

## CHAPTER 14

### THE PURPOSE TRUST: SHOULD IT BE EXTENDED TO NON-CHARITABLE PURPOSES?

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### 1. INTRODUCTION

In chapter 13 the Commission canvassed the reasons the state has had historically for restricting access to the purpose trust. One might wonder whether there is any reason today to restrict access to the purpose trust to purely charitable purposes when one considers that access to entities having perpetual succession is nearly a matter of right in the case of non-charitable purpose corporations. The answer lies, in our view, in the fact that the Crown, in its *parens patriae* jurisdiction, and the courts, exercising their equitable jurisdiction, will take measures to enforce these trusts and in the fact that the courts, also in their equitable jurisdiction, will take measures to ensure their long-term viability. The directors of a non-charitable corporation, although constrained by the objects of the corporation, cannot be forced to pursue them by the Crown or the courts;<sup>1</sup> viability of the corporation is ensured primarily by an interested membership. Hence, access to the purpose trust form might still be restricted on the basis that it offers considerable state-sponsored enforcement and viability advantages. To understand why the form is available to charity, we would have to look at why charity might be preferred to other purposes. This was in part the object of the

discussion in chapter 13. The Commission's concern in this chapter is whether the form, or variations of it, should be made more widely available. Our view, set out more fully in what follows is that, as such, the purpose trust should not be made available to non-charitable purposes, but that other devices of nearly equivalent value should be designed and implemented by statute. The key differences between these other devices and the charitable purpose trust are that, first, with these other devices the state is co-opted into enforcement or viability interventions only when there is a valid state interest in becoming involved; and, second, with these other devices, when the period of viability has ended, the remaining property is returned to the disponent instead of being applied *cy-près*.

However, law reform commissions in Manitoba<sup>2</sup> and British Columbia<sup>3</sup> have recently recommended that the exclusively charitable condition be dropped and that the availability of the purpose trust be extended to all purposes. Leading scholars in the law of trusts<sup>4</sup> have recommended likewise, and several jurisdictions, most notably Quebec,<sup>5</sup> Bermuda,<sup>6</sup> California,<sup>7</sup> and Liechtenstein<sup>8</sup> have moved forward with legislation. These developments in other jurisdictions require careful consideration.

## **2.THE PROPOSAL CONSIDERED AND REJECTED**

Under the schemes adopted or recommended for adoption in these jurisdictions, a new institution, the non-charitable purpose trust, is created. The legislation and proposals for legislation address the question of enforcement in slightly different ways. Under the Bermudian legislation and Manitoba proposal, enforcement rights and obligations are given to a third party, called the "enforcer". Where initially or subsequently the office of enforcer is or becomes vacant, such persons as may be allowed by the court, including the trustee, the settlor, the owner of a residuary interest, and persons who derive a direct or tangible benefit from the trust, may apply to have the court appoint a replacement. Likewise, where the enforcer is not fulfilling his or her duties to enforce the provisions of the trust using due diligence and care, these same persons may seek the removal of the enforcer. Under the British Columbia proposal, there is no "enforcer". Rather, the Attorney General, the settlor, the trustee, or any person "appearing to have a sufficient interest in the matter" is empowered to apply to the court for enforcement of the trust.<sup>9</sup> The proposals and legislation also extend the benefit of certain of the other privileges to this new institution scheme-making, initial and supervening *cy-près*, and perpetual existence.<sup>10</sup> In the contemplation of these legislative schemes, then, there is a much expanded role for the state in the pursuit of non-charitable purpose trusts.

There are basically two sets of arguments advanced to support the extension of validity of some sort to non-charitable purpose trusts. First, it is argued that there are many worthy purposes that do not come within the common-law definition of charity but are, arguably, worthy of public support. One author has said, for example: "It would seem unjustifiable to deny a donor the ability to assist goals and causes which benefit society and sorely need funding, such as protection of the environment."<sup>11</sup> Of course, it is not a prohibition against funding these other worthy causes with which we are concerned; it is only endowment funding that is restricted due to the unavailability of a non-charitable purpose trust. The British Columbia Law Reform Commission in its report is also careful to emphasize that it is the benefits of endowment-type funding that are sought,<sup>12</sup> and these are sought for the benefit, in its

view, of "philanthropic" purposes. Professor Waters has argued that there may be other sorts of purposes that are of benefit to the public besides those which may be called philanthropic. He describes in detail the use of a purpose trust to help fund the performance of a mining company's obligation to clean up a mine site once the mining is completed. Under the scheme he describes, a percentage of the mining profits are put aside at regular intervals, saved, and invested, then repaid to the mining company, as the obligation to clean up the site is performed.<sup>13</sup>

A second argument supports the creation of such an institution on the basis that it enhances the freedom of property owners to dispose of their property. Certainly, the common law's categorical prohibition frustrated the unobjectionable intentions of many disponers. However, enhanced freedom for one person often entails increased restraints on another. The law has always been careful to balance the two interests in the form of doctrines such as the perpetuities rules, preferences for early vesting, and the doctrine of repugnancy. The argument, therefore, must be an argument for *relatively* greater freedom for property owners to control economic resources after their death.

