. (The extent to which a for-profit corporation other than a trust company may be an express trustee will be determined by provincial legislation, but that is another issue.)

However, whether a non-profit corporation is viable without an adequate internal control mechanism is a very relevant issue for the present inquiry. A for-profit corporation has shareholders who can ensure by their votes that the directors of the corporation, as the agents of the corporation, carry out their duties properly and, therefore, though the directors are effectively the hands and the brain of the company they—like trustees under the gaze of trust beneficiaries—are subject to scrutiny and legal action for breach of their duties. A non-profit corporation has no shareholders and therefore there is no one to ensure the directors' duties are properly carried out. In particular when the non-profit corporation has purposes which are charitable, who ensures that the charitable objects (or purposes), whether financed by gifts from strangers or by the corporation's own earnings from approved and associated business activities, are properly carried out and the director's duties are adequately discharged? This is the contemporary concern of the Public Trustee in Ontario.

Were the corporation a trust the court, on the application of the provincial Attorney General, would have the jurisdiction under the rubric of case law to protect the interests of the charity.[23]

The corporation as trustee; its directors as trustees

How, then does the Attorney General bring a corporation before the court? Can a charitable corporation be said to be an *implied trustee* of its personally owned property, obligated to apply that property to its charitable purposes? A corporation must in any event apply its assets only to its objects but the question is whether it can also be regarded as a trustee of that property for those objects. Theoretically, one might object, the answer must be no. If it is a trustee, whether by implied intention of the promoters or by operation of law, that would appear to violate the whole theory of corporate personality. As an implied trustee the corporation would not own assets in its own name for its own use absolutely, as would a human legal person. In truth the corporation would be essentially a trust.

However, to frame an objection to trusteeship is not to say that a charitable corporation is not a trustee of its property for its charitable objects. Moreover, given the fact that a gift from a stranger for those charitable objects may either take the form of a gift outright to the corporation, or a gift to the corporation on trust for those objects, it is difficult to see why the concept of corporate personality *should* be allowed to rule that the former gift is beyond control by a Public Trustee but the latter is not. Pragmatically it makes little sense to have such a situation and the courts have gone a long way to prevent restrictions of this sort from arising. In *Re Public Trustee and Toronto Humane Society*[24] Anderson J. rued the

confused state of the laws and, noting the inadequacy of the ordinary corporate safeguards, was evidently relieved that beyond doubt the court has an "inherent equitable jurisdiction... in charitable matters".[25] Earlier he had concluded, on the point now under discussion:

> Without going the length of holding that the [incorporated] Society is in all respects and for all purposes a trustee, I have concluded that it is answerable in certain respects for its activities and the disposition of its property as though it were a trustee; specifically I am satisfied that it is amenable to the ancient supervisory equitable jurisdiction of the court.[26]

Those "certain respects" Anderson J. found in the undoubted liability of the charitable corporation to account under sections 3 and 4 of the *Charities Accounting Act*. Otherwise he concluded that that Act recognizes the assets of the Society to belong to the Society absolutely, save only that those assets must be applied to the Society's express objects. This was where the inherent equitable jurisdiction of the court came in; where property is dedicated to charity, trusteeship will trigger the supervisory jurisdiction.[27]

If the answer to the question of whether the corporation itself can be regarded as a trustee is ultimately a matter of whether the word "trust" reflects the true nature of the corporation's nature and consequent obligations (i.e., to operate in pursuit of its objects), one turns in the hope of greater clarity to the corporate directorship. Indeed, the *Toronto Humane Society* case itself was ultimately handled by the court through the reference to the duties of the directors rather than to the doctrinal character of the Society. Directors have duties and obligations as fiduciaries towards the company. If the corporation cannot be analyzed (or cannot in most contexts be analyzed) as being a trustee of its own property, can the directors of the corporation be reached instead? After all, as Anderson J. picturesquely put it, the question is whether, "since the corporation is without body to be kicked or soul to be damned, its directors must be held to the duties and obligations of trustees".[28] The directors are the hands and brain of the company—nothing happens but that they make it happen—and with this reasoning one can circumvent the conceptual problem of saying that a charitable corporation is a trustee of its own property. Instead one impugns the acts and omissions of the directors. All corporate activity can be reached in this way.

On this issue Anderson J. took the words of the court in *Re French Protestant Hospital*,[29] an early authority, where Danckwerts J. concluded that to him it seemed plain that directors "are, to all intents and purposes, bound by the rules which affect trustees".[30] Danckwerts J.'s decision

concerned projected remuneration for directors of the French Protestant Hospital for their professional services and he applied the "conflict of interest and duty" rule in rejecting the proposition that any such payment could be made. Anderson J. was also concerned with the remuneration of directors, acting in this instance as paid employees of the Humane Society. He followed Danckwert J.'s reasoning and forbade any remuneration. That he did so is doubly interesting, because Danckwert J.'s words are among the most trust-law inclined we have had, and represent something of a high-water mark.

On the other hand, as various authors have pointed out,[31] no authority of the twentieth century allows one to say categorically that directors are trustees in the full sense of the *Trustee Act*. The assurance, however, that this outcome might give the legal adviser is met by another consideration. Directors have long been recognized, as they are today, as fiduciaries. They administer property with powers of discretion granted to them and do so exclusively in the best interests of another, i.e., the company itself. Their equitable obligations are probably less severe but are of the same kind as those which the trustee *stricto sensu* knows well, and include the prohibition of the director from profiting personally in an unapproved "conflict of interest and duty" situation, as Anderson J. pointed out. Something which might add to the adviser's concern is that, whether one or more other liabilities or powers of trustees, e.g., investment, apply to directors is a question which, the courts insist, can only be answered in the light of all the facts in the instant case.

Looking back at the position of the charitable corporation itself and then at the position of its directors, though *Scott on Trusts*[32] says that it is probably correct to see the charitable corporation as more a trustee of its property than not, and while it may also be true to say that the corporation's director is more a trustee than not, case authority to an extent in Canada[33] and to a greater extent in the United Kingdom seems to be moving away from the proposition that, *in the trusts-law sense*, either is a trustee, i.e., the corporation of its property or the directors in regard to the obligations of their office, or their acts and omissions on behalf of the corporation. The apparently preferred view is that the corporation may own, in its own right and for its own purposes, property in its name that is not subject to an express trust or to a restitutionary trust, but there is enough that is "trust-like" about the corporation's position that it can be made subject to the court's trust jurisdiction.

So far as classifying the director of a non-profit corporation as a "trustee" is concerned, it is an uneasy situation that has evolved. The tide of fiduciary status is today running strong; trusteeship *stricto sensu* may not

exist, but let not the director, as a fiduciary, attempt to slough off any obligation of that status. And the courts will decide in each instance what was expected of the director in question. The law is not, and cannot be, precise in spelling out the ramifications of classifying a director as a "fiduciary" rather than as a "trustee". Does this of itself import, not only the case law obligations of trusteeship and the applicability of the provisions of the *Trustee Act*, but also the court's inherent jurisdiction over charitable trusts?

In *Liverpool and District Hospital for Diseases of the Heart* v. *Attorney General*,[34] before the position of the charitable corporation had acquired a high profile in Ontario, it had been closely examined in England. Slade J. decided that whether the holder of assets dedicated to charitable purposes is a trustee holding the benefit for others or is a charitable corporation holding for itself makes no difference for the purposes of the court's historic jurisdiction over charity. It is the holding of assets for charitable purposes that justifies the court in intervening for the protection of the assets and the furtherance of those purposes.[35] Though Anderson J. in *Re Public Trustee and Toronto Humane Society* and Osler J. in *Re Centenary Hospital Association* are not reported as having mentioned the *Liverpool and District Hospital* decision, it may well come to be accepted as establishing (a) that the court's jurisdiction embraces both trusts *stricto sensu* and incorporated charities, and (b) the rationale of that wide embrace. As Slade J. put it, "a [statutory charitable] company is in a position *analogous to that of a trustee* in relation to its corporate assets."[36]

Looking at the matter at the present time, it is my opinion that it is unlikely that we shall have more clarification from the courts than we now have. It is not possible for the courts to produce greater clarity in an area of equity such as this and one suspects that in any event the courts would prefer to leave themselves with the flexibility that now exists.

The issue that remains is not a difficult one. Who is responsible for bringing the charitable corporation before the court? Osler J. did not canvass this point because the Hospital Association was already before him, and on its own application. However, because the Crown is the *parens patriae*, the answer must surely be that, as with charitable trusts, it is the Attorney General of the province in question who will act, unless provincial statute has empowered another official to exercise the Attorney General's powers. If there is such legislation, it would then be a question of statutory interpretation: has the legislature delegated all the Crown's *parens patriae* powers or only some of them and, if the latter, which of the powers? An incidental advantage of statutory delegation, which may not be at first apparent, is that the delegate whose duties are the subject of

delegation is compellable. He or she must act in the appropriate circumstances. The Crown with those powers *may* act and that can lead to benign neglect.[37]

Where there exists no express trust or any trust by analogy, the court has no inherent jurisdiction. This is where the ancient protective power of the Court of Chancery stopped. Where assets are dedicated to charitable purposes but not with any intention of creating a trust obligation, the Crown would be involved because charitable purposes are a concern of the public. It is different where funds given by will to a named charity, extinct on the testator's death, are not given with a general charitable intent. In this situation the Crown takes the funds as *bono vacantia* by prerogative right and, of its clemency, permits a *cy-pres* application. The former situation very rarely occurs because, as in *Liverpool and District Hospital* itself, the courts have almost invariably found or assumed a trust element of some kind.[38] This perhaps is fortunate because the scope of the benevolent intervention of the Crown, and the nature of the court's role, if any, where there is no trust element, are debatable, and only in England have the major reforms in the *Charities Act, 1960,* relieved the situation. Those reforms went a long way towards dealing with these jurisdictional problems. Ontario, like the other provinces and the territories, lacks any such contemporary legislation and we in Canada may therefore be left peering into the antiquarian corners of English legal history if we ever want to know what we really mean by "the ancient supervisory equitable jurisdiction of the court".[39] Anderson J. in the *Toronto Humane Society* case spoke of the jurisdiction applying "in charitable matters".[40] It would be regrettable if this statement became another source of misconceptions.[41]

British Columbia: The Society Act

Ontario's legislation, as we have said, is in need of an overhaul for a number of reasons but even in other provinces where there has been legislation explicitly on the subject of the non-profit corporation, whether trust law or corporation law applies in a number of areas is still open to argument. For instance though, in the writer's opinion, the *Society Act*[42] of British Columbia is a distinct improvement on the *Corporations Act* of Ontario (principally because it is concerned only with "Part III corporations without share capital" and sets out both directors' powers and their obligations), there are still questions as to when trust law or corporate law is to fill the silences in the Act. For instance, in section 1 the word "director" includes a "trustee" where the society in question uses that descriptive term of its board member and section 4(1)(d) provides that a corporation has "the powers and capacity of a natural person of full

capacity as may be required to pursue its purposes". Are we to assume then that a director, who is a fiduciary in any event, has the obligations of a trustee where the *Society Act* is silent? And is the society itself an implied trustee of property which it holds as one having "full capacity"? The case law may now have answered the second question for us—it is a trusteeship by analogy, whatever the implications of that more studied phrasing might be—and the reader should take a look at section 26(b) when considering the position of the director under the *Society Act*. The director cannot be relieved by the society's documentation "from a liability that by virtue of a rule of law would otherwise attach to him in respect of negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the society".

At the end of the day, one of two things can be said. Either the *Society Act* has tried to solve the question as to which body of law fills the gaps by describing what incorporation means and by defining, as in a business corporations act, the obligations of the directors with regard to standards of behaviour, as well as their powers. Or, alternatively, the precise question now under discussion was not really thought about by the legislators and solutions, where they appear, arise by fortunate happenstance.

The problem as handled in Re Centenary Hospital Association

There was no need for Osler J. to pursue at length the implications of charity incorporation in *Re Centenary Hospital*. It became clear that, save for section 6(1) which was not relevant, the *Charities Accounting Act*, under which the Public Trustee claimed jurisdiction, is overridden by the *Public Hospitals Act*, whose terms provide totally for the circumstances that had occurred. And that really ended the litigation since the Public Trustee's duties did not include the supervision and regulation of public hospitals. However, it should be said, this must have come as news not only to the Public Trustee but to the Minister of Health. After all, it was the Minister's initial letter that had sent the Hospital off to the Public Trustee in the first place, for a *nihil obstat* that was not forthcoming. The Public Trustee may never before have sought to supervise public hospitals in the province but evidently the Minister was also of the opinion that her own Act (the *Public Hospitals Act*) did not prevail over the Province's detailed charity legislation.

Concerning the alleged trusteeship of a charitable corporation, it will be recalled that Osler J. interpreted section 1(2) of the *Charities Accounting Act*, as it now is ("Any corporation incorporated for a ... charitable ... purpose shall be deemed to be a trustee within the meaning of this Act ... ") to mean that outright gifts to an incorporated charity are now included within the Act, in addition to gifts to an executor or trustee. That was apparently the

intention of the government when the subsection was introduced in 1951; it merely refers back to section 1(1). The government's explanation of meaning at the time is certainly ambiguous, as Osler J. suggested but, though to the contemporary reader the subsection appears clearly to say something very different from the terms of that explanation, it is likely that this is a situation where the drafter and the government of the time were simply unaware of the issue now under discussion. Across the common law jurisdictions of Canada more than one of the statutory conundrums in this area have arisen in similar circumstances.

As to the case law on the trusteeship of incorporated charities and their directors, Osler J. discussed the *Toronto Humane Society* judgment of Anderson J. and concluded that, though there is room for the director in some respects to be classified as a trustee, that case has nothing to say on the issue of whether the Society is subject to the provisions of the *Corporations Act*, which, in section 274, expressly capacitates a non-profit incorporation as a natural person and authorizes it to act as this corporation had. The *Incorporated Synod of the Diocese of Toronto* case, a Court of Appeal decision,[43] gave him additional assurance that a distinction can be drawn between the corporation's own property and its trusteeship of other property. Otherwise, given the comprehensive provisions of the *Public Hospitals Act*, he effectively left the matter there.

It would be a loss if the Province left the matter there. Not all incorporated charities are public hospitals. Some good clarifying legislation is called for. It should not be the case that a public official and charitable bodies are each forced to resort to the courts, and the costs there involved, for the determination of issues that Queen's Park could surely solve. It is a tendentious argument to say that a public official, faced with the reasonable interpretation that he has a statutory jurisdiction, should then resort to a self-denying ordinance in pursuit of some *modus vivendi* with the affected parties. It is equally unacceptable that the charities for their part, often with limited resources of cash and willing hands, should have their time and energies wasted because of the consequent bureaucratic assertions of that jurisdictional right, if it was not intended in the particular instance that that right should exist. Why cannot a statute provide (1) (if this is what is wanted) that corporate law, including business corporations legislation, and not trust law, shall fill the lacunae in the *Corporations Act*, (care already having been taken, we may assume, to ensure that whatever is wanted from trust law or fiduciary law is expressly contained in the Act), and (2) that, given this, the jurisdiction and responsibilities of the Public Trustee are so-and-so, spelling it out, and specifying the areas where supervision is desired?

The Charities Accounting Act, Section 6: Its Scope and Application

Though it is not necessary for the decision, *Re Centenary Hospital Association* concludes that section 6(1) deals with the solicitation or procurement of funds from the public and with the manner in which those funds have been handled or expended, whatever the legal character of the organization that is raising, handling or expending the funds. The subsection refers to "person or organization", and that will be given, it seems, its natural wide embrace of meaning. Nor is there any qualification in the subsection as to whether, as a result of the solicitation, the funds are given outright or on express trust for purposes. Secondly, Osler J. was prepared to interpret section 6b(1) ("A person who holds land for a charitable purpose shall hold [its] land only for the purpose of actual use or occupation of the land for the charitable purpose"), on the basis of the "proportionality test". It is not to be given its literal meaning but is to be read as if it ran, "... shall hold [its] land *for the most part* for the purpose of actual use ... " (emphasis supplied). This is the test used in cases arising from the *Charter of Rights and Freedoms*. Osler J. concluded that the cost of the medical arts centre and the annual revenue it would earn were not "an unduly large proportion",[44] given the totality of the hospital's assets.

The Charitable Gifts Act, Section 2(1): "An Interest in Business"

If such an interest "is given to or vested in" a person for a charitable purpose, the subsection provides that that person shall retain no more than 10 per cent of that interest and must dispose of the remainder. Did this apply to the Hospital's medical arts centre? Counsel for the Hospital submitted that Revenue Canada's ruling that it was not a business for the purpose of the *Income Tax Act* should be given weight and was understood by the Court to say that "vested in" meant "gifted to", something which was not relevant to the funding of the proposed medical arts building. He also argued that the *Public Hospitals Act*, section 7, authorized the building of the centre and, as a particular statute, should prevail over the general legislation that is the *Charitable Gifts Act*. Finally, he took the position that, if business activities directly related to the objects of the charity were included within the scope of section 2(1), a hospital in today's circumstances could not operate at all.

In effect Osler J. chose to deal with the issue of the subsection on the basis of counsel's final argument, which he accepted. All hospitals are closely supervised by the Minister of Health in any event, he said, but it could not have been the legislature's intent to prevent the Hospital from carrying on directly related activities "to improve and upgrade the quality of care delivered by the Hospital"[45] just because each activity in isolation could be described as a business. He agreed with the Hospital's counsel. So,

unless Osler J. was thinking of the position of hospitals and the *Public Hospitals Act* only (and he may have been), the courts have now introduced a "related business"[46] exception to section 2(1). Again, as with section 6b(1) of the *Charities Accounting Act*, previously discussed, the language of the Act is unequivocal but we now appear to have the *Income Tax Act* approach that determines whether the otherwise prohibited carrying on of a business by a charity should be excepted when, like a museum's gift shop, it is immediately associated with the purposes of the charity. Is this also the distinction between the main non-charitable purpose that is prohibited and the subsidiary non-charitable purpose that is not?

Whether "vested in" means "gifted to" when the subsection speaks of "given to or vested in" leaves one with very real doubts. Apart from the idle tautology that such a construction alleges, an interest could be "vested in" as a result of purchase or exchange or the creation of the business by the charity. Osler J. thought each of the other three arguments of the Hospital's counsel, including this one, was "entitled to some weight" but one suspects we are going to hear more about the "weight" of this contention another day.

Conclusion

Because of the problem of the character of charitable non-profit corporations—a problem with which I struggle—this case is more than just a storm in an Ontario teacup. The question is, how much more? It has certainly taken Ontario public hospitals (save for gifts to those institutions) out of the domain of the provincial Public Trustee but otherwise it seems inconclusive if one asks how other incorporated charities now stand. We are effectively left with the hesitations of the *Toronto Humane Society* decision,[47] and the Court of Appeal decision in the *Incorporated Synod* case, which did not really deal with the issue at all. Most charities I know would opt for the minimum amount of legislation and the minimum regulation under such legislation. They would also be glad to be free of the paperwork. But if there is to be regulation and supervision, and some degree of both is to be expected for charitable corporations if it is appropriate for charitable trusts, at least it should be thought through as a piece, whether it concern trusts, corporations or Ottawa's "charitable organizations" which are neither. And it should cause the least possible upheaval. If that thesis is correct, it is more than timely that the provincial Attorney General has given such a wide-ranging reference to the Ontario Law Reform Commission on charity law reform, as occurred last summer.[48] And, though this is a provincial reference, those of us outside the Province of Ontario must hope that this well-respected Commission in Canada's wealthiest province will realize that its report will speak to all

of Canada. Canadians have never before had an enquiry of this kind at such a level on the law of charity, and we are likely to get the same from no other source. The mature wisdom of the Commission will be keenly awaited.

In the rest of Canada no Public Trustee or other public official appears to have been given the power to supervise charitable trusts or corporations, either to ensure that their purposes or objects are being properly carried out or to determine whether those purposes or objects are any longer in tune with the character and needs of contemporary society. What the Crown is doing in the persons of the provincial Attorneys General has yet to be researched. So there one has to stop because, save for the *Delaney* decision,[49] beyond Ontario's borders the trusteeship of charitable corporations and their directors is another unrecorded country. Of necessity, as Hamlet reflects in his final scene, the rest is silence.

FOOTNOTES

1. (1989), 69 O.R. (2d) 1, and 447 (costs).
2. *Charitable Gifts Act*, R.S.O. 1980, c. 63; *Charitable Institutions Act*, R.S.O. 1980, c. 64, as amended S.O. 1984, c. 55, s. 207; *Charities Accounting Act*, R.S.O. 1980, c. 65, as amended S.O. 1982, c. 11, and S.O. 1983, c. 61. This legislation is not paralleled in any other Canadian jurisdiction. See also the *Mortmain and Charitable Uses Repeal Act*, S.O. 1982, c. 12. Osler J. noted (*ibid*, at p. 16) that ss. 6b-6d of R.S.O. 1980, c. 65, as amended, replaced ss. 13 and 14 of R.S.O. 1980, c. 297, which was repealed by S.O. 1982, c. 12.

   The *Charities Accounting Act* was enacted in 1915 (S.O. 1915, c. 23), the *Charitable Institutions Act* in 1931 (S.O. 1931, c. 79), and the *Charitable Gifts Act* in 1949 (S.O. 1969, c. 10). The *Mortmain and Charitable Uses Act*, some of whose provisions, as mentioned, were carried over in 1982 into the *Charities Accounting Act*, was passed in 1909 (S.O. 9 Ed. VII, c. 58).
3. *Ibid.*, *Charities Accounting Act.*
4. *Re Public Trustee and Toronto Humane Society* (1989), 60 O.R. (2d) 236, 40 D.L.R. (4th) 111, and *Re Centenary Hospital Association*, *supra*, footnote 1.
5. The additional cases are *Re Incorporated Synod of the Diocese of Toronto and H.E.C. Hotels Ltd.* (1987), 61 O.R. (2d) 737, 44 D.L.R. (4th) 161, and *Re Harold G. Fox Education Fund* v. *Public Trustee* (1989), 69 O.R. (2d) 742.
6. See *Tudor on Charities*, 7th ed., 1984, by S.G. Maurice and D.B. Parker, pp. 308-311 (constitution, functions, jurisdiction and powers of the Commissioners). [For the views of the former Ontario Public Trustee on his role, see McComiskey, "The Role of the Public Trustee" (1983), 3 *Philanthrop.* No. 4, p. 9. See also Bond, "The Charity Commissioners for England and Wales" (1988), 7 *Philanthrop.* No. 4, p. 3.]
7. See *Assessment Act*, R.S.O. 1980, c. 31, as amended, s. 3.

8. *Supra*, footnote 1, at p. 8.
9. *Supra*, footnote 2, *Charities Accounting Act*.
10. R.S.O. 1960, c. 71 (now R.S.O. 1980, c. 95, as amended).
11. For the Crown's role as protector of charity, see *Tudor on Charities*, *supra*, footnote 6, p. 294 *et seq*. The distinction between the powers (or jurisdiction) of the Crown and the inherent jurisdiction of the court should be noted. The Crown is the protector of charity generally; the court's jurisdiction "is founded on the existence of a trust" (p. 295). See *Tudor*, p. 297, and footnote 33, for the Sign Manual power of the Crown. However, though there is this distinction between the inherent equitable jurisdiction of the court and the powers of the Crown (operative in effect in those areas where the court's jurisdiction does not exist), both the equitable jurisdiction and the royal jurisdiction stem from the same source, i.e., the Crown itself, and the Attorney General represents the Crown in both respects. The Attorney General is an advocate in the court, and an administrative lawyer with regard to the Crown's powers and its prerogative. There is no conflict. See Vaisey J. in *Re Bennet*, [1960] Ch. 18, 26.

    Re Centenary Hospital Association concerned three jurisdictions, i.e., that of the "Crown by right of being the Crown", that of the court inherent in its jurisdiction over trusts, including charitable trusts, and that of the provincial Public Trustee acquired by statute enacted by right of the Crown with the consent of the provincial legislature. Impatience with the historical origins and forms in this field is not a virtue.
12. R.S.O. 1980, c. 65, s. 8. The section tantalizingly adds, "or in equity or at common law or otherwise".
13. R.S.O. 1980, c. 410, as amended.
14. *Public Trustee Act*, R.S.O. 1980, c. 422. See, *supra*, footnote 1, at p. 14.
15. *Ibid.*
16. *Ibid.*, at p. 447.
17. It appears from the 1981 *Report of the Charity Commissioners* (para. 22), however, that today, as in Canada, new charities are being more often set up as registered statutory companies rather than as trusts. However, despite the historic dominance of the trust, institutions such as the Universities of Oxford and Cambridge and the British Museum are charter charitable corporations and this mode of incorporation—for the more significant institutions—has been familiar in England since the seventeenth century. Incorporation by special Act of Parliament has also not been infrequent for such institutions.
18. *Roman Catholic Archiepiscopal Corporation of Winnipeg* v. *Ryan* (1957), 12 D.L.R. (2d) 23, 26 W.W.R. 69, *sub nom. Re Delaney Estate* (B.C.C.A.), turns on the fact of incorporation. The Corporation was created by S.M. 1917, c. 109.
19. S.C. 1970-71-72, c. 63, as amended, s. 149.1(1)(a) and (b).
20. R.S.O. 1980, c. 512.

21. For Ontario, see the *Trustee act*, *ibid.*, ss. 26-29. Can section 35 of that Act (discretionary power of the court to grant relief to a trustee from liability for breach of trust) be invoked by a director of a charitable corporation?

22. These obligations are the care that would be given by the prudent person of business, limited delegation of duties and powers, avoidance of conflict of interest and duty, and maintenance of an even hand.

23. See *supra*, footnote 11.

24. *Supra*, footnote 4, *Re Public Trustee and Toronto Humane Society*. The Public Trustee took the position that the conduct of the Society's affairs had been irregular and that the directors as trustees should be called to account. The Society conceded that it was subject for enumerated purposes to the *Charities Accounting Act*, but argued that otherwise the directors, as directors, were subject to the provisions of the *Corporations Act* only, and were not required to account.

25. *Ibid.*, at p. 245.

26. *Ibid.*, at p. 243, 244 (O.R.) Osler J. in *Re Centenary Hospital Association* (*supra*, footnote 1, at p. 10) cited *in extenso* these words of Anderson J. and he "listed the very limited matters which, in [Anderson J.'s] view, the supervision of the court could address." They are (1) the legitimacy of the board of directors, (2) the conflict of interest and duty, and (3) control of the activities of the corporation. Anderson J. made an order appointing a person with specific instructions regarding how the particular remedial measures were to be put into effect.

27. The problem is this: an incorporated charity, initially formed as such, whether a charter corporation or a statutory corporation, is within the Crown's royal jurisdictional concern but not within the court's equitable jurisdiction unless there is a trust obligation present or the competent legislature has conferred upon the court the power and authority to act. In the absence of any provision in the Ontario *Corporations Act*, the Crown, seeking remedy in the courts (acting in this instance through the Public Trustee) will have to invoke the traditional equitable jurisdiction if it wishes to impugn the conduct of an incorporated charity.

28. *Supra*, footnote 4, p. 246 (O.R.). At p. 245 Anderson J. considered that the directors of charitable corporations are subject not only to the jurisdiction of the *Charities Accounting Act* (in this instance s. 6d(1)) but also to direction of the court given under the *Trustee Act*.

29. [1951] Ch. 567, [1951] 1 All E.R. 938. The problem Ontario has with its *Corporations Act* is much the same as that which the English have with the *Companies Acts*, 1948—1981.

30. *Ibid.*, at p. 570.

31. "Charitable Corporations: A Bastard Legal Form", E.J. Mockler, 1966 *Canadian Bar Assoc. Papers 229*, and "Directors and Trustees: The Charitable Corporation and Trusteeship", Paper No. IV, John M. Hodgson, Q.C., and Anne C. McNeely, *The Charitable Mosaic*, C.B.A.—Ontario, C.L.E., 1983.

[(1984), 4 *Philanthrop.* No. 2, p. 26.] Both these papers were referred to by Anderson J. in the *Toronto Humane Society* case, and the former was again cited by Osler J. in the case now under review. *Scott on Trusts*, 4th para. 348.1 (Vol. IV A), is the latest discussion, and provides a useful survey of the current position in the United States. Osler J. cited *Scott*, at p. 23 of Vol. IV A, at length. [*The Philanthropist* has published several other comments and articles on the subject. See, for example, Cullity (1977), 2 *Philanthrop.* No. 1, p. 41; Levis (1979), 2—No. 3, p. 12; Cullity (1988), 7—No. 3, p. 12; Vandor (1989), 8—No. 2, p. 3.]

32. *Ibid.*, *Scott on Trusts.*

33. *Supra*, footnote 1, at p. 10, and footnote 26. ("These subjects can very well be considered as being of particular concern to directors in their trustee capacity.")

34. [1981] Ch. 193, [1981] 1 All E.R. 994. See [1984] Conv. 112 (J. Warburton), and *Tudor on Charities*, *supra*, footnote 6, pp. 408-412, on the charitable company as trustee under English law. *Liverpool and District Hospital* raised the issue of whether the *Companies Act* or the corporate memorandum governed when, on a winding-up action, surplus assets remained. The former required distribution to members; the latter to some other institution having similar objects. Slade J. held that the memorandum governed the distribution.

35. See, *ibid.*, at pp. 213-216. Slade J. considered that in *Re French Protestant Hospital* Vaisey J. was not using the word "trust" in the strict sense of the law of trusts. Slade J. was of the view that "trust" (and hence the supervisory equitable jurisdiction of the court) would include both the transfer of assets to a trustee in the strict sense, or transfer to a corporation. The latter is under an obligation to hold its assets for its charitable purposes. In each instance there is a person (a trustee or a corporation) subject to an obligation against whom the court can act *in personam*. That is the essence of the equity jurisdiction.

36. *Ibid.*, at p. 209. Emphasis supplied.

37. The texts speak of a Crown "duty", but there is no one who can compel its exercise.

38. See, for example, *The Incorporated Society* v. *Richards* (1841), 1 Drury & Warren's Reports 258, 293-294 (a testamentary devise of a remainder interest "unto the *Incorporated Society in Dublin for promoting English Protestant Charter Schools in Ireland*, and their successors for ever". Emphasis supplied).

39. *Supra*, footnote 26.

40. *Supra*, footnote 25.

41. Suppose in a matter concerning the general assets of a charitable corporation, the Public Trustee takes a certain position, and the Court finds in favour of the Public Trustee, exercising the "inherent equitable jurisdiction of the court in charitable matters". The Court holds that no trust exists over those assets but interprets its jurisdiction as extending to "charity" at large. Could an appeal be taken on the grounds that: (1) the matter is part of the Crown's

concern with charity and beyond the Court's jurisdiction, and (2) the Crown has not delegated its particular prerogative powers in the statute creating the Public Trustee's office? The first ground of appeal involves another issue: can the Crown *choose* to submit a public purpose within its own purview to the interpretation, supervisory order, or administrative or *cy-pres* scheme-making power of the court and thus *confer* jurisdiction that would not otherwise exist? Does the Crown have any right *itself* to intervene in a charitable statutory corporation's handling of its general assets in the absence of any trust obligation of any kind?

42. R.S.B.C. 1979, c. 390, as amended.
43. *Supra*, footnote 5, *Re Incoporated Synod of the Diocese of Toronto.*
44. *Supra*, footnote 1, at p. 18.
45. *Ibid.*, at p. 19.
46. *Supra*, footnote 19, s. 149.1(6)(a), and (3)(a), *Income Tax Act (Canada).*
47. *Supra*, footnote 4, *Re Toronto Humane Society*, at p. 243; "I do not conceive it to be my function as a judge of first instance to resolve the question further than is absolutely necessary to the disposition of the dispute which is before me", per Anderson J. Later in *Re Centenary Hospital Association* Osler J. drew attention (*supra*, footnote 1, at p. 10) to this qualification by Anderson J. to his own findings as to the law.
48. "Ontario Law Reform Commission to Study Charities Law" (1989), 8 *Philanthrop.* No. 3. p. 67.
49. *Supra*, footnote 18, *Re Delaney Estate.*