ONTARIO BAR ASSOCIATION
SPECIAL DEMANDS FOR SPECIAL USE LANDS
Continuing Legal Education

RELIGIOUS AND INSTITUTIONAL PROPERTIES

MARCH 3, 2005
(CURRENT TO FEBRUARY 11, 2005)

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent
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A. INTRODUCTION

This paper addresses some of the more important issues that real estate practitioners should consider when dealing with real estate owned or to be acquired by charitable and not-for-profit organizations, with a particular emphasis upon those properties owned by religious and institutional organizations. Although it is not possible to deal with every issue that should be addressed, this paper attempts to provide an overview of some of the more important issues to consider when acting for a charitable or not-for-profit organization.

Accordingly, this paper is structured with a brief introduction, explaining the distinction between charities and not-for-profit organizations, and an overview of their organizational structures. The paper is then divided into sections representing issues on a jurisdictional level that real estate practitioners should consider when representing charities and not-for-profit organizations, i.e. at the federal, provincial and municipal level. Finally, the paper addresses some of the issues involving donor restricted charitable gifts and the doctrine of *cy-près*, which are essential for real estate practitioners to understand when dealing with property subject to a charitable purpose trust.

B. DISTINCTION BETWEEN A CHARITY AND A NOT-FOR-PROFIT

It is possible that religious and institutional properties can be owned by either a charity or a not –for-profit organization. It is therefore important for the real estate practitioner to understand the distinctions between the two forms of organizations.

1. Charities

As established in the 1891, English Court of Appeal decision in *Commissioners for Special Purposes of Income Tax v. Pemsel ("Pemsel")*,[1] an organization that wishes to be considered a charity at common law must have as its purpose one of the following objectives:

(a) relief of the poor;

(b) advancement of education;

(c) advancement of religion; or

(d) other judicially recognized purposes that are beneficial to the community.

Under the *Charities Accounting Act* ("CAA"),[2] the definition of charitable purposes mirrors the common law definition established in *Pemsel*. The *Income Tax Act* ("ITA"),[3] however, takes a different approach. The ITA does not define "charitable purpose". Instead, it relies upon the common law definition and recognizes different categories of organizations that are subject to special tax treatment. Most importantly, it distinguishes between a registered charity and a not-for-profit organization, and specifies the tax privileges and conditions that these organizations must satisfy in order to qualify for and maintain tax-exempt status.

Unlike not-for-profit organizations, registered charities (charitable organizations, public foundations and private foundations [ss. 248(1) and 149.1(1) ITA]), can issue tax receipts for the donations they receive and are exempt from income tax. Equivalent status is also available to an

[1] *Commissioners for Special Purposes of Income Tax v. Pemsel,* [1891] A.C. 531, [1891-4] All E.R. Rep. 28 (H.L.)
[2] *Charities Accounting Act,* R.S.O. 1990, c. C.10, (s.7).
[3] *Income Tax Act,* R.S.C. 1985, c.1.

extended list of qualified donees, such as municipalities and bodies performing a government function, Registered Canadian amateur athletics associations, low-cost housing co-operatives for the aged, the United Nations, Her Majesty in right of Canada or a Province, and prescribed Universities.

2. Not-for-Profit Organization

In order for an organization to qualify as a not-for-profit organization, there are four criteria under the ITA [section 149(1)(l)] that must be satisfied. These criteria, as explained in paragraph 1 of Interpretation Bulletin IT-496R, dated August 2, 2001, published by Canada Revenue Agency ("CRA"), are:

(a) it is not a charity;

(b) it is organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit;

(c) it is in fact operated exclusively for the same purpose for which it was organized or for any of the other purposes mentioned in (b); and

(d) it does not distribute or otherwise make available for the personal benefit of a member any of its income unless the member is an association which has as its primary purpose and function the promotion of amateur athletics in Canada.

Charities and not-for-profit organizations share common characteristics. For example, they are both organized for purposes other than the profit of their members and can be established and operated under similar legal structures. However, the definition of a not-for-profit organization and a charity are different, and the implications of these differences are important, since they impact the eligibility for and quantum of tax relief programs (exemptions and benefits) these organizations can access. For example, a not-for-profit organization does not pay tax on income or capital gains, except for income from property of an organization whose main purpose is to provide dining, recreation or sporting facilities. A not-for-profit organization, however, cannot issue charitable receipts for income tax purposes for donations that it receives.

C. ORGANIZATIONAL STRUCTURES

There are four legal structures that may be used to establish and operate a charity or not-for-profit organization.[4] It is essential for real estate practitioners to identify the type of legal structure through which a charity or not-for-profit organization is operating in order to determine the proper form for holding land and the applicable special rules or requirements that may apply. The types of legal structures are as follows:

1. Trusts

Trusts are not common legal structures for most charities and not-for-profit organizations. Trusts may be used to establish a not-for-profit organization, but trusts are more commonly used for charitable purposes, for tax purposes, or to isolate funds being held by a person for the benefit of another from the assets of the person holding the fund. A trust is created when one or more persons holds legal title to property, but another person or group of persons has the right to the enjoyment of or to benefit from that property, which in the case of a charitable trust, involves a charitable purpose as the beneficiary. A trust is usually established by a trust document or instrument that includes three essential components or "certainties:" the certainties of intention, subject matter and object. The charitable trust document typically sets out the purposes or objects of the trust, who the beneficiaries of the trust are, and how the trust property is to be managed by the trustees for the benefit of the charitable purposes.

2. Unincorporated Associations

An unincorporated association is a relatively common form of organization. However, it is actually not a legal entity. It is, essentially, an agreement among a number of persons that states their common purpose, establishes an organization to achieve that common purpose, and sets out how the purpose will be achieved. The relationship among the persons is contractual in nature and these organizations are sometimes referred to as "voluntary associations."[5] Such associations are distinct from trusts in that the members of the unincorporated association that is organized as a

[4] For a thorough discussion, see Donald J. Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*. 3rd ed. (Canada Butterworth 2002)
[5] *Orchard v. Tunney*, [1957] S.C.R. 436, 8 D.L.R. (2d) 273

non-profit organization as opposed to a charity are expected to receive some benefit from being members, whereas trusts are usually intended to benefit other persons or purposes.

