Trusts & Equity
Fall Term 2018

Lecture Notes – No. 7

Charitable Trusts: The Concept

Please note the following statutes:

Charities Accounting Act, RSO 1990, c.C.10:
Reporting requirements of trustees to the Public Guardian and Trustee

Charitable Gifts Act, RSO 1990, c.C.8:
Restrictions on ownership in profit-making ventures by charitable organizations

Charitable Institutions Act, RSO 1990, c.C.9:
Regulation of charitable residential institutions

Public Guardian and Trustee Act, RSO 1990, c.P.51, s.1
2: Public Guardian and Trustee may be a trustee of a charitable trust

Trustee Act, RSO 1990, c.T.23, ss. 14,15:
Jurisdiction of court to vest property in trustees

'Public Benefit'

The Basic Rule

The basic rule is that trusts (with the exception of trusts for the relief of poverty) must provide a 'public benefit'. That is, the trust has an approved purpose and confers a benefit on the community and not just a private benefit. See ***Oppenheim* v *Tobacco Securities* [1951] AC 297, 305** per Lord Simonds:

(a) Thus, there are two separate requirements: that there be a benefit and that it be a public benefit; for example, supporting contemplative nuns was found to have no public benefit in *Gilmour* v *Coates* [1949] AC 426.

(b) Thus, there is no public benefit where there is an educational trust for named person(s) (**Re Compton [1945] Ch 123**) nor for children of employees of a particular employer (Oppenheim v *Tobacco Securities* [1951] AC 297). Similarly, a convalescent home for members of a trade union is not charitable; *Re Mead's Trust Deed* [1961] 2 All ER 836. Similarly, it is not permissible to establish a charity in the residual category if the beneficiaries are not only chosen from within a single area, but also by reference to a specific creed; *IRC* v *Baddeley* [1955] AC 572 (the situation would be different if the charity was for the purposes of the relief of poverty).

(c) The public aspect is not satisfied where there is a fund, essentially for the subscribers themselves, which is not means-tested such that one might say it is generally for the relief of poverty rather than some form of private insurance; *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194. Thus a mutual benefit or a friendly society is not a charity, neither are professional societies that raise money from members or others for regulation of the profession or to promote the interests of members.

The Section Of The Community that Benefits Must Be Significant

Lord Wrenbury held in *Verge v Somerville* [1924] AC 496, 499 that the class of beneficiaries must be "an appreciably important class of the community."

In *Oppenheim* v *Tobacco Securities* [1951] AC 297, 306 it was held that "section of the community" denoted a class of persons that (i) as a class of possible Bs were not numerically insignificant and (ii) what was in common between the members of the class was not the relationship to a particular person(s).

In *Re Compton* [1945] Ch 123, it was said the potential beneficiaries cannot be a class by virtue of their common nexus with a single propisitus or multiple proposti - if so they are not a 'section of the community' to determine a charity ('the Compton test'). In *Dingle v Turner* [1972] AC 601, 624, Lord Cross said that the Compton test was problematic and that the question is ultimately "one of degree and cannot itself be decisive of the question whether the trust is a charity. Much must depend on the nature of the trust." It would seem that on balance, and bearing in mind all the speeches in *Dingle,* that trusts for employees of a single employer are still invalid. The nature of the test will vary somewhat according to the type of charity.

<u>The Heads of Charity (1): The Relief Of Poverty</u>

Trusts for the relief of poverty are treated most generously of all, and the reasoning harkens back to a time before the modern welfare state but is equally valid today. Relieving anyone's poverty is a good thing. Moreover, poverty does not mean absolute destitution but more in the way of insufficient resources to lead a 'normal life'.

Jones v Executive Officers of the T. Eaton Company
[1973] SCR 635

Here money from the residue of an estate was left under a will to the executive officers of Eaton's to be paid out to any 'needy or deserving' Toronto members of the 'Eaton Quarter Century Club' (an unincorporated association comprised of employees and former employees with at least 25 years service). There were by-laws for this club which provided that the Membership Committee could bring attention to members suffering due to sickness, death, or distress. It was held that words 'or deserving' following the word 'needy' meant a person who, although not actually poverty stricken, was in a state of 'financial depression'. Where a trust is limited to the relief of poverty it is not necessary that the public generally must be benefited.

