

PART IV

THE CURRENT LAW OF ONTARIO AND PROPOSALS FOR REFORM

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1. INTRODUCTION

In the remaining chapters of this study, we examine the provincial law governing charitable organizations and present proposals for reform. The discussion is divided into two main parts: chapters 13 to 16 deal with forms of organization, and chapters 17, 18, and 19 discuss the supervision of the nonprofit sector in Ontario.

There are two main historical sources for the provincial law the *parens patriae* jurisdiction of the Crown under the Crown prerogative, and the traditional role of courts of equity in the supervision of charitable trusts.¹ The former is a power in the Crown to protect property devoted to charity.² It has now been delegated largely, but not entirely, to the Public Trustee.³ The latter is a general jurisdiction of courts of equity over charitable purpose trusts. Since the latter is the source of the law on the trust form of organization, it is also a source of the privileges that, in part, define that form of organization. There are several subsidiary sources of provincial law; many of the privileges, for example, are statutory in origin, and corporations statutes establish the main elements of the corporations law.

The proposals for the reform that we suggest in this part, like those suggested for the federal laws in Part III, do not constitute a radical departure from the current law. In essence, we agree with the basic policy of the current law and therefore recommend reforms that improve and clarify its execution or modernize it by bringing it into line with developments in other related areas of the law. Our proposals are not based on the assumption that the federal reform that we recommend in Part III are implemented, although the total regulatory framework for charities would be much better if they were. One significant choice we have made is to recommend that the general reporting requirements of charities in Ontario not be increased substantially, even though the current reporting requirement at the federal level is deficient in a number of respects. Similarly, we do not recommend that Ontario adopt a new separate registration system equivalent in scope or intention to the current federal regime, even if elements of the federal regime remain seriously deficient. These improvements must await the decision and action of the federal government.

The dominant regulatory objectives of the provincial law are to facilitate charity by making available to it adequate legal forms, to protect charity from fraud and waste, and to aid in the pursuit of charitable purposes by compelling, in appropriate cases, charitable fiduciaries to fulfil their duties of loyalty and prudence. These objectives,

which are all complementary, are informed by a long-held respect for the work of the sector and for the charitable intentions of donors. Provincial governments are also interested in policing the eligibility of entities for fiscal privileges and in fostering the health of the sector so that it is available to collaborate in the pursuit of government ends. As we suggested several times in the discussion in Part III, these provincial objectives will require a more rigorous level of regulation than that required by the exclusively charitable standard, the foundational regulatory principle at the federal level. However, this heightened interest does not imply that the basic rules will be radically different. On the contrary, in most instances we use the same rules and the same classifications and categories as apply or that we recommend apply at the federal level. Our objective is the complete congruency of provincial and federal regulation. What changes at the provincial level is the organization and mandate of the public administration, the enforcement and compliance techniques, and, to some extent, the targeting of the rules.

We recommend in chapter 17 that a new provincial agency be established by consolidating the operations of the various provincial ministry branches responsible for charities matters. The main justification for this recommendation is to permit a rationalization of resources and an opportunity for greater administrative expertise to develop. We recommend that the agency be established as a quasi-autonomous commission within the Ministry of the Attorney General and that it be called the "Nonprofit Organizations Commission"(NOC). As its name suggests, its mandate will include matters of relevance to the nonprofit sector generally, not just the charities portion of it. The composition, functions, and powers of the NOC will be developed in detail in chapter 17. The point of introducing the recommendation at this juncture is so that we can make reference to it in the following chapters on forms of organizations.

Throughout Part IV, we use the classification of the nonprofit sector which we developed in chapter 9: religious, charitable (which can be divided into social welfare and philanthropic), political, mutual benefit and other, or general nonprofit. In some instances, we recommend that this classification system be used in the new law. Two minor comments are in order at the outset. First, recall that the first two purposes are charitable at common law. The point of our distinction between religious and charitable is not to deny that, and in the chapter on trusts, for example, we do not use the distinction at all. We use it only where we think religious charities ought to be treated differently. Second, federal law, it will be recalled, includes more in the category "charity" than the entities which are classified as charity at common law. Recall that federal "charities" are permitted to make grants to entities "qualified donees" which may not be charitable at common law, and that national amateur sports associations and arts organizations are extended the same advantages as charities. The provincial regime of regulation must accommodate this extended definition, and throughout Part IV, where relevant, we indicate the ways that this should be done.

There arises one final preliminary issue which cannot, due to its complexity, be resolved immediately, but which should be identified at the outset, and respecting which we can give some indication of our general approach to its proper resolution. As will be seen, we envisage the enactment of at least five new statutes, one for each form of organization, one establishing the jurisdiction and constitution of the NOC, and one to regulate fundraising as well as, perhaps, deal with other regulatory issues.

There will be numerous amendments to many other statutes as well. We refer to the NOC statute and the other regulatory statutes compendiously as the "regulatory statutes" in what follows. The difficulty is in devising a principle for the organization and distribution of all the resultant rules. Our general approach will be as follows. The law of organizational form will be concerned principally with the state's interest in facilitating charity through the provision of forms of organization and, to a lesser extent, with enforcing the duties of fiduciaries. The content of the fiduciary duties should be set in the organizational law since the duties are owed to the organization. Since the content of the fiduciary duties will be stated in the organizational law, the organizational law should also specify a role for the NOC in their enforcement. The regulatory statutes will be concerned with the enforcement of the fiduciary duties of charitable fiduciaries by a public agency, establishing the constitution and mandate of that agency, and establishing regulatory regimes on other specific issues. The regulatory classifications used in these statutes will be either the *Income Tax Act's* division of charities into foundations (public and private) and organizations, or the specific subject-matter or activity requiring regulation, such as "gaming" or "fundraising", which do not, it should be emphasized, always pertain exclusively to charities. The regulatory statutes will not, in other words, use categories derived from the law of organizational form. In our view, they should not, and it is one of the major mistakes in the drafting of the *Charities Accounting Act*,⁴ and the *Charitable Gifts Act*,⁵ for example, that these Acts currently do.

2.REFORMING ORGANIZATIONAL LAW

No common-law jurisdiction, to our knowledge, has ever formally addressed the question of the appropriateness of the various legal forms available to charitable organizations. It has never been asked: What are the natural or essential characteristics of this type of social organization and what, as a consequence, are its appropriate legal forms? Rather, circumstances have led to the adaptation of three main forms of organization, principally the trust and the corporation, but also the unincorporated association, which in essence is based in contract.

The law of trusts was adapted to the purposes of charitable activity in order to give effect to the intentions of donors, usually testators, to advance the cause of charity.⁶ The principal adaptation was the permission given by the state to the existence of a trust in favour of a purpose, as opposed to a person. This form's chief advantage is that it permits wealth to be endowed to a charitable purpose, in perpetuity if desired. Its chief deficiency is the lack of any reliable internal mechanism of accountability: who is there to ensure that the trustees diligently devote the endowed capital to the charitable purpose?

The corporate form also addresses the problem of the legal existence of entities devoted to the pursuit of purposes, but in a more versatile way. This form, in addition, is available to purposes well beyond the limited class of charitable objects recognized by the courts of equity. Its versatility has made the charitable purpose trust a much less appealing form of organization today. Yet the corporate form also suffers from a lack of a stable and rigorous system of internal accountability, since the only conceivable agency of internal supervision, the membership, is often disinterested or disorganized.

The reality is that the need for charity and the fundamental concerns of organizing for charity are perpetual. There can therefore be little objection in principle to the law's recognition of several forms of organization that permit wealth to be endowed for viable charitable purposes. The problem has been how to do it and, in particular, how to ensure that the human agents of the purpose fulfil their obligations.

In chapters 13, 15, and 16, we examine four general issues as they relate to the three forms of organizing for charity:

- (1) *Definition and Attributes*: is the essential nature of each form and what is its intrinsic advantages and disadvantages?
- (2) *Formation and Entry*: What are the conditions of entry into the form, and what conditions are imposed on the retention of status?
- (3) *Governance*: What standards of care and loyalty and what duties do the directing agents of the organization have, under what circumstances are they permitted to deal with the organization, and how are they held accountable?
- (4) *Reorganization and Dissolution*: When and under what circumstances is it permissible to alter the specific objects of the organization or the particular mandated means of pursuing those objects, and how are the assets of the organization treated on dissolution or when the organization's purposes become impracticable or impossible?

The law's answers to these questions have been affected as much by the form used as by the imperatives of the social reality. Thus, for example, directors of a charitable corporation are held to the standard of care of directors generally, while trustees of a charitable trust are held to the higher standard of trustees. Trust assets are applied *cy-près* when the trust objects become impossible, but there is no clear restriction in the common law on the treatment of corporate assets on the reorganization or dissolution of a charitable corporation. It is discrepancies such as these that are the source of many of the most obvious current difficulties in this area.⁷

In our proposals for reform, we take the following general approach. To resolve issues relating to organizational form, we look to the basic area of law from which the form is derived. Where an issue relates chiefly to the charitable function of the form, however, we resolve it by choosing rules that are best for charity, and, subject to necessary but minor variations, in a way that is identical for all three forms. In other words, we attempt to treat issues relating to organizational form distinctly from issues relating to regulation of the sector, although, of course, there is no possibility of completely separate treatment. As examples, issues such as the content of the fiduciary duties, the powers of charitable fiduciaries, and the structure of governance of charities are all resolved in our recommendations by looking primarily to the law of trusts for charitable trusts, modern corporations law for the charitable corporation, and basic contract law for the unincorporated association. But the treatment of a charity's property on dissolution, although inspired by the trust law *cy-près* doctrine, should, in our recommendation, be roughly the same regardless of the form of organization. And the state's involvement in ensuring that charitable fiduciaries fulfil their obligations of

loyalty and prudence, should, again in our recommendation, be the same, regardless of the form.

There really is no viable alternative to this way of dealing with issues of organizational form. The primary objective of the law with respect to the issues of organizational form is to facilitate charity. The three current forms provide a readily accessible and readily understood range of forms of sufficient variety to accommodate the needs of the sector. They are based on fundamental legal conceptions that are intellectually sound, that are generally understood, and that work. There is little or no appeal in designing some single common form of organization for all charities, and there is no need to import foreign models, since they could not add to the current flexibility.

3. PROVINCIAL SUPERVISION OF THE NONPROFIT SECTOR

In chapters 17, 18, and 19, we describe the general scheme of the regulation and supervision of charities by the provincial government and make recommendations for reform. There are two statutes of central relevance the *Charities Accounting Act*⁸ and the *Charitable Gifts Act*⁹ as well as many isolated statutory provisions, perhaps a hundred or more, contained in over sixty Ontario public statutes.¹⁰

The historical origin of the supervisory authority of the provincial government is the prerogative *parens patriae* of the Crown which has already been described. The Crown, it will be recalled, exercises a *parens patriae* jurisdiction over all charities through the Office of the Attorney General. The Crown also, it will be recalled, exercises a prerogative power in relation to the disposition of general gifts to charity that do not involve the interposition of a trust. This power is often referred to as "prerogative *cy-près*". Pursuant to it, the Crown through the Office of the Attorney General will devise a scheme for the specific disposition of property left to charity in general.¹¹

The historical *parens patriae* jurisdiction of the Crown has many facets. Generally speaking, at common law, the Attorney General was a necessary party in all proceedings in which there was a question regarding a charitable purpose trust or the powers of the trustees of a charitable purpose trust. Much, but apparently not all,¹² of this power has now been delegated to the Public Trustee under the various provisions of the *Charities Accounting Act*.¹³

In our proposals for reform, we take the following general approach. In chapter 17, we describe and recommend reforms to the agencies of the public administration in Ontario that have jurisdiction over charities, and other nonprofit entities, and we recommend reforms to the general regulatory framework governing charities. We also take up the principal areas of regulatory concern fundraising, investment, political activity, and international activity seriatim. Our basic recommendation is that a new agency the NOCbe established and be given ample and effective powers of supervision over the sector. With respect to the other matters, we recommend greater regulation of fundraising activity, but otherwise our proposals for the provincial regulation of charities are more or less exactly the same as what we have already recommended at the federal level. For the most part, the aim of the reform of this latter regulation is to clarify it and, in most cases, simplify it.

The issue of transfer payment accountability is taken up as a separate topic in chapter 18. Our recommendation is that a new general statute be adopted establishing fundamental norms governing transfer payment accountability at both the government end and the recipient end. Much of that regulation should be based on the same principles that justify the regulation of the charity sector and of fundraising. However, due to its complexity and different policy concerns, it is a discrete topic requiring discrete, albeit similar, treatment. We recommend in chapter that the NOC be given some jurisdiction over this issue, but suggest that the definition of the precise scope of that jurisdiction must await further comprehensive study of the issue of transfer payment accountability by the government.

The form of the new law will have to be given careful consideration. Generally speaking, we think that our approach of treating different issues discretely should be reflected in the new law. Thus, just as we have recommended that three new statutes be enacted to govern the three organizational forms, we would recommend that each area of regulatory activity be treated as a discrete and integral unit, either in its own statute, or an option which we prefer less, in a separate division of a comprehensive regulatory statute. Our preferred approach is likely to lead to greater coherence in the law and greater flexibility and adaptability. For example, the regulation of fundraising activities and the regulation of gaming services are sufficiently different in scope and approach as to require separate statutory instruments. Neither of these areas of regulation need or should in our view be a part of the statutory regime that establishes the public administration of charities.

Some of the new law should be established in a form that will permit it to be modified on a regular basis. For example, where we recommend that the provincial regulation follow exactly the federal regulation, it will be important for the provincial regulation to be able to adapt quickly and easily to changes in the federal law. The adaptability of the provincial law in this way is critical to the achievement of one of our primary objectives in all our proposals for reform, namely, that the charity sector not be faced with multiple levels of conflicting rules, at least to the extent that this can be avoided through better intergovernmental coordination.

Endnotes:

[1](#)

The court's jurisdiction extends to "trusts by analogy", meaning charitable purpose corporations and associations. The nature and extent of this jurisdiction, however, is not entirely clear. We examine the problem *infra*, chs. 15 and 16.

[2](#)

See *Ludlow Corp. v. Greenhouse* (1872), 1 Bli. N.S. 17 at 48, 4 E.R. 780 at 791, for a traditional formulation of the *parens patriae* role of the Crown. "That the King is to be considered as the *parens patriae*, that he is the protector of every part of his subjects, and that, therefore, it is the duty of his officer, the Attorney General, to see that justice is doen to every part of thos subjects". And, see, W. Blackstone, *Commentaries on the Laws of England*, Vol. III (Oxford: Clarendon Press, 1768) at 427. See H. Picarda, *The Law and Practice Relating to Charities*, 2d ed. (London: Butterworths, 1995), at 513-19 for a discussion. The origins of this Crown prerogative lay in the secularization of charity in the

late middle ages and its gradual removal from the stewardship of the church and the supervision of ecclesiastical courts. See G. Jones, *History of the Law of Charity 1532-1827* (London: Cambridge University Press, 1969) at 329.

[3](#)

See *Re Centenary Hospital Association and Public Trustee* (1989), 69 O.R. (2d) 1, 59 D.L.R. (4th) 449 (H.C.J.); supplementary reasons, at 69 O.R. (2d) 447 (H.C.J.) (costs).

[4](#)

R.S.O. 1990, c. C.10.

[5](#)

R.S.O. 1990, c. C.8.

[6](#)

Other legal systems have invented other ways of permitting individuals to endow wealth to a charitable or public purpose in perpetuity. The Greeks created perpetual endowments by gifts to a divinity, or a temple, or to a city by declaration in front of the popular assembly. Such gifts could be devoted to education, the support of athletes, the worship of a god or hero, or the construction and maintenance of public baths. Imperial Roman law permitted emperors to create charitable endowments for the relief of the poor by treating the endowments as a separate part to the *fiscus*. Roman citizens could do the same thing by gifts to permanent entities such as a *collegium* or *municipum*. The universal Christian church provided a vehicle for charitable sentiments and a model which inspired the founding of church-sponsored charitable institutions, such as orphanages, hostels for pilgrims, and hospitals. Contemporary civil law systems envisage a category of juristic person which has as its substratum charitably endowed assets, not shareholders or members. On these examples, see, generally, P.C. Hemphill, "The Civil-Law Foundation as a Model for the Reform of Charitable Trusts Law" (1990), 64 Australian L.J. 404; and R.-J. Dupuy, ed., *Le droit des fondations en France et à l'étranger* (Paris: La Documentation française, 1989). See, also, P.W. Duff, *Personality in Roman Private Law* (Cambridge: Cambridge University Press, 1938); M. Pomey, *Traité des Fondations d'utilité publique* (Paris: P.U.F., 1980). Now see the *Civil Code of Quebec*, arts. 1256-1259, for a modern version of the civil law foundation. See M. Boodman, *Les libéralités à des fins charitables au Québec et en France* (Montreal: Corporation Margo, 1980); J.E.C. Brierley, "Le régime juridique des fondations du Québec" in Dupuy, *supra*, at J.E.C. Brierley, "The New Quebec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts" in H.P. Glenn (ed.) *Droit québécois et droit français: Communauté, Autonomie, Concordance* (Cowansville, Que.: Yvon Blais Inc., 1993) at 383; and A.J. McClean, "The Trust in the Civil Code of Quebec in "Canadian Institute for Advanced Legal Studies, *Conférences sur le nouveau Code civil du Québec, Actes des Journées louisianaises de l'Institut canadien d'études juridiques supérieures* (Cowansville, Que.: Yvon Blais Inc., 1992).

[7](#)

See J. Warburton, "Charity Corporations. The Framework for the Future", [1990] Conv. 95. See, also, J.D. Gregory, "Establishing a Charity" (1993), 11 *Philanthrop.* (No. 4) 53; F. MacLeod, *Forming and Managing a Nonprofit Organization in Canada*, 3d ed. (North Vancouver: International Self-Counsel Press, 1995); Public Trustee of Ontario, "Submissions to the Ontario Law Reform Commission: Project on the Law of Charities" (1990-91), 10 *Est. & Tr.* 272.

[8](#)

Supra, note 4.

[9](#)

Supra, note 5.

[10](#)

See Appendix B for a list of statutory provisions.

[11](#)

See, further, Picarda, *supra*, note 2.

[12](#)

See *Re Centenary Hospital Association and Public Trustee*, *supra*, note 3.

[13](#)

Supra, note 4.

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