3. Corporations Without Share Capital

There are four types of corporate forms available to charitable and not-for-profit organizations in Ontario. There are other options for incorporation, such as private legislation. However, most not-for-profit or charitable corporations are incorporated under one of the following statutes:

a) Corporations without share capital incorporated under *the Ontario Corporations Act*

The objects of a corporation without share capital incorporated under the *Ontario Corporations Act*,[6] ("OCA") may be quite broad. Section 118 of the OCA permits a corporation to be incorporated under Part III of the OCA for the purpose of carrying on objects that are within Ontario's constitutional jurisdiction. There are five types of not-for-profit corporations under the OCA:

(i) general not-for-profit corporations, such as trade or business associations, etc.;

(ii) sporting and athletic organizations, such as minor hockey associations;

(iii) social clubs;

(iv) service clubs, such as the Rotary or Kin Clubs, etc.; and

(v) charitable corporations, including religious organizations and other organizations whose objects are charitable.

b) Corporations without share capital under the *Canada Corporations Act*

When an organization operates on a national level or in more than one province, or if its objects and activities generally fall within federal constitutional jurisdiction, then the organization will usually incorporate under Part II of the *Canada Corporations Act*, ("CCA").[7] Industry Canada is currently undertaking substantial revisions to the CCA. For

[6] *Ontario Corporations Act*, R.S.O. 1990, c. C.38
[7] *Canada Corporations Act*, R.S.C. 1970, c. C.32

example, incorporation under a revised CCA may be "as of right" as it is under the *Canada Business Corporations Act*,[8] although object clauses will still be required.[9] The CCA provides for similar types of corporations as does the OCA but is not as specific as is the OCA. A corporation without share capital under the CCA may be:

(i) charitable corporations, including religious organizations and other organizations whose objects are charitable;

(ii) sporting and athletic organizations, such as minor hockey associations;

(iii) social clubs; and

(iv) service clubs, such as the Rotary or Kin Clubs, etc.

c) Co-operatives without share capital

Co-operatives are specialized forms of corporations that are established under the *Co-operative Corporations Act*,[10] by articles of incorporation. A co-operative may be either one with share capital, similar to a business corporation, or without share capital and not-for-profit in nature. A full discussion of co-operative corporations is beyond the scope of this paper.

4. Share Capital Not-for-Profit Organizations

There are many "social clubs" in Ontario, which are meant to include clubs such as country clubs, golf clubs, tennis clubs, flying clubs, curling clubs, bowling clubs, ski clubs, lawn bowling clubs, boating clubs, yacht clubs, swimming clubs, soccer clubs, badminton clubs, recreational clubs and fraternal clubs, etc. The vast majority of these clubs are organized as non-share capital

[8] *Canada Business Corporations Act*, R.S.C., 1985, c. C-44

[9] For more information, please see *Charity Law Bulletin* No. 60 available at http://www.carters.ca/pub/bulletin/charity/2004/chylb60.htm.

[10] *Co-operative Corporations Act*, R.S.O. 1990, c. C.35

corporations under either the OCA or the CCA.[11] However, some of these clubs are organized as share capital corporations under the OCA.

Often, the historical reason for structuring social clubs as share capital corporations has arisen because of a need to raise funds for capital and operational needs for the clubs. These social clubs are unable to become registered charities due to the social nature of their objects and their objects are not exclusively charitable. Therefore, it is not possible for these social clubs to raise funds by soliciting donations. As an alternative to, or sometimes as a supplement to membership and initiation fees, social clubs that are structured as share capital corporations are also able to raise funds by soliciting subscription for shares in the clubs to prospective members. This has meant that share capital social clubs will often seek to have a large base of shareholders. As a result, many of these share capital social clubs are organized as public share capital corporations rather than private share capital corporations, since the restriction of private share capital corporations to fifty shareholders or less would not be a sufficient base from which these clubs could raise the funds necessary to operate beyond that which they can raise by debt financing or initiation fees. In so doing, the subscription of shares from these social clubs will often become a significant, if not the primary, means of raising funds for those clubs.

It is important to note that the requirements under the OCA and the *Securities Act* (Ontario)[12] concerning public share capital corporations are generally applicable to these clubs, notwithstanding that some of these clubs also operate as not-for-profit organizations under the ITA and the *Corporations Tax Act* (Ontario).[13]

D. OBJECTS AND ACTIVITIES

Real estate practitioners acting for a purchaser should be careful to review the constating documents (i.e. trust document, letters patent and by-laws, and/or special legislation if applicable) of any charity or not-

[11] This issue is discussed in a paper presented to the OBA on October 27, 2004, entitled "Apples, Oranges or Lemons? Legal Issues Arising in the Form, Function and Fundraising of Charitable and Not-for-Profit Organizations" by Terrance S. Carter and Theresa L. Man.
[12] *Securities Act* (Ontario), R.S.O. 1990, c. S.5.
[13] *Corporations Tax Act* (Ontario), R.S.O. 1990, c. C.40.

for-profit organization that they are acting on behalf of to consider whether there are any special provisions that would affect the organization's right to hold or dispose of its lands. Generally, if the organization is incorporated, unless otherwise restricted by the letters patent or by-laws of the corporation, the board of directors will have the authority to authorize the sale of land owned by the corporation (see section 23(n) of the OCA and section 16(1)(q) of the CCA).

In the case of a charity or not-for-profit organization incorporated under the OCA, however, if the organization is selling all or substantially all of its assets or undertaking, such a transaction must be authorized by a special resolution, requiring approval of two-thirds of the members present at a member's meeting.

Furthermore, real estate practitioners should note that the Office of the Ontario Public Guardian and Trustee ("PGT"), reviews and approves the applications for the incorporation of charitable non-share capital corporations in Ontario. The PGT requires that charitable non-share capital corporations only borrow money for current operating expenses, unless such borrowing is secured by real or personal property, by requiring that the following clause is included as a special provision in the letters patent of the corporation:

> "The borrowing power of the corporation pursuant to any by-law passed and confirmed in accordance with section 59 of the *Corporations Act* shall be limited to borrowing money for current operating expenses, provided that the borrowing power of the corporation shall not be so limited if it borrows on the security of real or personal property."