Per Spence J.:

> It has been suggested that a member of the Timothy Eaton Quarter Century Club may be considered as deserving because of merit, industry, intelligence, imagination, honesty, sobriety and even punctuality, or loyalty, but it must be remembered that the testator was not directing a distribution of the funds of the T. Eaton Company Limited which might well have been interested in the exhibition by its employees of any of those virtues but was directing the disposal of his own estate, and I find it hard to believe that he would consider any retired members of the T. Eaton Quarter Century Club to be "deserving" because he had been punctual or loyal. I am of the opinion that the only proper interpretation of the words "or deserving" following the word "needy" and as used by this testator at the time he did use it, means a person who although not actually poverty-stricken was nevertheless in a state of financial depression, perhaps as I said due to a sudden emergency, and that his purpose is sufficient to qualify as a charitable trust...
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> I have therefore, with respect, come to the conclusion as expressed by Jessup, J.A., in his majority reasons for the Court of Appeal for Ontario:
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> In my opinion, therefore, the intention of the testator, by his use of the word "deserving", must be taken to benefit not only the necessitous whom he designated by the word "needy", but also those of moderate means who might require financial assistance in the exigencies from time to time arising.
> Having come to the conclusion that the provision in the will constitutes a trust for the relief of poverty, I have now to determine whether it is valid in view of the fact that the possible beneficiaries do not include every member of the public but only the Toronto members of the Timothy Eaton Quarter Century Club. As I have pointed out, that limitation is far from confining as according to the evidence of the secretary-treasurer of the Timothy Eaton Company Limited it would include at least 7,000 persons and so might be considered to apply to a significant portion of the general public. I need not, however, rest my view as to the validity of the trust upon that ground for **I am of the opinion that when a trust is not only charitable in the sense outlined by Lord Macnaghten in *Com'rs for Special Purposes of Income Tax v. Pemsel,* [1891] A.C. 531, but is a trust for one of those four purposes, i.e., for the relief of poverty, then the Courts have not required the element of public benefit in order to declare in favour of the validity of the trust.** In Canada the decision of the Judicial Committee in *Re Cox,* [1955] A.C. 627 has been considered the authoritative delineation of the problem. However, in that particular case the Judicial Committee found that the trust in question was not one limited to the relief of poverty but was one which was within any of the four classes set out by Lord Macnaghten in *Com'rs for Special Purposes of Income Tax v. Pemsel,* and I am of the opinion therefore that that case is not an authority for requiring public benefit in cases where the trust was limited to the relief of poverty.

The Heads of Charity (2): Advancement of Religion

Whilst the advancement of religion was not expressly mentioned in the Statute of Elizabeth (except "repair of churches"), it was omitted only for fear of confiscation with changing attitudes of the Crown to specific religions. By the 19th century, there was toleration of non-established religions.

The modern thinking is to regard spiritual teaching and practices as charitable. **Unless the religion is itself subversive to religion generally or otherwise immoral, there is no distinction as between religions**; *Thornton v Howe* (1862), 31 Beav 14 and *Re Watson* [1973] 1 WLR 1472 (publication and distribution of religious writings).

This is brought more clearly into Ontario law through the **Religious Freedom Act, RSO 1990, c.R.22**, which reads in its entirety:

> Preamble
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> Whereas the recognition of legal equality among all religious denominations is an admitted principle of Provincial legislation; And whereas, in the state and condition of this Province, to which such principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct legislative authority, recognizing and declaring the same as a fundamental principle of the civil policy of this Province:
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> Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:
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> Free exercise of religious profession, etc., guaranteed
> 1. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province assured to all Her Majesty's subjects within the same.

Gilmour v Coates
[1949] AC 426

The testator left a gift to the 'Carmelite Priory, St. Charles' Square, Notting Hill. The cloistered nuns of the priory devoted their lives to prayer, contemplation, penance and self-sanctification within their convent. They did no work outside the priory. The priory lead expert evidence as to Catholic doctrine holding that the benefit conferred by the contemplative life is not only to those who followed it themselves, but also, through the efficacy of their intercessory prayers, on members of the public ('in bringing about their spiritual improvement, as well as by the example their life afforded of self-denial in order to attain greater love of God and union with Him.') The issue was whether the use was a charitable one.

