LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
INFORMAL PUBLIC APPEAL FUNDS

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The Commissioners are:

Arthur L. Close, Q.C., *Chairman*
Lyman R. Robinson, Q.C.
Peter T. Burns, Q.C.
Thomas G. Anderson

Gregory G. Blue and Elizabeth S. Liu are Legal Research Officers to the Commission.

Sharon St. Michael is Secretary to the Commission.

Linda Grant provides text processing and technical copy preparation.

The Commission offices are located at Suite 60l, Chancery Place, 865 Hornby Street, Vancouver, B.C. V6Z 2G3.

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TABLE OF CONTENTS

To The Honourable Colin Gabelmann
Attorney General of the Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
INFORMAL PUBLIC APPEAL FUNDS

When disaster or misfortune occurs, an appeal frequently goes out for aid to the victims. Such appeals are often co-ordinated by established charitable organizations. They may also be launched spontaneously by a small number of people with little or no experience in fundraising. The public response is usually generous and sometimes results in more being contributed than is required to meet the need in question.

Where a fund lacks a formal legal structure, the law governing how a surplus must be dealt with is unsatisfactory, and creates potential pitfalls for those involved. In some cases, it prevents the surplus from being put to equally good use elsewhere.

This Report recommends changes to rationalize the legal status of informally created public appeal funds, and to remove the uncertainties the present law creates for those involved in raising them. The changes apply only to legally informal appeals and do not affect the activities of charities and other bodies that raise money on a regular basis.

Arthur L. Close, Q.C. ,
Chairman

January 14, 1993

CHAPTER I INTRODUCTION

A. General

Appeals to the public for donations are a feature of everyday life. Appeals that occur on a regular basis are usually conducted by registered charities and other organizations having the benefit of experienced fundraisers and professional advice. But spontaneous appeals occur frequently as well, especially after a disaster like a fire or a flood. They may follow publication of a news item about a family or individual in some sort of distress. Campaigns on behalf of individual children requiring specialized medical treatment in a distant place have also become familiar examples of this kind of fundraising.

Unlike the regular campaigns of established fundraising organizations, spontaneous appeals are often begun by a single person or a small group. Rarely is an organization or foundation created at the beginning to manage the fund. The fundraisers simply issue a message asking for donations and, possibly, open a bank account to hold the fund. The help of the press and the electronic media may be enlisted to publicize the appeal. The emergency that gives rise to the appeal may have substantial emotional impact, and the generosity of the public's response is sometimes astonishing.[1] The amount donated may go well beyond what is required to meet the original need.

Sometimes the appeal turns out to have been unnecessary, because the need is met through governmental or other sources. Substantial amounts may already have been collected, however.

Occasionally the opposite situation arises. Too little may be raised to be of any use at all.[2] In either case, the fundraisers are left with money on their hands. This does not cause any difficulty if the terms of the appeal indicate clearly how any surplus or unused funds will be handled, and if donations are made with that understanding. But in the heat of the moment, the fundraisers may not have thought of the possibility of surplus or unusable donations.

At first glance, the courses of action open to the fundraisers appear to be straightforward. Either give the money back, turn it over to an equally worthy cause, or retain it for similar emergencies in the future. But all of these seemingly self-evident alternatives are rife with legal pitfalls.

If the purpose of the fund falls within the legal definition of "charity," returning the contributions would probably amount to a breach of trust. It would also be legally incorrect for the fundraisers to turn over the unused funds to an equally worthy cause without the permission of the court. People who issue spontaneous appeals for donations out of public-spiritedness or humanitarianism rarely appreciate the complexities of the

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[1] A recent campaign to enable a child suffering from a rare disease to receive treatment in the U.S. raised $70,000 at the local level within a matter of a few weeks. What is especially remarkable is that the money was raised at a time when the community's major industry was in the throes of a severe recession: "Port Alberni Rallies to Save Sick Child," *The Province* 20 November 1991; "Sick Girl Chicago Bound," *ibid*., 1 December 1991. The figure of $70,000 was reported by CBC AM radio on 2 December 1991. In contrast to many other cases, a foundation was formed in the course of the campaign to administer any surplus for the benefit of other persons needing medical care outside the province.

[2] One attempt to raise money for relief to the former USSR gathered only $105 despite receiving newspaper coverage: "Peace Fund Ends in Disappointment," *Vancouver Sun*, 10 October 1990, p. B4.

law of charity. In an emergency, there is little or no time to get legal advice on the subject.

If the purpose of the fund is not legally charitable, the surplus may have to be returned to the donors. Chances are, however, that the fundraisers will encounter difficulty with this. Many of the donations are likely to be anonymous, since collections are often made door-to-door or on the street. In this setting, donors' names and amounts given are not usually recorded. Some portion of a non-charitable fund is almost sure to be unreturnable for reasons like these.

What does the law say must be done with the unreturnable portion in a case where the donors are entitled
to get their donations back? The answer would shock anyone. *Nothing can be done with it except to let it accumulate interest indefinitely or else pay it into court.* This was confirmed in 1958 in the notorious English case *Re Gillingham Bus Disaster Fund*.[3]

The law is clearly unsatisfactory with regard to surpluses or unusable balances in informally created public appeal funds. This Report recommends that the law be changed to allow surpluses in such funds to be put to good use regardless of the way in which the purpose of the fund is characterized legally, and also to protect fundraisers from unwarranted liability. The recommendations in this Report only concern informal, spontaneous appeals for funds. *They do not apply to continuous or periodic campaigns by organized charities and other bodies raising money for their normal or authorized purposes as part of their usual activities.*

B. Terminology

In some cases, the law has given ordinary words special meanings and an attempt will be made to define them when they arise in the following text. It is useful at this point, however, to tie down the meaning of one word in particular. "Surplus" is ordinarily used to mean something that is left over. There are various ways in which a fund may be left with unused money. In this Report "surplus" is used to mean an amount in a public appeal fund that, for any reason, cannot be used for the purpose of the appeal, whether or not the fund is actually overcontributed.

C. About this Report

The Commission considered the subject of this Report in connection with a broader project on trustee powers and the *Trustee Act*.[4] The Report was not preceded by a Working Paper, although informal consultations were carried out with various concerned parties.[5]

The following chapter discusses the existing legal principles that apply to informal public appeal funds and how they sometimes fail to deal rationally with surplus donations. Chapter III is devoted to a discussion of the ways in which the existing law needs to be changed, while Chapter IV contains annotated draft

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[3] [1958] Ch. 300, *aff'd* [1959] Ch. 62 (C.A.).

[4] R.S.B.C. 1979, c. 414.

[5] Some of the recommendations made in this Report were summarized in a document entitled *Emergency Relief Funds: Law Reform Proposals for Discussion*, which was made available to concerned parties in February, 1992.

legislation that would put those changes into effect. A standardized trust document forms part of the draft legislation.

CHAPTER II EXISTING LAW CONCERNING SURPLUSES IN PUBLIC APPEAL FUNDS

A. The Legal Nature of Public Appeal Funds

1. An Informal Public Appeal Fund is a Trust

(a) General

When someone issues an appeal for donations for a particular purpose, and members of the public donate in response, the fund that is created is generally subject to a trust.[1] A trust is a relationship which exists when someone holds the title to property but is under a duty to use the property for the benefit of another person or for a legally permissible purpose.[2] The person who holds the title and is subject to the duty is the trustee. The person who gives the property to the trustee and stipulates the terms of the trust is called the settlor.

(b) Multiple Settlors

Most trusts have only one settlor. A trust of a public appeal fund is distinguished by the fact that it has many settlors. Each donation is a gift in trust, and each donor is therefore a settlor.

(c) The Trustees of a Public Appeal Fund

The trustees of a public appeal fund are the persons who have control over the use of the fund.[3] Normally it is the fundraisers who are in this position. The law gives the persons controlling the fund the authority to execute a formal document declaring themselves to be trustees and stating how they will administer the fund.[4] This is not frequently done, partly because the trustees may not appreciate the need for it.

(d) Significance of the Appeal

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1 *Re the Trusts of the Abbott Fund*, [1900] 2 Ch. 326. There will be no trust, however, if the donation is made with the intention that it is to become the recipient's property to use as the recipient pleases and the recipient has the legal capacity to hold the donation on that basis. For example, a donation to an incorporated charitable body made without any qualifications on its use that can be taken to create a trust becomes the absolute property of the charitable corporation, even though the use of the gift may be confined within certain limits by its constitution: *Re Delaney*, (1957) 26 W.W.R. 69 (B.C.C.A.). *See* the heading "Funds Held by Organizations as Their Own Property" later in this Chapter.

2 Keeton and Sheridan, The Law of Trusts (10th ed., 1974) 5; Waters, *Law of Trusts in Canada* (2nd ed., 1984) 5. Traditionally, only charitable purposes could serve as the objects of enforceable purpose trusts, apart from a few exceptions which are not relevant to the topic of this Report.

3 *Abbott, supra*, n. 1.

4 *Attorney-General* v. *Mathiesen*, [1907] 2 Ch. 383, 394.

A declaration of trust by the fundraisers will be ineffective unless it is fully consistent with the appeal.[5] The reason why the terms of the appeal are so important is that when donors entrust their gifts to the fundraisers, they assume the money will be used for the purpose stated in the appeal. The terms of the appeal are taken to represent the donors' intention in making the gifts.

This means that the terms of the appeal also determine the character of the trust that surrounds a public appeal fund. If the appeal indicates the fund will be used only for purposes that are legally charitable, the trust is charitable. If the appeal is for a purpose that is legally non-charitable, the trust is non-charitable. Important consequences flow from the characterization of the trust. They are discussed later in this Chapter.

2. Funds Held by Organizations as their Own Property

Continuous or periodic fundraising by incorporated organizations, societies and foundations usually stands on a different legal footing than fundraising that is begun simply by the issuance of an appeal by a single person or group. Since incorporation gives societies and incorporated foundations a separate legal personality, these bodies have the ability to hold donated sums as their own absolute property. Normally, a donation made to an incorporated fundraising body amounts to an outright gift, because it is not made with an express qualification on its use and because it is not customary for such bodies to mention particular uses in their appeals. The use of the funds such an organization collects is, however, governed by its constitution, bylaws, or other documents that set out the organization's authorized purposes.

Example

> A university alumni association, formed under the *Society Act*,[6] canvasses alumni annually for contributions. Among the purposes listed in the association's constitution is "the raising of money to assist the teaching and research activities of the University."

In this example, the money cannot legally be used other than for the authorized purposes of the organization, but the donor has made an outright gift to the association, which receives it as its own property. The donor, in this case, has not made the gift in trust and therefore the organization that receives the gift is not a trustee of it.

In most cases, the constitutions or incorporating documents of established fundraising organizations will contain specific requirements for dealing with funds that remain when the organization is dissolved. Statutory provisions apply in the absence of such requirements. The *Society Act*,[7] for example, stipulates how the assets of dissolved societies are to be handled, if their constitutions do not deal with the matter.[8] Due to provisions like these, the special problems surrounding surpluses in funds raised through informal appeals are not usually found in connection with money raised by incorporated fundraising organizations. *For this*

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5 *Re Henry Wood National Memorial Trusts*, [1967] 1 All E.R. 238 (Ch.D.).