In the case of a trust or unincorporated association, it is necessary to review the governing by-laws or constitution of the organization to determine whether the organization has the authority and power to acquire, lease or dispose of real property. Since an unincorporated association is not a person at law, it does not have the ability to own property in its own name. In such a situation, an individual or individuals own property in their own names in trust for the unincorporated association. The powers of such trustees will usually be set out in the constitution or by-laws, and sometimes in the trust document itself.

While religious organizations are governed by special legislation described below, it is also important when dealing with non-religious trusts or unincorporated associations to ensure that any sale is authorized at a meeting of its members which was properly called; the trustees are properly appointed and have power and authority to sell the lands; and that the terms of the trust will not be breached by such a sale.

E. FEDERAL ISSUES

1. Charitable Objects

In the case of charities, a real estate practitioner will need to consider the terms on which the organization received charitable status from the Charities Directorate at CRA. When organizations apply for charitable status, they are required to fill out a rather detailed form, describing their organization, its objects and activities. One section of this form (Part 3, Question 11 of Form T2050), requests information regarding whether or not the organization owns, or intends to own any real property, and an explanation of the title-holding arrangements. Therefore, the real estate practitioner should review the title holding arrangements at the time the application for charitable status was made to determine whether or not there have been any changes in those arrangements. If there have been changes, or if the conveyance under consideration would alter those title holding arrangements, the real estate practitioner will need to advise the Charities Directorate at CRA and obtain its approval for such changes. The Charities Directorate can then update their file on the charity, and offer any comments or suggestions regarding the title holding arrangements.

2. Related Business

Real estate practitioners should be aware of CRA's policies regarding charities and business activities in order to be able to advise charitable clients that are purchasing real property, where the charity is intending to lease, all or a portion, to a third party. In the event that CRA determines that the charity has become a commercial landlord, and it is an unrelated business to the charity, CRA would require that the charity divest itself of the unrelated business within a reasonable timeframe, or else risk revocation of its charitable status.

On March 31, 2003, CRA released a policy statement ("Policy Statement") regarding charities that are currently or plan in the future to be involved in business activities in conjunction with their charitable endeavours. The Policy Statement can be accessed on the CRA website at http://www.ccra-adrc.gc.ca/tax/charities/policy/cps/cps-019-e.html.

According to the Policy Statement, "business" in the context of a charity means an activity that is commercial in nature, from which the charity derives revenue from providing goods or services, and which are undertaken with the intention to earn profit. It indicates that "a charity can engage in some business-like transactions, provided they are not operated regularly or continuously." Other than businesses run by volunteers, as provided under subsection 149.1(1) of the ITA that are deemed to be related businesses, CRA takes the position that permitted related businesses are only those that are "linked to a charity's purpose" and are "subordinate to that purpose".

Accordingly, the two kinds of related businesses are as follows:

(a) businesses that are linked to a charity's purpose and subordinate to that purpose, such as:

- a hospital's parking lots, cafeterias, and gift shops for the use of patients, visitors, and staff;
- gift shops and food outlets in art galleries or museums for the use of visitors;
- book stores, student residences, and dining halls at universities for the use of students and faculty; and

(b) businesses that are run substantially by volunteers, which is a deemed related business under the ITA. If 90% of the people involved in operating the business are unpaid volunteers, e.g. a hospital auxiliary's gift store, the business activity will be deemed a related business. This type of related business does not have to be linked to the charity's charitable purposes.

An unrelated business is a business activity that is neither related nor deemed related, e.g. a youth centre running an operation to buy and sell used computers for profit, or running a catering business with paid employees. Charities cannot participate in unrelated businesses, as they risk losing charitable registration. The ITA, section 149.1(2) provides that the Minister of National Revenue may revoke the registration of a charitable organization if it "carries on a business that is

not a related business of that charity". However, the ITA provides that a charitable organization shall be considered to be "devoting its resources to charitable activities carried on by it to the extent that it carries on a related business" as defined under the ITA, section 149.1(6).[14]

Whether or not the charity has become a commercial landlord is a question of fact that would have to be determined on a case specific basis. CRA makes a distinction between a charity that may hold real property for investment purposes and one that holds it for business purposes. The key for determining that the property is held as an investment is the "passive nature" of the activities. While CRA recognizes that a charity would be required to manage investments so as to obtain a good return, the level of activity should not be similar to a commercial landlord whose primary business is renting out space to tenants in order to gain business income.

If a client wishes to obtain assurance from CRA on this issue, they may request a "technical interpretation" from CRA by providing more detailed facts to CRA on a no name basis in order to obtain a written response. Since the request is on a no name basis, technical interpretations are not binding on CRA. It is also possible to obtain a binding advance income tax ruling from CRA, however, such rulings can only be obtained for proposed transactions, not for pre-existing fact situations.

It is important to remember that while a passive investment in property that is not being used by the charity may satisfy CRA policy requirements; there are other considerations under the CAA that must be considered, and will be discussed later in this paper.

3. GST Considerations

Real estate practitioners will already be familiar with the operation and impact of the Goods and Services Tax ("GST") with regard to residential and commercial property transactions. Organizations and businesses that are GST registrants are entitled to "input tax credits" for all GST paid. Certain goods and services that are not taxed generally fall into either the category of

[14] For more information, please refer to *Charity Law Bulletin* No. 37 available at http://www.carters.ca/pub/bulletin/charity/2004/chylb37.htm.

zero-rated supplies or exempt supplies. Supplies provided by charities and not-for-profit organizations are generally considered to be exempt supplies. As with all exempt supplies, the business or organization receives no input tax credit for GST paid on goods and services used in providing exempt supplies. As a result, most charities and not-for-profit organizations are not GST registrants.[15]

Since most charities and not-for-profit organizations are not GST registrants, they are not entitled to any input tax credits on the GST they pay. Charities and not-for-profit organizations that are not GST registrants, however, are entitled to a "public service bodies rebate" of 50% on the GST that they pay.