The risks or costs of making any concessions to the non-charitable purpose trust and the arguments against adopting such an institution may be presented in the form of responses to the two arguments in favour. First, if the critique is that the common-law definition of charity is too narrow, then that may be answered, perhaps only partially, by an appropriate widening of the definition, one that is in accordance with our suggestion in chapters 6, 7, and 8. The critique which generates the proposal is a critique of the definition, but the proposal goes much further than is justified by the critique and results in validating such trusts, "as trusts for the purposes of the liberal party", trusts "for the maintenance of my ant collection", and trusts "for the purpose of educating my heirs"; and all this, in the proposals of some, in perpetuity, if the disponer so desires. Second, if the criticism is that legitimate desires of disponers are frustrated by an unduly restrictive common-law rule, then the response is not necessarily the creation of a right to establish a purpose trust. There are measures much short of this, such as the ones we suggest in what follows, which address the problem without engaging the state or the courts unduly in the execution of the idiosyncratic intention of disponers.

Our preference, then, is for a middle course, one which makes appropriate concessions to the arguments in favour, but one which also recognizes that the peculiar characteristics of the purpose trust are, as a package, appropriate only where the disponer's act is charitable or where the state is otherwise amenable to taking on the obligations imposed on it to ensure viability and enforcement. Our method in what follows is to canvass three models of partial viability available under the current law and, in the case of the last two, suggest substantial statutory improvements. We then revisit the special case of non-charitable public appeals and, finally, conclude with a recommendation in favour of permitting the government through the proposed Nonprofit Organization Commission (NOC) to approve certain public benefit non-charitable purpose trusts on a discretionary basis.

### **3.ENFORCEABLE AND UNENFORCEABLE CONTRACTUAL UNDERTAKINGS**

Here, we explore the possibility of a disponent achieving some or all of the effects of a valid purpose trust through the institutions of contract law. We apply the insights achieved in this exercise in the design of the reforms suggested below in sections 4 and 5.

One way to achieve a viability of sorts is to avoid the application of the beneficiary principle by the disponent drafting an instrument a "contract" that creates an arrangement just short of a trust. On one variation of this approach, the disponent would rely solely on the honesty and good faith of the person "the promisor" to whom his or her property is conveyed. Under this variation, the promisor makes a legally unenforceable promise to apply that property in a particular way. On another variation, a right to enforce the promisor's promise is granted in the contract to the disponent or to anyone else he or she might designate compendiously, "the promisee". The key characteristic of this approach, on either variation, is that the state (including the courts) remains neutral *vis-à-vis* the promisor's undertaking, intervening, in the second variation only, at the suit of the promisee who would be seeking to enforce his or her own contractual rights.

The first variation requires no legislative modification of the law. To avoid the application of the doctrine that voids non-charitable purpose trusts, the disponent need only use precatory words in the contract. When the promisor takes the property under the contract, he or she takes with no legal only a moral obligation to spend the fund in any particular way. Although in theory this arrangement is currently available, it may be difficult to create, since the precatory words used by the disponent may easily slip into the language of obligation, betraying an intention to create a purpose trust. Further, given the difficulties inherent in the interpretative exercise, courts might prefer that the gift fail rather than fall unencumbered by any legal responsibilities into the hands of the promisor. Nonetheless, with careful drafting, this arrangement is currently available. The beneficiary principle is not abolished, merely avoided. There is, interestingly, precedent for this arrangement under the old Quebec law of trusts.<sup>14</sup>

If the second variation is desired, then all that is required is the possibility in law of the promisee having a right to enforce the promisor's promise. This too, however, may already be permissible. The beneficiary principle, it could be argued, may defeat this approach since a court could well say that this contract is really a non-charitable purpose trust and, therefore, void. However, careful drafting by the disponent's lawyer should be able to prevail.

Under this second arrangement, it is difficult for the disponent to control the use of the property for long periods into the future, since his or her control, ultimately, extends only so far as others are willing to do his or her bidding, either by pursuing the purposes or pursuing those who are to pursue the purposes.<sup>15</sup> This arrangement would attract the application of contract law (as opposed to trust law) doctrines relating to certainty. Proprietary protection might be afforded by the disponent taking a security right over the property in his or her favour or by making the transfer of the property conditional on fulfillment of the promise. Finally, since the promisee, apparently, suffers no loss on a breach of the promise to pursue the purpose, he or she might have to seek specific performance of the promise or, perhaps, attempt to enforce a subsidiary promise to return the property or its value if the primary promise is breached. Nevertheless, whatever the modalities and this is the key point this

arrangement does not entail any state expenditure or involvement beyond what is generally provided to the enforcement of promises.

There are other permutations. It has been useful to explore these two to this limited extent. This exploration gives rise to two observations. First, achieving either variation requires little or no legislative modification of the law, although to enhance the level of certainty in the law, we recommend below in sections 4 and 5 that portions of the approach be codified.<sup>16</sup> Second, and more important, to the extent that this solution, on either variation, is thought deficient by the proponents of the non-charitable purpose trust, that deficiency must arise from the absence of a state role in the pursuit of the disponent's purposes, either through enforcement or ensuring viability. However, it is precisely that role which the proponents of the non-charitable purpose trust cannot justify.