6 R.S.B.C. 1979, c. 390.

7 *Supra*, n. 6.

8 *Supra*, n. 6, s. 73.

reason, this Report does not concern fundraising by incorporated bodies for their authorized purposes.[9] If an incorporated fundraising organization were to issue a specific appeal that was unrelated to any of its authorized purposes, however, the situation might be the same as in the case of an informal appeal. If so, the organization would be a trustee of the donated money, and the donors would be the settlors of the trust.

B. What Happens to a Surplus in a Public Appeal Fund?

1. General

In Chapter I we mentioned that surpluses are treated differently, depending on whether the purpose of the fund is legally charitable or not. A brief digression into the legal notion of "charity" is necessary in order to explain what is meant by a "legally charitable purpose."

2. The Legal Concept of "Charity"

(a) Definition of "Charity"

Suppose that in the course of the same week, someone makes two donations. One is to a fund for a neighbourhood family whose home was destroyed in a fire. The fund is to enable that particular family to rebuild their home, though other housing is available. The other donation is to a food bank. The donor may look on both donations as being gifts to charity. In its popular sense, "charity" means virtually the same thing as "benevolence."

In law, however, "charity" has a narrower meaning. Essentially, the legal idea of charity is that of a private gift for a public purpose. A "public purpose," in this context, means a benefit to the community as a whole, or to a significant segment of it. In addition, the purpose of the fund must fit within one of the following categories:[10]

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[9] Another provision that affects the surplus funds of registered charities (including those that are organized as trusts) is s. 188 of the *Income Tax Act*, S.C. 1970-71-72, c. 63. S. 188 imposes a confiscatory tax on funds remaining undisbursed after one year from the revocation of the charity's registration. It does not necessarily prevent *cy-pres* application of the funds in favour of "qualified donees" in the meantime. "Qualified donees" are defined in s. 149.1(1)(h) and are essentially organizations that may issue a receipt entitling the donor to a charitable tax deduction or credit. They include other registered charities.

[10] These four categories are sometimes referred to as the "*Pemsel* list," after the name of an English case in which they were enunciated, *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531, 583 (H.L.). In fact, the *Pemsel* list represented an attempt to summarize the kinds of purposes that previously had been held to be analogous to those mentioned in the preamble to the *Statute of Charitable Uses*, 43 Eliz. 1, c. 4. (The "use" was the forerunner of the modern trust.) The preamble to this 1601 statute is still the foundation of the law of charity. The "good, godly and charitable uses" listed in the preamble were: (a) the relief of aged, impotent or poor persons, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, (b) the repair of bridges, ports, havens, causeways, churches, sea-banks and highways, (c) the education and preferment of orphans, (d) the relief, stock or maintenance for houses of correction, (e) the marriage of poor maids, (f) the support of young tradesmen, handicraftsmen and persons decayed, (g) the relief or redemption of prisoners or captives, (h) the aid or ease of poor inhabitants concerning payment of fifteens (a tax levied on one-fifteenth of the value of a person's movable property), setting out of soldiers and other taxes. In Canada, the *Pemsel* list, which was derived from the preamble and the case law interpreting it, is referred to as an authoritative summary of the various classes of charitable purposes: *Guaranty Trust Company of Canada* v. *Minister of National Revenue*, [1967] S.C.R. 133. The traditional rule of exclusivity requires that all the objects of a charitable trust be exclusively charitable. It formerly rendered a trust with mixed charitable and

1. The relief of poverty.[11]
2. The advancement of education.
3. The advancement of religion.
4. Other purposes beneficial to the community.

The fourth category is not as wide as it might appear. The kinds of purposes that are found to be charitable under it must be analogous to a purpose that has previously been held to be within the spirit of the preamble to the *Statute of Charitable Uses*,[12] passed in 1601. That preamble is considered the foundation of the law of charity because the list of purposes it contains came to be the standard by which the "charitableness" of a given purpose was measured.

Canadian courts still apply these principles in determining whether an activity is charitable. These determinations are most frequently made in connection with claims for exemption from taxation. Recently the courts have shown a tendency to consider "benefit to the community" in light of contemporary attitudes and values,[13] rather than referring *exclusively* to previous case law to apply the analogy test.

(b) Charitable Public Appeal Funds

Relief of distress and suffering is a charitable purpose. A fund created for this purpose would be charitable. Most disaster relief funds fall into this category, provided that they are restricted to relief of actual need. If the fund goes beyond fulfilling basic needs, it is not charitable. For example, a fund for the benefit of local flood victims that is available only to provide food, shelter, and replacement of basic living items, would be a charity. If it could be used to replace property of any kind whatsoever that was lost or damaged in the flood, it would be non-charitable. One reason why the fund for a particular family whose house has burned down is probably non-charitable is that it goes somewhat beyond actual need. It is earmarked for reconstruction of a dwelling on the same site, rather than simply to enable the family to get alternative housing.

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non-charitable objects void, unless a basis for apportionment existed, in which case the charitable portion could be saved. The exclusivity rule has been relaxed to some extent by s. 44 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224. S. 44 states that where a charitable purpose is linked conjunctively or disjunctively with a non-charitable purpose and would otherwise be void for that reason, it operates exclusively for the charitable purpose. A "mixed" purpose trust that is not saved by s. 44 may still survive as a non-charitable purpose trust operating as a power by virtue of s. 21 of the *Perpetuity Act*, R.S.B.C. 1979, c. 321. *See Report on Non-Charitable Purpose Trusts* (LRC 128, 1992).

[11] In the case of trusts for the relief of poverty, the requirement of public benefit is not strictly applied and may even be absent: *Jones* v. *T. Eaton Co. Ltd.*, [1973] S.C.R. 635. As long as the benefit of the trust is to go to persons drawn from a class rather than to ascertained individuals, the class may be quite small: Re Wedge, (1968) 67 D.L.R. (2d) 433 (B.C.C.A.).

[12] 43 Eliz. I, c. 4. *See* n. 10, *supra*.

[13] *E.g.* In *Native Communications Society of B.C.* v. *Minister of National Revenue*, [1986] 3 F.C. 471 (C.A.), non-profit broadcasting and publishing activity carried on by aboriginal peoples of British Columbia was held to be within the fourth head of the *Pemsel* classification. A trust for promotion of amateur sport was held to be charitable in *Re Laidlaw Foundation* (1984) 48 O.R. (2d) 549, 13 D.L.R. (4th) 491 (Div. Ct.), since it would further the general level of health among the public. In contrast, a trust for the promotion of Welsh culture was held to be non-charitable in 1947 (*Williams' Trustees* v. *Inland Revenue Commissioners*, [1947] A.C. 447 (H.L.) and sport used to be ruled essentially non-charitable unless carried on within an educational institution: *Re Nottage*, [1895] 2 Ch. 649; *London Hospital Medical College* v. *Inland Revenue Commissioners*, [1976] 2 All E.R. 113 (Ch.D.).

The restriction to relief of actual need is sometimes misunderstood by the donating public. In 1981 many donors and slide victims protested when it was learned that a large portion of the fund collected for the relief of victims of the 1979 Port Moody landslides had not been distributed because it had not been required to meet the victims' "immediate needs." Many of the victims thought the fund should have been used to meet property losses for which they had not been fully compensated. Apparently, so had the donors.[14]

As a general rule, a further requirement of charitable public appeal funds is that they must be for the benefit of a segment of the community, rather than for identified persons.[15] In the example used above in which the same person makes one donation to the food bank and another to a fund for the homeless family, the food bank is charitable because it is directed at a segment of the community (persons who cannot afford to buy food.) An additional reason why the fund for the individual family is probably non-charitable is because it is for the benefit of specific persons, and no others.

At the root of the legal notion of charity is the voluntary dedication of private resources to meet needs which might otherwise require expenditure from public sources. In an age when the state has assumed a greater role in relieving the distress of less fortunate elements of society than was formerly the case, it may be more difficult to find the distinction between a community-related need (charitable) and a private need (primarily non-charitable). This distinction remains in effect for the purpose of the law of charity, however.

3. Surpluses in Charitable Funds

(a) Cy-pres

A surplus in a charitable fund that cannot be spent for the purpose stated in the appeal may sometimes be applied to a similar charitable purpose with the approval of the British Columbia Supreme Court. The jurisdiction of the Supreme Court to re-allocate unused balances in charitable trusts to other charitable purposes is called *cy-pres*. The theory underlying *cy-pres* is that the donor's intention should be fulfilled as far as possible. If the donor's overriding intention was that the property should remain available for charity, rather than be used only for a particular charitable purpose, the property is not allowed to revert to private hands if it is possible to apply it to a similar charitable purpose.[16]

In order to invoke the *cy-pres* doctrine, there must first be a valid charitable trust that has failed in whole or in part for reasons of impossibility or impracticability. In the context of public appeal funds, this means that at least some portion of the fund cannot be spent for the purpose mentioned in the appeal, or that it would be impracticable to try to do so. "Impracticality" in connection with *cy-pres* means that while it would still be possible to carry out the trust literally, doing so would be ineffective.

> Example 1: A scholarship fund is created through donations to enable a local student to attend a rather famous private school. After the fund comes into being, but before the scholarship is awarded, the school is closed. The scholarship fund sits idle.

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[14] *Vancouver Sun*, 8, 9, 12 January 1981. A similar controversy developed around the Penlee Lifeboat Disaster Fund in England: "Spontaneous Disaster Funds," (1982) 132 New L.J. 223.

[15] *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501 (C.A.). If the persons are ascertainable but numerous enough to form a substantial section of the community, however, a trust for their relief may be charitable: *Pease* v. *Pattinson*, (1886) 32 Ch.D. 154.

[16] *Re Faraker*, [1912] 2 Ch. 488 (C.A.).

Example 2: An appeal is issued for donations for relief of persons displaced when their village is partially destroyed by a rockslide. Only a small amount is collected before the government announces a relief programme that makes the appeal fund unnecessary. The amount collected is not enough to be of any real use in the relief effort.

The first example of a "surplus" arising in a public appeal fund describes circumstances that would make it impossible to carry out the purpose of the fund. A student cannot be sent to a school that no longer exists. The second example illustrates a case in which it would be impracticable to carry out the purpose of the appeal. While the money could still be spent on the original purpose, it would do little good, because the alternative source of help is extensive enough to meet the need completely.

In order for the court to approve a scheme submitted by the trustees for re-allocating a surplus, it must be satisfied that the surplus will be applied to a purpose as close as reasonably possible to the purpose stated in the appeal.

(b) When Cy-pres is Not Available

Cy-pres is not available in every case where there is a surplus in a charitable public appeal fund.[17] The doctrine is complex and the many judicial decisions dealing with this area are difficult to reconcile. In addition, courts have been less consistent in their application of *cy-pres* principles to public appeal funds than with other charitable trusts.

It is beyond the scope of this Report to analyze the case law on *cy-pres* in detail.[18] For present purposes, it is sufficient to note that if a surplus in a charitable fund cannot be applied to a similar charitable purpose because *cy-pres* is not available, the same rules apply as if it had been a surplus in a non-charitable fund. These are discussed in the next section.

4. Surpluses in Non-charitable Funds

(a) The Resulting Trust

A surplus in a public appeal fund created for a non-charitable purpose is governed by the principles that apply when a trust fails because it cannot be performed as the settlor intended. When a trust fails for this reason, the trustee is considered to hold the property in trust for the settlor. This is called a resulting trust because the beneficial interest in the property "results" or "returns" to the settlor. Normally the property itself is returned to the settlor and the trustee drops out of the picture.

(b) The Re Gillingham Bus Disaster Scenario

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[17] *See Re YWCA Extension Campaign Fund*, [1934] 3 W.W.R. 49 (Sask. K.B.); *Re Ulverston and District New Hospital Building Trusts*, [1956] 1 Ch. 622 (C.A.).

[18] Detailed discussion of the case law pertaining to the *cy-pres* doctrine as it affects public appeal funds may be found in Phillips, "The Problem of Surpluses in Funds Raised by Public Appeal," (1990) 9 *The Philanthropist* 3; Thompson, "Public Charitable Trusts which Fail: An Appeal for Judicial Consistency," (1971-72) 36 Sask. L.R. 110. S. 10 of the *University Foundations Act*, S.B.C. 1987, c. 50 allows the board of a foundation governed by the Act to determine if a gift is still serving the objects of a foundation, and to re-apply it as they consider proper. Similar provisions can be found in other statutes governing certain foundations: *e.g. Victoria Foundation Act*, S.B.C. 1987, c. 35, s. 10; *Mission Foundation Act*, S.B.C. 1987, c. 34, s. 15; *Chilliwack Foundation Act*, S.B.C. 1985, c. 62, s. 13.

A resulting trust of a surplus in a public appeal fund means, in effect, that the surplus has to be returned to the donors. The problem that this may cause is illustrated by the facts of *Re Gillingham Bus Disaster Fund*.[19] A number of cadets had been killed and several more injured when a bus ran into them while they were marching in a column along a road. The mayors of three towns had called for donations to pay the funeral expenses of those killed and to aid those who were disabled. The balance of the fund was to go "to such worthy cause or causes ... as the Mayors may determine."

A large amount was collected, mainly from anonymous donors. Only a small portion of the fund was spent, due in part to the fact that the cadets or their families were compensated by the bus company. The terms in which the appeal was framed prevented a valid charitable trust of the surplus, because "worthy" covered more than exclusively charitable purposes and the primary objects of the fund were also non-charitable.[20] Since the fund was non-charitable, the surplus could not be re-allocated for other purposes. Instead, it was subject to a resulting trust for the donors. Since most of the donors were unknown and had no way of proving they had made a donation, the fund has reportedly been idle ever since the case was decided in 1958.[21]

Because many informal appeals are conducted at least in part through door-to-door or street collections, some portion of the fund is likely to be contributed anonymously. This, of course, gives rise to the problem seen in *Re Gillingham*[22] All that the trustees can do is to pay the unreturnable portion of the fund into court under a section of the *Trustee Act*[23] which permits trustees to do this and be discharged of further

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19 [1958] Ch. 300, *aff'd* [1959] Ch. 62 (C.A.).

20 *See* n. 10, *supra*, regarding the requirement of exclusivity in connection with charitable trusts.

21 Waters, *supra*, n. 2 at 367.

22 *Supra*, n. 19.

23 R.S.B.C. 1979, c. 414. S. 40 of the *Trustee Act* allows trustees to pay trust money into court, thereby obtaining a discharge of further responsibility for it. One other provision of the *Trustee Act*, namely s. 39, deserves mention. At first glance, s. 39 of the *Trustee Act* might appear to be a solution to the problem in *Re Gillingham Bus Disaster Fund*:

> 39. A trustee, executor or administrator may, without the institution of a suit, apply by petition to the court for an order that the trustee, executor or administrator be at liberty to distribute the proceeds of the estate he is administering among the parties entitled to them, having regard only to the claims of the persons the trustee, executor or administrator has been able to ascertain to be entitled and whose residence or address he has been able to find out, and that the trustee, executor or administrator shall not be liable for the proceeds of the estate or assets, or any part of them, so distributed to persons of whose claim and residence or address the trustee had not notice at the time of the distribution. On such application, the court may give directions with regard to the time for distribution and the notice that shall be given to bring the fact of distribution to the notice of persons who may possibly be interested in the distribution; but this section shall not prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets (as the case may be), or any part of them, into the hands of the person or persons who may have received them.

This is not the case, however. The section surely does not authorize a trustee to pay out to a beneficiary a larger share than the one to which the trustee knows the beneficiary is entitled. The trustees of a non-charitable public appeal fund in which there is a surplus contributed partly by known donors in recorded amounts, and partly by unknown donors in unrecorded amounts, would obviously be aware that payment of the entire surplus to the known donors would give them more than the refunds to which they are entitled. The section appears to be designed instead to deal with situations in which a trustee must distribute property among the members of a class and is unable to determine the proper share of each member, because it is not clear whether or not the class has closed. It would allow the trustee, with leave of the court, to distribute to members of the class when it appeared

responsibility for the money.[24]

It is not hard to think of other scenarios in which a similar result could occur.

Example

A group of citizens in Leaning Rock, B.C. wants to change the method of assessment for property tax. They raise money among themselves to retain a lawyer to represent them in making presentations to provincial and local governments, and to pay the expenses of an advertising campaign. They also solicit support from a wider segment of the public by putting collection boxes in their places of business. Faced with mounting opposition, the government changes the assessment method in a relatively short time, before much of the money is spent. Since no record has been kept of those who gave to the campaign by the means of the collection boxes, there is no way to return the donations made in this manner.

The fund is non-charitable because its purpose is to influence government policy and effect a change in the law. In the law of charity, such a purpose is characterized as "political." Political ends are not charitable.[25] The money gathered through the collection boxes, which is unreturnable because there is no record of the donors, cannot be used for general civic purposes or even be given to a local charity. It would be hard to find anyone satisfied with this outcome.

(c) Funds for Specific Persons

Appeals on behalf of specific persons, such as a child or a particular family, raise some further complications. Such a fund is usually characterizable as a private trust and it is possible that the person or persons named in the appeal may hold the entire beneficial interest in the fund. If a surplus arises for some reason, a dispute over its ownership is not unlikely to occur.

Example

A call for donations is issued for Felicity, a 10-year-old child, who suffers from a rare disease. Her only hope is an experimental treatment in the U.S. Her parents cannot pay the necessary costs. The appeal clearly implies that the money is needed for travel and medical expenses, but does not specifically say it is to be used only for that purpose, nor does it mention what will be done with any money that is not actually used in that way. Donations flood in from many sources and a large fund is collected. Only half of it is actually spent on Felicity's travel and medical expenses.

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all the members of the class may have been ascertained, without being liable for breach of trust if other beneficiaries later come to light. *See Re Bailey*, (1982) 38 B.C.L.R. 227 (S.C.).

[24] Since the fund is subject to a trust, it cannot be claimed by the Crown immediately as *bona vacantia* (goods having no owner). Like other money paid into court under the Trustee Act, the money would be held by the Minister of Finance in a segregated trust account: *Supreme Court Rules*, rules 58(2), (9). If no claim to the money had been satisfactorily established after 10 years, it would become part of the consolidated revenue fund and would no longer have to be treated as a liability of the Province: *Unclaimed Money Act*, R.S.B.C. 1979, c. 418, s. 1. A claimant could still obtain payment afterwards on satisfactory proof of entitlement: *ibid.*, s. 4.

[25] *Re Patriotic Acre Fund*, (1951) 1 W.W.R. 417 (Sask. C.A.); *Re Toronto Humane Society*, (1987) 60 O.R. (2d) 236 (H.C.).

Scenario 1: Felicity is cured. When she reaches majority, she claims the remaining half of the fund as her own property.

Scenario 2: The treatment is unsuccessful and Felicity dies before reaching majority. Her relatives claim the remaining half of the fund for her estate.

Sometimes the resolution of such disputes seems to be dictated mainly by the convenience of the result. In Scenario 1, there is a good chance that a court would find that the fund belongs to Felicity absolutely, especially if the aftermath of her illness leaves her with some need for continuing assistance to gain a footing in life. At majority, she would be entitled to demand it be paid to her.[26] After all, the wording of the appeal does not expressly restrict the use of the fund to one category of need, and the appeal was not made in respect of anyone else. In Scenario 2, it is obvious that relatives will gain a windfall if the money is found to have belonged to Felicity. It is open to the court to hold instead that the donors must have intended the fund to be used only for the costs associated with Felicity's treatment. As that purpose failed with Felicity's death and there was no mention in the appeal of what should be done with money left over, there would be a resulting trust in favour of the donors.[27] The resulting trust keeps the money out of the hands of the relatives. Unfortunately, it could also bring about the *Gillingham* scenario, leaving the fund unusable.

(d) Overcoming the Resulting Trust By Careful Wording of the Appeal

A resulting trust of a public appeal fund can be prevented by wording the appeal so as to make it clear to donors at the outset that if any money is not needed for the primary purpose of the fund, it will be used in other specified ways. When a donation is made in response to an appeal presented in this way, the donor has to be taken to assume that the gift may be used for the other, secondary purposes mentioned in the appeal.

If the fundraisers are experienced or well-advised, their appeal will include a reference to alternative uses for any surplus. The reality is, however, that not all appeals are worded carefully. The more spontaneous the appeal, the more unlikely it is that the fundraisers will have considered the possibility that a surplus may arise. This could give rise to the *Gillingham* scenario or, more likely, a well-intentioned breach of trust committed by using the money for other worthwhile causes. In the case of a fund for specific persons, it could give rise to an unedifying dispute between the beneficiaries, the fundraisers, and the donating public

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[26] *Re Andrew's Trust*, [1905] 2 Ch. 48. The rule in *Saunders* v. *Vautier*, (1841) 4 Beav. 115, *aff'd* Cr. & Ph. 240, 41 E.R. 482 enables a person of full capacity who holds the entire beneficial interest in a gift held in trust to insist that the trust be wound up and the subject-matter of the gift transferred to him or her absolutely. When a will or trust directs that an entire sum of money or other property is to be applied by a trustee to benefit someone in a particular way and it proves impossible to do so, the beneficiary can sometimes take the gift in its entirety anyway. For example, if a will directs that a trustee hold $10,000 "for my granddaughter's university education" and the granddaughter decides not to go to university, the court determines whether the dominant intention relates to the gift itself or the purpose for which the gift was to be applied. If, as in most cases, the court finds that the dominant intention was to confer a benefit rather than to have the gift used in a particular way and no other, the granddaughter will take. This can be so even if the granddaughter dies before reaching university age: *Barlow* v. *Grant*, (1684) 1 Vern. 255, 23 E.R. 451. If the dominant intention was to have money used to further the granddaughter's education and not otherwise, the granddaughter does not have an absolute right to the money, and if it is not usable for her university education, it would belong to the grandparent's estate. *See Morrison* v. *Mills*, (1961) 36 W.W.R. 673 (Alta. S.C., App. Div.); *Long's Estate* v. *Long*, (1979) 61 A.P.R. 234 (Nfld. S.C.). If the trustees have a discretion to decide what part of a larger whole should be used for a particular purpose, the beneficiary has no absolute right to the whole: *Re Sanderson's Trust*, (1857) 3 K. & J. 497, 69 E.R. 1206.

[27] *Re the Trusts of the Abbott Fund*, [1900] 2 Ch. 326. The real distinction between *Abbott* and *Andrew* may simply be that in *Abbott* the beneficiaries were dead and in *Andrew* they were alive. *See Andrew, supra*, n. 26 at 52.

over the use of the remaining money.[28]

C. Summary

Issuing an appeal to the public for donations for a particular purpose generally gives rise to a trust. The trust may be charitable or non-charitable, depending on the purpose of the appeal. Funds are non-charitable if they are raised for the benefit of specific persons, as many informal and spontaneous appeal funds are. If part of a non-charitable fund is surplus because it can't be used for the original purpose and no alternative use for it is mentioned in the appeal, the surplus may in some cases belong to persons for whom the appeal was made. In others, it has to be dealt with according to the principles that apply to failed trusts.

Those principles may require that a surplus in a non-charitable fund be paid back to the donors. If part of the fund can't be paid back because it was contributed anonymously, the unreturnable portion cannot be used for any other purpose. It remains idle. This is the *Gillingham*[29] scenario.

On the other hand, a charitable fund may sometimes be used for a similar charitable purpose if the court approves the scheme. This is known as *cy-pres*. When *cy-pres* is not available, the general principles governing failed trusts apply. The possibility of the *Gillingham*[30] scenario is present once again.

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[28] While the case of Joe Philion in Orillia, Ontario involved a fund that was more formally constituted than the kind discussed here, it provides an example of the kind of controversy that can arise when the expectations of donors and recipients do not coincide. A substantial fund had been collected from many sources for Philion, a teenaged burn victim who was undergoing special treatment in Boston, Mass. The townspeople of Orillia had constructed a specially-equipped dwelling for him and his family, which they occupied following his return. The family decided to move to Vancouver Island, partly as a result of excessive publicity and what they perceived as onerous expectations on the part of the community. Segments of the community regarded this as ingratitude, and resolved to oppose an application by Philion for access to the trust fund. Opposition was based on reports that Philion's parents proposed to use the fund to acquire property on Vancouver Island, while the community believed the fund should have been used exclusively for Philion's medical needs. Ultimately, the balance of the fund was released to Philion pursuant to an unopposed order of the Ontario Supreme Court, but the episode had created a bitter climate in a community that had distinguished itself by its generosity. *See* "Burn victim cuts ties to Orillia despite pleas," *Toronto Star*, 30 September 1990, p. A2; "Family defends use of trust fund," Vancouver Sun, 28 September 1990, p. A15; "Family's independence bid creates hard feelings," Globe and Mail, 1 October 1990, p. A6.

[29] *Supra*, n. 19.

[30] *Ibid*.

CHAPTER III REFORM

A. General

Most problems associated with surpluses in public appeal funds could be avoided if those issuing an appeal obtained adequate advice before doing so, but it is simply unrealistic to expect this in times of urgent need. The tendency to launch spontaneous appeals in such times and the tendency of the public to respond generously to them show no sign of lessening. It would be pointless to discourage them. The law should be reshaped to better accommodate those tendencies instead.

The problem exemplified by *Re Gillingham Bus Disaster Fund*[1] is one obvious reason for reform, but devising a solution to it also provides an opportunity to clarify and restate other aspects of the law governing public appeal funds. The solution described in this Chapter for the problem of a surplus in a non-charitable fund forms part of a group of recommendations aimed at dispelling the cloud of legal obscurity that surrounds public appeal funds.

B. Sensible Treatment of Surpluses: Getting Rid of *Gillingham*

1. Harmonizing the Rules for Charitable and Non-Charitable Funds

(a) General

In order to prevent the possibility that a fund may have to remain useless, the rule that imposes a resulting trust on a surplus in a non-charitable public appeal fund (and in charitable funds when *cy-pres* cannot be invoked)[2] should be reversed. It is the resulting trust that prevents the surplus from being employed in other ways by forcing the trustees to hold the surplus for the benefit of the unknown donors, who generally cannot establish their claims. Surpluses in both charitable and non-charitable funds should be available to meet other valid needs.

One option would be to require the entire fund, or at least the amount that is not specifically demanded by way of refund, to be given to charity. The Ontario Law Reform Commission has made recommendations along these lines.[3] But there are many worthwhile purposes that do not fit into the legal concept of charity, and not all charities enjoy an equal measure of support from all elements of the public. In order for the public to accept re-allocation readily, the purpose to which the surplus is directed should be similar enough to the original one for donors to think their intentions are being respected. There should be enough leeway to select alternatives as close as reasonably practicable to the original purpose of the appeal, whether it is charitable

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1 [1958] Ch. 300, *aff'd* [1959] Ch. 62 (C.A.).

2 S. 14 of the English *Charities Act* 1960, 8 & 9 Eliz. II, c. 58, allows surplus charitable funds contributed by donors whose identities or whereabouts are unknown to be re-allocated to other charitable purposes, whether or not all the traditional prerequisites for *cy-pres* would otherwise be satisfied. It does not, however, deal with surpluses in non-charitable appeal funds. *See also* Law Reform Commission of Tasmania, *Unclaimed Charitable Funds* (LRC 3, 1975).

3 Ontario Law Reform Commission, *Report on the Law of Trusts* (1984) 472.

or not.

One Canadian province seems to have moved in this direction. Section 52(3) of Nova Scotia's *Trustee Act*[4] allows the court to approve a scheme for distribution of funds contributed by members of the public for the benefit of "a class of persons." There appears to be no restriction on the nature of the distribution. The provision apparently allows the court to approve a scheme for distribution of a surplus whether the fund is charitable or not. A fund for "a class of persons" may be charitable in the sense of benefiting a substantial segment of the community, or it may be for the personal benefit of particular persons and therefore non-charitable.[5]

The Nova Scotia approach is attractive on grounds of simplicity and practicality, and we are of the view that British Columbia should follow it in principle, with two qualifications. The first involves funds for specific persons, such as a child who requires medical treatment elsewhere. If the general law would hold that a private trust has been created for that person, we do not see a reason to deprive him or her of the right to assert a claim to a surplus in the fund. The surplus should not be diverted to other purposes without the consent of the person for whom the appeal was issued.

The second qualification relates to charitable funds. Since charitable funds enjoy certain advantages which could be lost if they could be turned to non-charitable ends, especially in relation to taxation, it should be possible to re-allocate a surplus in a charitable fund only for other charitable purposes. There is no corresponding necessity to restrict the use of surpluses in non-charitable funds to non-charitable alternatives, however. There is only a need to satisfy the public that the money is not being misused.

(b) Non-monetary Donations

Occasionally, personal property and possibly even land may be donated. Contributions of food and other supplies to a disaster relief fund are common. Should donated personal property turn out to be unneeded and thus form part of a surplus in a fund, there would usually be little difficulty in dealing with it in terms of its money equivalent. It could be converted to money or re-distributed in kind as the trustees chose.

Different considerations apply to land donated to an appeal fund. A donor of land would be much more likely than a donor of goods to want the property back if it ceased to be used for the purpose of the fund. Land would probably be transferred to trustees on formal trust terms that might provide for the possibility of its return. Anonymous gifts of land would be virtually non-existent, due to land registration. For these reasons, and because of the rarity of gifts of land, there is no need to include land in the surplus that is subject to re-allocation. The presumption can be in favour of its return, without causing prejudice to the solution to the *Gillingham*[6] problem.

2. The Court's Role

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4 R.S.N.S. 1989, c. 479 (enacted by S.N.S. 1968, c. 61, s. 1.)

5 While the purpose of the Nova Scotia provision is not entirely clear, it appears to have been intended to address the problem of *Re Gillingham Bus Disaster Fund, supra*, n. 1: *cf.* Waters, *Law of Trusts in Canada* (2nd ed., 1984) 631-632, 906.

6 *Supra*, n. 1.

(a) General

The current law of *cy-pres* requires the court's approval for alternative applications for a charitable fund. If the trustees act unilaterally to apply the unused balance for new purposes, they commit a breach of trust. This is in keeping with the usual role of a trustee as a person who is under a strict duty to carry out the settlor's instructions faithfully, and who is able to seek the court's directions if in doubt as to how they should be carried out. When a court approves a *cy-pres* scheme, it is determining what those instructions would likely have been if the settlor had been aware of the impossibility or impracticability of the original purpose of the trust.

Unlike most other trusts, however, a trust of a public appeal fund does not depend on express instructions given by a single donor, and the trustee is not chosen by the donors. The terms of the appeal, which are taken to represent the donors' intention, are often set by the trustees themselves.

Given the lack of any real connection between the donors and the trustees, why should the trustees have to apply to the court before making good use of the surplus? Should they not be able to do so on their own initiative? The answer to this question, in our view, is that if prospective donors thought there was no control over the ultimate use of their gifts, they would be much less inclined to donate.[7] An opportunity for impartial scrutiny of the trustees' proposed course of action would prevent the appearance of arbitrariness that the ability to re-allocate unilaterally might create.

Public anger over the diversion of excess donations can be dramatic. Following the 1989 San Francisco earthquake, the American Red Cross was said to have reserved $40 million for future emergencies out of a total of $52.5 million that had been donated for relief of the earthquake victims. This allegation led to outrage among some donors.[8]

We favour a general requirement for court approval of a scheme to apply a surplus for purposes other than the original ones stated in the appeal, except where such a requirement would not make economic sense, due to the size of the surplus.

(b) Small Surpluses

Where the cost of making an application to the court is out of proportion to the size of the surplus, practicality requires that the trustees should be able to distribute the surplus without having to make an application to the court. Restrictions on the trustees' range of choice may serve as a substitute for independent scrutiny where small amounts are concerned. Few donors would be likely to object if the trustees could only distribute the surplus among designated charities having uncontroversial aims and enjoying a broad base of support from the donating public. Examples of these might be the Hospitals Foundation of British Columbia,[9] or a foundation established under the *University Foundations Act*.[10] The list of designated charities could be

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7 Ss. 38-50 of the New Zealand *Charitable Trusts Act 1957*, No. 18, contain an elaborate procedure whereby donors can vote on a proposed scheme for distribution of the fund. It is available only for charitable funds, although "charity" is given an extended meaning in s. 38. The essential difficulty with this approach, of course, is that only the known donors can vote. Those who give anonymously cannot prove their eligibility.

8 "Red Cross Under Fire for Handling of Quake Funds," Vancouver Sun, 30 March 1990.

9 *Hospital Act*, R.S.B.C. 1979, c. 176, s. 29.2.

10 S.B.C. 1987, c. 50.

set out in legislation or prescribed by regulation. Designation by regulation would allow the list to be changed more easily, but could tend to politicize the designations and produce more controversy than a list contained in an Act.

In our view, an appropriate limit on the size of surpluses that could be re-allocated by the trustees acting alone is $10,000. A scheme for re-allocation of a surplus larger than this should require court approval.

(c) The Application to the Court

An application for approval of a scheme should be timely, so that unneeded money can be put to good use. A reasonable amount of time to prepare a scheme would be 60 days from the time the trustees agree that a portion of the fund will be unnecessary or cannot be used for the purpose of the appeal.

Normally it is not necessary for the settlor to be represented at the hearing of an application for approval of a *cy-pres* scheme. We believe donors should have the right to appear and make submissions to the court when the application concerns a public appeal fund, however. We also believe that if the fund was originally intended for the benefit of a specific person, that person should also have the right to appear and make submissions with respect to the use of the surplus, even though he or she may not have a beneficial interest in it.[11]

Current law gives counsel for the Attorney General the right to appear and be heard with respect to a *cy-pres* application concerning a charitable fund. The Attorney-General represents the public interest in the proper administration of charities when exercising this right.[12] The distinctions between charitable and non-charitable public appeal funds are, for the most part, highly technical. The two kinds of public appeal funds come into being in similar ways. Public concerns may arise with respect to their use. It is appropriate for the Attorney General to be able to represent the public interest in addressing them, regardless of the legal characterization of the fund. The Attorney General should therefore be included in the list of those having the right to appear and be heard with respect to the disposition of a surplus.

3. Donors Who Want Their Money Back Instead

In order to solve the *Gillingham*[13] problem, it is not strictly necessary to extend the *cy-pres* doctrine to the part of a surplus that may be returned to donors. Should the portion of a surplus contributed by donors whose identities and whereabouts are known be refunded? What is fair in terms of the expectations of this category of donors?

It is probably correct to say that most people give with only the specific purpose of the appeal in mind, without any thought to the possibility of a surplus. Yet the present law presumes that donors intend either that a surplus should belong to them or to charity, depending on whether or not the fund is a charitable one to which the doctrine of *cy-pres* can be effectively applied. It is precisely this emphasis on the donor's

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[11] Of course, if the situation is one in which the beneficial interest in the fund is found to rest in its entirety with the person for whom the fund was created, there can be no question of a true "surplus," since anything left over after the specific purpose of the appeal is satisfied would belong to the person named in the appeal.

[12] In legal theory, the Attorney General acts on behalf of the Crown exercising the *parens patriae* jurisdiction, but this is a symbol for the embodiment of the public interest in the Crown.

[13] *Supra*, n. 1.

presumed intention at the time the gift is made that prevents a workable solution to *Gillingham*.[14] A more practical analysis would start with the question whether a substantial number of donors would object if the unspent portion of their gifts were to go towards a purpose related to the purpose of the appeal, instead of being refunded. Since there are some costs associated with a mass refund that normally would have to be met from the surplus itself, refunds would be reduced by a prorated share of the costs. This would lessen the benefit to be had from a refund in any event. It is probably a safe bet that most donors would be content to have the entire surplus re-allocated to a similar and equally worthwhile purpose, rather than recover a prorated portion.[15]

Some donors may indeed prefer a refund, however. It would be fair to them, and also to the trustees who have to administer the fund, to stipulate that donors who wish to recover the unspent portion of their gifts must state this preference at the time the donation is made.[16] Subject to the right of a donor to make such a declaration, the full surplus, and not merely the portion donated anonymously, should be available for re-allocation.

The cost of having to make small refunds might be rather high in relation to their actual benefit to the donors. Many fundraising organizations will not issue receipts for small amounts, because the added administrative cost is thought to outweigh the benefit that the donor receives in the form of a negligible increase in tax credits. A minimum donation of $100 is a fair and reasonable prerequisite for the right to claim a refund out of a surplus.

C. Other Areas Where Reform or Restatement is Desirable

1. Confirming the Status of a Public Appeal Fund as a Trust

The present law concerning public appeal funds is not accessible to the people who need to be aware of it because it is dispersed throughout a maze of judicial decisions stretching back into the nineteenth century and beyond. The legal consequences of raising money through an appeal might be better understood if the nature of the trust created in this manner, and the obligations of the persons who hold the fund, were

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[14] *Ibid*.

[15] A recent American case provides an interesting example of how donors might react. In *Application of the Troy Savings Bank*, (1989) 549 N.Y.S. Supp. 2d 910 (Sup. Ct.) a fund had been raised to pay the funeral expenses of a child who had been murdered. Only 16.5% of the fund was needed for this purpose, and the bank holding the fund applied for directions as to how the balance should be distributed. Notice of the application was served on every donor who could be identified, and the notice was published in an attempt to reach the rest. Of the 742 donors, only a handful responded. Twenty-three donors suggested the balance should go to the child's family. Eleven wanted the balance to be donated to charities aiding children or victims of crime. Three suggested the money be used to set up a memorial fund, four suggested a trust fund for the murdered child's sisters, and two others suggested the balance be used as a reward for information leading to the murderer's arrest. Only two wanted their donations returned, but merely for the purpose of giving to a charity of their choice. Unable to find a single collective intent on the part of the donors, the court ordered the return of 83.5% of the contributions made by the two donors wanting a refund, and divided the rest of the money in half. One half was given to the child's family and the other half to a charity providing services to children. As the law now stands, this pragmatic course of action would probably not be open to a British Columbia court.

[16] The Ontario Law Reform Commission also recommended that donors be allowed to claim refunds if they wish. Under the Ontario proposals, a donor would also have to declare an intention to claim a refund at the time the original gift is made: *supra*, n. 3 at 473.

expressed in legislation. Accordingly, the draft legislation in the following Chapter expressly affirms that a public appeal fund is a trust.[17] It also affirms the status of those having control of the fund (not necessarily every fundraiser) as its trustees.

2. Enforceability of the Trust

(a) Charitable Funds

The Attorney-General may bring a proceeding to enforce a charitable trust. This power flows from the Crown's role as the protector of charities, and would presumably extend to charitable public appeal funds. There is no need to interfere with this historical aspect of the office of Attorney-General, but there are reasons for widening the circle of potential enforcers in the case of public appeal funds. Many appeals are launched at the local level. Disputes over the administration of the fund could be divisive in a community, and the Attorney-General may be placed in an embarrassing position if perceived by one faction to be supporting another. Considerations like these may lead the Attorney-General to be circumspect about commencing proceedings.

More ready enforcement might be had if donors were empowered to take proceedings to enforce the trust. This would be a somewhat unusual right. Only a beneficiary or a co-trustee may normally bring an action against a trustee for breach of trust. The settlor has no such ability. In the case of a charitable trust created by way of a public appeal, however, there is no personal beneficiary. This provides more reason to allow donors the right to bring a proceeding against the trustee for the proper administration of the trust.[18]

(b) Non-charitable Funds

(i) Funds for the Benefit of Particular Persons

The means of enforcing a trust of a non-charitable public appeal fund under present law are less clear than in the case of charitable funds. If the fund is for the benefit of specific persons, those persons should be able to bring proceedings against the trustees to enforce the trust, if the trustees fail to fulfil it. This would accord with general trust law, which gives the beneficiary the right to bring a proceeding against the trustee in order to have the trust carried out. Strong authority for this right on the part of persons named in an appeal is in short supply, however. To remove any doubt, the draft legislation expressly gives persons named in an appeal the right to enforce the trust in their favour.[19]

(ii) Funds for a Non-charitable Purpose

A fund may be raised for an impersonal purpose that does not qualify as being charitable in legal terms.

> Example 1: An environmental group opposed to a major energy project issues an appeal for donations towards a fund to be used to finance a lobbying effort directed at influencing the policy decisions of a regulatory agency.

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17 Chapter 1V, Draft Legislation, s. X.3(1).

18 *Ibid*., s. X.3(4)(b).

19 *Ibid*., s. X.3(4)(c).

Example 2: Members of a community raise money to pay expenses of a campaign to repeal a controversial bylaw.

In Example 1, the purpose of the fund is to influence a decision by regulators. In Example 2, it is to produce a change in the law. Efforts to influence public policy or achieve a change in the law are considered "political" aims, which are non-charitable.[20]

Trusts for non-charitable purposes were formerly treated as void, apart from a very few exceptions.[21] Section 21 of the *Perpetuity Act*[22] allows them to exist for a 21-year period only, but it is questionable whether that provision makes them enforceable.[23] Since there are many legitimate non-charitable purposes for which money could be raised, however, there should be a legal mechanism to protect against misuse. In the case of charitable funds and funds for the benefit of specific persons, that mechanism is a trust. It can be adapted to protect funds for impersonal non-charitable purposes as well, provided it can be made enforceable. The draft legislation in Chapter IV validates trusts of public appeal funds, whether or not they would be enforceable under general trust law.[24]

The argument for permitting a donor to bring proceedings to enforce the trust is even stronger where non-charitable purpose trusts are concerned, since no other potential enforcer (apart from a co-trustee) has any greater connection to the fund. There is no human beneficiary. The draft legislation accordingly allows donors to enforce non-charitable purpose trusts.[25]

3. A Model Trust Document for Public Appeal Funds

As with most other legal relationships, there is less room for disputes and misunderstandings in connection with a trust if the rights, powers, and duties involved are spelled out clearly in a written document. Trustees of a public appeal fund should be encouraged to enter into such a document.[26] It is to their benefit to assume administrative powers that other trustees normally have, and to establish procedures for retirement and the appointment of new trustees. It is also to their benefit to put in place the kinds of limitations on trustee liability that are commonly found in modern trust documents. The fact that the trustees of a public appeal fund may have little or no background in trust administration makes an explicit trust document all the more important.

A trust document is more likely to be signed by trustees of public appeal funds if a workable standard form in plain language is available. The Model Trust Document that forms Schedule A to the draft legislation is designed as such a form. It should be adaptable to most situations where money is raised informally by

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20 *Re Patriotic Acre Fund*, (1951) 1 W.W.R. 417 (Sask. C.A.). *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406, 442.

21 *See* Law Reform Commission of British Columbia, *Report on Non-Charitable Purpose Trusts* (LRC 128, 1992).

22 R.S.B.C. 1979, c. 321.

23 *Supra*, n. 21 at 32-33.

24 Chapter IV, Draft Legislation, s. X.3(2).

25 *Ibid*., s. X.3(4)(b).

26 *Attorney-General* v. *Mathiesen*, [1907] 2 Ch. 383, 394; *see supra*, Chapter II, under the heading *"(c) The Trustees of a Public Appeal Fund."*

way of a public appeal. The Model Trust Document sets out basic administrative powers needed for a simple discretionary trust, contains a reasonable limit on trustee liability, and provides for retirement and replacement of trustees.

The Model Trust Document may not come to the attention of all who may need it, however. To ensure that at least a basic structure for a trust is in place whenever a public appeal fund comes into being, the draft legislation deems the trustees to have signed a trust document containing Part 2 of the Model Trust Document. Part 2 is the portion that does not refer to the facts of individual cases. Actual trust terms would override the deemed ones to the extent of any conflict.

D. Summary

The law concerning public appeal funds should reflect the reality that such funds are often brought into being without the benefit of professional advice. Structures should be in place to allow these funds to serve their purpose and to allow surpluses to be dealt with in a rational way.

The problem of a surplus in a non-charitable public appeal fund, as illustrated by *Re Gillingham Bus Disaster Fund*,[27] can be solved by abolishing the resulting trust that the present law now imposes. Instead, the surplus should be available to be applied for another useful purpose, much like unused charitable funds may be distributed under the doctrine of *cy-pres*. Trustees of the fund should be able to distribute surpluses of less than $10,000 among designated charities enjoying wide support, without the need to apply to the court for approval. Schemes for the alternative use of larger surpluses should require court approval to allay concerns the public may have over the ultimate destination of the money.

Legal principles relating to public appeal funds are scattered through a mass of trust cases. They should be restated in modern language in legislative form, so as to be more accessible to those who need to be aware of them.

Funds raised for impersonal, non-charitable purposes need the protection of a valid trust, and the legislation should make such trusts enforceable.

Since the trustees of a public appeal fund may not appreciate the need to make a formal declaration of trust and adopt standard trustee powers, a standard form along thelines of the Model Trust Document in Schedule A to the draft legislation should be available. In order to serve as a stopgap where a trust document is silent, or where no such document is signed at all, Part 2 of the Model Trust Document should be deemed to apply to every public appeal fund, except where any actual trust terms are inconsistent with it.

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[27] *Supra*, n. 1.

CHAPTER IV DRAFT LEGISLATION AND MODEL TRUST DOCUMENT

A. General

Appeals to the public for aid and the responses of individual members of the public to them are often impulsive acts, stemming from spontaneous reactions to images of distress and suffering. If it is true, as the trial judge said in *Re Gillingham Bus Disaster Fund*, that "Emotion is a bad foundation for such an activity,"[1] then it is all the more important that the legal foundation for the activity should be a rational one. The recommendations made in this Report are intended not only to remove the lingering absurdity of perpetually unusable funds which that case illustrated, but also to ensure that the law fulfils the policy of giving effect to humanitarian objectives as far as possible, rather than frustrating them.

The draft legislation and Model Trust Document in this Chapter embodies the recommendations made in this Report. For this reason, it is unnecessary to list the recommendations formally.

While the draft legislation could be enacted in a separate statute, it is presented as a set of amendments to an existing Act. In the Commission's view, the most appropriate location for these amendments would be in a revised *Trustee Act*.[2]

B. Draft Legislation and Model Trust Document (Schedule A)

Her Majesty, by and with the advice and consent of the Legislative Assembly of British Columbia, enacts as follows:

1. The _____ *Act* is amended by adding the following after section X:

Definitions

X.1 In sections X.1 to X.6,

"appeal" means an oral, written or electronically disseminated message directed at the public generally or at a section of the public,

(a) requesting donations to, or

(b) indicating that the proceeds of any sale, competition, lottery, raffle, entertainment, service or event will be applied towards,

At some stage in a fundraising effort a request for donations must go out to the public. The request is commonly called an "appeal." It invariably mentions the reason why the fund is being raised.

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1 [1958] Ch. 300, 304.

2 R.S.B.C. 1979, c. 414. The Commission is reviewing the current *Trustee Act*.

a fund that is intended to be used in a specified manner, other than a message communicated as part of a permanent or continuing fundraising effort;

The definition of "appeal" in this draft legislation is restricted to sporadic, informal appeals.

"court" means the Supreme Court of British Columbia;

Matters involving trusts are dealt with by the Supreme Court.

"public appeal fund" means a fund of money or other property, raised through an appeal.

The definition of "public appeal fund" covers funds raised in any of the ways covered by the definition of "appeal," e.g. simple gift, purchase of a nominal benefit, buying a raffle ticket, or sponsoring an entrant in a competition. It also covers a fund consisting in whole or in part of donations in kind as well as in money.

Application

X.2(1) Subject to subsection (2), sections X.1 to X.6 apply to a public appeal fund only to the extent that they do not conflict with

Many appeals are issued informally with little planning, especially at the local level. Usually, the rights and obligations that attach to them are poorly understood by fundraisers and donors alike. This draft legislation is intended to establish a "default" scheme to apply only to the extent that a public appeal fund is not regulated under some other legal structure, such as other legislation or a formally created trust. When money is raised by an incorporated society or foundation for its normal purposes, its use will generally be governed by the organization's constitution.

(a) another enactment,

(b) the constitution, charter, incorporating document, or bylaws, of an incorporated body or foundation, or

(c) a trust document,

that governs or regulates the public appeal fund

(2) Subsections X.1 to X.6 do not apply to a fund raised by an incorporated body for the advancement of its usual charitable or public purposes.

Subs. (2) makes it clear that fundraising campaigns by incorporated charities for their usual charitable purposes are unaffected by this draft legislation. A special appeal unconnected with the organization's usual purposes would be affected, however.

Trust of Public Appeal Fund

X.3.(1) A public appeal fund is subject to a trust for the benefit of the person for whom or the purpose for which it is raised.

Subs. X.3(1) confirms that a public appeal fund is affected by a trust. It restates the effect of case law, but in so doing it highlights the nature of the rights and obligations surrounding the fund. A trust is a relationship in which a person or entity (the *trustee*) has legal ownership of certain property, but also has a duty to administer the property for the benefit of another person (the *beneficiary*) or so that a legally permissible purpose is served.

(2) A trust under subsection (1) is enforceable whether or not a trust having the same objects would be enforceable under the general law.

Subs. (2) allows a public appeal fund to be protected by a trust even if a valid, enforceable trust with the same objects would be legally impossible in another context. (The persons whom or the purposes which a trust is intended to benefit or sustain are called its "objects.") Generally speaking, an enforceable trust must have as its objects specific persons or an identifiable class of persons, or else the furtherance of a purpose the law regards as charitable. Formerly, trusts for non-charitable purposes were invalid apart from a few exceptions. Combinations of charitable and non-charitable objects were not permitted. The present law still affords them only limited recognition under s. 21 of the *Perpetuity Act* and s. 44 of the Law and Equity Act. Subs. (2) recognizes that appeals are often launched spontaneously, without prior legal advice on their wording. For example, an appeal might be launched for "the relief of the X and Y families, left homeless after a flood. Any excess will go for other local causes." Apart from statutory validation, this combination of objects could not give rise to a valid trust for a number of technical reasons. The Commission has made proposals for reform of the law in this area in its Report on Non-Charitable Purpose Trusts. Subs. (2) would allow this draft legislation to coexist with those proposals, but would also allow it to be enacted independently of them.

(3) A person who directs the management and disbursement of a public appeal fund, other than a bank, credit union, trust company or other savings institution in which the public appeal fund is deposited, is a trustee of the public appeal fund.

Subs. (3) states who is a trustee of a public appeal fund.

A bank or other savings institution which merely holds the public appeal fund on deposit is not treated as a trustee under subs. (3). S. 206 of the *Bank Act* (Canada) exempts chartered banks from having to ensure that a trust attaching to a deposit is carried out. The Financial Institutions Act, S.B.C. 1989, c. 47 contains provisions that appear to give a similar exemption to provincially regulated credit unions and trust companies: ss. 74, 82(2).

"Savings institution" is defined in s. 29 of the Interpretation Act, R.S.B.C. 1979, c. 206 as:

> (a) a bank,
> (b) a credit union,
> (c) a trust company authorized to carry on deposit business under the *Financial Institutions Act*, or
> (d) a corporation that is a wholly owned subsidiary of a bank and is a loan company to which the *Loan Companies Act* (Canada) applies.

(4) In a proceeding commenced by

(a) a trustee,

(b) a donor,

(c) a person or a member of a class of persons for whose benefit a public appeal fund is raised in whole or in part, or the legal representative of that person or member of a class, or

(d) the Attorney General,

Subs. (4) allows for the enforcement of the trust affecting a public appeal fund. Allowing a donor to enforce the trust is a departure from existing law, which generally does not give the right to enforce the trust to the person who creates it by providing the trust property. Instead, the right to do so belongs to the beneficiary. Since a public appeal fund is created by many different donors and the trustees of such a fund are not necessarily under the same degree of scrutiny by a beneficiary as those of a trust created under a will, for example, the Commission believes a donor should be able to seek the court's aid to ensure that the fund is used properly. Subs. (4) also confirms that anyone for whose specific benefit a public appeal fund is raised has the same right of access to the court to ensure that the trust is carried out as other trust beneficiaries do. In this respect, subs. (4) restates what probably is the present law regarding the ability of a person named in an appeal to enforce the trust attaching to the appeal fund, but confirms that ability expressly. It also extends it to the legal representative of a person under disability, such as a minor, and the Attorney General. The Attorney General is included because there is a public interest in the proper administration of a fund that is created by public donation.

the court may make an order that it considers just in the circumstances for the enforcement of a trust to which a public appeal fund is subject.

(5) Subsection (4) does not affect the authority of the Attorney General to commence a proceeding to enforce a trust to which a charitable public appeal fund is subject.

A public appeal fund could be either charitable or non-charitable. The distinction depends on many factors. Charitable trusts are considered public in nature. They are enforceable by the Attorney General under existing law. Subs. (4) is not intended to prevent the Attorney General from exercising that power.

Trust Terms

X.4.(1) A formal document that is executed for the better administration of the trust by a trustee of a public appeal fund or a person intending to become such a trustee may be in the form of Schedule A, adapted to meet the circumstances.

Normally the source of trustees' powers over the trust property, and their duties in respect of it, is a formal document referred to as the instrument. When a trust comes into being through creation of a fund by means of an appeal, the persons in charge of the fund should enter into a similar document, so that the rights and obligations surrounding the fund are made clear. While present law allows fundraisers to sign a document of this kind, it is rarely done. Schedule A to the draft legislation contains a Model Trust Document which could be adapted to most situations.

(2) A document executed under subsection (1) may include a reasonable limitation on the liability of a trustee for a breach of trust that does not involve dishonesty or wilful conduct which the trustee knows to be a breach of trust.

It is customary for trust documents to excuse trustees for liability for losses due to technical breaches of trust that do not involve any dishonest conduct or wilful disregard of the terms of the trust. It is important that trustees of a public appeal fund obtain the same protection, or few persons would voluntarily accept that role.

(3) Every trustee of a public appeal fund is deemed to have executed a formal trust document containing as much of Part 2 of Schedule A as does not conflict with anything mentioned in paragraphs X.2(1) (a), (b) or (c) that governs or regulates the trust.

In order to clarify the rights and duties surrounding the fund, subs. (3) makes the terms of Part 2 of the Model Trust Document apply to every public appeal fund, except to the extent that they are inconsistent with any express trust terms contained in another enactment, the constitution or other fundamental documents of an organization, or a trust document. Such express terms will prevail over any inconsistent terms in the Model Trust Document.

Unusable Balance in a Public Appeal Fund

X.5.(1) Subject to section X.6, no trust arises in favour of a donor when money or other property remaining in a public appeal fund ceases to be needed or cannot be used for the purpose described in the appeal.

Trustees may be left with surplus funds on their hands for a number of reasons. More may have been collected than was needed to achieve the purpose of the appeal, or perhaps the need was satisfied from some other source. The trust of the fund is said to fail with respect to the remaining balance, since the balance cannot be used for the original purpose of the fund. Present law dictates that if the purpose was legally charitable, the balance must be re-allocated to a similar charitable purpose by the court. The trustees cannot act unilaterally to re-allocate it, nor can they give the donors their money back. The re-allocation of charitable funds by the court is known as *cy-pres*. If the purpose of the fund was non-charitable (such as assistance to specific persons) and the purpose cannot be fulfilled, the balance is said to be held on a resulting trust in favour of the donors. This requires the balance to be returned pro rata to the donors. Often it is impossible to return the money, because the donors may have given anonymously or money may have been collected in a way which does not allow one donation to be distinguished from another. Both of these problems may be present when funds are raised informally. Subs. X.5(1) reverses the rule that a resulting trust arises on the failure of a non-charitable trust, insofar as public appeal funds are concerned. Section X.6 still provides for refunds to donors who formally request them, however.

(2) Subject to subsection (8) and section X.6, the court may approve a scheme to distribute money or other property remaining in a public appeal fund if it is no longer needed or cannot be used for the purpose de-scribed in the appeal.

Subs. X.5(2) extends the principle of *cy-pres* to non-charitable public appeal funds. The requirement for re-allocation of surplus balances is subject to the trustees' powers in relation to small surpluses under subs. (8) and to a donor's rights under s. X.6.

(3) A person mentioned in section X.3(4) may apply to the court for approval of a scheme to distribute money or other property remaining in a public appeal fund.

Subs. (3) enables a scheme to be proposed by a trustee, a donor, or by a person whom the fund was intended to benefit.

(4) A person mentioned in section X.3(4) may appear, make submissions, or propose an alternative or amended scheme, in an application made by another person under subsection (3).

It is desirable for donors and others connected with a public appeal fund to be able to express their views before a decision is made on how to distribute the unused balance.

(5) A scheme for distribution of money or other property remaining in a charitable public appeal fund must allow the money or other property to be used only for a charitable purpose.

Present law requires that once money or other property has been given to charity, it must be used only for charitable purposes. Subs. (5) restates this principle in relation to public appeal funds raised for purposes that are legally charitable.

(6) A scheme for distribution of money or other property remaining in a non-charitable public appeal fund may allow the money or other property to be used for either:

Many worthwhile purposes fall outside the legal concept of charity. Subs. (6) indicates that a court may approve a re-allocation of a balance in a non-charitable public appeal fund to a purpose that may not be legally charitable. It must, however, be used in a way that is in keeping with the underlying spirit leading to the appeal. This gives donors some assurance that their gifts will not be used in ways they would not have intended. The term "object" is used here in the sense in which it is used in trust law. It refers to the person for whom or the purpose for which the trust is created and must not allow for any benefit to a trustee or a donor from the money or other property.

(a) a charitable object, or

(b) a non-charitable object consistent with the spirit of the appeal,

(7) A trustee of a public appeal fund is bound by a scheme approved under subsection (2) to distribute the remaining balance of the public appeal fund.

Self-explanatory.

(8) If the money or other personal property forming the remaining balance of a public appeal fund amounts to $10,000 or less in value, the trustee may distribute it among the charities [listed in Schedule B] or [prescribed by regulation of the Lieutenant Governor in Council], instead of applying to the court for approval of a scheme under subsection (2).

If the surplus is small, an application to the court for approval of a *cy-pres* scheme would be uneconomical. But if the trustees are given free rein to donate it to whatever cause they wish, donors may be dissatisfied with the way their money is being used. Subs. (7) creates a compromise by allowing trustees to donate a surplus under $10,000 to charity without having to apply to the court for approval, but restricts their choice to a list of charities enjoying very wide support among the donating public. The list might be enacted as a schedule to the Act containing this legislation, or be prescribed by regulation.

(9) Subsections (2) to (8) do not apply if a person has a beneficial interest in the money or other property remaining in a public appeal fund that would entitle the person, if that person were under no legal disability, to demand the transfer to that person of the money or other property absolutely, unless that person consents to their application.

If the surplus belongs beneficially to the person for whose benefit the fund was raised under general trust law, the court will not have the power to approve a scheme to re-allocate it without that person's consent.

Refund if Donation Unused

X.6.(1) A person who donates at least $100 or personal property of equivalent value to a non-charitable public appeal fund without receiving or expecting any contractual or other benefit in return may request that the trustees refund the unused portion of the donation in the event that the trustees are unable to use the entire fund for the purpose of the appeal.

Since donors are often motivated to give only for the specific purpose of the campaign, a person who has made a substantial donation entirely gratuitously should be able to obtain a refund if the donation will not be used for that purpose. Subs. X.6(1) allows such a donor to claim a refund. It applies only to non-charitable public appeal funds, since charitable ones are subject to the doctrine of *cy-pres*. See the note beside subs. X.5(1).

(2) A request under subsection (1) must be made in writing at the time of the donation.

A possibility that a belated demand might be made for refunds would be a major administrative problem for trustees. It would prevent them from knowing the extent of the balance available for other worthwhile purposes. For this reason, subs. (2) requires that a donor declare an intention to claim a refund at the time the donation is made.

(3) If money or other property remaining in a public appeal fund is no longer needed or cannot be used for the purpose described in the appeal, the trustees must refund to a person who has made a request under subsection (1) the un-spent portion of the donated money or personal property by that person, or, if that amount or portion cannot be readily determined, a prorated portion of the donation.

If a portion of the public appeal fund cannot be used for the original purpose of the appeal, subs. (3) requires the trustees to make a pro rata refund out of the remaining balance to a donor who has stipulated for a refund when making a donation.

(4) If real property that has been donated to a non-charitable public appeal fund

(a) is no longer needed or cannot be used for the purpose described in the appeal,

(b) has not been converted into money or another form of property, and

(c) but for this subsection, sections X.5(2) to (8) would apply to the real property,

Subs. (4) provides that if land has been donated and will not be used for the purposes of a non-charitable public appeal fund, it must be returned to the donor rather than become subject to re-allocation for other purposes, unless the donor has stipulated otherwise. The reason for this is that land is unique and generally of much greater value than other kinds of property, and it would be reasonable to assume that the donor would want it back if it is not to be used as the donor intended. Because of land registration, it is most unlikely that return of a non-charitable gift of land would be frustrated by the anonymity of the donor. Subs. (4) would apply in very few cases, since land would seldom be donated and if it were, special conditions would likely be imposed on the gift to protect the donor's interests.

the trustee must return the real property to the donor, unless the terms of the donation provide otherwise.

(5) An order under section X.5(2) approving a scheme for distribution of money or other property remaining in a public appeal fund does not affect money or other property which the trustees must return under subsections (3) or (4).

Subs. (5) indicates that a refund must be made to a donor who has complied with subs. (1) and (2), regardless of the fact that a scheme for re-allocation of the surplus may have been approved by the court.

2. The Act is further amended by adding the following Schedules:

SCHEDULE A
MODEL TRUST DOCUMENT

(Note: You should include the clauses that appear in square brackets only if they apply to the fund you are setting up. Otherwise leave them out. The material in italics is only for explanation and you should leave it out of the document.)

THE TRUST FUND
Part 1

The persons who have signed this document as the Trustees of the *(name of fund)* Trust Fund declare as follows:

1.0 **Name of Trust Fund**

1.1 This document concerns a fund called the " *(name of fund)* Trust Fund."

2.0 **How the** *(name of fund)* **Trust Fund Came Into Being**

(List the reasons why the fund was created. Mention any particular facts and events that led to a need for the fund.

Example No. 1:

2.1 Jimmy Bloggs is a 5-year-old boy living in Lodestone Heights B.C.

2.2 On July 1, 1990 Jimmy Bloggs was injured in a motor vehicle accident. His left arm was amputated.

2.3 Jimmy Bloggs needs a state-of-the-art artificial arm to enable him to carry out day-to-day tasks. The arm will have to be replaced several times as Jimmy grows. It will also have to be serviced regularly to keep it in good working order.

2.4 The parents of Jimmy Bloggs cannot afford an advanced electronic artificial arm.

2.5 Jimmy Bloggs and his parents will need other special equipment to meet his needs.

2.6 Many members of the community of Lodestone Heights have offered to help Jimmy Bloggs and his family.

Example No. 2:

2.1 On November 1 1991 an earthquake devastated the community of Lodestone Heights.

2.2 The earthquake destroyed many homes in Lodestone Heights, damaged roads, and disrupted communications.

2.3 Many residents of Lodestone Heights were injured and many lost all their belongings also.

2.4 A fund is needed to supplement efforts by government and various private agencies to relieve the community of Lodestone Heights.

2. An appeal to the public for donations to the *(name of fund)* Trust Fund [was made on *(date)*][will be made].

[2. Members of the public have donated (*insert amount or description of property donated*) in response to the appeal. (*Use if appeal has led to donations already.*)]

3.0 **Purposes of the** (name of fund) **Trust Fund**

3.1 The purposes of the *(name of fund)* Trust Fund are:

(a)
(b)
(c)
(d)
....

(Set out the purposes for which the Trustees are to be able to make payments from the Fund. These purposes must be in keeping with the terms of the appeal for donations. They must show clearly who is to benefit from the Fund. They should also state what is to happen to any money that is left over after the Fund's purposes have been fulfilled as far as possible.

Example No. 1:

The purposes of the Jimmy Bloggs Special Needs Trust Fund are:

(a) to purchase an artificial arm for Jimmy Bloggs and replace it when the Trustees agree a replacement is needed;
(b) to maintain the artificial arm and its replacements in good functioning order;
(c) to purchase, maintain, and replace other technological aids which the Trustees think are necessary or desirable to meet the special needs of Jimmy Bloggs;
(d) to assist the parents of Jimmy Bloggs to equip their dwelling to accommodate his special needs;

(e) if and when the Fund is no longer needed for the purposes set out above, to pay any surplus then remaining to an organization caring for child amputees.

Example No. 2:

The purposes of the Leaning Rock, B.C. Earthquake Relief Fund are:

(a) to provide medical treatment, food, clothing, and temporary shelter to victims of the earthquake;
(b) to provide supplies and equipment to assist in the effort to rescue and evacuate victims of the earthquake;
(c) to assist persons who are in financial need as a result of losses suffered in the earthquake.
(d) to maintain any surplus as a special fund to provide similar relief to the victims of future earthquakes.)

Part 2

4.0 **Reason For Signing This Document**

4.1 The persons who [will issue][have issued][the appeal] [now direct the management and disbursement of the *(name of fund)* Trust Fund] wish to declare the terms on which they [hold][will hold] the Fund in trust and deal with it in order to achieve its purposes, and to declare how they will deal with any surplus in the Fund, and so they have signed this document.

5.0 *Definitions*

5.1 In this document the words **"Fund" "Trustee"** and **"Trust Period"** have the meanings set out below:

5.2 **"Beneficiary"** means a person for whose benefit or on whose behalf the Trustees may make payments from the Fund.

5.3 **"Fund"** means the (name of fund) Trust Fund, consisting of money and other property donated or otherwise received at any time for the purposes of that Fund, and also any interest, dividends, or other income which is earned on the money and other property that is donated.

5.4 **"Trustee"** means a person who has signed this document in order to assume the duties of managing and disbursing the Fund and who has not retired or been removed, but does not include a bank, credit union, trust company, or other savings institution in which the Fund or any part of the Fund is deposited.

5.5 **"Trust Period"** means:

(a) the period of 80 years beginning on the day on which the first donation was received in response to the first appeal;[1] or

[1] Eighty years is selected as a maximum duration for the trust in order to coincide with the time within which interests must vest under the *Perpetuity Act*, R.S.B.C. 1979, c. 321. The "default" regime envisioned by the draft Act and the trust terms in the schedules must cover both charitable and non-charitable funds. While the trust of a

(b) a shorter period beginning on the day on which the first donation was received in response to the first appeal and ending on the earliest of

(i) the day on which the Trustees declare in writing under clause 6.3 that the Trust Period is at an end,
(ii) the day on which the court approves a scheme to distribute the money or other property remaining in the Fund,
(iii) the day on which no money or other property remains in the Fund.

6.0 **Trustees' Duties**

6.1 The Trustees are to hold the Fund during the Trust Period and use the income and capital for the purposes of the Fund as set out in clause 3.1.

6.2 The Trustees must consider, at least once in each year while any money or other property remains in the Fund, whether the remaining money or other property is still needed or can be used for the purposes of the Fund.

6.3 If the Trustees decide that any money or other property remaining in the Fund is no longer needed or cannot be used for the purposes of the Fund, they must set out in writing the reasons that led them to make that decision and declare the Trust Period to be at an end.[2]

6.4 After the end of the Trust Period the Trustees continue to be trustees of any money or other property that remains in the Fund for the purpose of distributing it according to a scheme approved by the court, or in a manner otherwise required or permitted by sections X.5 and X.6 of the Act or any other applicable Act or law.

7.0 **Powers of Trustees**

7.1 **Further Appeals and Donations**

7.1.1 The Trustees may issue further appeals for donations to the Fund and raise money for the Fund by any other lawful means whenever they believe it is necessary or advisable to do so.

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charitable fund can last forever, and it does not matter that anyone who receives a benefit from it according to its terms may do so after 80 years from the creation of the fund, the situation is different if the fund is non-charitable. Anyone who can potentially benefit under a non-charitable fund must fall into the benefited class within the 80-year "wait and see" period. For the sake of simplicity, the trust terms limit the maximum duration of the trust of a public appeal fund to 80 years, regardless of its nature. Given the informal, *ad hoc* character of the fundraising at which the draft legislation is directed, it is thought that this is a sufficiently long period for the fund to endure. If a perpetual charity is intended, it will likely be established in a much more formal manner.

[2] The trustees are empowered by clause 6.3 to wind up the trust without having to make an application to the court, if they determine the Fund is no longer needed or usable for its stated purposes. Since the trustees actually administer the Fund, they are better situated to determine if it continues to perform a useful function. An application that would force the court to make determinations of fact regarding the continued usefulness of the Fund could be expensive and time-consuming. While the trustees may have to apply to the court for the approval of a scheme to distribute any surplus (*see* s. X.5 of the draft legislation and clause 6.4 of the trust document), application for approval of a scheme would normally be much more straightforward and less costly than one in which the continued usefulness of the Fund was in issue.

7.1.2 The Trustees may accept any donations to the Fund as long as the donations are not made on conditions that are inconsistent with the purposes of the Fund.

7.2 **Payments from the Fund During the Trust Period**

7.2.1 During the Trust Period the Trustees may make payments from the Fund without having to distinguish between capital and income[3]

(a) in the amounts and at the times they see fit for or on behalf of any beneficiary, or otherwise for the purposes of the Fund,[4]
(b) to pay expenses, income taxes and other taxes, or charges, for or on behalf of any beneficiary, or arising in respect of the Fund; or
(c) to make a refund to a donor or return donated property if a refund or return is required by section X.6 of the Act.

7.2.2 Clause 7.2.1 is not intended to affect the jurisdiction of the court to determine the receipts and disbursements that relate to capital and those that relate to income.[5]

7.3 Investment

7.3.1 The Trustees may invest any part of the Fund that is not needed immediately for payments under clause 7.2.1 in investments in which it is lawful for the Minister of Finance to invest the consolidated revenue fund of the Province under the *Financial Administration Act* or in the classes of investments in which the *Trustee Act*[6] allows trustees to invest.

7.3.2 With regard to any property forming part of the Fund the Trustees may

(a) retain the property uninvested for any length of time;
(b) leave it in a particular form for any length of time;
(c) sell or convert the property or any part of it to money;
(d) convert one form of investment into another; or
(e) authorize securities belonging to the Fund to be commingled with other securities in order to facilitate investment and reinvestment, provided that the share of the Fund in the commingled pool of securities is accounted for separately.

7.3.3 During the Trust Period the Trustees may accumulate and add to the capital of the Fund any income

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3 This power exempts the trustees from having to apportion many kinds of receipts and expenses between capital and income for the purpose of making disbursements.

4 This wording, when read together with clause 8.0, makes the trust discretionary. Since this is a "default" scheme, only a wide power would fit a variety of circumstances.

5 Case law indicates that a discretionary power to adjust between capital and income accounts which purports to oust entirely the jurisdiction of the court to categorize receipts and disbursements as "capital" or "income" will be unenforceable: *Re Bronson*, [1958] O.R. 367 (H.C.).

6 This is a reference to the current *Trustee Act*, R.S.B.C. 1979, c. 414 as it stands at the date of this Report. S. 15 contains a list of categories of investments in which trustees are authorized to invest trust property, except where the terms of the trust prohibit them from doing so.

arising from the Fund that they do not use otherwise in a manner allowed by this document.

7.4 **Nominees**

7.4.1 The Trustees may allow any investments or other property forming part of the Fund to be held by or in the names of nominees.

7.5 **Professional Advice and Services**

7.5.1 In relation to anything concerning the Fund the trustees may arrange for a person, firm, organization or corporation engaged in any profession, trade or business to give advice or perform services (including the receipt and payment of money) on their behalf.

7.5.2 The Trustees are not liable for any loss arising from their reliance in good faith on advice or services obtained under clause 7.5.1.

7.6 **Transfer of Fund to Incorporated Body, Etc.**

7.6.1 The Trustees may transfer all or part of the Fund to a corporation, society, foundation, or other incorporated organization having objects similar to the purposes of the Fund, or into another fund having similar purposes, if, in their opinion, the purposes of the Fund will be better served by so doing.

7.6.2 The Trustees may form a corporation, society, foundation, or other incorporated organization for the purpose of transferring the Fund to it under clause 7.6.1.

7.7 **Other Transactions, Elections and Consents**

7.7.1 The Trustees may enter into any transaction, execute any document, make any election, or give any consent concerning the Fund or property forming part of the Fund if they think it will better enable the Fund to serve its purposes.

7.8 **Rules Governing Performance of Trustees' Duties**

7.8.1 The Trustees may make rules that are consistent with this document to govern

(a) their meetings;
(b) management of the Fund generally, including an investment plan or policy;
[(c) how to determine if and to what extent a person is entitled to benefit from the Fund.]
(use (c) if the Fund is for the benefit of a class of persons such as victims of a particular disaster)

8.0 **Trustees' Discretion**

8.1 The Trustees may use the powers which this document gives to them to enable them to administer the Fund effectively and to comply with any relevant Act or law, but not for any other reason.

8.2 Except as indicated in clause 8.1 the Trustees may exercise a power under this document in their absolute discretion.

8.3 The Trustees may ask for the opinion of a beneficiary on a matter affecting the administration of the Fund or the exercise of their powers, but they are not bound by the beneficiary's opinion.

9.0 **Trustees Act By Majority**

9.1 A majority of the Trustees may validly do anything that the Trustees may lawfully do.

9.2 If any Trustees disagree with a decision or act of the majority, those trustees may state their disagreement in writing but unless the decision or act is unlawful they are to join with the majority in doing anything necessary to carry out the decision or act if it cannot be carried out otherwise.

9.3 Trustees who state their disagreement with a decision or act of the majority in writing under clause 9.2 are not liable for any breach of trust or any loss resulting from that decision or act even if they have joined with the majority in compliance with clause 9.2 in order to carry it out.

10.0 **Trustees' Liability**

10.1 A Trustee is not liable for any loss to the Fund unless the loss is due to that Trustee's own

(a) dishonesty, or
(b) wilful conduct which the Trustee knows is inconsistent with this document.

10.2 Clause 10.1 is not restricted by clause 7.5.2.

11.0 **Retirement and Appointment of Trustees**

11.1 Whenever there are at least 2 trustees of the Fund a trustee may retire by signing a written notice of retirement and delivering it to the remaining trustees either personally or by registered mail.

11.2 On personal delivery or mailing of the notice of retirement to the other trustees the trustee sending the notice ceases to be a trustee for all purposes except for anything which must be done in order to vest any property of the Fund in the remaining or new trustees.

11.3 After a trustee retires the remaining trustees may appoint in writing a person to replace the trustee who retired.

11.4 The appointment of a person as a trustee under clause 11.3 takes effect when that person signs this document.

11.5 The statutory provisions concerning removal, retirement, and appointment of trustees apply to the trustees of the Fund except as indicated in this section 11.0.

Part 3

SIGNED by the following persons as Trustees of the *(name of fund)* Trust Fund on *(date)*:

Signatures of the first persons to act as Trustees)

WITNESS:

(Signature and address of witness to signatures of first Trustees)

SIGNED by the following persons as new Trustees appointed to replace a Trustee of the (name of fund) Trust Fund:

(Signatures of new Trustees)

WITNESS:

(Signature and address of witness to signature of each new Trustee)

SCHEDULE B[7]

Hospitals Foundation of British Columbia

A foundation established or continued under the University Foundation Act, S.B.C. 1987, c. 50

C. Acknowledgments

We wish to thank all those persons who took time to discuss with Commission staff the issues treated in this Report. We have benefited greatly from their insight and experience.

In particular, we wish to thank Mr. Blake Bromley, a legal practitioner who provided extensive and valuable comment on earlier drafts of the Report. The responsibility for the recommendations made in the Report and for the form in which they are expressed belongs, however, to the Commission.

We also acknowledge the contribution of Gregory G. Blue, a member of the Commission's legal staff, who undertook research and, subject to the direction of the Commission, prepared this Report.

[7] List of charitable organizations designated as eligible to receive a portion of a surplus in a public appeal fund. (See Chapter III under the heading "(b) Small Surpluses" and section X.5(8) of the draft legislation.) The list is presented here as a schedule to an Act, but could also take the form of a list prescribed by regulation. The foundations appearing below are mentioned here only as examples of the kinds of organizations that might be designated.