THE CHARITABLE CORPORATION: A "BASTARD" LEGAL FORM REVISITED

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> "*The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the piety of early times, are considered to be charitable*"
>
> (*Pemsel,* per Lord Macnaghten)

The title of this article refers back to E.J. Mockler's justly celebrated article of 1966: *Charitable Corporations: A Bastard Legal Form*. In what has been described judicially as "a fine piece of classical irony", he stated:

> "*As the common law has developed, numerous situations have arisen in which legal forms have been interbred; purity has been lost to expediency and the needs of the day have spawned some curious results. Forms, once strangers to each other, have been joined out of wedlock and the result has been the birth of a nullius filius. Of all the bastard legal forms it is my contention that the charitable corporation ranks close to the top of the list. It has strains of both corporation law and trusts and on the paternal side one sees shades of the Chancellor's foot*!"[2]

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1 Maurice C. Cullity, Superior Court of Justice, Toronto, Canada. This is a reprint of an article which first appeared in *The Philanthropist*, Volume 17, No. 1 in 2002. The article was developed from a presentation by The Honourable Mr. Justice Maurice Cullity to "Fundamental New Developments in the Law of Charities in Canada", a program of the Continuing Legal Education Section of the Canadian Bar Association – Ontario, in Toronto on Friday, October 27, 2000.

2 (1966), C.B.A. Papers 229; quoted with "relief" by Anderson J. in *Re Public Trustee and Toronto Humane Society* (1987), 60 O.R. (2nd) 236 (Ont. H. C.), at 243 and also by Osler J. in *Re Centenary Hospital Association* (1989), 33 E.T.R. 270. See also J.M. Hodgson and A.C. McNeely, "Directors and Trustees: The Charitable Corporation and Trusteeship", in *Charitable Mosaic* (Toronto: Canadian Bar Association – Ontario, 1983).

As that passage indicates, the genetic sources of the law governing charitable corporations are not in dispute: they are to be found in the law of trusts, the law of corporations and the prerogative interest and jurisdiction over charities which has found its way into the inherent equitable jurisdiction of the court. The parents – all three of them – can be identified with certainty. Mockler used the word "bastard" in the sense of "hybrid" as well as connoting birth out of wedlock. The former is a synonym to which no objection could be taken in the present context. The interaction of the three sources of the present law has a very long history. It stretches back to the origins of the modern law of charity in the *Statute of Elizabeth 1601*, 43 Eliz.1, c.4 (U.K.). However, if the sources were ever "strangers to each other", this could, I think, only have been in a heaven of jurisprudential concepts; they were always related in the law as it evolved in English and Canadian courts. For anyone interested in the manner in which principles of equity have developed, the history is fascinating and the development, and the interaction, are continuing. I will attempt to sketch in some of the historical background and refer to a number of issues that may have to be addressed in the future.

Charitable Corporations as Trustees

Fifty years ago, the prevailing view in the cases and the leading texts was that charitable corporations were a species of charitable trust. Thus, in the 3rd edition of *Halsbury* it was stated:

> "*As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not*."[3]

Similar statements could be found in relatively recent editions of *Tudor on Charities*[4] and *Snell's Principles of Equity*[5]. Acceptance of this view appears to have become established in the mid-19th century after the inadequacy of the corporate law applicable to chartered corporations to ensure effective management and application of funds to charitable objects had become apparent.

Prior to this development, the Court of Chancery gave more deference to corporate structure and the system of regulation by visitors. Unless an express

3 Volume 4, p. 394.

4 At p. 7.

5 At p. 7.

trust had been created, the Court would intervene only if the visitors, or governors, who were to supervise the incorporators had control of the funds of the body. The jurisdiction in such a case was described as one of "necessity" and the visitors – not the corporation – were treated as if they were trustees. The position at the end of the 18th century was summarized in *Attorney General* v. *Governors of the Foundling Hospital* by Lord Commissioner Eyre as follows:

> "There is nothing better established, than that this court does not entertain general jurisdiction to regulate and control Charities established by Charter. Where the establishment is fixed and determined the court has no power to vary it. If the Governors, established for the regulation of it, are not those who have the management of the revenue, this court has no jurisdiction; and if it is ever so much abused, as far as respects the jurisdiction of this court it is without remedy: *but if those, established as Governors, have also the management of the revenues, this court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue.*"[6]

Necessity, as the basis of jurisdiction, and a reluctance to interfere with the administration of the corporate property of charitable bodies, were recurring themes in the 18th century cases.[7] Even earlier, it was used to give jurisdiction to commissioners appointed under the *Statute of Elizabeth, 1601* and to imply a visitatorial jurisdiction in the founders of charitable institutions, or foundations, and their heirs.[8]

In the early 19th century, as investigations into the administration of charitable funds revealed the inadequacy of corporate law to prevent abuses, the court gradually extended its jurisdiction to cases in which, at an earlier period, deference would have been paid to the function and powers of visitors. As a justification for their intervention, judges ceased to speak of the jurisdiction of necessity and, instead, referred exclusively to the Court of Chancery's jurisdiction with respect to trusts. Many of the earlier cases involved privately endowed charities or royal foundations, such as hospitals, schools and university colleges, where the analogy with trusts was particularly close. This change in characterization provided a firm basis on which the Court could exercise a general supervisory jurisdiction that was

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6 (1793), 2 Ves. 42 (L.Comm), at 47 (italics added); see, also, *Attorney General* v. *Middleton* (1751), 2 Ves. 327; *Attorney General* v. *Lock* (1744), 3 Atk. 164; *ex parte Kirby Ravensworth Hospital* (1805), 15 Ves. 305; *Attorney General* v. *Dixie* (1805), 13 Ves. 305.

7 *Ibid*., see also, *Attorney General* v. *Smart* (1748), 1 Ves. 72; and *Attorney General* v. *Talbot* (1748), 1 Ves. 78.

8 *Sutton Colefield Case* (1605), Duke 68; *Phillips* v. *Bury* (1694), Skinner 447; Holt K.B.715.

not restricted – or barely restricted – by the implications of legal personality. Although earlier references to the existence of a trust as the foundation of the jurisdiction can be found[9] and although it can hardly be said that the later authorities reveal a completely consistent approach or terminology[10], three decisions of Sir John Romilly M.R. were influential from the second half of the 19th century until quite recently.

The following passages from his judgments indicate both the attitude of the Court and the broad concept of a trust that was relied upon:

> *"The only remaining point, then, on this part of the case, is whether the jurisdiction of the court is taken away by reason of the visitorship of the Bishop of Winchester. If this were the law, it would be very unfortunate, for it does not require the history of this case to teach us that visitorships vested in anyone, whether a corporation sole or aggregate, or the heir of the founder, is a mere nominal office, duties of which are rarely spontaneously performed. But the law is not so. Where there is a clear and distinct trust this court administers and enforces it as much where there is a visitor as where there is none. This is clear both on principle and authority …Green v. Rutherforth and the case of the Birkhampstead School and several other cases, expressly establish the authority of this court in cases of trusts, and the duty of this court to see they are properly performed, notwithstanding that there may be a special or a general visitor.*[11]
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> *This court has authority to redress a breach of trust, where the objects of the founder have been prevented or neglected.*[12]
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> *With respect to the internal regulation and management of a charity, apart from any question of breach of trust, if the original founder of the charity has appointed a visitor for the purpose of seeing that certain parts of the internal regulation are carried into effect, this court does not interfere with*

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9 For example, *Attorney General* v. *Brown* (1818), 1 Swan. 265; *ex parte Berkhampstead Free School* (1813), 2 Ves. & B. 134.

10 Significance continued to be attributed to the distinction between corporate property and property held on a special trust in some cases: see, for example, *Wellbeloved* v. *Jones* (1822), 1 S. & S. 40; *Attorney General* v. *Caius College* (1837), 2 Keen 150; *Corporation of the Sons of the Clergy* v. *Mose* (1839), 9 Sim. 610; *Attorney General* v. *Catherine Hall* (1820), Jac. 381.

11 *Attorney General v. St. Cross Hospital* (1835), 17 Beav. 435, at 466.

12 Attorney General v. The Sherborne Grammar School (1854), 18 Beav. 256, at 280.

> *the visitatorial power, unless it finds a breach of trust; that is something totally at variance with the views of the founder.*"[13]

Similarly, in *Incorporated Society in Dublin* v. *Richards,* where a testator had left the residue of his estate to "The Incorporated Society in Dublin for the promotion of English Protestant Schools in Ireland", Sugden L.C. stated:

> "*It was contended on the part of the defendant, although but faintly, that those words do not mean that the devise was for the purposes for which this Society was incorporated, but constituted an absolute gift to them, unfettered by any trust. I cannot say that I feel any difficulty upon that ground, because the nature of the trust is expressed in the very description of the society contained in the gift; and giving it to them in that character, the testator gives it charged with an obligation to devote it to those purposes, and the plaintiffs must take it, if at all, subject to the obligation. As I put it in the course of the argument, it is just as if the testator said "I give to the Governors of the Deaf and Dumb Schools" or the Governors of any other Charitable Institution – when, although he does not say in express terms that the gift is in trust for the charity, yet it must clearly be taken to be so.*"[14]

This approach, which inferred the existence of a trust from the charitable nature of a corporation's objects, lasted for well over 100 years and provided the foundation for a general jurisdiction of the court over the management and application of charitable funds held by charitable corporations.

While the 18th and early 19th century cases show the courts attempting – not always consistently and never definitively – to draw lines of demarcation between areas in which corporate law and trust law would apply, the effort was virtually abandoned after the cases mentioned. As late as 1967, the editors of *Tudor* were prepared to state categorically:

> "*The jurisdiction of the court is founded on the existence of a trust…*"[15]

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13 *Attorney General* v. *The Dedham School* (1837), 23 Beav. 350, at 356; contrast the approach of Lord Langdale M.R. in *Attorney General* v. *Magdalen College* (1847), 10 Beav. 402; *Attorney General* v. *Dulwich College* (1840), 4 Beav. 255; *Skinners Company* v. *The Irish* Society (1838), 7 Beav. 593; Attorney General v. Caius College, supra, footnote 10.

14 (1841), 4 Ir. Eq. Rep. 177, at 198-9.

15 6th ed., p. 302.

Similarly, in the 27th edition of Snell (1973) it was stated:

> "*It should be observed that there is no such legal entity as a "charity" and that although some charitable organisations are incorporated, many are not. The question, strictly speaking, is not whether a "charity" exists, but whether the trusts on which property is held are trusts for a charitable prupose*."[16]

The passage is still to be found in the 30th edition (1999) with, however, the following significant addition:

> "*…or, where the organization is incorporated, whether the objects of the corporation are charitable*."[17]

The abandonment of the view that charitable corporations are necessarily trustees of their property has been accomplished in this jurisdiction only recently. In the cases that led the way, the reasoning in *Bowman* v. *Secular Society Ltd.*[18] where the House of Lords emphasized that registered companies in England hold their corporate property as beneficial owners, has been much relied upon even though the company in that case was not a charity. As early as 1918, one judge in an Irish case[19] expressed the view that the principle in *Bowman* should be applied to a charitable corporation and that the decision in *Incorporated Society in Dublin* v. *Richards* should, in effect, be confined to its own facts. In 1957 the Court of Appeal of British Columbia applied the principle to charitable corporations[20] and, two years later, the possibility that such corporations might hold some property beneficially and other property on trust was recognized in the High Court of Australia.[21] Prior to that decision, the Australian cases generally accepted the view that charitable corporations were necessarily trustees of their corporate property.[22]

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16 P. 142.

17 P. 170.

18 [1917] A.C. 406…

19 *Miley* v. *Attorney General*, [1918] 1 I.R. 455; *cf, Re Ogden*, [1933] Ch. 678, at 681; *Attorney General* v. *St. John's College, Cambridge* (1834), Coop. T. Brough. 394

20 *Re Delaney* (1958), 12 D.L.R. (2d) 23.

21 *Sydney Homeopathic Hospital* v. *Turner* (1959-60), 102 C.L.R. 188

22 For example, *Re Godfree*, [1952] V.L.R. 353; *cf, Re Emery* (1928), 34 A.L.R. 167, where beneficial ownership by a charitable corporation was recognized.

Support for that position can still be found in more recent decisions.[23] In England, in 1980, the reasoning in *Bowman* was applied to a charitable company.[24]

The 19th century approach lingered on in Ontario with the strong support of the office of the Public Trustee.[25] In 1987, its continued status was touched upon – but not resolved – by Anderson J. in *Re Public Trustee and Toronto Humane* Society[26] but, in the same year, the Court of Appeal, without referring to the general issue, appears to have accepted that property was beneficially owned by a corporation established for charitable religious purposes.[27] Two years later, the question was discussed, at some length, by Osler J. in *Re Centenary Hospital* Association[28] where, without expressing a firm view one way or the other, the learned judge noted the recognition given by the Court of Appeal to beneficial ownership by a charitable corporation. Finally, in *Re Christian Brothers of Ireland in Canada*, Blair J. accepted that charitable religious corporations could hold property beneficially[29] and this view was endorsed by the Court of Appeal.[30]

Basis of the Court's Jurisdiction over Charitable Corporations

If, as seems very likely, courts will continue to claim a supervisory jurisdiction over charitable corporations, the developments I have described will require a reconsideration of the basis of the jurisdiction of the court in matters of charity. Rejection of the view that charitable corporations are necessarily trustees means that the law of charities can no longer be regarded as simply part of the law of trusts. Despite the numerous judicial statements of high authority in 19th century cases that support such an analysis, the view that courts of equity have a more general inherent jurisdiction over charities was recognized by Anderson J. in *Re*

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23 *Re Sir Moses Montefiori Home*, [1984] 2 N.S.W.L.R. 406; and see Ford & Lee, *Principles of Law of Trusts* (2nd ed., 1990), pp. 929-30 where this view is still preferred.