#### **4. SECTION 16 OF THE *PERPETUITIES ACT*: THE NON-CHARITABLE PURPOSE TRUST AS A POWER**

Another middle course is currently pursued in section 16 of the *Perpetuities Act*.<sup>17</sup> This section, at least partially, addresses the criticism voiced against the common law that the evident and laudable intentions of many disponents are frustrated too frequently by an unduly restrictive common-law doctrine which declares void non-charitable purpose trusts. Section 16 validates non-charitable purpose trusts, but as powers not as trusts, in the following language:

16.(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised ... within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but in case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or person's, or the person or person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital.

Similar legislation has been enacted in other Canadian jurisdictions.<sup>18</sup> Under this approach, there is no obligation in the holder of the power to exercise it, and there are no enforcement or viability advantages provided by the state. Enforcement of the power can only be "negative" in the sense that those who take upon a failure to exercise the power may restrain its improper exercise, but they have no standing and no material interest in seeking to ensure that the power is exercised.<sup>19</sup>

There are a number of serious difficulties with the section 16 approach. In what follows, we suggest a number of substantial reforms to it, some of which are derived

from the discussion above in section 3. The end result is a legal institution which is no longer exclusively characterizable as a power and which is similar in substance to the non-charitable purpose trust recommended by others, but which falls short of that institution by not involving the state or the courts unnecessarily in enforcement or viability measures and by requiring, in general, that the property be returned to the disponent or his or her estate once the period of viability has ended. The new institution has the proprietary characteristics of a trust (which, arguably, the device described in section 3 has as well), but in order to clarify that it is not a full-fledged *purpose* trust, it may be better, for the purpose of discussion, to refer to it as a "fund" or a "section 16 trust", and to the persons who control it as "administrators" or "section 16 trustees".

Now we examine the difficulties with section 16.

First, it is unclear why, if the section is intended to address all aspects of the non-charitable purpose trust problem, it is included in the *Perpetuities Act*. This placement gives the impression that it is only the indestructible trust problem that is being addressed, but of course, the language of the section clearly addresses the problems presented by the beneficiary principle, the certainty principle, and by the situations in which initial and supervening *cy-près* are relevant.<sup>20</sup> The fact that the provision has such a significant impact on trust doctrine argues in favour of moving the provision from the *Perpetuities Act* into the *Trustee Act*.<sup>21</sup> We recommended as much in our previous report.<sup>22</sup>

Second, section 16 is drafted to address the non-charitable purpose trust problem with only the testamentary disposition in mind. Its orientation should be more general and include and address all situations where a fund is sought to be devoted to a non-charitable purpose.

Third, if the orientation of the new provision is made more general, then the new provision should also identify more precisely who may enforce the administrator's duties and whether the right to enforce those duties is "positive" or "negative" or both. In our view, positive enforcement should be available to anyone to whom a promise to pursue the relevant non-charitable purpose has been made, our "promisee" in the discussion above in section 3. There will usually be no such person in the case of a testamentary disposition hence the preference in section 16 to construe the trust as a power but where funds are raised by public appeal to support a non-charitable purpose, for example, all donors are promisees and they should be entitled to enforce the promise made by the administrator to apply the funds raised to the particular non-charitable purpose. Where there are no such promisees, this should only be a negative enforcement power in those who take the residue.

A fourth problem concerns the issue of certainty of purposes. Where the purposes are entirely uncertain, in our view, the fund should simply fail. Where some of the named purposes are certain and some are not, and the administrator is given a discretion to choose freely among the purposes, then the administrator should be permitted to choose among the set of certain purposes, and the uncertain purposes should be void.

A fifth difficulty concerns the restrictiveness of the twenty-one-year limit on duration. Professor Waters argues that this number "might just as well have been produced by

the process of "think-of-a-number".<sup>23</sup> The number derives from the common-law perpetuity period of a life in being plus twenty-one years, which in the case of purpose trusts would almost always have been twenty-one years. The number has been enacted in all but one of the reforming statutes in Canada. Professor Waters has suggested that the period should be extended to forty years. He also suggests a discretion in the court to extend the period beyond the forty-year period where the section 16 trust maintains its utility. This suggestion is based on a very fine but nonetheless valid distinction between requiring a finding that the section 16 trust objects remain useful and requiring a finding that the property should be applied *cy-près* in a particular way because the purposes are impracticable or impossible.

Before resolving this issue, it is important to look once more at the sorts of situations in which section 16 trusts can be created and the reason why a period of limited duration is imposed. These trusts may arise in wills, in trust deeds, and in public appeals, and they can be the expression of everything from whimsical intention to a serious and socially beneficial purpose. If continued viability ought to be a function of continued private interest, as we would argue, imposing a short period of duration is one way to ensure that the people associated with the founding of the section 16 trust are still alive to ensure its viability. Looked at in this way, the restrictive period is intended both as a perpetuity period aimed at addressing issues relating to limiting the disponent's power of control and enhancing the alienability of property, as well as an estimate of the period of interest in the viability of the section 16 trust into the future. In the case of whimsical section 16 trusts, the heirs who take after the twenty-one years are at least available to ensure that the trust property is not spent on anything other than proper purposes. In the case of a section 16 trust to fund the further training of members of a union in perpetuity, for example, the purpose is viable so long as the union exists and is vital, which may well be decades. This suggests to us that the solution is to select a reasonably short period of initial validity of twenty-one years, and if the section 16 trust, although not charitable, has socially redeeming qualities, the NOC be empowered to extend the period of validity beyond the perpetuity period. To that end, the trustees of such trusts will need statutory authority to negotiate with the NOC to convert what is a section 16 trust (or, perhaps, a *Re Denley's* trust as discussed below in section 5 into a purpose trust whose period of viability extends beyond the perpetuity period. Such authority should allow the section 16 trustee to negotiate in such a way so as not to exceed any aspect of the disponent's intentions.