The sale of real property by a "public service body" as defined in section 123(1) of the *Excise Tax Act* ("ETA"),[16] which includes charities and not-for-profit organizations, may be exempt from GST unless one of the following exclusions applies:

(a) sale of a "residential complex" is exempt if the conditions for sales of used residential property are satisfied (ETA V-V.1-1(j), V-VI-25(a));

(b) a deemed sale, such as under self-supply rules or change-in-use rules (ETA v-V.1-1(b), V-VI-25(b));

(c) sale to an individual unless it included a structure that was used by the public service body as an office, or in the course of commercial activities (ETA V-V.1-1(k), V-VI-25(c)) ;

(d) Sale to a trust all of whose beneficiaries are individuals (ETA v-V.1-1(k), V-VI-25 (c), 123(1));

(e) Sale of property used primarily in commercial activities (ETA V-V.1-1(m), V-VI-25(g)); or

[15] For more information, see the CRA web site at http://www.cra-arc.gc.ca/E/pub/gp/rc4082/rc4082-02e.pdf, as well as "Charities and the GST/HST" by Terrance S. Carter at http://www.carters.ca/pub/bulletin/charity/2004/chylb52.htm.
[16] R.S.C. 1985, c. E-15

(f) Sale of real property where the public service body has made an election under ETA s. 211 allowing treatment of the property as taxable to the extent it uses it in commercial activities (ETA V-V.1-1(m), V-VI-25(g)).

When advising a charity or not-for-profit organization that is purchasing real estate, the real estate practitioner should take care to caution their client that the typical clause in the Agreement of Purchase and Sale for commercial properties that GST is in addition to the purchase price will not result in an input tax credit for the organization if they are not a GST registrant. For an organization that is not a GST registrant, this could be an unexpected, additional, and substantial expense.

For example, a typical charity or not-for-profit organization that purchases a $1 million property to be used entirely for their charitable purposes would be faced with an additional GST cost of $70,000, of which 50% could be claimed pursuant to the public service bodies rebate. Therefore, the charity or not-for-profit organization may be faced with an additional charge of $35,000 on the purchase of the property because an input tax credit is not available.

Alternatively, charities and not-for-profit organizations that supply some non-exempt supplies and are GST registrants may use the GST in addition to the purchase price in calculation of their input tax credits (being a claim to recover the GST/HST paid or owing to suppliers for goods and services acquired, imported, or brought into a participating province to provide taxable goods and services by GST/HST registrants). Furthermore, it may be possible for charities and not-for-profit organizations that purchase property of which a portion will remain, at least for a period of time, for commercial activities (see the discussion under the CAA for charities), to become a GST registrant for that portion of the purchase price that remains commercial. For example, a charity or not-for-profit organization purchases a property for $1 million and one half of the property will continue to be leased to a business, while the other half of the property will be used in charitable activity. In such a situation the charity or not-for-profit organization would be entitled to an input tax credit on the one half of the GST owing, and a 50% public service bodies rebate on the other 50% GST owing as follows:

Total GST owing	$70,000
Minus Input Tax Credit on commercial portion of building	$35,000
Minus 50% public service bodies rebate on charitable or not-for-profit portion of building	$17,500
GST owing	$17,500

In addition to cautioning the client with regard to the above, it may be prudent to advise the charity or not-for-profit organization to consult their accountant or tax advisor in considering their liability for payment of GST pursuant to the contemplated transaction.

F. PROVINCIAL ISSUES

1. *Religious Organizations' Lands Act*

As discussed previously, unincorporated associations do not have the ability to own property in their own name.[17] To facilitate this form of ownership by religious organizations, the *Religious Organizations' Lands Act* ("ROLA")[18] and its antecedent legislation permitted trustees to be appointed on behalf of the religious organization to hold land on a perpetual succession basis, notwithstanding that individual trustees may come and go. However, the remedial benefit of ownership of land through successive trustees is predicated on the assumption that a trust has been created by the members of the religious organization. As such, an unincorporated religious organization functions differently from other unincorporated associations, such as a service club, in that an unincorporated religious organization is structured on the premise that it is, at least to a limited extent, a charitable trust.

However, it is doubtful whether many religious organizations in Ontario understand that their organizations are structured as a charitable trust and that their constitution constitutes, at least in relation to land, a declaration of trust. What in fact occurs in many organizations is that the constitution only makes reference to the appointment of trustees for limited purpose, i.e. the

[17] For a more exhaustive discussion of ROLA, please see "To Be or Not to Be: Incorporation of Autonomous Churches in Ontario" by Terrance S. Carter, available at www.carters.ca/pub/article/charity/1995/tobeornot.pdf.
[18] *Religious Organizations' Lands Act*, R.S.O. 1990, c. R.23.

holding of land, without structuring the whole organization as a charitable trust. As a result, a typical unincorporated organization such as a church in Ontario has three elements to it:

(a) the creation of a limited purpose trust through the appointment of trustees to hold land on behalf of the religious organization;

(b) the establishment of those trustees as a quasi-corporation under ROLA to achieve perpetual succession in ownership of the land for the religious organization; and

(c) the structuring of an unincorporated association without trustees akin to other unincorporated groups for all other purposes of the organization, particularly, for example, when non-trustee officials within the organizations such as members of a board of management, are empowered to oversee the administration of the organization instead of the trustees.

These three threads, i.e. the appointment of the trustees, the quasi-corporate capacity of those trustees, and the voluntary association of individuals on a non-trust basis for other purposes has and continues to create significant confusion. For instance, many religious organizations that purport to own land under ROLA do not have any provision within their constitution for the appointment of trustees.

Who then are the trustees for purposes of owning land under ROLA? It is probably the members of the governing board of the organization. However, this conclusion has to be arrived at after reviewing the facts involved in the operations of that religious organization, which in turn necessitates that a legal conclusion be drawn concerning who in fact are the trustees of the religious organization. Other constitutions automatically deem members of the governing board to be trustees for the religious organization. Nevertheless, it is unlikely that members of those boards perceive their role as being trustees of a charitable trust. Rather, it is probable that they consider themselves as members of the controlling board only, without much or any recognition of their role and duties as trustees of a charitable trust.

a) Scope of ROLA

ROLA does not prescribe statutory prerequisites for the establishment of unincorporated religious associations. ROLA simply permits an unincorporated religious association to own land through the appointment of trustees. In Ontario there is no legislation requiring standards or requirements for the establishment of unincorporated religious associations. The only government regulation of any significance is the requirement by CRA that the association have a constitution that confirms that the organization is being operated for exclusively charitable purposes, that upon dissolution its assets will be transferred to another registered charity, that the organization be operated without profit or gain to its members, and that there be some type of basic association government in place, i.e. a controlling board. Such a requirement from CRA only began when registration of charities was implemented in 1967. As a result, there are doubtlessly many older religious organizations in Ontario organized as unincorporated associations that hold land by trustees on a perpetual basis pursuant to ROLA but which do not have any written constitution.

While ROLA provides a comprehensive statutory code for the acquisition, holding, mortgaging and selling of land through trustees who are appointed to act on behalf of the religious organization, ROLA is a statute that is limited to conveying land only. Section 2 of ROLA states that a religious organization may acquire and hold land for certain purposes in the name of trustees either individually or by collective designation and by their successors in perpetual succession for the benefit of the religious organization. Although ROLA does establish an effective quasi-corporate capacity for trustees to hold land, it totally ignores the issue of who is to own other property of the religious organization, i.e. chattels, bank accounts, investment funds, etc.

There are limitations even with regard to matters that ROLA does address, i.e. the ownership of land. The first is that section 2 of ROLA states the purpose for which trustees can hold land for a religious organization is limited to that of a) a place of worship, b) a residence of its religious leader, c) a burial or cremation ground, d) a book store, printing or publishing office, e) a theological seminary or similar institution for religious instruction, f) a religious

camp, retreat or training centre, or g) any other religious purpose. Although the last object, i.e. "any other religious purpose", is intended to be a catch all, it may not be broad enough to permit trustees to hold land for a religious organization operated daycare, an elementary or high school, because the primary purpose of such institutions has more to do with general education than it does the advancement of religion.

b) Authority of trustees

In addition, section 6(1) of ROLA states that the ability of trustees to own land in perpetual succession or to do anything else under ROLA is only available if the unincorporated religious organization adopts a resolution conferring such authority upon the trustees. As such, if the constitution does appoint trustees to own land on behalf of the religious organization, or if there is no constitution, or if there has never been a resolution adopted by the members authorizing trustees to hold land on behalf of the religious organization, then there would be no authority for trustees to hold property in perpetual succession. This could mean, subject to a court interpretation, that the original trustees who acquired title for the property may in fact still be holding the legal title to the property on behalf of the religious organization.

A religious organization could remedy this situation pursuant to section 3(6) of ROLA, by passing a resolution appointing trustees to hold land on its behalf. This would have the effect of automatically vesting the property in the names of the newly appointed trustees without the necessity of any conveyances. However, there are probably many religious organizations that have not taken advantage of this remedial provision of ROLA because they are not aware of the problem in the first place. In such religious organizations, it is possible that trustees have signed deeds or mortgages on behalf of the organization without ever having been properly appointed or authorized to act on behalf of the religious organization either by the constitution or by resolution. Alternately, those conveyances or mortgages may be invalid, which may mean that individual members of the religious may be personally liable for any detrimental consequences.

Even where trustees have been properly appointed by the religious organization, there is always the possibility that they may either refuse or be reluctant to follow the direction of the membership. Where such situations do occur, the removal or replacement of a trustee will be necessitated, accompanied by all of the unfortunate political ramifications that such a removal entails.

If the trustees do acquiesce to the direction of the membership, a tension still exists because of the dichotomy caused by the lack of authority inherent in being a trustee under ROLA and the significant legal liability that a trustee is exposed to by virtue of holding that position. ROLA states that trustees cannot exercise any of the powers contained in ROLA until they are authorized to do so by resolution of the membership. As such, trustees are virtually powerless and are little more than figureheads of the religious organization similar in role to the Governor General of Canada when required to sign legislation on the direction of the elected government. On the other hand, a person who agrees to act as a trustee for a religious organization assumes significant personal liability. Even though the trust established under ROLA is a "bare" trust, i.e. the trustee holds land upon the complete direction and control of the beneficiaries, a trustee is not exempt from personal liability: "so long as a trustee holds property in trust, he always retains his legal duties, namely to exercise reasonable care over the property, either by maintaining it or by investing it; he cannot divest himself of these duties."[19] The dichotomy occurs because a trustee has significant fiduciary obligations and liabilities at common law but under the provisions of ROLA is stripped of any ability to make decisions on his own and therefore protect himself.

c) Limitations in ROLA

One significant limitation in the authority given to trustees to deal with land under ROLA involves the restrictions around mortgaging. Section 9(1) of ROLA states that trustees may mortgage religious organization land only for purposes of securing a debt incurred for the acquisition or improvement of land or for the building, repairing or extending or improvement of any buildings thereon. While this provision authorizes the vast majority of

[19] Waters, D.W.M. *Law of Trusts in Canada*. (1974) The Carswell Company, at pg. 25.

mortgages that churches are required to give, it is not inconceivable, particularly in a time of economic down turn, that a church may be required to give to its banker a collateral mortgage to obtain an operating line of credit to meet their day to day operating expenses. If this line of credit has nothing to do with buying land, improving land, building, repairing or improving structures on the land, then there would be no statutory authority to allow trustees to sign such a collateral mortgage. If a bank proceeded with a power of sale against the mortgaged property and the subsequent purchaser of the property prior to closing questioned the authority under which the mortgage had been given, it is conceivable that the sale of the property might fail and that the trustees that signed the collateral mortgage might be held personally liable for providing the bank with an invalid collateral mortgage.

One of the primary reasons given in support of organizing religious organizations as unincorporated associations under ROLA is the authority given under section 10 permitting a religious organization to lease land that is no longer required for its purpose for up to forty years. Although this provision under ROLA is more generous than what is provided for under the CAA (which permits the PGT to vest land in itself if land is not being used for charitable purposes for a period of three years).

Even though ROLA does permit leases up to forty years, it can only be done where the membership has first determined that the land is no longer required for its purposes. Where religious organization lands may still be needed for the charitable purposes of the organization, then under section 10(5) of ROLA, the trustees may only enter in leases for terms of no more than three years.

Another limitation of ROLA is that the trustees' ability to sell land on behalf of the religious organization is limited to situations where the membership has determined by resolution that the land in question is no longer necessary for its purposes. While this form of resolution will not normally be a problem, it is conceivable that a religious organization that is struggling financially may very well have to sell its property to obtain sufficient cash to maintain its operation and rent other facilities in the short term until the membership can again become financially viable. Where this happens, it may be difficult for a membership to pass a

resolution stating that the lands are no longer necessary for its purposes, when in fact the building is still needed by the organization but the membership simply cannot afford to retain ownership of the land and buildings. As a conveyancing matter, such resolution should be certified in accordance with section 19(2) of ROLA and be deposited on title.

Often religious organization constitutions will state that a decision to buy, sell or mortgage land will require a percentage vote greater than the majority of the members present at the meeting, i.e. a two-thirds majority vote. However, section 17 of ROLA overrides this provision in that ROLA specifically states that any resolution passed in accordance with ROLA is automatically adopted if a majority of those present at the meeting and entitled to vote thereat support the resolution. As such, unincorporated religious organizations operating under ROLA would do well to review and possibly revise their constitution so that it does not contradict this mandatory provision of ROLA.

An interesting, but annoying statutory obligation created by ROLA that trustees are not probably aware of is the requirement under section 16 that trustees who are either involved in leasing or selling land, make available on the first Monday in June of each year for inspection to members of the religious organization a detailed statement showing the rents that accrued during the preceding year and all sums in their hands for the use and benefit of the religious organization that were in any manner derived from land under their control or subject to their management and show the application of any portion of the money that is being expended on behalf of the organization. Even if the religious organization has not recently sold land or entered into any long term lease agreement, if there have been any short term rentals, such as a lease to a community group for a limited duration, section 16 would require the preparation of disclosure statements to the congregation. Why the first Monday of June was selected is not clear, but of all the days of the week that people are apt not to be at church, synagogue, or mosque, the day after Sunday would surely qualify as the most unlikely day.

A further limitation of ROLA is section 27(2), which states that ROLA is specifically subject to the trusts in any deed, conveyance or instrument. For religious organizations that acquired land during the early portion of this century, those trustees may have received title subject to

the terms of trust contained in the applicable deed. The terms of trust may be very different and might even be contradictory to the statutory authorization in ROLA not to mention the current practices and doctrines of the religious organization. In such a situation, legal advice should be obtained to determine how the current trustees can comply with the terms of the trust in the original deed but still obtain the benefit of conveyancing under ROLA.

A final limitation of ROLA is that it remains biased in favour of religious organizations with a congregational form of government.[20] Under ROLA, the trustees are appointed and derive all of their authority from the members assembled in a meeting called for that purpose. It is possible that the congregational model is not appropriate for many religious organizations, which are governed by a local board or denominational board: "those organizations for whom the Act are not suitable must therefore seek incorporation either under general statute or under a special act."[21]

d) Personal liability of trustees

Although section 8 of ROLA authorizes trustees to maintain and defend actions for the protection of land and the interest of religious organizations in such land, an unincorporated religious association does not have any other authority to initiate or defend legal action in the name of the organization.

Furthermore, personal liability may arise in an unincorporated religious association in relation to:

(i) actions against trustees, primarily as a result of their signing mortgages and debt documents on behalf of the religious organization;

(ii) actions against officers of the religious organization, primarily as a result of contracts that they enter into on behalf of the religious organization; and

[20] Oosterhoff, A.H. "Religious Institutions and the Law in Ontario: An Historical Study of the Laws Enabling Religious Organizations to Hold Land." (1981) *Ottawa Law Review*, Volume 13:3, at page 465.
[21] *Ibid*.

(iii) actions against members in their personal capacity in all situations where the religious organization is liable, whether that liability is in contract or tort (i.e. a wrongful act or omission such as sexual abuse or negligence).

In regard to personal liability of trustees, there is conflicting case law which in some situations finds trustees personally liable and in other situations find that they are not. The different results depend primarily upon how the trustees have signed debt documentation. In one case,[22] the court found that trustees who had been duly appointed by a religious organization and who had signed a mortgage on behalf of the church in their capacity as trustee were not personally liable.

However, in another case,[23] the court found that a contract describing individuals as church trustees but signed by them in their own personal names without clearly indicating that they were signing as trustees resulted in those individuals being personally liable under the terms of the contract. As such, although church trustees will not normally be held personally liable for mortgages or contracts that they sign on behalf of the church, they do run the risk of personal liability if they have not clearly indicated that they are signing as trustees, or they have not been duly appointed as trustees on behalf of the religious organization by either its constitution or by resolution, or they have not acted within the scope of their lawful powers, i.e. entering into a mortgage without membership approval or entering into a collateral mortgage for a line of credit that is beyond the authority provided for under the ROLA.

Therefore, when a real estate practitioner is acting on behalf of a purchaser that is buying property from a Vendor that is selling under ROLA, the practitioner should, at the very least, requisition the following:

(i) a certified copy of the members resolution of religious organization appointing the trustees;

(ii) a certified copy of the members resolution of the religious organization authorizing the sale of the property; and

[22] *Beatty v. Gregory*, (1987), 24 O.A.R., 325 affirming (1986) 28 O.R. at 60 (H.C.),
[23] *Cullen v. Nickerson*, (1861) 10 U.C.C.P., 549 (C.A.)

(iii) if a deed of trust exists regarding the property, it should be carefully reviewed for any clauses that require observance by the trustees, and a declaration should be requisitioned stating that such duties have been fulfilled by the trustees.

2. Special Legislation

In addition to considerations such as ROLA, the real estate practitioner should review whether or not a charity, such as a church, may be subject to special legislation.[24] For example, The United Church of Canada was created in 1925 through a statute of the federal government known as "*An Act Incorporating the United Church of Canada.*"[25] This legislation was reproduced in the provinces, such that Ontario passed "*An Act Respecting the Union of Certain Churches Named Therein.*"[26]

Another example is the General Synod of the Anglican Church in Canada which was incorporated by federal legislation in 1921 for the purpose of holding and managing the property and assets of the national church.[27] However, lands of local Anglican churches are often owned by trustees pursuant to special legislation incorporating Diocese of the Anglican Church, such as the Diocese of Niagara.[28]

Such special legislation must be reviewed to determine whether there are additional requirements that the charitable client should be concerned with, as such statutes may require consent of hierarchical bodies within these organizations before property can be transferred or the naming of certain church officials as trustees for the purposes of holding land. Furthermore, the legislation may require that property owned by the church was to be used for certain charitable objects, and the real estate practitioner should be careful to ensure that the terms of any such provisions have been followed by those entrusted with the property. Churches that are not subject to special legislation may nevertheless be subject to regulations or agreements between the religious body and the specific denomination to which the religious body belongs. Real estate practitioners should

[24] Ogilvie, M.H. *Religious Institutions and the Law in Canada*. (Toronto: Thomson Canada Limited, 1996).
[25] 14-15 George V., Chapter 100
[26] 15 George V., Chapter 125
[27] S.C., c.82 as amended by S.C. 1951, c.55 and S.C. 1956, c. 57
[28] *An Act to Amend the Act Incorporating the Synod of the Diocese of Niagara*, 54 Vic. Chap. 100. s. 5.

inquire of their client whether this may be the case, and if the client is unaware of any such regulations, verify this with the governing body of the religious organization.