Lord Simons held that there may be a religious purpose to the nuns' practices but the claimed public benefits were incapable of legal proof. His Lordship said:

> My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof. But, then it is said, this is a matter not of proof but of belief: for the value of intercessory prayer is a tenet of the Catholic faith, therefore in such prayer there is benefit to the community. But it is just at this "therefore" that I must pause. It is, no doubt, true that the advancement of religion is, generally speaking, one of the heads of charity. But it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing where they cannot prove: the court can act only on proof. A gift to two or ten or a hundred cloistered nuns in the belief that their prayers will benefit the world at large does not from that belief alone derive validity any more than does the belief of any other donor for any other purpose.

The nature of 'religion' itself is hard to pin down. In some cases it has been held that the religion must be more than just some sort of philosophy of the existence of man; *R v Registrar General, ex p Segerdal* [1970] 2 QB 697 (Scientology). Two central components are faith and worship of God; *Barralet* v *AG* [1980] 3 All ER 918 (ethics and religion insufficient).

The Heads of Charity (3): Advancement of Education

Educational purposes were recognised in the Statute of Elizabeth ('the maintenance of schools... and scholars in universities... the education and preferment of orphans...') and have long featured in charity law. Study of most subjects are considered sufficient, but ridiculous or improper things are excluded (schools for prostitutes, museums of pornography, etc.) - where an artist bequeathed his studio and his work as a museum, and the art was objectively junk, there was no educational benefit; **Re Pinion [1965] Ch 85, cb, p.443**.

Incorporated Council Of Law Reporting v. Attorney-General [1972] Ch. 73

The Incorporated Council of Law Reporting for England and Wales publishes the official law reports. The issue was whether a gift to it for its purposes was charitable and, in particular, whether it was charitable as for the advancement of education (or indeed within the residual class). In the case, Russell LJ was of the view that the trust was valid under the residual class; Sachs and Buckley LJJ held that it was valid as an educational trust.

Sachs LJ held:

> Taking the latter point first, it is, of course, the fact that one of the main, if not the main, uses to which law reports are put is by members of the legal profession who study their contents so as to advise clients and plead on their

behalf. Those reports are as essential to them in their profession as the statutes: without them they would be ill equipped to earn professional fees. Does it follow, as submitted by Mr. Francis, that a main purpose of the reports is the advancement of professional interests and thus not charitable? The argument put thus is attractive, not least to those who, like myself, are anxious not to favour or to seem to favour their one-time profession. But the doctor must study medical research papers to enable him to treat his patients and earn his fees; and it would be difficult indeed to say that because doctors thus earn their emoluments the printing and sale of such papers by a non-profit making institution could not be held to be for the advancement of education in medicine.

Where the purpose of producing a book is to enable a specified subject, and a learned subject at that, to be studied, it is, in my judgment, published for the advancement of education, as this, of course, includes as regards the Statute of Elizabeth I the advancement of learning. That remains its purpose despite the fact that professional men - be they lawyers, doctors or chemists - use the knowledge acquired to earn their living. One must not confuse the results flowing from the achievement of a purpose with the purpose itself, any more than one should have regard to the motives of those who set that purpose in motion.

As to the point that the citation of reports to the judiciary is fatal to the council's claim, this, if independent of the contention concerning professional user to earn fees, seems to turn on the suggestion that as the judges are supposed to know the law the citations cannot be educative. That, however, is an unrealistic approach. It ignores the fact that citation of authority by the Bar is simply a means by which there is brought to the attention of the judge the material he has to study to decide the matter in hand: in this country he relies on competent counsel to quote the extracts relevant to any necessary study of law on the points in issue, instead of having to embark on the time consuming process of making the necessary researches himself. Indeed, it verges on the absurd to suggest that the courteous facade embodied in the traditional phrase "as, of course, your Lordship knows" can be used to attempt to conceal the fact that no judge can possibly be aware of all the contents of all The Law Reports that show the continuing development of our ever changing laws. The Law Reports (including volume 1 of the Weekly Law Reports) for 1970 alone contain some 5,200 pages: incidentally, if one confined one's views solely to the three volumes of the Weekly Law Reports there would still remain over 4,000 pages. For my part I feel no diffidence in expressing my indebtedness to counsel in the instant case, as I have done in other cases this term dealing with other subjects, for educating me in the law of charitable purposes by the citation of the 41 authorities previously mentioned.