A sixth difficulty concerns the treatment of the section 16 trust where there is an initial or supervening impossibility or impracticability. We recommend that a revised section 16 make continued practicability and possibility a condition of viability.

Finally, there is the question of what should happen to the property remaining after the period of viability, as extended, has expired. The case of non-charitable public appeals may require special consideration and we return to it below in section 6. Otherwise, we recommend two solutions. Where the section 16 trust is part of an imperfect charitable trust, any funds remaining should be applied *cy-près* to the charitable purposes. We have already suggested this in our 1984 report.<sup>24</sup> Where it is not, the treatment afforded under the current law that is, section 16(2) is, in our view, correct: the property should be dealt with as it would have been had the disposition been void from the outset.

## **5. THE *RE DENLEY'S* TRUST: A NON-CHARITABLE PURPOSE TRUST WITH INDIRECT BENEFICIARIES**

The *Re Denley's* purpose trust, according to Lord Goff, is not exempt from the certainty requirement. It also attracts none of the enforcement privileges extended by the state to charitable purpose trusts, but it is enforceable by the indirect beneficiaries. It is subject to the rule against indestructible trusts and, presumably, the rule against remote vesting. It is not clear whether the *cy-près* doctrines apply to it. The reasoning in the *Re Denley* decision<sup>25</sup> itself would seem to indicate that the *cy-près* doctrines are not available, since Lord Goff emphasizes the fact that the trust is not charitable in holding that it is subject to the certainty requirement. Thus, if the purpose in such a trust is or becomes impracticable or impossible, there is no jurisdiction in the court to modify the purpose to make it viable once again. If either of these contingencies arises, it is, therefore, an open question what becomes of the property. In the worst case scenario, it would merely linger, subject to the (now impracticable or impossible) trust for the non-charitable purpose, until the gift over takes effect. There must, in any event, be a gift over that takes effect within the perpetuity period, otherwise the gift is void for breaching the rule against indestructible trusts. Lord Goff did not address these questions since the gift in *Re Denley's* explicitly limited the duration of the trust to the perpetuity period and also explicitly dealt with the possibility of the purpose being or becoming impracticable or impossible.

We recommend that the *Re Denley's* trust be revised and codified in a new *Trustee Act* in substantially the same way as the reforms to the section 16 trust. Thus, the revisions should be as follows. First, the right to enforce these trusts should be extended to the disponent and his or her personal representative. Second, where there are certain and uncertain trusts contained in one disposition, and the trustee's power is entirely discretionary, then only the certain ones should be valid. Third, the *Re Denley's* trust should be available even if it is created in a way that breaches the rule against indestructible trusts. Where that rule is breached, however, the trust should be deemed viable for a period of twenty-one years only, and only if the court is of the opinion that declaring the trust valid more closely approximates the disponent's intention than declaring it void. Fourth, as soon as the trust becomes impracticable or impossible, its period of viability should cease. Fifth, once the period of viability has ended, any remaining property should be treated in the same way it would have been treated had the trust been invalid from the outset, *unless* the disponent has provided for a gift over in favour of a person or a charitable trust. Where there is an element of public benefit to the trust and where the NOC agrees, as discussed above in section 4, a different viability period should apply. The reform and codification of the section 16 trust and the *Re Denley* trust could take the form of a single provision by ensuring that the right to enforce the trust is in the promisee *or* in any indirect beneficiary, as defined in *Re Denley*. We will, however, continue to refer to them separately.

## **6. PUBLIC APPEALS FOR NON-CHARITABLE PURPOSES**

Often, moneys raised through a public appeal for funds are raised for a purpose that is not charitable. Therefore, such funds are not held pursuant to a valid purpose trust. This difficulty is now addressed by section 16 of the *Perpetuities Act* and in some instances by the *Re Denley's* trust. As already discussed, section 16 treats the funds as being held subject to a power, and if our reform proposal is implemented, the donors

and their representatives would have standing to complain when the funds have been misspent. The purpose, under our recommendation, would have to be specific or certain, and the section 16 trust is and would continue to be valid for only twenty-one years. Similarly, where there are indirect beneficiaries of the non-charitable public appeal purpose trust, under our recommendation there would be analogous statutory provisions creating a modified *Re Denley's* trust. The only remaining issue to be addressed is the treatment of the non-charitable public appeal funds in the case of initial and supervening impracticability or impossibility and in the case where the period of viability has otherwise expired. There are three possible approaches: (a) apply a doctrine analogous to the *cy-près* doctrines; (b) treat the property as *bona vacantia*; or (c) treat the property as though the initial gift was void, as we suggested above for the usual case. This question arises for consideration because returning the property to the donors in these situations is highly problematic from a practical standpoint since they are often difficult to identify and locate. Therefore it may seem that (c) is not a sound approach.

We examine each of the possibilities in turn and in the end opt for a combination of the principles underlying (b) and (c). In our 1984 report,<sup>26</sup> we recommended (a), but have changed our view because we now see no real distinction among the different types of reformed section 16 or *Re Denley* trusts they are all non-charitable and therefore all equally worthy or unworthy of state aid; and because, since the publication of our 1984 report, the Legislature has enacted the *Unclaimed Intangible Property Act*,<sup>27</sup> which establishes a comprehensive regime for the treatment of unclaimed property. The latter point is relevant in the case of public appeals, of course, since as stated, in many cases it will not be possible to identify or locate the donors to the public appeal.

#### **(a) *Cy-près* Approach**

One difficulty in designing a *cy-près* doctrine for these situations is defining a test similar to the general charitable intention test to determine whether the donor's wishes over all are best implemented by applying the gift *cy-près* or by allowing the gift to fail and revert to him or her, or to his or her estate. The doctrine would also have to specify what sorts of alternative purposes were eligible for selection: should the new project, for example, be as close as possible to the old, or should it be that *and* charitable? Under the *cy-près* doctrine, the first issue is addressed by asking whether there is a general intention of the requisite kind; in our 1984 recommended reform, the existence of such an intention would be presumed. That approach, it seems to us, may work in most non-charitable public appeal type situations. The fact that donors to a public appeal remain anonymous or contribute to a fund to which the vast majority of donors are anonymous is strong evidence of an intention to give not just to that purpose, but absolutely.<sup>28</sup> Our recommendation in the 1984 report, therefore, was that this sort of fund should be eligible for *cy-près* treatment.<sup>29</sup> If so, the second question arises: what purposes are eligible for selection? Should the court attempt to design a project as close as possible to the initial project, no matter how personal, private, or whimsical; or should there be some public value to the project, given the state's co-option in its implementation? Again, for public appeals the answer is relatively easy since the appeal will invariably be for a purpose that has some public value even though it is not recognized (by hypothesis) as charitable. We recommended that in the case of public appeals the fund be applied *cy-près*, but in

order to guarantee the existence of a rationale for state involvement, it should be applied *cy-près* to a purpose that is charitable.<sup>30</sup> This is one of several minor concessions to the viability of the non-charitable purpose trusts that we recommended in 1984, but as stated, that we no longer recommend.<sup>31</sup>

### **(b) *Bona Vacantia* Approach**

The second approach is to treat the property as *bona vacantia* on the basis that since the donor's intention was to abandon all property interest in the donated sum, there is no owner.<sup>32</sup> In support of this approach, it has been argued by some that the intention to give up all property interest and the intention to benefit other purposes in the event that the stated purpose becomes impracticable, impossible, or non-viable are distinct, and the existence of the first does not entail the existence of the second. Therefore, we argued, it is artificial to seek any *cy-près* application of such funds on the basis that such application is in furtherance of the disponent's intention.<sup>33</sup> Treated as *bona vacantia*, however, there still remains the decision of what to do with the funds. Should the funds fall into the consolidated revenue fund, or should the Crown exercise a prerogative *cy-près* power, as it would do in the case of failed gifts to charity unmediated by a trust? In other words, granting some validity to the distinction between the intention to abandon and an intention to benefit some more general purpose, what is the Crown to do with the funds? We were of the view that the application of the funds *cy-près* is likely to be closer to the wishes of most donors most of the time than allowing the donated funds to fall into the consolidated revenue fund as a voluntary tax.<sup>34</sup> We are now of the view that if the donor no longer takes an interest in the disposition of the property, then state purposes supported by the consolidated revenue fund are as valid as any *cy-près* charitable purpose, and the time and expense devoted to keeping the section 16 trust or *Re Denley* trust alive is not worth it.

### **(c) Return of Property to Donor Approach**

The third approach is to argue that the property should revert to the donor. Our current view is that, provided donors can prove they are donors, they should be entitled to have their donations back, on a proportionate basis and after legitimate expenses have been taken into account. A procedure to manage the return of these moneys indeed of all moneys held under a section 16 or *Re Denley's* trust should be established by statute. The statute would state that such funds are held in trust for the donors and provide that the trustee is obliged to take reasonable measures to notify the donors and return the money. If, within a specified time period the money is not reclaimed, it should be treated as unclaimed intangible property and dealt with under the *Unclaimed Intangible Property Act*.<sup>35</sup> That statute currently provides for a five-year period before beneficial interests in trust property become "unclaimed" under the Act.<sup>36</sup> This clearly is too long for the situations under consideration here. We suggest two years.

As an additional measure, the *Unclaimed Intangible Property Act* might also be amended to permit the NOC to apply such section 16 and *Re Denley* trust funds to some public purpose, other than the consolidated revenue fund, in trust, under the "public trust" provisions to be suggested below in section 7. Several such funds might be established, for example, to fund education projects in the charity sector or for

disaster relief. The value of this approach is the flexibility it gives the state with respect to the particular projects pursued, their size (several such funds could be consolidated), and scope, while respecting somewhat the benevolent intentions of donors.

## **7.PUBLIC BENEFIT TRUSTS**

As a final reform measure, there should be a power in the NOC to adopt specific or general regulations establishing the viability of non-charitable purpose trusts that are, in its opinion, of sufficient public benefit to warrant state participation in their enforcement and viability. As purpose trusts, these trusts should be subject to the charitable purpose trusts rules set out in the proposed new *Trustee Act*, including the rules governing status registration, reorganization, and dissolution.

## **8.CONCLUSION**

Our solutions do not require the involuntary involvement of the state in the enforcement of private purpose trusts, and courts are not co-opted into ensuring viability where there is no public interest in doing so. Long-term existence is also generally a function of continued private interest. We believe this is the best policy, and that it would be a misallocation of public resources if all non-charitable purpose trusts were treated as viable. However, we emphasize that a major part of our argument in support of this position is that the common-law definition of charity requires substantial judicial reform.

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### **Endnotes:**

[1](#)

See, for example, H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts*, 2d ed. (Sydney: Law Book Co., 1990), at 818, where it is suggested that this difference between the two forms makes the charitable purpose trust a more attractive form of organization for foundations.

[2](#)

Manitoba Law Reform Commission, *Non-charitable Purpose Trusts* (Report No. 77)(Winnipeg: Queen's Printer, 1992)

[3](#)

Law Reform Commission of British Columbia, *Working Paper on Non-Charitable Purpose Trusts* (Vancouver: Ministry of Attorney General 1991), and Law Reform Commission of British Columbia, *Report on Non-Charitable Purpose Trusts* (Vancouver: Ministry of Attorney General, 1992) (hereinafter referred to as "B.C. Report").

[4](#)

See D.W.M. Waters, "The Role of the Trust in Environmental Protection Law", in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993) 383, and P.C. Hemphill, "The Civil-law Foundation as a Model for the Reform of Charitable Trusts Law" (1990), 64 Aust. L.J. 404. See, also, S. Bright, "Charity and Trusts for Public Benefit" Time for a Re-Think?", [1989] Conv. 28; P.A. Lovell, "Non-charitable Purpose Trusts Further Reflections" (1970), 34 Conv. (N.S.) 77; L. McKay,

"Trusts for Purposes Another View" (1973), 37 Conv. (N.S.) 420; and J.W. "Trust, Power and Duty" (1971), 87 Law Q. Rev. 31.

## 5

The new *Civil Code of Quebec* recognizes two kinds of perpetual trusts. The first, referred to in art. 1268, was a private trust is "created for the object of erecting, maintaining or preserving a thing or of using property appropriated to a specific use...for some...private purpose". The second, referred to in art. 1270 and called a social trust, is "constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purposes". Under the new Code, social trusts and private trusts may be constituted in perpetuity. They are subject to a supervisory jurisdiction, to be specified in an as yet unenacted statute, and to supervision by the settlor. Note that the essential characteristic of the social trust is that it be for a purpose that is of general interest. This may or may not be similar in meaning and scope to the "public benefit" of the common law.

## 6

*The Trusts (Special Provisions) Act, 1989* (Bermuda). See A.R. Anderson, "The Statutory Non-Charitable Purpose Trust: Estate Planning in the Tax Havens", in Waters, *supra*, note 4, at 99.

## 7

*California Probate Code*, Cal. Stats. 1990, c. 79, § 15203. See, also, California Law Reform Commission, *Recommendation Proposing the Trust Law* (1985).

## 8

Liechtenstein Law of Trust Enterprises, April 10, 1928.

## 9

B.C. Report, *supra*, note 3, App. A, s. 44(10) of the draft legislation

## 10

With respect to scheme-making, the proposal in Manitoba Law Reform Commission report, *supra*, note 2, provides:

103.(1) Where a non-charitable purpose trust has a purpose that is certain and the trust

(a) does not state a method to achieve that purpose, a court may order the use of the method that, in its opinion, fulfills the intention of the creator of the trust;

(b) states an unclear method to achieve that purpose, a court may order any clarification of the method that, in its opinion, fulfills the intention of the creator of the trust; or

(c) states a method to achieve that purpose and that method is or becomes impossible, impracticable or obsolete, a court may revoke that method and order the use of another method to achieve that purpose.

....

(3) A court acting under clause (1)(c) is not obliged to substitute a method that is similar to the original method.

The proposal in the British Columbia Law Reform Commission Working Paper proposal, *supra*, note 3, App. A, repeals and substitutes s. 44 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224. The draft legislation provides:

44.(5) Subject to subsection (8), the court may vary a non-charitable purpose trust by analogy with the doctrine of *cy-près* as if it were a charitable trust

(a) through substitution of a purpose that is as similar to the original purpose of the trust as is reasonably practicable, and

(b) if the court is unable to find a purpose that is reasonably similar to the original purpose of the trust, through substitution of a purpose that is not contrary to the spirit of the original settlement.

(6) Subject to subsections (7) and (8), the court may vary a non-charitable purpose trust by approval of a scheme substituting a new purpose for the trust that is not contrary to the spirit of the original settlement if the court is of the opinion that the purpose of the trust is obsolete, or no longer useful or expedient, due to a change in circumstances since the creation of the trust.

On the perpetual existence point, the British Columbia's proposal provides:

44.(4) The rule of law limits the time during which the capital of a trust may remain unexpendable to the perpetuity period under the rule against perpetuities does not apply to a non-charitable purpose trust.

#### [11](#)

Anderson, *supra*, note 6, at 101.

#### [12](#)

B. C. Report, *supra*, note 3, at 29-32.

#### [13](#)

Waters, *supra*, note 4.

#### [14](#)

The charitable trust under the *Civil Code of Lower Canada* was similar in form to the "trust" described in the text. In *Valois v. de Boucherville*, [1929] S.C.R. 234, [1929] 3 D.L.R. 801, the Supreme Court of Canada held valid a charitable purpose trust even though the disponent expressly exempted her trustee from rendering any account of her trusteeship and even though the Court found that there was no inherent jurisdiction in the Superior Court of Quebec to enforce or supervise the trust. See, also, *Sabatier v. Royal Trust Co.*, [1978] C. S. 954, 2 E.T.R. 308 (Que. S.C.).

#### [15](#)

The use of corporations as promisor and promisee may aid in this quest for perpetual existence.

#### [16](#)

In *Conservative & Unionist Central Office v. Burrell (Inspector of Taxes)*, [1980] 3 All E.R. 42 at 62-63 (Ch.D.); aff'd [1982] 1 W.L.R. 522, [1982] 2 All E.R. 1 (C.A.), Vinelott J. presented the following similar argument:

Suppose that an explorer were to invite subscriptions to a fund to finance an expedition to explore some unexplored area of the world. That would clearly not be a charitable purpose and there is no unincorporated association which can be conjured up as the owner of the subscribed fund. Counsel's submission for the Crown, if well founded, would lead to the conclusion that either the subscribers would remain the beneficial owners of the moneys subscribed, the explorer having no more than a revocable mandate to use them for the stated purpose, or alternatively the subscribed fund would belong beneficially to the explorer who would be free to abandon the exploration and spend the moneys on himself. Counsel for the Crown frankly accepted that this consequence follows from his argument and said that the latter alternative is the correct one. The law would be in a very sorry state if it were so, but I do not think it is. It appears to me that if someone invites subscriptions on the representation that he will use the fund subscribed for a particular purpose, he undertakes to use the fund for that purpose and for no other and to keep the subscribed fund and any accretions to it (including any income earned by investing the fund pending its application in pursuance of the stated purpose) separate from his own moneys. I can see no reason why if the purpose is sufficiently well defined, and if the order would not necessitate constant and possibly ineffective supervision by the court, the court should not make an order directing him to apply the subscribed fund and any accretions to it for the stated purpose. The example I have given would probably not meet these criteria, but it is not difficult to imagine a case where a fund was subscribed for a purpose which would meet these criteria, for instance, a fund raised by subscription for immediate distribution to a class of person who were not objects of charity, the subscriptions being invited on terms which did not give rise to any private trust. There appears to me to be a clear analogy between an invitation to subscribe to a fund on a representation that it will be used for a particular purpose and a third party contract of the kind considered in *Beswick v. Beswick* [1967] 2 All ER 1197, [1968] A.C. 58. However, apart from the possible remedy of specific performance I can see no reason why the court should not restrain the recipient of such a fund from applying it (or any accretions to it such as income of investments made with it) otherwise than *[sic]* in pursuance of the stated purpose. If that is so, then it appears to me that the recipient of the fund is clearly not the beneficial owner of it and that the income of it is not part of his total income for tax purposes. Equally, whilst the purpose remains unperformed and capable of performance the subscribers are clearly not the beneficial owners of the fund or of the income (if any) derived from it. If the stated purpose proves impossible to achieve or if there is any surplus remaining after it has been accomplished there will be an implied obligation to return the fund and any accretions thereto to the subscribers in proportion to their original contributions, save that a proportion of the fund representing subscriptions made anonymously or in circumstances in which the subscribers receive some benefit (for instance, by subscription to a whist drive or raffle) might then devolve as bona vacantia.

## [17](#)

R.S.O. 1990, c. P.9.

## [18](#)

See *Perpetuity Act*, R.S.B.C. 1979, c. 321, s. 21(1); *Perpetuities Act*, R.S.A. 1980, c. P-4, s. 20(1); *Perpetuities Act*, R.S.N.W.T. 1988, c. P-3, s. 17(1); and *Perpetuities Act*, R.S.Y. 1986, c. 129, s. 20(1). This partial solution was inspired by the American Law Institute, *Restatement (Second) of Trusts* (Washington, D.C.: 1957), §124, and was first recommended for adoption in Canada by the Ontario Law Reform Commission, *Report on the Rule Against Perpetuities* (Toronto: Ministry of Attorney General, 1965).

## [19](#)

As the B.C. Report, *supra*, note 3, at 35-37, points out, however, it is not clear whether s. 21 of the B.C. *Perpetuity Act*, *supra*, note 18 (the equivalent of s. 20 of the Ontario *Perpetuities Act*, *supra*, note 17) intends that the trust be treated as a trust or a power or a trust power, that is whether it gives rise to an obligation in the trustee to execute (a trust or trust power) or not (a power), since the section says that "the trust is valid". In our view, the statutory language is better interpreted as creating a power. If our

proposals concerning the non-recognition of non-charitable purpose trusts is accepted, then this statutory language should be clarified.

[20](#)

The beneficiary principle is addressed by permitting non-purpose trusts to exist as powers. Certainty is addressed in the opening phrase which requires that the non-charitable purposes be "specific". And the *cy-près* issues are circumvented through the technique of creating a permission, as opposed to an obligation, to spend, so that if the specific non-charitable purpose is or becomes impracticable or impossible, there is no insurmountable problem because the money does not have to be spent anyway, and if it is not spent by the end of the 21-year period, it reverts to those who would have been entitled had the trust been invalid from the outset. See *Wood v. R.*, [1977] 6 W.W.R. 273 at 281, *sub nom. Re Russell* 1 E.T.R. 285 at 301 (Alta. T.D.): "The...Act does not remedy only the perpetuities problem." See, also, *L.I.U.N.A., Local 537 Members' Training Trust Fund v. R.* (1992), 47 E.T.R. 29 at 49, 92 D.T.C. 2365 at 2373 (Tax Ct. Can.), to the same effect. In *Wood v. R.*, *supra*, it will be recalled, it was held that what was required by "specific" was "conceptual" certainty or "linguistic or semantic certainty". We agreed with this approach in Ontario Law Reform Commission, *Report on the Law of Trusts* (Toronto: Ministry of Attorney General, 1984), at 452-53, and recommended that the word "specific" be defined accordingly.

[21](#)

R.S.O. 1990, c. T.23.

[22](#)

*Report on the Law of Trusts*, *supra*, note 20, at 452.

[23](#)

D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 288.

[24](#)

*Report on the Law of Trusts*, *supra*, note 20.

[25](#)

*Re Denley's Trust Deed*, [1969] 1 Ch. 373, [1968] 3 All E.R. 65.

[26](#)

*Report on the Law of Trusts*, *supra*, note 20.

[27](#)

R.S.O. 1990, c. U.1 [to come into force on proclamation].

[28](#)

For an application of this line of reasoning in the context of a charitable appeal, see *Re Welsh Hospital (Netley Fund)*; *Thomas v. Attorney-General*, [1921] 1 Ch. 655, [1921] All E.R. Rep. 170; *Halifax School for the Blind v. Attorney General of Nova Scotia*, [1935] 2 D.L.R. 347 (N.S.T.D); *Re Hillier ; Hillier v. Attorney-General*, [1954] 1 W.L.R. 700, [1954] 2 All E.R. 59 (C.A.), *per Evershed M.R.* *Contra*, see *Re Y.M.C.A. Extension Campaign Fund*, [1934] 3 W.W.R. 49 (Sask. K.B.), and *Re Ulverston & District New Hospital Building Fund*; *Birkett v. Barrow & Furness Hospital Management*

*Committee*, [1956] Ch. 622, [1956] 3 All E.R. 164 (C.A.) (the latter insofar as the known donors were concerned). In some judicial decisions there is even a hint that a distinct doctrine applies to the effect that in the case of charitable public appeals there is no need to find a general charitable intention and that the mere intention to part with the property absolutely is sufficient to attract the application of the *cy-près* doctrines. See Harman J. *in obiter* in *Re British School of Egyptian Archaeology; Murray v. Public Trustee*, [1954] 1 W.L.R. 546, [1954] 1 All E.R. 887 (supervening *cy-près*) and Denning L.J. in *Re Hillier, supra* (initial *cy-près*).

[29](#)

*Report on the Law of Trusts, supra*, note 20.

[30](#)

Similar legislation is in place in Australia. See *Dormant Funds Act, 1942*, Pub. Acts N.S.W. 1824-1957, No. 25; *Charitable Funds Acts 1958-64*, Queensland Stat. 1964, No. 40; *Collection Acts 1966-8* (Queensland); and *Charitable Collections Act 1946-49* (South Australia).

[31](#)

See, generally, M.A. Hickling, "The Destination of the Funds of Defunct Voluntary Associations" (1966), 30 Conv. (N.S.) 117.

[32](#)

See *Re Gillingham Bus Disaster Fund; Bowman v. Official Solicitor*, [1958] Ch. 300, [1958] 1 All E.R. 37; *aff'd* [1952] Ch. 62, [1958] 2 All E.R. 749 (C.A.) for a discussion and rejection of this solution. See *Re West Sussex Constabulary's Widows, Children & Benevolent (1930) Fund Trusts; Barnett v. Ketteringham*, [1971] Ch. 1, [1970] 1 All E.R. 544, for an application of this approach.

[33](#)

See Waters, *supra*, note 23, at 630, and J. Phillips, "The Problem of Surpluses in Funds Raised by Public Appeal" (1990), 9 Philanthrop. (No. 2) 13, at 9.

[34](#)

There are many statutes which apply abandoned or confiscated property to charitable purposes. See, for example, the *Bread Sales Act*, R.S.O. 1990, c. B. 1, s. 9 (3) (this statute was repealed by S.O. 1996, c. 1, Sch. M, s. 70). In many instances the property concerned is perishable.

[35](#)

*Supra*, note 27.

[36](#)

*Ibid.*, s. 4(2).

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