3. *Charities Accounting Act*

In the past, lands of charitable organizations were subjected to the *Mortmain and Charitable Uses Act* (Ontario) ("MCU Act") that prevented charitable organizations from accumulating land for uses such as investments. The MCU Act provided that land assured to a charitable organization was to be sold within two years, or else the land vested in the Public Guardian and Trustee ("PGT").

In 1982 the MCU Act was subsumed by the CAA. Section 8 of the CAA addresses the use and occupation of lands for charitable purposes and states in subsection 8(1) that a person (charitable corporations are deemed to be trustees in the CAA), shall "hold the land only for the purpose of actual use or occupation of the land for the charitable purpose." Therefore, the CAA contains a broad prohibition on trustees of land held for a charitable purpose from allowing that land to be used for any other purpose than the organization's charitable objects.

In an era where charitable organizations such as religious organizations owned land for the purpose of a house of worship, section 8 of the CAA had a rather straightforward application. However, many charities, such as religious organizations, are either choosing or being forced by new economic realities to seek arrangements for land that may not be as straightforward as they have in the past. For example, many charities may choose to purchase land on commercial properties such as malls. The charity may wish to use a portion of the land for their charitable purpose and lease or use a portion of the land for purposes other than those of the charitable objects of the organization. The charity may intend to take over the space leased to commercial tenants as their leases expire, or the charity may wish to continue leasing the space to a commercial tenant. Such a situation would appear to conflict with the breach prohibition in section 8 of the CAA.

In such a situation it is important to consider the application of subsection 8(2) of the CAA which states as follows:

> Where in the opinion of the Public Guardian and Trustee, land held for a charitable purpose,
> (a) has not been actually used or occupied for the charitable purpose for a period of three years;
> (b) is not required for actual use or occupation for the charitable purpose; and
> (c) will not be required for actual use or occupation for the charitable purpose in the immediate future,

the Public Guardian and Trustee may vest the land in himself or herself by registering a notice in the land registry office to that effect and stating that the Public Guardian and Trustee intends to sell the land, and shall, where practicable, deliver a copy of the notice to the person who held the land for the charitable purpose.

Subsection 8(3) of the CAA permits the PGT to sell land that it determines under subsection 8(2) is no longer used or required for a charitable purpose after the PGT vest the land in himself or herself by registering a notice in the land registry office to that effect. The proceeds of sale are then applied to the charitable purpose. However, before the PGT can take the steps of vesting the land in itself, registering a notice, and selling the land, subsection 8(2) contains two thresholds that the PGT must satisfy itself of.

The first threshold is that the PGT must form an "opinion" that all three of the statements in clauses (a) to (c) are applicable to the land in question. Therefore the PGT must form an opinion that the land has not been used or occupied for the charitable purpose for a three year period; is not required for actual use or occupation for the charitable purpose; and will not be required for actual use or occupation for the charitable purpose in the immediate future. All three of the above requirements present an opportunity for the real estate practitioner to advocate with the PGT on behalf of their charitable client.

The second threshold is that subsection 8(2) states that the PGT "may" vest the land in himself or herself. Therefore, once the PGT has formed an opinion that the land has not been used or occupied for the charitable purpose for a three year period; is not required for actual use or occupation for the charitable purpose; and will not be required for actual use or occupation for the

charitable purpose in the immediate future, the wording of the CAA provides for *discretion* by the PGT as to whether or not the land should be vested in itself and sold.

Therefore, the general prohibition contained in section 8 of the CAA raises several questions for which the answers at present are not entirely clear. For example, does the general prohibition of section 8 apply to the whole of the land holding owned by the charity, or simply a portion of the land? If it does not apply to all of the land, what proportion of the land is acceptable? At present, the PGT has no official policies or guidelines regarding these specific matters. This may be a result of the diverse nature of charitable organizations and their purposes and preferences for carrying out their charitable objects. The PGT therefore reviews such matters on a case by case basis in light of applicable legislation and the unique facts of each charity.

While no hard and fast rules exist regarding what portion of the land section 8 of the CAA addresses, there are certain "rules of thumb" that the real estate practitioner may consider when confronted with a charitable client who may run afoul of section 8 of the CAA. For example, the PGT may consider the specific use that the charity's surplus land is being used for. If the land is being used for a purpose that is simply ancillary to, or incidental to, the objects of the charity, the PGT may not form the opinion that the land is not required for actual use or occupation for the charitable purpose.

What amount of land could be used for an ancillary or incidental purpose is a gray area that would be determined on a case by case basis. The PGT may consider subsection 2(1) of the *Charitable Gifts Act*,[29] which restricts the interest of a charity in any for profit business to ten per cent, and conclude that a charity may utilize 10% of its land for an ancillary/incidental use. Alternatively, the PGT could consider the disbursement quota requirements applicable to charities that are found in section 149.1 of the ITA, to conclude that a charity may utilize 20% of its land for an ancillary/incidental use.

[29] *Charitable Gifts Act,* R.S.O. 1990, c. C.8.

Therefore, a real estate practitioner dealing with the PGT regarding section 8 of the CAA may wish to consider the above and other provisions of legislation related to charities depending on the specific facts confronted by their charitable client. Furthermore, it is imperative in the event that a charity seeks to purchase land where there is an existing commercial tenant, that the real estate practitioner obtain and carefully review the terms of the commercial lease. Such a review should include determining whether the term of the lease would conflict with the provisions of section 8 of the CAA, which may necessitate discussion with the PGT with regard to the above issues.

4. *Charitable Gifts Act*

The *Charitable Gifts Act* ("CGA") is primarily concerned with the operation of business activities by charitable organizations. While precise definitions of what constitutes a "business", or "interest" in a business are not clear, a charity is generally limited in its ownership of a for-profit business, other than a religious charity, to only 10% of the interest in such business. Therefore, charities that are operating for profit real estate operations, such as rental properties, should be concerned with the CGA.

A charity that owns more than 10% of an interest in a business is required to dispose of the excessive interest within seven years. A charity that owns more than 50% of a for-profit business must co-ordinate with the PGT to address the profits generated by the business each year. The business is required to pay the undistributed profit to the charity on the dates determined jointly by the PGT and the business and file an annual return by March 31st of each year showing the assets and liabilities of the business and other financial information requested by the PGT.

5. Heritage Properties

The *Ontario Heritage Act* ("Heritage Act")[30] gives municipalities the power to protect its local heritage resources. This power includes designating a property within its jurisdiction as being of "cultural heritage value or interest."[31] If a municipality intends to designate a property, its council

[30] *Ontario Heritage Act*, RSO 1990, c. O.18.
[31] *Ibid*, at subsection 29(1).

will inform the property owner and the Ontario Heritage Foundation,[32] publish its intent to designate in a local newspaper,[33] and enact a by-law designating the property as being of "cultural heritage value or interest." The Heritage Act does not provide any exemptions for charitable organizations.

a) Designation process and impact on property rights

There are no specific criteria by which a property will become designated. Serving and publishing the notice of intention:

(i) stays all demolition and alteration permits previously issued by the municipality;[34]

(ii) generally restricts the owner's right to alter, renovate, demolish or remove the heritage attributes of the property without consent from the municipal council.[35] This is however a time limited restriction since the owner can still demolish after 180 days has passed from the date the council denied the demolition application;

(iii) may result in a need to restore or upkeep the property's heritage qualities – which can become a financial burden to the property owner.[36]

On November 2, 2004, *An Act to Amend the Ontario Heritage Act* ("Bill 60")[37] received second reading in the Ontario legislature. Bill 60 has since been amended by the Justice Policy Committee and at the time of writing this paper, was expected to receive Third Reading when the legislature resumes in February, 2005. The amendments proposed in Bill 60 are part of a larger objective to strengthen and improve heritage protection in Ontario. If passed, Bill 60 will expand municipal powers, provide for new provincial powers to identify and designate properties that are of heritage significance, enhance the jurisdiction of the

[32] The Ontario Heritage Foundation is a non-share capital corporation that advises the Minister of culture in the administration of the Heritage Act regarding the conservation, protection and preservation of the heritage of Ontario. The powers of the Foundation are detailed in sections 9 and 10 of the Heritage Act. Under Bill 60, the Ontario Heritage Foundation will be renamed the Ontario Heritage Trust.
[33] *Supra* note 30, at s. 29(3).
[34] *Supra* note 30, at s. 30.
[35] *Supra* note 30, at s.33 & 34.
[36] *Re Toronto College Street Centre Ltd and City of Toronto et al*, 47 O.R. (2d) 734
[37] *An Act to Amend the Ontario Heritage Act* (Bill 60) is available at http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b060_e.htm.

Ontario Municipal Board (the "OMB"), and provide for enhanced demolition controls over designated properties.

As a result of the expanded designating powers, it is likely that Bill 60 will increase the number of buildings designated as having "cultural heritage value or interest." In this regard, owners of properties that may have cultural heritage value or interest (for example, older churches and cathedrals) which are not presently designated under the Heritage Act, may become designated when Bill 60 comes into force. The proposed amendments have been applauded in the heritage community. However, given that more buildings will be designated and given that municipalities will have by-law making powers to impose minimum standards for maintenance and upkeep on designated property owners, complying with the standards, may become a financial burden for many designated property owners.

In addition, charitable and not-for-profit organizations could find that designation will further restrict the development potential of their properties and therefore curtail the market for, as well as the market value of, these properties. As a result, charitable and not-for-profit organizations with limited operating budgets that may not be able to continue to maintain their designated properties may also find themselves in the difficult position of finding a decreased number of potential purchasers, should they decide to sell a property that has been designated.

b) Expanded identification and designation process

One of the more significant changes proposed to Part IV of the Heritage Act will result in properties being subject to not only municipal designation but provincial designation as well provided that the Minister of Culture ("Minister") believes the property in question has "cultural heritage value or interest to the province." In addition, with regards to municipal designation, section 29 will be amended to ensure that where criteria are prescribed by regulations, only those properties that meet the prescribed criteria will be designated. It is important to note that the Heritage Act in its current form does not provide specific criteria by which a property will become municipally designated for its "cultural heritage value or

interest." With regards to prescribing criteria for provincial designation, the language is more definitive and suggests that criteria will be prescribed by regulation to indicate which properties may be designated by the Minister.[38]

In general, provisions in Bill 60 that will apply to municipally designated properties will likewise apply to provincially designated properties. As a result, owners of provincially designated properties will be able, for example, to make demolition requests and in doing so will be subject to the same review and appeals processes that would apply for municipally designated properties. Further, it is reasonable to predict that the introduction of provincial designation will increase the sphere in which designations can be made and in the larger context will result in more properties of "cultural heritage value or interest" being targeted, preserved and protected in the province.

c) Effect of notice of designation

A notice of intention to designate, whether municipally or provincially, will continue to void all permits obtained prior to designation that would allow the property owner to alter or demolish the property, and will give the municipality's council[39] or the Minister[40] interim control over alteration, demolition and removal of the property to be designated.

d) De-designation

Another integral component of the larger objective to protect heritage resources is reflected in Bill 60's proposed amendments making it more onerous for designated property owners to repeal a municipal by-law designating the property as being of "cultural heritage value or interest." Property owners will still be able to object to their property being designated. However, the proposed section 32(14) will allow "any person" to object to the removal of the designation. This amendment will modify the de-designation process, which currently

[38] *Supra* note 30, subsection 34.5(1)(a). See also Explanatory Note to the Ontario Heritage Amendment Act, 2004. This is also available at: http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b060_e.htm.
[39] *Supra* note 37, subsection 30(2)
[40] *Supra* note 37, subsection 35.5(4)

does not allow third party objections to a property owner's application to remove the designation.[41]

e) Extended demolition controls under Bill 60

Another significant amendment proposed in Bill 60 will give municipalities the right not just to delay, but to prohibit the demolition of buildings that are of cultural interest to the community. