

Donor-Restricted Charitable Gifts: A Practical Overview Revisited II*

TERRANCE S. CARTER

*Carter & Associates, Barristers and Solicitors, Orangeville, Ontario***

[Editor's Note: The paper on which this article was based was intended for a legal audience but the issues surrounding donor-restricted charitable gifts must be of some concern to all executives and boards who accept such gifts on behalf of the charitable organizations they serve. So that readers may benefit from access to the full text of Terrance Carter's comprehensive survey of the topic, this article will appear in two parts. Part I follows; Part II will appear in Volume 18, No. 2.]

Part I

1. Introduction

Since the presentation on which this article is based, there has been considerable public recognition of the importance of donor-restricted charitable gifts. This increased recognition has occurred because of a realization that with the new generation of philanthropists, a different approach to charitable giving which recognizes the importance of accommodating the donor's wishes as well as the expectations of the charity, is emerging. As stated by a senior fundraiser:

Philanthropy has become *donor rather than cause centred*. Altruism has become self-interested, and we now have the *donor-consumer... What will move donors is their wants, not our needs*.¹ [emphasis added]

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**Carter & Associates is affiliated with Fasken, Martineau, Dumoulin LLP, Barristers and Solicitors. Terrance Carter serves as counsel to Fasken, Martineau, Dumoulin LLP on charitable matters.

This “donor centred” approach to philanthropy is in part a reflection of the “Baby Boomer” generation’s need to dominate and control all aspects of their lives. As the Boomers reach their forties and fifties, they are no longer prepared to part with their wealth by leaving it in the sole control of the charity. Instead, they are insisting on exercising some measure of control over their gifts. In a *Time Magazine* article on “The New Philanthropy,” the following observation was made:

Silicone Valley Chief Executive Officers, along with other newly rich Americans, are finally stepping up to the collection plate. And just as they transformed American business, members of the new generation are changing the way philanthropy is done. *Most are very hands on.*² [emphasis added]

As a result of the greater demand by donors to exercise control over their gifts, there is an increasing obligation placed upon charities and their legal counsel to ensure that restrictions imposed by donors are respected, while at the same time ensuring that the charity is able to comply with those restrictions, and making sure that they do not unnecessarily expose the charity and its board of directors to legal liability. Thus, the following article provides greater focus on situations in which charities and their boards of directors may be exposed to liability, and what practical steps can be taken to avoid such risks.

2. Setting the Stage

The following scenario provides an illustration of a typical situation which is not uncommonly faced by lawyers who advise charities.

As legal counsel for a financially troubled charity which operates a youth centre for street kids, you are asked to advise on the legal implications of the charity ceasing to operate. The board is contemplating a possible amalgamation with another charity or, alternatively, dissolving the charity and transferring its remaining assets to another charity that has similar charitable objectives. In reviewing a copy of the current financial statement for the charity, you notice that there is a reference in the statement to the “Simpson Endowment Fund”. As part of your due diligence in advising the charity, you ask for details.

You are advised that the Fund was established 10 years ago when Mr. Simpson died. He left \$50,000 to the charity to be used to build a gym as an addition to the youth centre. Unfortunately, the gym addition was never built because the \$50,000 gift from the Simpson estate was insufficient to ensure the completion of the project and monies could not be raised from other supporters. When you asked why the current balance in the “Simpson Endowment Fund” is now only \$20,000 instead of the original \$50,000 plus accrued interest, you are advised that, on occasion over the last 10 years, the board has had to use some of the fund to balance the operating budget of the youth centre.

At a board meeting, one of the new members who was not aware of the history of the Fund asks you whether or not the Fund has been properly dealt with and, if not, what the legal implications are for the charity and its board of directors and what should be done to rectify any irregularities if they have occurred.

To assist those who may face similar problems, this article will provide an overview of the more important issues that arise in dealing with charitable gifts that are subject to donor restrictions, whether those restrictions are in the form of an endowment, a conditional gift, or a restricted purpose trust fund. The difficulty in attempting such a task, though, is that every issue raised in this grey area of the law leads to myriad related matters which must be considered so it is easy to become confused by the numerous questions that should be addressed.

In addition, the legal and equitable principles that arise are often complex and murky, involving complicated concepts of trust law, corporate law, the law of associations, contract law and, more currently, income tax law. Although there are numerous textbooks and articles dealing with many of the individual legal issues involving donor-restricted charitable gifts, there do not appear to be any published materials that provide one source dealing with all of the various legal issues.

This article is not meant to be a comprehensive analysis of the law in this area. Instead, it is intended to provide a practical overview of the relevant issues for lawyers, executive directors, fundraisers and interested members of boards of directors of charities. In this regard, the article can most effectively be used as an initial reference tool or guide, similar to a rough set of “Coles Notes,” that can be consulted before proceeding with the more thorough research required to provide a competent legal opinion for a client.³

3. Preliminary Legal Considerations

(A) The Legal Nature of a Gift

What constitutes a “charitable gift”? For ease of use, reference is made to *Black’s Law Dictionary* for a standard definition of what is a gift in law:

Gift – a voluntary transfer of property to another made gratuitously and without considerations.⁴

(B) What Is the Basic Nature of a Charitable Purpose?

The other fundamental consideration in understanding donor-restricted charitable gifts involves an appreciation of the special nature of a charitable purpose and its impact on different forms of such gifts. A selected discussion of the characteristics and key issues involving charitable purposes is set out below.

(C) What Is the Definition of a “Charitable Purpose?”

The term is generally used in the context of a charitable purpose trust but has application to other legal forms of charities as well. The *Restatement of Trusts*⁵ defines a charitable purpose trust as follows:

A charitable purpose trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.

The Ontario Law Reform Commission, *Report on the Law of Charities*⁶ summarizes the basic nature of a charitable purpose trust as follows:

... a promise or undertaking made by the initial trustee, followed by undertakings of his or her successor trustees, to apply a certain locus of wealth, sometimes in perpetuity, to a particular purpose. So analyzed, it is more akin to an oath or a vow, albeit legally enforceable, than to a bilateral contract. It is this feature that gives it its special and problematic juridical character.

(D) What Are the Basic Attributes of a Charitable Purpose Trust?

Compared to other forms of trusts, a charitable purpose trust has certain beneficial attributes which are unique to it. Those attributes are summarized as follows:⁷

- A charitable purpose trust is exempt from a requirement that there be a beneficiary of the trust. This means that there is no one to enforce the trust other than the Attorney General in accordance with that office’s traditional *parens patriae* role in overseeing charitable purposes.
- A charitable purpose trust will not fail for uncertainty of objects even though there are no identifiable beneficiaries, provided that the purpose is exclusively charitable.
- The court is prepared to write or rewrite a charitable purpose trust in certain limited circumstances discussed later in this article by supplying a *cy-près* scheme i.e., by making the charitable objects “as near as possible” so that the charitable purpose intended by the donor can continue to be achieved.⁸
- A charitable purpose trust is exempt from the prohibition against remoteness of vesting, otherwise known as the “modern” rule against perpetuities. This rule would otherwise require that a contingent interest in property vest within the perpetuity period, i.e., the length of any life in being at the time the instrument establishing the contingent interest is created plus 21 years. Section 16 of the *Perpetuities Act* reformed the rule against perpetuities so that instead of asking “what could conceivably happen”, we now “wait and see” whether the interest under consid-

eration in fact vests within the perpetuity period. As a result, in Ontario a contingent interest is void only if it must vest, or actually does vest, outside the perpetuity period.⁹ With regard to a charitable purpose, the exemption from the rule against remoteness of vesting means that a charitable purpose is “liberated” from rules prohibiting remote conditional interests.

- A charitable purpose trust is exempt from the prohibition against indestructible or perpetual trusts. This rule would otherwise prohibit the tying up of capital in trust where it is impossible to identify the absolute equitable owners for a period greater than the perpetuity period. This means that both property and funds held by a charity can be held in perpetuity without violating any rule of law.

(E) Does a Charitable Purpose Trust Have Application To a Charitable Corporation?

The issues involved in determining whether a charitable purpose trust has application to a charitable corporation are a highly confused and unsatisfactory area of the law.¹⁰ The main aspect of this question is whether a charitable corporation holds its assets “in trust” for its charitable purposes. The difficulty is that the case law has been divergent on this issue.¹¹ As well, this issue has been further confused in Ontario as a result of section 1(2) of the *Charities Accounting Act*,¹² which states that a charitable corporation is a trustee of its property for purposes of that *Act*.