24 *Liverpool and District Hospital for Diseases of the Heart* v. *Attorney General*, [1981] Ch. 193

25 *Re Faith Haven Bible Training Centre* (1988), 29 E.T.R. 198 (Ont. Surr. Ct.), at 207; *Re David Feldman Charitable Foundation* (1987), 26 E.T.R. 86 (Ont. Surr. Ct.) 86, at 92.

26 *Supra,* footnote 2.

27 *Re Incorporated Synod of Diocese of Toronto* (1987), 61 O.R. (2d) 737.

28 *Supra,* footnote 2.

29 (1998), 21 E.T.R. (2d) 93.

30 (2000), 47 O.R. (3d) 674.

Public Trustee and Toronto Humane Society and relied on by him to justify the intervention of the court in the internal affairs of an incorporated charity.

In *Liverpool and District Hospital for Diseases of the Heart* v. *Attorney* General[31] Slade J., while not referring in express terms to the inherent jurisdiction of the court, held that it had power to make a *cy près* order with respect to assets owned beneficially by a corporation on the ground that the position of the body was sufficiently analogous to that of a trustee. The earlier authorities that referred to trusts were explained (away) in the following passage:

> "*The expressions "trust" and "trust property" may be, and indeed have been, used by the court in rather different senses in different contexts...In a broad sense a corporate body may no doubt actually be said to hold its assets as a "trustee" for charitable purposes in any case where the terms of its constitution place a legally binding restriction upon it which obliges it to apply its assets for exclusively charitable purposes. In a broad sense it may even be said, in such a case, that the company is not the "beneficial owner" of its assets. In my judgment, however, none of the authorities on which [counsel for the Attorney-General] has relied...establish that a company formed under the Companies Act 1948 for charitable purposes is a trustee in the strict sense of its corporate assets so that on a winding up these assets do not fall to be dealt with in accordance with the provisions of section 257 et seq. of that Act. They do, in my opinion, establish that such a company is in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs; but that is quite a different matter. The conclusion that a company incorporated for charitable purposes is not a trustee in the strict sense of its corporate assets, in my judgment, derives strong support from the following considerations ...*"[32]

The Court then referred to, among other things, the reasoning in *Bowman* and the general legislative intention to be found in the *Companies Act (U.K.)*.

Analysis in terms of the inherent jurisdiction of the court and an application of principles applicable to charitable trusts only by analogy is not novel. It does, I believe, best explain the jurisdiction of necessity asserted in the 18th century cases. Although trust language was employed in decisions such as *Foundling Hospital* –

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31 *Supra*, footnote 24.

32 P. 209.

and in decisions that preceded it and in those decided early in the 19th century[33] – the original emphasis was placed on the control and management of the property and revenues of charitable corporations rather than on the existence of trusts in a strict sense.[34] To this extent, the reference to loose terminology by Slade J. is justified. However, I do not think it is possible to deny that, in the great majority of the cases dating from the middle of the 19th century in which the trust theory was recognized and applied, the courts were referring to trusts in the strict sense.[35]

The older view was consistent with numerous statements in the early authorities that attribute the jurisdiction of the Chancellor not to the enforcement of trusts but rather to a delegation of the prerogative of the Crown. Thus, Blackstone stated:

> "The King as *parens patriae* has the general superintendence of all charities, which he exercises by the keeper of his conscience, the Chancellor."[36]

Of the Chancellor, Blackstone states that he

> "…has the general superintendence of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity."[37]

The comments of Blackstone and numerous other early text writers and judges were considered in extensive detail by Marshall C.J. in the Supreme Court of the United States in *Philadelphia Baptist Association* v. *Hart's Executors* where it was concluded:

> "*There can be no doubt that the power of the Crown to superintend and enforce charities existed in very early times; and there is much difficulty in marking the extent of this branch of the Royal prerogative before the statute [of Elizabeth]. That it is a branch of the prerogative and not part of*

33 *Supra*, footnote 9.

34 See, for example, *Attorney General* v. *Middleton* (1751), 2 Ves. 327.

35 See, for example, *Re Manchester Royal Infirmary* (1889), 43, Ch. D. 420, at 428.

36 Comm. Volume 3., p. 487.

37 *Ibid.*, p. 47.

the ordinary power of the Chancellor is sufficiently certain."[38]

While the trust theory was accepted, there was a tendency to limit the prerogative aspects of the Chancellor's jurisdiction to cases of private gifts for charitable purposes where no trust was declared and no trustee appointed and those in which the Crown, by default, was the visitor of a chartered charitable corporation.

The relevance of the above rather esoteric discussion is not entirely historical although an inquiry into the historicity of the supposed delegation from the Crown and the process by which it occurred may be safely left to historians or, perhaps, mythologists. It might, however, be noted again that the principle of necessity – that there must always be someone to ensure that charitable funds are duly administered in furtherance of the objects of a charitable corporation – was applied to justify not only the intervention of the court where the corporate supervisors – the visitors or governors – had control of the revenues, but also as the basis of the rule that the founders and their heirs were the visitors of private (eleemosynary) charitable corporations. On a failure of heirs, the powers of the visitor vested in the Crown[39] and was exercised on its behalf by the Lord Chancellor whose jurisdiction has been given to the Superior Court of Justice in this province.

The more important point is that the extent to which the law of trusts applies to charitable corporations has been a live issue in this jurisdiction in recent years. An inquiry into the interaction of corporate law and trust law is no longer blinkered by the view that such corporations are necessarily trustees.

This permits attention to be given – as it was in the 18th century cases – to the extent to which the court should interfere with the management and operation of charitable corporations and the circumstances in which this should be done. Acceptance of the view that trust law may be applied by analogy requires, rather than excludes, such an inquiry.

Exercise of the Jurisdiction of the Court over Charitable Corporations

The above comments suggest that, on the general question addressed by Mockler, Professor Austin Scott's summary of the position in the United States – where the subject has received far more attention and has been extensively litigated – is now

38 (1819), 17 U.S. 1, at 47; this conclusion does not appear to have been affected by the later decision of the same court in *Vidal* v. *Girard's Executors* (1844), 11 L. Ed. 205, where it was accepted that the Court of Chancery exercised jurisdiction to establish charities, and enforce charitable gifts, prior to the *Statute of Elizabeth*.

39 *Phillips* v. *Bury*, *supra*, footnote 8.

equally applicable to this jurisdiction. Professor Scott stated that the correct question is not to ask whether a charitable corporation is, or is not, a trustee:

> "*The question is in each case whether a rule that is applicable to trustees is applicable to charitable corporations, with respect to unrestricted or restricted property*."[40]

While it is possible that some decisions based on the trusteeship theory may have to be reconsidered in the light of the recent developments, it seems more likely that most will now be recharacterised as instances of trust law applied by analogy in an exercise of the court's inherent jurisdiction. This, at least, might be considered to be the appropriate starting point. The situations in which recharacterisation, or reconsideration, may be required are quite numerous. In some, there may be thought to be little, or no, doubt as to which alternative should be chosen. Others are more problematic. In still others, the reconciliation of trust law and corporate law has yet to be addressed.

(a) Charitable Corporations as Trustees

Before indicating some of the areas in which these issues may arise, I note that the recognition that charitable corporations can own property beneficially does not exclude the possibility that the property of such a corporation may be vested in it on an express trust for its charitable objects. This has been recognized since at least the middle of the 18th century[41] and, while one might think that generally the consequences should be similar, if not identical, to a case where no trust exists, it is by no means clear that this will always be so. Essentially, the question is whether, by employing the vehicle of trust, on the one hand, or corporation, on the other, donors will be permitted to choose significantly different legal regimes to govern the application of the property they are giving to charity. A broader question is the extent to which the interests of donors are to continue to receive the recognition, deference and protection that has been a characteristic of charity law in the past.

It has also long been recognized that charitable corporations may receive and hold funds on trust for particular charitable purposes within their corporate objects. Before the system of corporate regulation by visitors fell into disuse and the general notion that charitable corporations were necessarily trustees became accepted, the court would intervene to enforce such specific trusts of which charitable corporations were trustees while recognizing that no similar jurisdiction

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40 *Law of Trusts* (4th ed., 1989), p. 348.1.

41 *Attorney General* v. *Landerfield* (1743), 9 Mod. Rep. 286; Holdsworth, *History of English Law*, Volume 9, p. 52.

would exist with respect to the corporate property of such bodies. As far as the jurisdiction of the court was concerned, no distinction appears to have been drawn between such trusts and charitable trusts with private individuals as trustees. For this purpose, a clear line was drawn between the corporate assets of a charitable corporation and assets to which a specific trust was attached. In *Green* v. *Rutherforth*, a specific trust was found and the court intervened. Lord Hardwicke L.C. stated:

> "*I agree in general that if a subsequent donor gives the legal estate, or in trust for the college, without a declaration of a special trust it will fall under the power of the general visitor to judge of the legal property in the one case, or the equitable in the other; because by giving in trust [to] the college generally, and neither creating a distinct visitor or a special trust, the donor has by plain implication intended, it should fall under the general statutes and rules of the college, and be regulated with the rest of their property: although in the latter case indeed a bill must be in equity to compel the trustees, if they refuse: but in the present, the testator has declared a particular, special trust which must in some way be carried into execution, and the will observed.*"[42]

Conversely, in *Attorney-General* v. *Magdalen College*, the court declined to interfere to enforce a duty to establish and maintain a grammar school that was imposed in the statutes of Magdalen College on the ground that, although there was sufficient proof of the obligation, there was no "evidence of a trust as the word trust is understood in this court."[43]

Most people who make charitable gifts at the present time do so by way of outright contributions or bequests to particular incorporated institutions or foundations. Where gifts are made by way of trusts, this will normally be because the donor wishes to control the use of the subject matter of the gift by imposing restrictions and specific obligations upon the recipient. Prizes, bursaries and scholarships at school or universities are simple examples. Sometimes, of course, it is the recipient that seeks to raise funds by earmarking them for a specific purpose such as a chair, a library or some other research facility at a university, equipment or a building at a hospital or the maintenance or display of a particular collection at a museum or art gallery. In all of these cases, the feature that distinguishes the trust from the outright gift is the continuing exercise of control by the donor through the terms of the trust. Unless specific authority to the contrary is granted, or a scheme is made by the court, the designated, or restricted, funds must be kept, and

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42 *Green* v. *Rutherforth* (1750), 1 Ves. 462, at 473; *cf, Dummer*v. *Corporation of Chippenham* (1860), 29 Beav. 144.

43 (1847), 10 Beav. 402, at 410-1.

accounted for, separately from the unrestricted corporate funds of the recipient. The control of the court over the recipient is unquestionable quite independently of the *Charities Accounting Act*. Restrictions imposed by the donor with respect to the investment, accumulation of income or the expenditure of capital must be observed. In all these respects, the rules applicable to private trusts – with the exceptions relating to *cy près*, perpetuity, inalienability and enforcement by the Public Guardian and Trustee or by the Attorney-General – are generally believed to be applicable.

One aspect of these rules that is fundamental to the law of private trusts is that, although a trustee acts as a principal and incurs personal liability when contracting with third parties, its right to be exonerated or indemnified out of the trust assets may be affected, or excluded, by its conduct. A trustee is not entitled to an indemnity out of the trust fund for expenses and liabilities that were not properly incurred. Moreover, as the trustee is not the beneficial owner of the trust assets, creditors and other parties with whom the trustee contracts can only have recourse to the trust assets by way of subrogation to the trustee's right of indemnity. If that right does not exist, or has been lost, the creditor cannot obtain satisfaction out of the trust fund. This limited immunity of trust funds is well-established in the case of private trusts and is obviously of considerable significance for the purposes of business trusts.[44] It has, of course, nothing to do with charitable immunity. The limited immunity to which I have referred follows inexorably from the fact that a trustee does not own the trust property. The beneficial interest of the trustee *qua* trustee is limited to, and co-extensive with, its right of indemnity out of such property.[45]

In *Scott on Trusts* it is accepted that these principles are equally applicable to charitable trusts. To the extent that they are based upon the absence of beneficial ownership by the person with legal title to the subject property, they would appear to have no application to charitable corporations as far as their corporate property is concerned. In the context of private trusts, they have also been applied to liability in tort. Issues such as the extent, if any, to which charitable corporations have been affected by recent decisions of the Court of Appeal and the extent, if any, that the principles applicable to charitable trusts now diverge from those that govern private trusts as well as other issues may have to be considered in the future. These include the question of whether distinctions are to be drawn between

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44 See Ford, *Trading Trusts and Creditors Rights* (1981), 13 Melborne Univ. L.Rev. 1, at pp. 9-14; *Ford and Lee*, *supra*, footnote 22, paras. 1403-1406; *Octavo Investments Pty. Ltd.* v. *Knight* (1979), 144 C.L.R. 360; *R.W.G. Management Ltd.* v. *Commissioner of Corporate Affairs,* [1985] V.R. 385; Cullity in Youdan ed., *Equity, Fiduciaries and Trusts* (1989),pp. 199-200.

45 *Ibid., Octavo Investments Pty. Ltd.*

trusts administered by a defendant charitable corporation and those administered by trust companies or others for the benefit of one or more of a corporation's objects; between trusts administered by such a corporation and those where other trustees have discretionary powers to apply income or capital to specific purposes within the objects of the defendant corporation; and between trusts creating endowments and other trusts.

Related, and interesting issues, will be to identify the principles that will determine when a plaintiff may have recourse to the assets of one or more charitable trusts of which a defendant tortfeasor, who is an individual or a trust company, happens to be a trustee and, perhaps, to determine whether the traditional use of protective trusts to insulate property from a beneficiary's creditors would be effective in the case of charitable trusts.

There remains the fundamental issue of the criteria to be applied in determining whether property held by a charitable corporation is owned beneficially or in trust. Recent developments recognize that these are alternative methods of holding property for charitable purposes and, although it appears that the consequences will be similar, they will not necessarily be identical in all respects. Rejection of the view that trusteeship must be inferred from the charitable objects of a corporation, and acceptance of the principle in *Bowman*, suggests that a gift to such a corporation *simpliciter*, or even expressly for its general purposes, will not be sufficient to create a trust. Nor should indications – express or implied – that the donor's intention is to support the work of the body be enough. On the other hand, any special restrictions imposed by a donor on the management or application of the property that is the subject matter of the gift or perhaps, evidence that sufficiently indicates the existence of an intention that the property is not to be dealt with in all respects as part of the general assets of the body in accordance with its corporate powers, may be sufficient to give rise to a trust.

(b) Misapplication of Funds

The jurisdiction of the court to intervene to prevent or annul dispositions of charitable property contrary to the charter or regulations imposed by the founder of a chartered corporation predated the development of the theory that such corporations necessarily held their property as trustees although the language of trusts was often, although not always, utilized in support of the decisions.[46] The willingness of the court to intervene received greater impetus as that theory obtained a general acceptance.[47] Even dispositions by municipal corporations

46 See, for example, *Taylor* v. *Dulwich Hospital* (1720), 1 P. Wms. 655; *Lydiatt* v. *Foach* (1700), 2 Vern. 410; *Watson* v. *Hinsworth Hospital* (1707), 2 Vern. 596; *cf, Attorney* General v. Corporation of Bedford (1754), 2 Ves. 505.

which early in the 19th century were held to be outside the jurisdiction of the court, were subsequently brought within it.[48] This change in approach was attributed to the effect of the *Municipal Corporations Act, 1835 (U.K.)* which was said to have imposed "public duties" on such corporations.

As chartered corporations had the powers of a natural person, they could pass legal title to property but, if the disposition was contrary to the directions of the founder, the trusteeship theory dictated that the recipient of the property would, subject to the doctrine of purchaser for value without notice, receive it as a trustee.[49] The jurisdiction of the court to intervene extended to the failure to apply funds for corporate purposes in the manner directed by the founder as well as to their application for purposes that were not authorized.

There is one significant difference between these old cases involving schools, university colleges and hospitals and the position of charities incorporated under the *Corporations Act* and even by private or public *Act* of the legislature. In the old foundations in England it was quite common for the founder to give specific directions with respect to the management, administration and expenditure of the corporation's funds. The existence of such obligations in the charter or the rules provided by the founder contributed to the confusion and uncertainty as to the possible application of trust law and, in some early cases, the distinction between beneficially-owned corporate property and trust property was explained on the basis that such obligations were trusts. A similar approach was adopted in the later cases involving municipal corporations.[50]

In this jurisdiction, where corporations are usually established under the provincial, or federal, *Corporations Act* and few, if any, obligations – as distinct from powers – are expressly imposed in the letters patent, the analogy is closer to that of trustees of discretionary trusts where the court's intervention is limited, broadly, by the concept of an abuse of discretion. Whether an exercise of powers by the directors of a charitable corporation would be interfered with on that basis,

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47 See, for example, *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145; *Attorney General* v. *Crook* (1836), 1 Keen 121.

48 Contrast *Attorney General* v. *Camarthen* (1805), G. Coop. 30 and *Attorney General* v. *Liverpool Corporation* (1835), 1My & Cr. 171, at 201; *cf, Davy* v. *Leicester Corporation*, [1894] 2 Ch. 228; *Attorney General* v. *Cashel* (1842-3), 3 Dr. & War. 294; *Evan* v. *Corporation of Avon* (1860), 29 Beav. 144.

49 *Re Clergy Orphan Corporation*, *supra*, footnote 46, at 154; *Attorney General* v. *Hicks* (1809), Highmore Mort. (2nd ed.), 336; *Colchester Corporation* v. *Lowten* (1813), 1 Ves. & B. 226, at 246.

50 See cases cited, *supra*, footnote 48.

or even on the basis of the less intrusive equitable concept of a fraud on a power, is an open question. There is, at least, an argument that in choosing as the recipient of a gift an incorporated body with powers of a natural person, and forbearing to impose any specific restrictions or obligations with respect to its management and application of the property, donors should be considered to have chosen a regime that gives more autonomy and discretion to its directors and members than would exist under a trust. On this basis, the courts would be more reluctant to interfere not only with the internal management of the body but also with its financial decisions. In particular, there may be more room for deference to be paid to protective measures that exist under the corporate structure than will normally be the case with trusts. This, I believe, may be implicit in the cautious approach adopted by Anderson J. in *Re Public Trustee and Toronto Humane Society*.[51]

Although the nature of the relief claimed in the *Toronto Humane Society* case is not set out in great detail in the report, it seems that the applicant – with the support of the Public Trustee – requested the intervention of the court: (a) to cure irregularities in the election of directors and officers of the body; (b) to appoint a trustee to manage its affairs; (c) to determine the propriety of decisions of the Society to pay remuneration to its directors; and (d) to determine the propriety of the Society's support of a body with political objections relating to the welfare of animals.

Anderson J. declined to appoint a trustee to take over the affairs of the Society; gave directions with respect to the holding of the next annual general meeting of members to elect new directors; declared that the directors were not entitled to remuneration without the approval of the court; declined to make any order with respect to the past support of the political objects but warned that, if such support became a top priority of the Society, it would invite the intervention of the court. In reaching these decisions, the learned judge referred to the basis of the court's jurisdiction as follows:

> "*Intervention is warranted on any one of three bases. Whatever doubts may surround the status of directors of charitable corporations, I am satisfied that it partakes sufficiently of trust to make them amenable to direction made in pursuance of the Trustee Act. Looking at both the directors and the corporation, jurisdiction under section 6d (1) of the Charities Accounting Act, as amended, could be invoked. Finally (in my view conclusive), there is the inherent equitable jurisdiction of the court in charitable matters.*"[52]

51 Toronto Humane Society, supra, footnote 2.

52 *Ibid.*, at 245.

On the first two matters addressed, the court declined to make findings with respect to the regularity of the Society's corporate proceedings and the election of directors that had been held. The learned judge stated:

> "*In principle I am persuaded that ultimately the affairs of the Society must be entrusted to the members and a duly elected board of directors acting responsibly and with due regard for the nature of the institution and of its obligations. In the current state of affairs I am not at all persuaded that an annual meeting, convened under the aegis of either of the conflicting groups, would produce a satisfactory result, fairly reflective of the views of the majority of members of the Society. Accordingly, I propose to exercise the jurisdiction of the Court to regulate the conduct of the next annual meeting. The Court will nominate an impartial person to convene and preside at the meeting. Directions will be given at the conclusion of these reasons.*"[53]

The decision on the question of remuneration was explained as follows:

> "*Charitable institutions, or indeed nonprofit organizations of any kind, are reasonably easy victims for any small but determined group with the intention of taking control. That in itself is a sufficient potential evil. When one couples with it the capacity to pay a substantial remuneration there arises a situation which all human experience indicates should be avoided. There is not, as there would be in the case of a commercial corporation, a body of shareholders with a financial interest in scrutinizing and controlling the activities of the directors...Whether one calls them trustees in the pure sense (and it would be a blessing for a moment if one could get away from the problems of terminology), the directors are undoubtedly under a fiduciary obligation to the Society and the Society is dealing with funds solicited or otherwise obtained from the public for charitable purposes. If such persons are to pay themselves, it seems to me only proper that it should be upon the terms upon which alone a trustee can claim remuneration, either by express provision in the trust document or by the order of the court. The latter would appear to be the only practical mechanism.*"[54]

It is suggested that the decision in the *Toronto Humane Society* case was a landmark in the development of the law of charity in this jurisdiction in the following respects:

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53 *Ibid.*

54 *Ibid.*, at 246-7.

(1) It recognized that the internal affairs and the regulation of the finances of incorporated charities are not governed exclusively by corporate law and the provision of Part III of the *Corporations Act*. Advice and directions under the *Trustee Act*, generally and with respect to compensation, can be given and the inherent equitable jurisdiction of the court in matters of charity is applicable;

(2) This jurisdiction may justify intervention both in the internal affairs of an incorporated charity with respect to its governance and the election of its directors, and with respect to the expenditure of its funds on non-charitable or borderline purposes;

(3) However, generally, the affairs of an incorporated charity must be left to its members and the intervention of the court will be limited to cases where corporate law is inadequate to protect the interests of charity; and

(4) Statutory provisions applicable to trustees may be applied to incorporated charities and their governing bodies.

The aspect of the decision that probably attracted the most attention from the professional advisors to charities was that relating to the remuneration of directors. At the time, section 126 of the *Corporations Act* read as follows:

"126. (1) A corporation, except a corporation to which Part V applies, shall be carried on without the purpose of gain for its members and any profits or other accretions to the corporation shall be used in promoting its objects and the letters patent shall so provide, and, where a company is converted into a corporation, the supplementary letters patent shall so provide.

(2) Nothing in subsection (1) prohibits a director from receiving reasonable remuneration and expenses for his services to the corporation as a director or prohibits a director or member from receiving reasonable remuneration and expenses for his services to the corporation in any other capacity, unless the letters patent, supplementary letters patent or by-laws otherwise provide."

Anderson J. did not regard subsection 126(2) as legislative authority sufficient to exclude an application of the provision of the *Trustee Act* which give the court a measure of control over the compensation to be awarded to trustees.

The implications of this part of the decision were responsible for the subsequent

application to the court in *Re Harold G. Fox Education* Fund[55] where the authority of the corporation to remunerate an officer for his services as such, was in question. The officer was also a director. The charter prohibited the payment of remuneration to directors but not to officers. In approving remuneration that had been paid, Van Camp J. followed the *Toronto Humane Society* case by holding that the court should have been asked for its approval in advance but held that "given the uncertainty of the law that breach should be relieved against"[56].

The enactment of section 5.1 of the *Charities Accounting Act* in 1996 would, it seems, permit regulations to be made authorizing remuneration to be paid with the approval of the Public Guardian and Trustee.

The question of the application to charitable corporations of statutes referring to trustees will be referred to below. It is, perhaps, the most difficult and contentious of the outstanding questions. Apart from that point, I believe that the approach in the *Toronto Humane Society* case was consistent with the original notion that the jurisdiction of the court to interfere with the management of the property of a charitable corporation was based on a concept of necessity; the court would not interfere to the extent that corporate safeguards were adequate to protect the management and application of the property to charity. In many – perhaps the majority – of charitable corporations created under the *Corporations Act*, there is no one other than the court to supervise the application of funds to the corporate objects. In such cases, the directors are often the only members of the corporation. Where, however, the members are a different, or wider, body with effectively exercised corporate control over the directors, both the older authorities and the decision of Anderson J. point in the direction of judicial restraint.

The existence of the inherent jurisdiction, is however, surely sufficient to fill a gap in the *Charities Accounting Act* that was identified in *Re Canadian Foundation for Youth Action*.[57]There,Cornish J. held that neither the *Charities Accounting Act* nor any other statute conferred power on the court to order the directors of an incorporated charity to repay funds misapplied during their term of office. The learned judge held that the corporation, and not its directors, was deemed to be a trustee for the purpose of the statute. To the extent that this view was supportable while the jurisdiction of the court was considered to be limited to cases of trusts, it is not compelling if reference is made to the inherent jurisdiction of the court which, as the amendments made to the statute in 1996 recognize, is not supplanted by the machinery created by the *Act*. This view is, I believe, supported by

55 (1990), 34 E.T.R. 113 (Ont. H.C.).

56 *Ibid.*, at 119.

57 (1977), unrep. (Ont. Surr. Ct.).

authorities both before and during the period in which the trusteeship principle was dominant[58] – quite apart from more recent developments in the law governing fiduciary relationships and unjust enrichment. In such cases the directors were treated as if they were trustees. The correctness of this approach appears to have been confirmed clearly by the reasoning in *Toronto Humane Society*.[59]

(c) Removal and Appointment of Trustees

I have not found any case in which the corporate assets of a charitable corporation were taken from it against the will of its governing body and re-vested in another corporation in trust or otherwise. An assertion of any such authority would appear to be inconsistent with the statements in the *Foundling Hospital* case. The power of the court to remove corporators was denied in *Attorney General* v. *The Earl of* Clarendon[60] and *Re Chelmsford Grammar School*.[61] In the first of these cases, the Master of the Rolls stated:

> "*Corporations constituted trustees have indeed sometimes been, by decrees of the court, devested of their trust for an abuse of it; as any other trustees would have been. Such was the case of the Corporation of Coventry in the time of Lord Harcourt; but this is very different from devesting a person of his corporate character and capacity*."[62]

If this approach represents the present state of the law, it points to one continuing significant distinction between property owned beneficially by a charitable corporation and property held by it as a trustee. Trustees can, of course, be removed and replaced by the court for breach of trust and trustees who are charitable corporations should, in principle, be in no different position.

(d) The Scheme-Making Jurisdiction

Judicial consideration of the question whether the court has power to order an administrative scheme for the more efficient management and application of the funds of an incorporated charity or a *cy près* scheme when the objects of a

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58 As to the latter, see *Re Faith Haven Bible Training Centre*, *supra*, footnote 25.

59 Compare the passage cited from the *Foundling Hospital* case, *supra*, footnote 6 with the very similar approach of Danckwerts J. in *Re French Protestant Hospital*, [1951] 1 All E.R. 938.

60 (1810), 17 Ves. 491.

61 (1855), 1 K. & J. 543.

62 *Supra*, footnote 60, at 499.

charitable corporation become impracticable, has reflected much the same development as the jurisdiction to intervene to prevent misapplication of funds. The *dictum* in the *Foundling Hospital* case[63] has been regarded by some authorities as denying power to alter, directly or indirectly, the provisions of a corporate charter. However, under the influence of the trusteeship theory, the courts showed little hesitation in doing this, as it illustrated in the passage that follows immediately after that quoted above from the judgment of Lord Romilly in *Attorney General* v. *The Sherborne Grammar School*:

> "*[The Court] has also authority to direct a scheme in order to enforce the more complete attainment of [the founder's] objects. This Court has a further power and authority when the objects contemplated by the founder cannot be carried into effect, to direct the application of the revenues of the charity to promote objects in accordance with the spirit of the original foundation, the actual compliance with which has become impossible. But it has no authority to vary the original foundation, and to apply the charity estates in a manner which it conceives to be more beneficial to the public, nor even such as the Court may surmise that the founder himself would have contemplated, could he have foreseen the changes which have taken place by the lapse of time.*"[64]

In *Re Whitworth Art Gallery Trusts*, in approving a *cy près* scheme, with respect to the property of an incorporated charity, the Court attempted to reconcile the statements in the *Foundling Hospital* case with the exercise of the jurisdiction. Vaisey J. stated:

> "*I have looked at some of the authorities cited in the Christ's Hospital case, and the proposition which seems to me to emerge from them is that a charitable corporation founded by Royal Charter cannot be re-founded or re-established by the Court, but can be regulated and controlled by the Court, especially on financial grounds, and in that case the Court is entitled to have regard to altered circumstances…*"[65]

As the result of the scheme approved by the Court was that an art gallery owned by the corporation, and its contents, were transferred to the Victoria University of Manchester on trust to maintain and manage them for the benefit of the public, the decision does not appear to leave a great deal of continuing practical significance

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63 *Supra*, footnote 6.

64 *Supra*, footnote 12, at 280-1.

65 [1958] Ch. 461, at 467.

for the principle in *Foundling Hospital* that the court cannot re-found or re-establish a charity founded by Royal Charter. If, at least with the consent of the corporation, its property can be transferred to a different entity on new trusts, the inability to alter the charter is not likely to prove a hindrance to an exercise of the *cy près* jurisdiction. Where the corporation was not to be divested of its ownership, the courts in the 19th century appear to have had no doubt of their jurisdiction to make administrative and limited *cy près* schemes to depart from literal adherence to the founder's rules in order to implement "their general object and spirit".

Where a trustee – corporate or otherwise – ceases to exist or becomes insolvent, it has long been established, and it is fundamental, that the trust will normally continue, as a trust will not fail for want of a trustee.[66] Thus, in principle, on the dissolution or disqualification of a charitable corporation that holds assets on trust, a new trustee would, as a general rule, be appointed.[67] Only if some modification of the original purposes of the trust is required, would a *cy près* scheme be necessary.

Where a charitable corporation is dissolved, it was held in the *Liverpool Hospital* case that the court has power to make a *cy près* scheme with respect to assets it owned beneficially where a provision in its incorporating documents excluded the rights of its members to participate and provided for the disposition of the assets to institutions with similar objects. It is, of course, an invariable practice to include such provisions in the charters of corporations in this jurisdiction if it is intended that they should enjoy the privileges accorded in equity, and by statute, to charitable bodies and trusts.

In principle, the absence of such a provision might well be sufficient to exclude the existence of such privileges. Where there is no such provision, a corporation that has obtained funds from donors for its support might still be restrained from diverting such funds to its members by a change of objects, or on its winding up, if it is possible to find an express or implied representation that the funds would be applied to its general charitable objects at the time the donations were made.

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66 The inherent jurisdiction of the court to appoint new trustees is, of course, supplemented, and not replaced, by the powers conferred in the *Trustee Act*.

67 *Towle Estate* v. *Minister of National Revenue* 67 D.T.C. 5003 (S.C.C.), at 5010. Some doubt as to the continued application of this principle to charitable corporations may have been raised by the decision of the Court of Appeal in *Re Christian Brothers of Ireland in Canada*, *supra*, footnote 30.

(e) Perpetuity and Inalienability

There are two respects in which charitable trusts are treated more leniently with respect to their vesting and duration than private trusts.

As far as vesting is concerned, the rule in *Christ's Hospital* v. Grainger[68] permits gifts over from one charitable trust to another outside the perpetuity period. This is so whether the original gift was expressed to be determinable on the performance of an event that may occur outside the period or was made absolutely subject to a condition subsequent. The question whether this rule applies where the gift over is an absolute gift to a charitable corporation was argued at first instance and in the House of Lords in *Royal College of Surgeons* v. *National Provincial Bank.*[69] The gift over in that case was made to the Royal College of Surgeons "absolutely for the general purposes of the said College". The House of Lords held unanimously that the gift over was valid notwithstanding that it could have taken effect outside the perpetuity period. Only Lord Cohen referred to the argument that the gift should be construed as an outright gift to the college and, therefore, as not subject to the perpetuity exception. At first instance, Danckwerts J. had referred without criticism or discussion to the view of the Irish Court[70] that charitable corporations can hold property beneficially and had rejected the argument that the exception did not apply to the facts of the case. Lord Cohen, likewise, did not confront the argument directly but commented:

> "*Moreover, in some cases, at any rate, charitable corporations are by reason of their charitable objects necessarily trustees subject to the jurisdiction of the Court of Chancery. See Halsbury's Laws of England*, …"[71]

The other members of the House of Lords were content simply to accept that the exception applied to cases of gift over from one charity to another. Although the point was argued, as none of the members of the panel found it necessary to decide whether the Royal College of Surgeons would receive the property as a trustee, the most reasonable inference may be that this was not considered to be material.

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68 (1848), 16 Sim. 83.

69 [1952] A. C. 631.

70 *Miley, supra*, footnote 19.

71 *Supra*, footnote 68, at 668

On similar facts, in *Halifax School for the Blind* v. *Chipman*,[72] it appears to have been assumed without comment that a gift over of income to be used for the general purposes of the appellant – an incorporated charity – was not perpetuitous.

The issue decided in *Halifax School for the Blind* was whether a perpetual gift of income to an incorporated charity entitled it to demand the capital from which the income was derived. The court evidently did not find it necessary to consider whether the income was received beneficially or in trust by the corporation. It held that a perpetual endowment was valid as the recipient was charitable and that, in such circumstances the rule in *Coward* v. *Larkman*[73] – that a perpetual gift of income involves a gift of capital – should not be applied.

The same issue arose, and was decided in the same way, in the High Court of Australia in *Congregational Union* v. *Thistlethwayte*[74] where, again, no consideration was given to the question of whether the intended recipient of income – an incorporated charity – would take the property beneficially or in trust. In subsequent proceedings in connection with the same will,[75] one judge, Kitto J., while expressly recognizing the possibility that charitable corporations may hold property beneficially, appears to have regarded the earlier decisions as depending on a conclusion that the recipient charity was to hold the income on trust for its purposes. This view was not specifically endorsed by the other members of the Court whose approach appears to have been more consistent with a treatment of the gifts made to incorporated charities – with no reference to their purposes or words of trust – as beneficial gifts to the corporate recipients.

Although, with the exception of Kitto J., the courts in the cases mentioned above did not squarely confront the possible significance of beneficial ownership as against the creation of a trust, some weight should, again, probably be given to the fact that, even when the question was argued, they did not find it necessary to do so. This suggests that the perpetuity and inalienability exceptions may apply even where it is accepted that the recipient of a gift over will become the beneficial owner of the property. This, however, could probably only be on the assumption that the recipient has no power to divert the property to non-charitable objects by obtaining an amendment to its charter, or on a winding up.

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72 [1937] 3 D.L.R. 9.

73 (1888), 60 L.T. 1.

74 (1952), 87 C.L.R. 375.

75 *Sydney Homeopathic Hospital* v. *Turner* (1959), 102 C.L.R. 188.

(f) Application of Statutes

If, as I have suggested, the recent developments that recognize beneficial ownership by charitable corporations entail a recognition that corporations and trusts provide separate, and alternative methods of holding and applying property to charity, one might think, *prima facie* at least, that statutes referring to corporations, and not those applicable to trusts, will apply to charitable corporations and *vice versa*.

This is the area in which the greatest degree of uncertainty remains. In the past, questions have arisen with respect to the application to corporations of sections of the *Trustee Act* dealing with the permissible range of investments, the remuneration of trustees and the power of the court to relieve trustees who have committed technical breaches of trust. Some of these matters have been affected to a limited extent by recent statutes. It has also been suggested that the archaic provisions of the *Accumulations Act* apply to charitable corporations. The arguments that have been made in favour of these propositions have usually been based primarily on the notion that a charitable corporation is, *per se*, a trustee although the inherent jurisdiction of the court has occasionally been pressed into service in a secondary role. Sometimes the arguments have required not only an application of statutes that, in their terms, are confined to trusts, but also a rejection of provisions of the *Corporations Act* that are specifically made applicable to charities incorporated under Part III of that statute. I refer, in particular, to the provisions of section 71 dealing with conflicts of interest and those of section 126 that refer to the remuneration of directors.

The decisions in *Toronto Humane Society* and *Harold G. Fox Education Fund* illustrate the application of provisions of the *Trustee Act* by analogy in, I believe, an exercise of the inherent jurisdiction of the court. In *Re Faith Haven Bible Training Centre*,[76] a case decided on the basis of the view that a charitable corporation necessarily holds all its assets in trust, the provisions of section 35 of the *Trustee Act* were applied to absolve the directors from some, but not all misapplications, of charitable funds. Independently of the section, it is, perhaps, difficult to see why the power to make such relieving orders would not be within the inherent jurisdiction of the court.[77]

I believe some practitioners found the decision in *Toronto Humane Society* and *Re Harold G. Fox Education Fund* somewhat surprising because of a belief that they conflicted with the legislative intention behind subsection 126(2) of the

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76 *Faith Haven*, *supra*, footnote 25.

77 See *Attorney General* v. *Talbot* (1748), 1 Ves. 78; Picarda, *The Law and Practice Relating to Charities* (2nd ed., 1995), p. 509.

Corporations Act – one of the provisions in Part III that are expressly made applicable to charitable corporations and other nonprofit organizations. Obviously, neither Anderson J. nor Van Camp J. found any such inconsistency for I do not believe there is any suggestion in those cases that the inherent jurisdiction permits the court to ignore, or override, an otherwise applicable statute. In *Liverpool Hospital* it was argued on behalf of the Attorney General that the winding up provisions of the *Companies Act* did not apply to the hospital. The argument was described as "startling" and rejected on the basis that it could be justified only on the erroneous view that, as an incorporated charity, the hospital was a trustee of all its assets.[78]

A related question concerns the authority of the Minister to require certain provisions to be inserted in the letters patent of a charitable corporation or to refuse to insert particular provisions on the ground that this is required by the law governing charitable trusts.

A few years ago, these questions were of considerable concern to charities in Ontario and their professional advisors. I do not know whether this is still the case but I believe they are probably still sufficiently controversial to make it inappropriate for me to comment on specific examples – except for the obvious point that whatever support was obtained from the notion that charitable corporations are trustees in a strict sense would now seem to have disappeared. The notion that, in the exercise of an inherent equitable jurisdiction that of its nature involves an exercise of judicial discretion, statutes that, in their terms, are applicable only to trustees may be applied by analogy to charitable corporations, does not seem extraordinary as long as it does not conflict with the provisions of another statute that is intended to apply to such corporations. As Chitty J. once said with respect to the jurisdiction of the court in charity matters:

> "*To whatever lengths the court may have gone it has never assumed legislative authority*."[79]

Conclusion

When Mockler wrote his article, the law of charitable corporations was in a state of great uncertainty. Despite its longevity, the notion that they were necessarily trustees seemed contrary to basic principles of corporate law and was beginning to be questioned. However, its influence in this jurisdiction became even more pervasive over the next 30 years and the position of the directors of such

78 *Supra*, footnote 24, at 205.

79 *Attorney General* v. *Governors of Christ's Hospital*, [1896] 1 Ch. 879, at 888

corporations – in my experience, most of them volunteers – became increasingly invidious. As the comments I have made indicate, I believe we have still a certain way to go before the law achieves a desirable degree of clarity. As I have also indicated, I believe the prospect of this occurring has now improved. Quite apart from any other considerations, it should no longer be possible in this area to adhere to the theory that judge-made law does not change – a fiction that, in the past, has led to strenuous and confusing attempts to reconcile irreconcilable decisions and statements of judges in charity cases from different periods.

Rejection of the notion that charitable corporations are necessarily trustees, recognition that such corporations and charitable trusts are different methods of devoting property to charity, and acceptance of the inherent jurisdiction of the court should, when taken in combination, permit the emphasis to be placed on the right questions of principle and policy. Rather than inflicting, by a process of remorseless deduction, all of the consequences of the onerous office of trusteeship on charitable organizations and foundations and their directors and administrators, the intervention of the court can be limited and restrained, as I think it should be, to cases where it is truly necessary to ensure, and assist in, the advancement of charitable purposes.