For these reasons I reject the contentions that the user of The Law Reports by the legal profession for earning fees of itself results in the purposes of the council not being charitable and thus return to the question whether they are charitable on the footing that their substantially exclusive purpose is to further the study of the law in the way already discussed. Such a purpose must be charitable unless the submission that the advancement of learning is

> not an advancement of education within the spirit and intendment of the preamble is upheld: but for the reasons already given that submission plainly fails. Accordingly, having regard to the fact that the members of the council cannot themselves gain from its activities, its purposes in my judgment fall within the second of Lord Macnaghten's divisions.

Lord Justice Russell held:

> There are some matters which require no proof. The making of the law of this country is partly by statutory enactment (including therein subordinate legislation) and partly by judicial exposition in the decision of cases brought before the courts. It cannot be doubted that dissemination by publication of accurate copies of statutory enactments is beneficial to the community as a whole: and this is not the less so because at least in many instances the ordinary member of the public either does not attempt to, or cannot by study, arrive at a true conclusion of their import, or because the true understanding is largely limited to persons engaged professionally or as public servants in the field of any particular enactment, or otherwise interested in that field. The fact that to perhaps the majority of those who acquire and study a copy of (for example) a Finance Act it constitutes what might be described as a tool of their trades or professions or avocations in no way lessens the benefit to the community that results if accurate versions of that Finance Act are published and not kept like a cat in a bag to be let out haphazard. The same is to be said of the other source of our law, judicial decisions and the reasons therefor, especially in the light of our system of precedent. It is in my view just as beneficial to the community that reliable reports of judicial decisions of importance in the applicability of the law to varying but probably recurrent circumstances, or demonstrating development in the law, should be published; and all the more so if the publication be supervised by those who by training are best qualified to present the essence of a decision correctly and to distinguish the ephemeral from the significant. To state that the publication also supplied many professional men with the tools of their trade does not seem to me in any way to detract from the benefit that accrues to the community from the fact that the law does not remain locked in the bosom of the judiciary.
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> ... It seems to me that *if* the publication of reliable reports of decisions of the courts is for the benefit of the community and of general public utility in the charitable sense, it is an inevitable and indeed necessary step in the achievement of that benefit that the members of the legal profession are supplied with the tools of their trade. I do not see how the benefit to the public, assuming it to be a charitable object, could otherwise be achieved. So it would be if there were a non-profit-making association under gratuitous professional supervision for the production at moderate expense of pure medical drugs or efficient surgical instruments. But the only main object or purpose in such case would be, it seems to me, the relief of the sick. We were in this connection referred to a number of cases, some on one side of the line and some on the other, where the question was whether a main object was the promotion of the interests of a professional body or organisation. I do not find these helpful. Here the association consists of

> members who as such can derive no conceivable benefit from their gratuitous supervision of the activities of the association.

The term education is a dynamic one; ‘education’ in 1601 is not of the same meaning as now; **IRC v McMullen [1981] AC 1**, per Lord Hailsham:

> Both the legal conception of charity, and within it the educated man's ideas about education, are not static, but moving and changing. Both change with changes in ideas about social values. Both have evolved with the years. In particular in applying the law to contemporary circumstances it is extremely dangerous to forget that thoughts concerning the scope and width of education differed in the past greatly from those which are now generally accepted.

There are 4 general categories acceptable to the *McMullen* court:

> (a) training of the mind; or
> (b) raising the artistic taste of the country; or
> (c) improving the sum of communicable knowledge in an area which education may cover; or
> (d) transmitting information or training persons in any structured manner that advances knowledge and the abilities of the recipients.

In **Vancouver Society of Immigrant and Visible Minority Women v. MNR [1999] 1 SCR 10**, Iacobucci J accepted that the more dynamic approach favoured elsewhere was meritorious. He said at para. 168-169:

> In my view, there is much to be gained by adopting a more inclusive approach to education for the purposes of the law of charity. Indeed, compared to the English approach, the limited Canadian definition of education as the "formal training of the mind" or the "improvement of a useful branch of human knowledge" seems unduly restrictive. There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view...
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> To limit the notion of "training of the mind" to structured, systematic instruction or traditional academic subjects reflects an outmoded and under inclusive understanding of education which is of little use in modern Canadian society. As I said earlier, the purpose of offering certain benefits to charitable organizations is to promote activities which are seen as being of special benefit to the community, or advancing a common good. In the case of education, the good advanced is knowledge or training. Thus, so long as information or training is provided in a structured manner and for a genuinely educational purpose -- that is, to advance the knowledge or abilities of the recipients -- and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.

The structure of the activity in question might be important - thus preservation of steam engines might be a hobby (not charitable) or fulfil a serious educational purpose and qualify as charitable. It is a question of fact.

The Heads of Charity (4): 'Other Purposes Beneficial to the Community'

There are a broad range of uses that have been approved in Canada and elsewhere under the residual heading, including promotion of health, provision of recreational facilities, municipal betterment and relief of tax and rating burden, gifts for the benefit of a locality, patriotic purposes, protection of life and property, social rehabilitation, and protection of animals.

For example, *amateur sport*.

A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)
2007 SCC 42

After reviewing the authorities, Rothstein J held for the majority that a youth soccer association was not charitable as it existed for the promotion of a particular sport with only incidental benefits for youth:

> 41. Although I am sympathetic to the proposition that organizations promoting fitness should be considered charitable, there is no mention of these objects in the Letters Patent of A.Y.S.A. The Letters Patent only refer to promoting soccer and increasing participation in the sport of soccer. A.Y.S.A.'s application to the CRA describes its "main objective" as being "to offer youths in the community the opportunity to develop and hone soccer skills through practice and competition so they can develop pride in their abilities and soccer skills". The application also mentions "physical fitness" and diversion from exposure to "anti-social behaviour". But these are clearly by-products of its main objective, the promotion of soccer. The fact that an activity or purpose happens to have a beneficial by-product is not enough to make it charitable. If every organization that might have beneficial by-products, regardless of its purposes, were found to be charitable, the definition of charity would be much broader than what has heretofore been recognized in the common law.
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> 42. In referring to A.Y.S.A.'s Letters Patent and application to the CRA, I do not wish to leave the impression that the assessment to be carried out is formalistic in nature. That was the only evidence in the record in this case. But the government is entitled and indeed obliged to look at the substance of the purposes and activities of an applicant for registered charity status. Rewriting the objects in the Letters Patent or filing a carefully worded application will not be sufficient. The organization, in substance, must have as its main objective a purpose and activities that the common law will recognize as charitable. Examples of sporting activity that the government acknowledges would be charitable include therapeutic horseback riding for children with disabilities, or sports camps for children living in poverty. In these examples, the objectives are ones well established as charitable.

43. **In *Vancouver Society*, Iacobucci J. for the majority found that it is imperative to preserve the distinction that the ITA makes between charitable and non-profit organizations. Although it might be tempting to consider any non-profit activity for social welfare to be charitable, the ITA clearly anticipates that not all non-profit social welfare activities will be charitable. This signals that the scheme of the ITA does not support a wide expansion of the definition of charity. The concern expressed in *Vancouver Society* to maintain the distinction between non-profit and charitable organizations, also informs the present appeal.**

44. Finally, it is necessary to consider whether what is proposed is an incremental change. A.Y.S.A. argues that as some sporting organizations are already charities, it would be incremental to broaden charitable status to youth amateur fitness sports. The government submits that 21 percent of all non-profit organizations in the country are sports and recreation organizations, and that the potential recognition of these organizations as charities could have a significant impact on the income tax system. I agree with the government that this would seem to be closer to wholesale reform than incremental change, and is best left to Parliament. While it may be desirable as a matter of policy to give sports associations the tax advantages of charitable status, it is a task better suited to Parliament than the courts. In this regard, I note that in the United Kingdom, the charitable status of "the advancement of amateur sport" was brought about through statute (Charities Act 2006 (U.K.), 2006, c. 50, s. 2(2)(g)). As stated by the majority in Vancouver Society, substantial change in the definition of charity must come from the legislature rather than the courts.