American legal authorities have commented upon this grey area of the law as follows:¹³

The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trustee. The question is in each case whether a rule that is applicable to trustees is applicable to charitable corporations with respect to unrestricted or restricted property. Ordinarily, the rules that are applicable to charitable trusts are applicable to charitable corporations, as we have seen, although some are not...

Generally speaking, the attributes of a charitable purpose trust will have application to a charitable corporation when the corporation holds property in accordance with a special purpose charitable trust (discussed further below). The same attributes will also apply, but in a different sense, with regard to unrestricted charitable property of a charitable corporation.

From the *Christian Brothers* decisions, it is clear that a charitable corporation does not hold its unrestricted assets “in trust” for its charitable purposes. Instead, it owns such assets beneficially to be used in accordance with its corporate objects. This was noted by Blair J. in *Christian Brothers Gen. Div.* as follows:

A charitable corporation does not hold its assets “as trustee” for charitable purposes... It holds its assets beneficially, like any other corporation. As a matter of corporate law, of course, it must use those assets in a manner consistent with its corporate objects, and its directors have fiduciary obligations to ensure that such is the case. Where its corporate objects and its charitable purposes coincide – as they do in this case – it must use its assets in a manner consistent with those charitable purposes. Nevertheless, this does not mean that it holds all of its assets in some kind of trust capacity.¹⁴

In the end, while it may be said that for some purposes a charitable corporation is in a position analogous to that of a trustee with respect to the use and disposition of its property – at least with respect to the court’s power to exercise its “ancient supervisory equitable jurisdiction” over it – the weight of authority supports the conclusion that its assets are not held by it “as trustee” for its charitable objects, but are owned beneficially to be used by the corporation in a fashion consistent with its objects.¹⁵

This position was confirmed by the Ontario Court of Appeal in *Christian Brothers Ont. C.A.*¹⁶ The British Columbia Supreme Court also came to the same conclusion involving the assets of the Christian Brothers located in that province.¹⁷ As such, it is now generally accepted that unrestricted property of a charitable corporation is not to be construed as trust property held by a charitable corporation for its charitable purposes.

In a practical context, this means that a charity may use an unrestricted gift to the full extent of its charitable objects based upon its corporate authority as a legal entity without having to interpose a charitable purpose trust to establish either the legal authority or the parameters within which the gift can be used. Since the nature of a charitable corporation as a separate legal entity both empowers the charity to carry out its charitable purposes and also allows it to protect the charitable purposes by virtue of the doctrine of *ultra vires* (i.e., that the corporation cannot operate outside of its corporate objects), it would serve no useful purpose at law to require that a charitable corporation hold its property in trust for its general charitable purposes. A charitable corporation, both according to corporate law, as well as in accordance with the equitable jurisdiction of the courts over charitable property, is obligated to ensure that an unrestricted gift to the charity is only used within the parameters of the corporate objects of the charity.¹⁸

A charitable unincorporated association, on the other hand, has on its face more in common with a charitable purpose trust, although they are not exactly the same. Since a charitable unincorporated association is not a separate legal entity, its property, by necessity, must be held in trust by trustees. However, the fact that property is held by the trustees of an unincorporated charitable association is due to its inability to own property itself, rather than because an unincorporated association is holding its unrestricted property in trust for its charitable purposes. Having said that, the property that is held in trust for an unincorporated charitable association is, by virtue of the trust relationship, a

charitable purpose trust. It is interesting, therefore, that a charity organized as a charitable unincorporated association would generally have its property held as a charitable purpose trust but if it becomes incorporated, it no longer does. This is an interesting dichotomy that does not yet appear to have been addressed by the courts.

With regard to a charitable corporation, even though the corporation can own its general property without the imposition of a trust, once a donor imposes restrictions on a gift whereby the charity is unable to use the gift for the full range of its charitable objects, then the gift will be held as a separate special purpose charitable trust with all aspects of a charitable purpose trust having application to the donor-restricted gift. It in essence becomes a charity within a charity. This unique nature of a special purpose charitable trust is discussed further under “Are Special Purpose Charitable Trusts Recognized in Canadian Law?” below.

To the extent that special purpose charitable trusts and other types of donor-restricted charitable gifts are dealt with in a similar manner by a charity no matter how the charity is organized, whether it be in the form of a charitable corporation, an unincorporated charitable association, or a charitable purpose trust, references in the balance of this article to “charity” are intended to include all legal forms through which charities operate. In this regard, *Waters* makes the following observations:

As Snell¹⁹ points out, “the question, strictly speaking, is not whether a ‘charity’ exists, but whether the trusts in which property is held are trusts for charitable purpose”. To which might be added, “or whether the objects of a corporation are charitable”.²⁰

4. What Is the Difference Between Unrestricted and Donor-Restricted Charitable Gifts?

(A) Unrestricted Charitable Gifts

(1) What Is the Nature of an Unrestricted Charitable Gift?

An unrestricted charitable gift is a gift at law to be applied towards a charitable purpose, (whether the charitable purpose is in the form of a charitable purpose trust, a charitable corporation, or a charitable unincorporated association), that is not subject to any restrictions imposed either directly or indirectly by the donor, other than the legal requirement that the gift be used for the charitable purpose of the recipient charity. As a result, the board of a charity is at liberty to apply an unrestricted gift to its charitable purposes as stated in its constituting documents without restrictions, limitations, conditions, terms of reference, directions, or other restricting factors imposed by the donor that would fetter or limit the discretion of the board in applying the gift in whatever manner it deemed to be most appropriate to achieve its charitable purpose.

This means that, provided the board of a charity does not exceed its charitable purposes, whether through breach of a fiduciary duty with regard to the general trustee-like obligations in dealing with its charitable property or embarking on *ultra vires* activities that are beyond the objects of the corporation, the charity may use the gift at its absolute discretion. This may involve disbursing all or a portion of the gift, or investing the gift either over the short term or in perpetuity and using the income to pursue any one of the authorized charitable purposes within the constating documents of the charity. In addition, if the board of a charity decides to designate unrestricted charitable gifts for a specific charitable purpose, there is nothing to stop the board from subsequently undesignating the funds and applying the funds to another charitable purpose within its charitable objects.

(2) What Are Some Examples of Unrestricted Charitable Gifts?

Unrestricted charitable gifts form a broader category of gifts than do donor-restricted charitable gifts, since unrestricted charitable gifts include all sources of monies gifted to a charity that are not subject to donor restrictions. The following are some examples of unrestricted charitable gifts:

- government grants that are not restricted to a particular program;
- sponsorship monies received without restrictions;
- unrestricted charitable gifts from donors, either while the donor is alive or through a testamentary instrument, that are directed to be used for the general purposes of the charity, or alternatively where there are no references to restrictions, conditions, limitations or restrictions in the gift;
- board-designated funds consisting of unrestricted charitable gifts that have been designated by the board for a particular purpose or held as a board-initiated endowment fund.

With all of the above funds, and in particular in relation to board-designated funds, it is open to the board to vary, change, or terminate the restrictions or purposes for which those funds have been applied in any other manner that the board thinks is best to achieve the charitable purposes of the charity, without the board being in breach of trust.

(B) Donor-Restricted Charitable Gifts

(1) What Is the Nature of a Donor-Restricted Charitable Gift?

Black's Law Dictionary defines the term “restrict” or “restriction” to mean: “To restrain within bounds; to limit; to confine”.²¹

For purposes of comparing donor-restricted and unrestricted charitable gifts, “*donor-restricted charitable gift*” in this article means a gift at law to a charitable purpose that is subject to restrictions, limitations, conditions, terms

of reference, directions, or other restricting factors imposed by the donor that would constrain or limit a charity concerning how the gift can be used.

As a result, the board of a charity that receives a donor-restricted charitable gift needs to be careful to identify the nature of the donor restriction and to recognize the legal consequences of the specific type of restriction that has been imposed by the donor, as well as the importance of complying with the restrictions in question.

Too frequently, charities fail to either identify or adequately understand the nature of the donor restriction that has been imposed. This, in turn, exposes charities and their boards of directors to unnecessary and potentially serious liability.

(2) Different Forms of Legal Restrictions

The different forms of legal restriction that donors may impose often have distinctive legal consequences associated with them. As a result, it is important to understand both the various forms that donor restrictions may take and the legal consequences that flow from each type.

5. What Are the General Forms of Donor-Restricted Charitable Gifts?

(A) Special Purpose Charitable Trusts

(1) What Is the Nature of a Special Purpose Charitable Trust?

A special purpose charitable trust is a gift held by a charity in trust for a specific charitable purpose that falls within the parameters of the general charitable purpose of the charity as set out in its constating documents. The board would be acting *ultra vires* if it were to authorize the corporation to hold property as a special purpose charitable trust where the special charitable purpose was outside the scope of the charity's corporate objects:

Corporations established by a statute or otherwise for particular purposes which have no existence for any purposes outside those for which they were created cannot be trustees of charitable trusts for purposes other than those for which they were established.²²

In this regard, while unrestricted charitable gifts are beneficially owned by a charity for its general charitable purposes, gifts that are contributed to a special purpose charitable trust are held by the charity in trust for the stated special purpose and are not owned beneficially by the charity.²³ The charity is, in effect, managing a separate and specific charitable purpose trust within the confines of its own general charitable purpose, i.e., a charity within a charity, except that a special purpose charitable trust is not required to be registered by Canada Customs and Revenue Agency (CCRA) as a separate charitable organization or charitable foundation.

To the extent that a gift constitutes a separate charitable purpose trust, the charity can only use the gift to accomplish the specific charitable purpose established by the donor and for no other purpose.

The residue of the estate of the testatrix is given on a valid charitable trust. *It is clear that it can never be used for any purpose other than the charitable one to which it is devoted.*²⁴ [emphasis added]

Special purpose charitable trusts are commonly referred to as “donor-restricted trust funds”, “charitable trust property”, “special purpose funds”, “endowment funds” and “restricted funds”. The general terminology that will be used in this paper is “*special purpose charitable trusts*”, although reference is made to other terminology where the context warrants.

(2) *Are Special Purpose Charitable Trusts Recognized In Canadian Law?*
Common Law Recognition of Special Purpose Charitable Trusts

There is a long line of case law, as well as commentaries, that recognize the existence of a special purpose charitable trust as being distinct from the general charitable purpose of the charity which administers it. In this regard, *Tudor on Charities*,²⁵ which was quoted with approval by the Court of Appeal in *Christian Brothers Ont. C.A.*, makes the following statement about special purpose charitable trusts in comparison to unrestricted gifts received beneficially by a charity without the imposition of a trust:

A gift to a charitable company is usually construed as a gift to the body beneficially. The Court’s approach was set out by Buckley J. in *Re Vernon’s Will Trusts*:

There is no need in such a case to infer a trust for any particular purpose. The objects to which the corporate body can properly apply its funds may be restricted by its constitution, but this does not necessitate inferring as a matter of construction of the testator’s will a direction that the bequest is to be held in trust for those purposes:

The natural construction is that the bequest is made to the corporate body as part of its general funds, that is to say, beneficially, and without the imposition of a trust.²⁶

and

*A charitable company may hold particular property, distinct from the general property of the company, on trust for a specific charitable purpose.*²⁷ [emphasis added]

In the *Christian Brothers B.C.S.C.* decision, the facts of which are described below, Levine J. concluded, after reviewing extensive supporting case law, that:

A charitable corporation, such as C.B.I.C. generally holds property absolutely to be used for its charitable purposes, but may hold property as trustee for a specific charitable purpose.²⁸

Levine J. relied upon a number of cases in support of this conclusion, including *Re Ulverston & District New Hospital Building Fund*,²⁹ *Attorney-General for Queensland v. Cathedral Church of Brisbane*,³⁰ *Re Young Women's Christian Association Extension Campaign Fund*,³¹ *Re Church Army*,³² *Re Lucas*,³³ *Re Finger's Will Trust*.³⁴ After reviewing these authorities, but without dealing with the separate issue of what impact a special purpose charitable trust has on the issue of exigibility of the assets (which is discussed later in this article), Levine J. concluded that special purpose charitable trusts are in fact recognized in Canadian law:

Although the Ontario Court of Appeal disagreed with Blair J.'s conclusions about the effect of a "specific charitable purpose trust" on immunity, it did not say that such a trust does not exist in law, as argued by the liquidator.... Thus, contrary to the position taken by the liquidator, the cases which consider whether a special purpose trust has been created by a will for the purpose of determining whether the gift is valid or void do have application to the question in issue here: whether a special purpose trust was created by inter vivos gifts to a charitable organization. All the circumstances of the making of the gift must be reviewed to determine its terms and effect."³⁵

She further stated that:

A corporation cannot hold property on trust for a non-charitable purpose, as such a trust would be void for uncertainty of objects or as offending the rule against perpetual duration. A corporation can, however, hold property as a trustee for a charitable purpose, where "there are circumstances which show that the recipient is to take the gift as a trustee." (*Re Vernon's Will Trusts* at p. 303.)³⁶

Hollinrake J.A. of the British Columbia Court of Appeal approved of Levine J.'s analysis on this issue in his decision in *Christian Brothers B.C.C.A.*,³⁷ thus confirming that a special purpose charitable trust exists in Canadian law. Although not referred to by Levine J. or by Hollinrake J.A., support for this conclusion can be found in the decision of *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society*,³⁸ in which the Court commented as follows:

All the assets of the association are held in trust for its members (of course subject to the contractual claims of anybody having a valid contract with the association) *save and except to the extent which valid trust have otherwise been declared of its property*.³⁹ [emphasis added]

It is also interesting to note that the Ontario Legislature has acknowledged that funds can be held for a specific charitable purpose separate from the general charitable funds of a charity as a result of amendments to the *Charities Accounting Act* of Ontario,⁴⁰ set out below, that authorize regulations to be adopted permitting the comingling of various funds held for different special purposes:

s.5.1(1) The Attorney General, on the advice of the Public Guardian and Trustee, may make regulations providing that acts or omissions that would otherwise require the approval of the Ontario Court (General Division) in the exercise of its inherent jurisdiction in charitable matters shall be treated, for all purposes, as though the acts or omissions had been so approved ... (2) [in relation to] ... (b) the administration and management of charitable property that is held for restricted or special purposes.

The Position That Special Purpose Charitable Trusts Are No Longer Recognized in Canadian Law

The position that special purpose charitable trusts may no longer be recognized in Canadian law arises from comments made by Feldman J.A. in *Christian Brothers Ont. C.A.* In order to understand those comments, it is first necessary to understand the facts behind the *Christian Brothers* case and the series of decisions that have been rendered in the case.

The background facts involving the *Christian Brothers* case have been well summarized in the decision of Levine J. in *Christian Brothers B.C.S.C.*, the highlights of which are set out below:⁴¹

- Christian Brothers is a worldwide Roman Catholic teaching order which has had a presence in North America since 1876 when the Christian Brothers came to Newfoundland to teach Roman Catholic youth.
- In 1898, the Christian Brothers opened the Mount Cashel School, an orphanage for boys in St. John's, Newfoundland.
- In 1922, the Christian Brothers opened and operated Vancouver College in Vancouver, British Columbia.
- In 1960, the Christian Brothers agreed to establish and operate St. Thomas More Collegiate in Burnaby, B.C.
- In 1962, the Christian Brothers were incorporated by a Special Act of Parliament.
- In 1989, the Newfoundland Government appointed a Royal Commission to enquire into allegations made by boys who had been residents at Mount Cashel Orphanage that they had been sexually, physically and emotionally abused by members of the Christian Brothers. The findings of the Commission resulted in criminal charges and numerous civil actions for damages for abuse.
- By July 1999, the aggregate amount claimed from the Christian Brothers was approximately \$67,000,000.
- By 1996, the Christian Brothers realized that the claims for damages far exceeded their general corporate assets that amount to no more than \$4,000,000. They therefore made application to be wound up under the

Winding-Up and Restructuring Act.⁴² Christian Brothers was subsequently ordered to be wound-up and a liquidator was appointed.

- In July of 1997, the liquidator asked the winding-up court for advice and direction on legal questions relating to whether charities or their assets were immune from liability or were exigible to satisfy tort claims. The winding-up court directed that those questions be heard by a judge of that court.
- In November 1997, Blair J. ordered that the nature and scope of any trusts involving property located in British Columbia would be dealt with by the courts in British Columbia.
- The resulting B.C. decision of Levine J. in *Christian Brothers B.C.S.C.* held that the two schools located in British Columbia were held by the Christian Brothers as special purpose charitable trusts.
- In *Christian Brothers B.C.C.A.*, the B.C. Court of Appeal affirmed Levine J.'s decision.
- In relation to the issue of exigibility of special purpose charitable trusts, discussed in more detail later, Blair J. in *Christian Brothers Gen. Div.* held that the general corporate property of a charity is not immune from exigibility by tort creditors; however, property held as a special purpose charitable trust by a charity would not be available to compensate tort creditors of the charity unless the claims arose from a wrong perpetrated within the framework of the particular special purpose charitable trust in question.
- In *Christian Brothers Ont. C.A.*, Feldman J.A. agreed with Blair J. that there is no general doctrine of charitable immunity applicable in Canada; however, she held that once Blair J. had determined that there was no doctrine of charitable immunity in Canada, it then became redundant for the court to analyze whether special purpose charitable trusts of a charity were exigible to pay the claims of tort creditors. As a result, the Ontario Court of Appeal held that all assets of a charity, whether they are owned beneficially or they are held pursuant to a special purpose charitable trust, are available to satisfy claims by tort victims upon the winding-up of the charity.⁴³
- The British Columbia courts did not decide the issue of exigibility, which they held was not a question that was open to them to determine. However, in his dissenting opinion in the Court of Appeal, Braidwood J.A. took the position that this issue was open to the court to decide, essentially agreeing with Blair J. on this issue.

Even though the Ontario Court of Appeal held that special purpose charitable trusts are not immune from claims by tort victims, Feldman J.A. went to considerable lengths to confirm that charities can still hold specific property

pursuant to a special purpose charitable trust and that a charity and its directors must hold and deal with such assets as charitable trust property, including the obligation to seek judicial variation of a special purpose trust through a *cy-près* court order where the applicable charitable purpose has become impossible or impracticable. In this regard, Feldman J.A. stated:

The authors of *Tudor on Charities* 8th ed. (1995), p. 59, have extrapolated from this law the proposition that a charitable company may hold particular property in trust for specific charitable purposes, distinct from its other property, and that “clearly to misapply said property would be a breach of trust”. I agree with the authors of *Tudor on Charities* as to the obligations that charity would accept with such gifts, but subject to the following qualifications:

- (a) as long as the charity is in operation; and
- (b) subject to any *cy-près* order of the court, that the charity will be obligated to use the funds for the purposes stipulated by the trust⁴⁴

Having recognized special purpose charitable trusts, Feldman J.A. had to distinguish between property held as a charitable purpose trust and property held pursuant to a private trust where the trust property is protected from claims against the trustee personally in order for the assets of a special purpose charitable trust to be seized by tort claimants of the charity. In order to do this, Feldman J.A. went through a process of removing so many attributes of a special purpose charitable trust that it ends up being a trust in name only and imposes, at most, “trustee-like” obligations upon a charity concerning how it uses such “trust” property. This judicial erosion of the special purpose charitable trust as a legal trust is evident in the following statement by Feldman J.A. concerning the effect of a special purpose trust:

To the extent that charitable corporations do accept donations in trust for one of their charitable purposes, as opposed to in the form of a precatory trust, or a non-trust agreement governing the conditions and use of the gift, the trust obliges the charity to use the donation only for the specific objects of the trust while the charity is operating, again subject to any court order that may be sought for *cy-près* if while the charity itself continues to operate, that purpose or object becomes impossible or impracticable to continue. If the charity, while still operating, determined that it was in the best interests of the charity to use the assets held on special purpose trust instead of other assets to pay tort claims, that may be a situation where the charity would seek the approval of the court for the scheme, if the consequence would be that the particular purpose would no longer be carried out by the charity.

When a corporation is wound up, the “business” of the corporation ceases.... Where the corporation is a charity, this means that the charity ceases to carry out its charitable purposes. The obligation of the charity to use assets held on trust for one or more of the trust purposes also ceases as it may no longer carry on.⁴⁵

What is evident from the decision of Feldman J.A. of the Court of Appeal is that in deciding, as a matter of policy, to make the property of a special purpose charitable trust exigible to tort creditors of the charity, Feldman J.A. ignores the fact that a special purpose charitable trust is in fact a true trust at law, instead of the charity holding property in trust for itself in a trustee-like capacity.

If the beneficiary of a special purpose charitable trust were the charity itself, it would be understandable that the Court of Appeal would find that the property of a special purpose charitable trust would be available to satisfy the claims of tort creditors of the charity. However, fundamental to the concept of a special purpose charitable trust is that the usual requirement that there be an identifiable beneficiary of a trust is not applicable to a charitable purpose trust. This is one of the basic attributes of what constitutes a charitable purpose trust. A charitable purpose trust is recognized as benefiting the public-at-large instead of a single beneficiary and the purpose is enforceable by the courts as a complete trust in the same way as any private trust is. Since Feldman J.A. recognizes the case authority that special purpose charitable trusts can be held distinct from the general corporate property of a charitable corporation, and since the public-at-large is the beneficiary of such trusts, it then follows that a special purpose charitable trust is as much a trust at law as a private trust with all of the attributes associated with a trust, including protection of trust property from creditors of the trustee personally.

The impact of Feldman J.A.'s decision on the separate issue of exigibility of special purpose charitable trusts is discussed later in this article.

(3) The Requirements For the Creation of a Special Purpose Charitable Trust

Both traditionally and in practice, a special purpose charitable trust is considered to have been established when the donor has expressed an intention that the property being given to the charity is to be held for a specific charitable purpose, e.g., when money has been raised for an endowment program or through a public fundraising appeal for a specific project. However, the opposing approaches taken in the *Christian Brothers Gen Div.* decision of Blair J. and the *Christian Brothers B.C.S.C.* decision of Levine J. have raised a number of important issues concerning what type of evidence will be required to establish that the donor had the necessary intent to create a special purpose charitable trust. Blair J. held that there is a higher, more formal standard that is required, whereas Levine J. determined that the applicable requirements are less formal and can involve consideration of all relevant circumstances involved in making the gift.

Certain observations can be made regarding the differences in approach taken in the two decisions. In determining what is required to establish the intention of a donor to create a special purpose charitable trust, Blair J. in *Christian Brothers Gen. Div.* distinguished between what he considered to be a "true"

[whatever that means] charitable purpose trust and gifts or bequests that are simply “earmarked” for some specific charitable purpose and are not, in fact, trusts at all. He stated that before there can be a “true” charitable purpose trust, the trust must first be established in accordance with the general formal requirements of trust law:

For a “trust” to come into existence, there must be a settlor, a trustee, trust property and trust objects (i.e., person beneficiaries or charitable purposes). The arrangement must be characterized by the “three certainties” – which are considered essential to the creation of a trust – namely certainty of intention, certainty of subject matter, and certainty of objects...: [See Waters, *supra*, footnote 8, at p. 107].

It must be clear that the settlor intended to create a trust, it must be clear exactly what assets are to form the trust property, and the beneficiaries (the objects) of the trust must be ascertained or ascertainable.

If the purpose is “charitable” – i.e., for the relief of poverty, the advancement of education, the advancement of religion, or for other purposes beneficial to the community – and the foregoing criteria met, a charitable purpose trust is established.⁴⁶

In addition to requiring the formalities of trust law, Blair J. confirmed that all gifts received by a charity are presumed to have been received by it beneficially for its general charitable purposes, unless there is evidence that gives rise to the creation of a special purpose charitable trust, i.e., where it was created in accordance with the formalities referred to above:

Nor is there any presumption that the assets of The Christian Brothers of Ireland in Canada, as a charitable corporation, have been received in trust or in a trust-like capacity, to be used only for the charitable purposes of the corporation. In law, the presumption is to the contrary. That is, the assets of the corporation are presumed to have been received by it beneficially and for its absolute use – albeit in accordance with the objects of the corporation, as required by corporation law – unless there is some evidence to give rise to the creation of a trust.⁴⁷

Given the formalities that Blair J. requires for the creation of a special purpose charitable trust and the fact that the law generally presumes gifts received by a charitable corporation to have been received beneficially and not held in trust, Blair J. describes gifts where donors have not formally expressed an intention sufficient to create a special purpose charitable trust to be a “precatory trust” only, i.e., only a suggested designation by the donor and not a “true” special purpose trust. He mentions, as an example of a gift that in his opinion might be a “precatory trust” gift, contributions that are raised through a public fundraising campaign for a specific building project of a charity:

A “precatory trust” is not a trust at all. Where the donor gives or bequeaths the property to the charitable corporation absolutely and merely imposes some sort of moral obligation on the corporation to use the property in a certain way – using words of expectation or desire or purpose, but not words indicating that the donee is not to

take the property beneficially but only for the objects or purposes described – no charitable trust is established. The charitable corporation takes the gift or bequest and holds it – and any property derived from it – for the general charitable purposes and objects of the corporation. The asset is therefore exigible on the rationale explained above with respect to contributions made to a charitable corporation for its general charitable purposes.⁴⁸

Property emanating from contributions made through general fund-raising campaigns – *or even through fund-raising campaigns for particular projects* – as, for example, the fund-raising campaign for the establishment of the Novitiate in Mono Mills – might fall into this category.⁴⁹ [emphasis added]

If this position were to prevail, it would be open for a charity to argue that a gift that a donor had thought was a restricted gift in the form of a binding special purpose charitable trust was really only a precatory trust that amounted at most to a moral obligation upon the charity but was not the imposition of a legal requirement. This would create a great deal of uncertainty for charities in general and for donors in particular.

However, the approach taken by Levine J. in *Christian Brothers B.C.S.C.* ignores the formalities required by Blair J., and instead adopts a more traditional approach concerning what is required to create a special purpose charitable trust. After citing Waters concerning the need for “certainty of intention” as one of the three requirements for a special purpose charitable trust, Levine J. states that the required intention to create a charitable purpose trust is not dependent upon the utilization of technical words such as “in trust,” or otherwise, but rather requires that the court look at all of the relevant circumstances to determine the real intention of the donor. In this regard, Levine J. quotes with approval the following statement from Waters:

*There is no need for any technical word or expressions for the creation of a trust. Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention, a trust is set up.*⁵⁰ [emphasis added]

In finding that the schools located in British Columbia were held as special purpose charitable trusts by the Christian Brothers, Levine J. had to deal with the fact that there was no clear statement of intention to this effect. In support of the finding that there was sufficient evidence to establish a special purpose charitable trust, she relied upon the following statement from *Smith v. Kerr*:

It is true that the word “trust” is not found, but that word is not necessary, if upon the fair construction of the whole document it is manifest that a trust or duty or obligation was intended.⁵¹

Levine J. went on to make the following observations concerning what is required to establish satisfactory evidence of an intent by a donor to create a special purpose charitable trust:

Where there is no trust document, the court will consider other evidence to determine the intention of the settlor, including contemporaneous documents and usage, the circumstances surrounding the execution of any trust document, the donor's contemporaneous acts, the early application or distribution of the funds and the construction placed on doubtful questions which arose in the early administration of the trust...evidence of the use of property by the trustees over a long period of time may assist in determining the intention of the settlor.⁵²

The approach taken by Levine J. is a less radical departure than that of Blair J., as it is a return to the more settled approach in determining what is required to create a special purpose charitable trust. However, even if the position taken by Blair J. were to be followed in the future and a donor-restricted gift lacked the formalities to be considered a special purpose charitable gift, the charity would still be subject to the statutory jurisdiction of the Public Guardian and Trustee of Ontario in being able to seek an order to enforce a "donor direction" under s.4(d) of the *Charities Accounting Act*. A further discussion concerning the effect of this provision of the *Charities Accounting Act* is set out later in this article.

From a practical standpoint, though, Blair J.'s decision would mean that any donors who have assumed that their restricted gifts are enforceable against the charity would be surprised to find that if they had not clearly established their gift as a formal "true" special purpose trust, it might be arguable that the receipting charity would be able to apply the gift for any of its general charitable purposes, as opposed to using the gift only in accordance with the restrictions that the donor had intended.

Although this may be good news for those charities that feel unduly constrained by restrictions imposed by donors, there would also be a corresponding erosion of confidence by donors who, in the past, have assumed that their gifts constituted binding donor-restricted special purpose charitable trusts that could not be altered by either the current or future boards of a charity. This confidence was predicated on the willingness of the courts, particularly in England, to find an implied special purpose charitable trust even where the donor's intention was not patently obvious. (This judicial willingness is discussed later in this article.) However, Blair J.'s decision, if followed, would indicate a leaning by the courts against finding an implied special purpose charitable trust. If this trend is followed, it could discourage donors from making restricted charitable gifts and, in turn, could be a problem for charities such as community foundations, which rely heavily upon, and encourage donor-restricted charitable gifts, particularly in the form of endowment funds.

In *Christian Brothers B.C.C.A.* Hollinrake J.A. essentially adopted the reasoning of Levine J. in *Christian Brothers B.C.S.C.* with little analysis or explanation. In this respect, the decision in *Christian Brothers B.C.C.A.* is unsatisfactory as it leaves the dichotomy between the approaches taken by Blair J. and Levine J. unresolved.⁵³ Moreover, since leave to appeal to the Supreme Court of Canada has been denied in both the Ontario and B.C. cases,⁵⁴ this question is not likely to be resolved soon.

Until further guidance is available on this matter, it would therefore be prudent for charities, donors, and their legal counsel to be careful in ensuring that the formalities required for the creation of a trust are clearly articulated in the document creating a restricted gift, whether it be through an *inter vivos* endowment agreement or by means of a testamentary gift. Specifically, it would be important to clearly categorize the gift as being a special purpose charitable trust by naming the charity as the trustee, describing the property that constitutes the gift to be held in trust by using the words “in trust”, and explaining the specific charitable purpose for which the property is to be used. Failure to do so by lawyers who are instructed to establish restricted gifts or endowments may become the basis of a claim in negligence for not ensuring that the intent of the donor had been adequately expressed to create a binding special purpose charitable trust capable of effectively restricting the charity in the future.

In relation to existing endowment agreements, the wording should also be carefully reviewed and a legal opinion sought to determine whether or not the wording was sufficient to create a special purpose charitable trust in light of Blair J.’s decision in *Christian Brothers Gen. Div.* In addition, the wording of standard disposition clauses that are suggested by charities to estate practitioners for use in creating donor-restricted charitable gifts in wills, should also be reviewed.

Since it is not known whether the approach of Blair J. or the approach of Levine J. will prevail, the balance of this article has been prepared to reflect both the cautious approach that should be adopted in the event that Blair J.’s reasoning is followed, while at the same time recognizing that case law supports the broader interpretation reflected in Levine J.’s reasoning that looks at all of the relevant circumstances, instead of only what is in writing, in determining the intention of the donor.

(4) Endowment Funds

What Is the Nature of An Endowment Fund?

An endowment fund is generally considered to be a special purpose charitable trust through which the donor requires that the capital of the gift be held in perpetuity. Since one of the advantages of a charitable purpose trust is the exemption from the rule against indestructible trusts, a charity is able to accept gifts where the capital is held in trust on a perpetual basis. This method of

charitable funding is not available to a nonprofit organization, since a nonprofit organization does not constitute a charitable purpose trust at law.

How Is the Capital In An Endowment Fund To Be Invested?

The capital in an endowment fund is to be invested in accordance with either the investment terms contained in the document creating the endowment fund or in accordance with the investment powers of the charity set out in its constating documents. Whether or not a portion of the income that is earned from an investment will be capitalized and reinvested will depend upon either the terms in the endowment agreement or the investment policy established by the board of the charity in accordance with its investment powers. Unless the terms of the endowment require that all of the earned income is to be disbursed, it is normal for the board to provide that a portion of the income is to be reinvested so that the capital of the endowment fund will at least keep up with inflation and will preferably increase on a net basis over the years.

For What Purpose Can Income Earned On An Endowment Fund Be Used?

How the income earned on an endowment fund is applied depends upon whether the donor has expressed a specific direction concerning disbursement of income in the endowment agreement or alternatively whether the board has established terms of reference concerning how endowment income is to be applied. In either scenario, the board must ensure that the income is applied only towards the charitable purposes of the charity. To the extent that the donor has not established restrictions concerning how the income from the endowment fund is to be used, the board of a charity will be at liberty to apply the income to any of its charitable purposes, as determined by the board from time to time.

How Are Endowment Funds Created?

There are three ways in which endowment funds can be created: by the board, by the donor, or by a combination of the two.

When the endowment fund is initiated by the donor, it will normally involve the donor leaving money through a testamentary gift in perpetuity or, alternatively, creating an endowment fund by means of an endowment agreement. If an endowment agreement is employed, whether it be one supplied by the charity or one drafted by the donor's legal counsel, issues such as investment and management of the endowment fund, the name of the endowment fund, as well as disbursement of the income from the endowment fund will normally be addressed.

When the board of a charity takes steps to create an endowment fund, it usually announces that a named endowment fund has been established and invites donors to contribute to it. The board in this situation will establish the terms of reference for the endowment fund, i.e., how the income will be disbursed and how the capital fund will be invested. If it is a board-initiated endowment fund, it will normally have a descriptive name associated with it, such as "The

Education Fund”, or “The Millennium Fund”, so that prospective donors can identify it when making a contribution.

In the third type of endowment fund, the board invites donors to establish individual endowment funds with the charity. This allows the donor, (within the parameters of the charitable purposes of the charity) to structure the endowment fund personally. This type of endowment fund is often encountered in community foundations and may involve the donor being able to name the endowment fund and permit family members and friends to make additional contributions of capital from time to time.

To the extent that the board of a charity contributes any of its unrestricted charitable funds to an endowment fund, those contributions can be re-designated by the board at any time towards any of its other charitable purposes. However, any monies that are contributed by donors to either a board-initiated endowment fund or a fund that is initiated by the donor in accordance with the formal requirements of a special purpose trust cannot be varied by either the board or the donor without court approval. (This issue is discussed in more detail later in this article.)

(5) Donor Restricted-Use Funds

What Is the Nature of Donor Restricted-Use Funds?

Unlike endowment funds, donor restricted-use funds do not require that the capital of a gift be held in trust. Instead, the capital, as well as earned income will be expended over a period of time rather than being held in perpetuity and may be applied in accordance with certain specific charitable purpose restrictions. Unlike endowment funds where the restriction on the use of capital will continue in perpetuity, a donor restricted-use fund involves restrictions that eventually will be fulfilled, thereby bringing the fund to an end.

Time Restrictions

Some restrictions that are imposed by donors involve either a delay in when a gift can be used, i.e., until a specified date, or a requirement that the gift be expended over a specific number of years. In either situation, the time restriction will eventually expire when the capital and any accrued income have been fully expended.

Purpose Restrictions

Donors may also impose purpose restrictions concerning how a gift will be applied to further a particular capital purpose such as a building program, or an operational purpose, such as a relief effort in a foreign country. In either situation, it is essential that the purpose restrictions established be within the parameters of the charitable purpose set out in the charity’s constating documents. If this is not the case, then the board of the charity will either be in breach of trust if it is a charitable trust, or liable for having authorized *ultra vires* activities outside of the corporate authority of the charity if it is a corporate charity.

In addition, donors may establish purpose restrictions concerning the manner in which the charitable objects of a charity are to be carried out. For instance, donors may establish restrictions that do not limit what the charity can do, but rather who is entitled to benefit from its activities. In such a situation, it is important that the board ensure that the restrictions are not void as being repugnant or contrary to public policy, such as restrictions that are discriminatory.⁵⁵

How Are Donor Restricted-Use Funds Created?

As with endowment funds, donor-restricted funds can be established at the initiation of the donor either through an *inter-vivos* or testamentary gift that includes a time or a purpose restriction. Alternatively, the board of a charity can take the initiative in establishing a restricted-use fund by inviting donations from supporters or from the public for a specific purpose. Provided that the wording used to establish the donor-restricted fund meets the formal requirements of a trust, the monies received will generally constitute donor-restricted charitable purpose trust funds to be used in furthering a specific charitable purpose, such as a building program for a new church or a new wing for a hospital.

(6) Restricted Charitable Trust Property

What Is the Nature of Restricted Charitable Trust Property?

Restricted charitable trust property is a term used to describe real estate that is acquired subject to certain terms of trust contained in the deed for the property. Religious charities often receive or acquire property through deeds that set out specific terms of trust which will continue in perpetuity, even if the land and buildings are sold, by impressing the sale proceeds with the same terms of trust. As a result, it is essential that the board of a charity determine whether or not any of its real property either now or in the past is subject to restricted charitable trusts and, if so, to ensure that the property either was, or is, currently being used in accordance with the applicable restrictions.

Nature Of Restrictions Involving Restricted Charitable Trust Property

Generally, restrictions normally found in deeds containing restricted charitable trusts tend to be of a religious nature and fall into one of three categories:

- restrictions pertaining to religious doctrine, i.e., requiring that the property be used only for individuals who subscribe to a particular religious doctrine;
- restrictions pertaining to use, i.e., limiting the property to a particular use, such as use for a church, cemetery or seminary; and
- restrictions limiting the use of the property to those who follow a particular religious practice, similar to requiring that the property be used only by members of a church who adhere to the practice of “strict

communion”, i.e., where the sacrament of communion can only be received by baptized members of a particular denomination.

What is not often understood by a charity, either in receiving a deed to property from a vendor that is made subject to a special purpose trust or in unilaterally imposing a trust at the time that it takes title to the property, is that the trust that is created is a trust in perpetuity which will have permanent implications similar to an endowment fund or to any other special purpose trust fund. Since the charity will not have the ability to unilaterally vary the terms of trust without court authorization, it needs to be both aware of the terms of trust and to ensure that it can either comply with the restrictions or otherwise seek court authorization to vary it. (The legal principles upon which the court will vary the terms of a charitable trust are discussed in more detail later in this article.)

How Are Restricted Charitable Trust Properties Created?

Restricted charitable trust properties are almost invariably created by the inclusion of a specific trust clause in a deed for land. This can occur when a grantor donates property to a charity and intends the property to be used only for a particular purpose. In such a scenario, the grantor may include a reversionary clause in the deed stipulating that the property is to revert back to the grantor in the event that the terms of the trust are not complied with. When this occurs, it is important to review the specific wording in the deed to determine whether or not a condition subsequent has been created as opposed to a special purpose charitable trust, since different legal implications flow from the distinction. (The differences between a conditional gift and a special purpose charitable trust are discussed later in the article.)

In the other scenario in which a trust clause is included in a deed, the charity itself imposes the terms of trust stating that the property being acquired can be used only for a specific purpose or purposes.⁵⁶ The terms of trust would need to be consistent with the charitable objects of the charity. If not, it would be unlikely that the restricted charitable trust in the deed would be a valid and enforceable special purpose charitable trust.

A more problematic situation arises when monies are given specifically for the construction of a building on a particular piece of land for a particular purpose. The issue is whether the application of the special purpose charitable trust fund to construct a building has the effect of imposing a special purpose charitable trust upon the land itself. This issue was dealt with in the Australian case of *Attorney-General for Queensland v. Cathedral Church of Brisbane*⁵⁷ in which monies were raised through a public fundraising appeal by the Cathedral Church of Brisbane to construct a hospital on lands that the church owned. Although the High Court of Australia had no difficulty in finding that the funds given constituted a special purpose charitable trust, the Court rejected the notion that by accepting public funds for the stated purpose of constructing a

hospital, the church had implicitly declared a trust to use the land in question for such purpose:

Clearly, the sum raised by public subscription was held by its recipient on trust to use it in the erection of the hospital. But in my opinion, by accepting the public subscriptions, neither the Synod, by its committee, nor the [church] accepted an obligation to declare a trust of the land on which the hospital should be erected. The undoubted circumstance that a hospital may be a charity in the relevant sense does not require the conclusion that the building of a hospital by the Cathedral created a charitable trust of the land on which it was built.

...but I am unable to conclude that, because the purpose of the public appeal for funds was charitable, the land upon which the building was erected and the building itself became impressed with a charitable trust. My own analysis is, as I have said, that [as] the Cathedral appealed to the public for funds to enable it to build a hospital on its own lands, the lands and the hospital remain in the absolute property of the Cathedral. No trust of land or building was, in my opinion created.⁵⁸

An interesting aspect of this decision is the implicit recognition that once funds given for a special purpose charitable trust have been applied to their intended purpose, such as the construction of a building or a portion of a building, i.e., a wing of a hospital, not only is the land in question not made subject to a special purpose charitable trust, but the special purpose charitable trust of the original gift comes to an end. This means that, contrary to the suggestion by Feldman J.A. in *Christian Brothers Ont. C.A.*, once the subject matter of a special purpose charitable trust has been applied in accordance with the terms of the donor's restriction, i.e., to renovate or enlarge a building, then the trust will be considered to be at an end and the building that has been improved by such funds will continue as the beneficial property of the charity without restrictions. This approach was reflected in the High Court of Australia decision in *Attorney-General of Queensland v. Cathedral Church of Brisbane*:

The further distinction needs to be borne in mind. A trust to a charitable institution such as a church of money or property for the improvement of the fabric of the church or of some other purpose will in many instances be fully performed once the money has been so expended. There is no separate *continuing* trust of the improvement.⁵⁹ [emphasis added]

What Happens When Property Subject To a Restricted Charitable Trust Is Transferred?

Where land that is subject to a charitable trust is transferred, the proceeds of the sale will remain subject to the terms of trust.⁶⁰ Alternatively, if the property is being sold to a successor (for example, where an unincorporated church incorporates and transfers all of its property to an incorporated church entity), the transferee charitable corporation will take the property subject to the same

terms of trust as were set out in the original deed, whether or not the current deed makes reference to those terms of trust.

(7) *Implied Special Purpose Charitable Trust Funds*

What Is the Nature Of Implied Special Purpose Charitable Trust Funds?

The word “implied” in an implied special purpose charitable trust fund refers to what is required at law as evidence that the donor in fact intended to create a charitable trust. If the document accompanying a charitable gift clearly states that the gift is to be held in trust and the basic three certainties of a trust are met, the donor will clearly have created an express special purpose charitable trust fund. On the other hand, if the circumstances surrounding the gift or the general language in the document accompanying the gift are sufficient to establish that the donor intended the gift to be held in accordance with a special purpose charitable trust, then the donor would be considered to have established a trust by implied intent.⁶¹

As indicated earlier in this article, Blair J. in *Christian Brothers Gen. Div.* stated that a special purpose charitable trust must be formally established in writing with a settlor, trustee, identifiable trust property and trust objects, preferably using specific terminology indicating that the gift is being given “in trust”. However, there are numerous reported cases, as indicated earlier, particularly from England, where the courts have been prepared to consider extrinsic evidence concerning whether the donor intended to create a special purpose charitable trust and, if so, what the nature of the restrictions that would apply were:

If the [donor’s] intention is not expressed in the instrument, however, or if the intention is expressed in ambiguous language, extrinsic evidence is admitted. Such evidence may be of the known opinions of the [donor], of the state of law existing at the date when the instrument took effect, or of contemporaneous usage, or the like, and the evidence is admitted to enable the court to determine the objects of the charity in the manner in which the trusts are to be preformed.⁶²

In dealing with this issue at the trial level, the Supreme Court of British Columbia in *Christian Brothers B.C.S.C.* recognized that there was no written declaration of trust by which the two schools in British Columbia had been stated as being held in trust by the Christian Brothers:

Both schools say that the donors of the funds used to establish the school intended to create a trust of the funds for the specific charitable purpose of the operation of the school. There is no trust document in the case of either school expressly setting out the intentions of the donors to create such a trust, so the school is relying on the type of evidence described above.⁶³ [i.e., extrinsic evidence, such as contemporaneous acts and the early administration of the trust.]

After thoroughly reviewing all of the circumstances, in lieu of a formal declaration of trust, Levine J. concluded that there was sufficient evidence to conclude that there was an implied special purpose trust fund.

At the outset, I find the evidence is overwhelming that in the case of both schools, the intentions of all of the parties (that is, the identifiable donors of funds, the Archbishop and his representatives and the representatives of the congregation) were to establish the schools and not to further the general charitable objects of the congregation. That is, none of those involved in establishing and operating the schools had any intention or took any steps to provide for the congregation to use the schools' property for any purpose other than to operate schools for the use of the communities they were established to serve.⁶⁴

What Are Examples Of Implied Special Purpose Charitable Trust Funds?

Instances where an implied special purpose charitable trust fund might be found, presuming that the reasoning of Levine J. in *Christian Brothers B.C.S.C.* prevails over that of Blair J. in *Christian Brothers Gen. Div.*, would include the following:

- A public fundraising campaign for a specific purpose, whether it be a capital endowment fund or a building project.⁶⁵
- A donor who gives money to a charity with no accompanying written documentation setting out his or her intentions. However, in discussions with the development officer for the charity and in preliminary correspondence between the donor and the development officer, there is clear reference made to the fact that the gift is to be held in perpetuity as an endowment fund for a particular purpose, i.e., to fund a professorship at a university.
- Most donors making a gift to a parallel foundation, such as a hospital foundation, assume that the gift will be used to benefit the parallel operating charity, particularly when the names of the parallel foundation and the parallel operating charity are virtually identical, i.e., the "ABC Hospital" and the "ABC Hospital Foundation". However, some foundations have charitable objects that permit the board of directors of the foundation to use the monies received by the foundation for purposes other than benefiting the parallel operating charity. Notwithstanding the doctrine of constructive notice,⁶⁶ (which states that third parties dealing with a corporation are deemed to have constructive notice of the registered public documents of the corporation), if the corporate authority of a foundation to give monies to charities other than the parallel operating charity has not been effectively communicated to its donors, particularly where the foundation has the same name as the parallel operating charity, and the public fundraising campaign makes reference to the need to support the parallel operating charity, donors who make gifts to the foundation might allege breach of an implied special purpose trust fund

under s.6 or s.10 of the *Charities Accounting Act*,⁶⁷ if the monies are disbursed to charities other than the parallel operating charity.

- To overcome potential problems in this regard, it would be advisable for a foundation having objects allowing it to fund a broad spectrum of charities to ensure it has given donors clear written communication of this broad corporate authority – through brochures and annual reports, for example – to refute future allegations that an implied special purpose trust fund had been created by the foundation to benefit only the parallel operating charity.
- Even though the courts in both *Christian Brothers Gen. Div.* and *Christian Brothers Ont. C.A.* held that unrestricted charitable gifts are owned beneficially by a charitable corporation and not held in trust for its charitable purposes, such property may still only be used in accordance with the corporate objects of the charitable corporation in compliance with the doctrine of *ultra vires*; otherwise, the board members of a charity could be found personally liable for losses which arose out of *ultra vires* actions they authorized. As such, there are similarities between an implied special purpose trust fund and an unrestricted gift to a charity. In both situations, there is an implied restriction on what the charity can do with the gift that has been received, with corresponding personal liability consequences to the board members if they fail to comply. With an implied special purpose charitable trust fund, the trust restrictions are gleaned from circumstantial evidence; with an unrestricted charitable gift, the restrictions are found in the charitable objects themselves. In accordance with the doctrine of constructive notice,⁶⁸ a donor is entitled to presume that the charitable objects of a charitable corporation are in fact those that are set out in its letters patent.
- This in turn raises an interesting question. Does a charity have corporate authority to transfer unrestricted charitable property to another charity whose objects are significantly different from, or opposed to, its own objects? For instance, would a charity with objects that are dedicated to helping women facing crisis pregnancies to carry their unborn children to term in accordance with a “sanctity of life” philosophy statement be permitted to transfer some or all of its unrestricted funds to a registered charity that operates an abortion clinic? Does it suffice that the recipient charity is a “qualified donee” under the *Income Tax Act*?⁶⁹ Since the definition of a “qualified donee” in the *Income Tax Act* includes non-charities, such as municipalities, a similar question arises in situations where a charity transfers charitable property to a municipality. Simply because a transfer of charitable property complies with the provisions of the *Income Tax Act* does not necessarily mean that such a transfer complies with either corporate law or, when applicable, charitable trust law. In such situations, it may be open to a donor to argue that the

charity's transfer of unrestricted charitable property was outside of its charitable purposes, either as an action *ultra vires* the corporate authority of the charitable corporation, or in breach of an implied or express trust in relation to a charitable purpose trust.

- To avoid such allegations, it is important that a charity include in its constating documents, either in its letters patent or declaration of trust, a provision stating that the charity has the authority to transfer funds to “qualified donees” as defined in the *Income Tax Act* and that such corporate power be communicated to donors either by providing a copy of the objects and power clauses in the annual report for the charity or by referring to such corporate authority in a donor information package.

FOOTNOTES

1. Mark Sarner, “The Capital Campaign: Capital Fundraising at the Millennium”, *Canadian Fundraiser* (August 16, 2000), p. 6.
2. Karl Taro Greenfield, “A New Way of Giving”, *Time Magazine*, July 24, 2000, p. 39.
3. For a more detailed discussion of an approach involving pro-active legal advice, see Terrance S. Carter, “Advising the Charitable Client: Pro-Active Legal Risk Management Advice”, Law Society of Upper Canada, *Special Lectures*, 1996 (Carswell: Toronto, 1996), p. 267.
4. See *Black's Law Dictionary*, revised 6th ed. (St. Paul, Minn.: West Publishing Co.), p. 817. For an overview of the legal issues that are involved in determining what legally constitutes a gift, see Arthur B.C. Drache, Q.C., “A Gift By Any Other Name May Not Be A Gift”, *Charities and Not-For-Profit Law*, Canadian Bar Association of Ontario, April 24, 1998.
5. American Law Institute, *Restatement (Second) of Trusts* (Washington, D.C.: 1959), para. 348.
6. Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ministry of the Attorney General, 1996), p. 395.
7. *Ibid.*, pp. 395–414.
8. See D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), p. 502.
9. *Supra*, footnote 6, p. 407 and the *Perpetuities Act*, R.S.O. 1990, c. P-9, s.16.
10. For a thorough discussion concerning the interrelationship between charitable purpose trusts and charitable corporations, see Cullity J., “The Charitable Corporation: A ‘Bastard’ Legal Form Revisited”, attachment to 17 *Philanthrop*. No 3.
11. For a discussion of the divergent case law on this topic, see Ontario Law Reform Commission, *supra*, footnote 6, pp. 456–460. See also *Christian Brothers of Ireland in Canada (Re)* (1998), 37 O.R. (3d) 367 (Ont. Ct. (Gen. Div)), 21 E.T.R. (2d) 117, rev'd (2000), 47 O.R. (3d) 674 (Ont. C.A.) [hereinafter *Christian Brothers Gen. Div.*]; *Christian Brothers of Ireland in Canada (Re)*, (2000), 47 O.R. (3d) 674 (Ont. C.A.), rev'g (1998), 37 O.R. (3d) 367, application for leave to appeal to the Supreme Court of Canada dismissed, November 16, 2000 [hereinafter *Christian Brothers Ont. C.A.*]; *Rowland v. Vancouver College Ltd.* (2000), 78 B.C.L.R. (3d) 87 (S.C.), 34 E.T.R. (2d) 60, aff'd (2001), 94 B.C.L.R. (3d) 249 (C.A.) [hereinafter *Christian Brothers B.C.S.C.*]; *Rowland*

- v. *Vancouver College Ltd.* (2001), 94 B.C.L.R. (3d) 249 (C.A.), aff'g 78 B.C.L.R. (3d) 87 (S.C.), application for leave to appeal to the Supreme Court of Canada dismissed, May 23, 2002 [hereinafter *Christian Brothers B.C.C.A.*].
12. *Charities Accounting Act*, R.S.O. 1990, c. C-10.
 13. A.W. Scott, *The Law of Trusts*, 4th ed. By W.F. Fratcher, vol. 4A (Boston: Little, Brown & Company, 1989), para. 348.1, pp. 23–25.
 14. *Christian Brothers Gen. Div.*, *supra*, footnote 11, at 390–91.
 15. *Ibid.*, at 392.
 16. *Christian Brothers Ont. C.A.*, *supra*, footnote 11, at 701–702.
 17. *Christian Brothers B.C.S.C.*, *supra*, footnote 11, at 110 and 153–154. While the B.C. Court of Appeal in *Christian Brothers B.C.C.A.* reviewed with approval the trial judge's reasoning with regard to the existence of special purpose charitable trusts in the context of ownership of property by charitable associations and by implication by charitable corporations, it did not address the specific question of a charitable corporation's ownership of its general charitable funds.
 18. *Christian Brothers Gen. Div.*, *supra*, footnote 11, at 392, concurred with in *Christian Brothers Ont. C.A.*, *ibid.*, at 702.
 19. Snell, *Principles of Equity*, 28th ed. (1982), p. 145.
 20. *Supra*, footnote 8, p. 503.
 21. *Supra*, footnote 4, p. 1478.
 22. *Tudor on Charities*, 8th ed., Jean Warburton and Deborah Morris (London: Sweet & Maxwell, 1995), p. 191.
 23. See the next section of this article for a more detailed discussion of this principle.
 24. *Guaranty Trust Company of Canada v. Minister of National Revenue*, [1967] S.C.R. 133, at 138.
 25. *Supra*, footnote 22.
 26. *Ibid.*, p. 159; see also *Vernon's Will Trusts (Re)*, [1971] 3 All E.R. 1061 (Ch.).
 27. *Ibid.*, p. 191.
 28. *Christian Brothers B.C.S.C.*, *supra*, footnote 11, at 112.
 29. *Ulverston & District New Hospital Building Fund (Re)*, [1956] 3 All E.R. 164, at 168–169 (C.A.).
 30. *Attorney-General for Queensland v. Cathedral Church of Brisbane* (1977), 136 C.L.R. 353, at 371 (H.C. of A.).
 31. *Young Women's Christian Association Extension Campaign Fund (Re)*, [1954] 3 W.W.R. 49, at 52 (Sask. K.B.).
 32. *Church Army (Re)* (1906), 94 L.T. 599 (C.A.).
 33. *Lucas (Re)*, [1948] 2 All E.R. 22, at 25–26 (C.A.).
 34. *Finger's Will Trusts (Re)*, [1972] Ch. 286, at 294–295.
 35. *Christian Brothers B.C.S.C.*, *supra*, footnote 11, at 106–107.
 36. *Ibid.*, at 111.

37. *Christian Brothers B.C.C.A.*, *supra*, footnote 11, at 273–275.
38. *Bucks Constabulary Widows' and Orphans' Fund Friendly Society (Re)*, [1979] 1 All E.R. 623 (Ch.D.).
39. *Ibid.*, at 626 (per Walton J.).
40. *Supra*, footnote 12.
41. *Christian Brothers B.C.S.C.*, *supra*, footnote 11, at 95–98.
42. *Winding-Up and Restructuring Act*, R.S.C. 1985, c. W-11.
43. For a more detailed discussion of the Ontario Court of Appeal decision in *Christian Brothers, Ont. C.A.*, see David Stevens, “Exigibility of Special Purpose Charitable Trusts: The Christian Brothers Ontario Court of Appeal and British Columbia Supreme Court Decisions”. (Paper presented at Canadian Bar Association of Ontario, First Annual Charity Law Symposium *Fundamental New Developments in the Law of Charities 2000* (Toronto)) [unpublished].
44. *Christian Brothers Ont. C.A.*, *supra*, footnote 11, at 704.
45. *Ibid.*, at 708–709.
46. *Christian Brothers Gen. Div.*, *supra*, footnote 11, at 397.
47. *Ibid.*, at 409.
48. *Ibid.*, at 396.
49. *Ibid.*, at 397.
50. *Supra*, footnote 8, at 107.
51. *Smith v. Kerr*, [1900] 2 Ch. 511, at 522.
52. *Christian Brothers B.C.S.C.*, *supra*, footnote 11, at 107–108.
53. The recent case of *Ukrainian Youth Assn. of Canada v. Galandiuk* (2001), 43 E.T.R. (2d) 317 (Ont. Sup. Ct.) follows the approach of Levine J. in *Christian Brothers B.C.S.C.* However, the decision simply adopts the test with no discussion or explanation and it is therefore not particularly helpful in providing insight with respect to the direction which other courts are likely to take on this issue.
54. *Christian Brothers of Ireland in Canada (Re)*, [2000] S.C.C.A. No. 277; *Rowland v. Vancouver College Ltd.*, [2001] S.C.C.A. No. 652.
55. *Supra*, footnote 8, at 262.
56. *Supra*, footnote 49, at 520.
57. *Supra*, footnote 30.
58. *Ibid.*, at 358–359.
59. *Ibid.*, at 372.
60. See *Anglican Diocese of Algoma v. Algoma University* (Ont. Ct. (Gen. Div.)) [unreported] (contact the Office of the Public Guardian and Trustee). In this case, the Diocese had received a grant of land over 100 years ago that included a trust clause stating that the land could only be used for “Indian education”. The Diocese sold off portions of the land, including all of the land on which the University of Algoma is built. In a mortgage action involving the University land, the Public Guardian and Trustee investigated what had happened to the proceeds from the sale of the special purpose trust property and required

that the Diocese establish a special purpose trust fund for “Indian education” in an amount equivalent to the sale proceeds of the land together with accrued interest. See also *Christian Brothers Gen. Div.*, *supra*, footnote 11, at 410.

61. *Supra*, footnote 8, p. 18.
62. *Supra*, footnote 22, pp. 168, 169 and 179.
63. *Christian Brothers B.C.S.C.*, *supra*, footnote 11, at 108.
64. *Ibid.*, at para. 262.
65. *Ibid.*, at para. 277.
66. *Ernest v. Nicholls* (1857), 6 H.L. Cas 41, 10 ER 1351. See also Ontario Law Reform Commission, *supra*, footnote 6, p. 469.
67. *Supra*, footnote 12.
68. *Supra*, footnote 62.
69. *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Section 149.1(6) of the *Income Tax Act* allows registered charities to disburse up to 50 per cent of their incomes to “qualified donees”, which according to s.110.1(1)(a) and (b), includes registered charities and other specified noncharities, including municipalities.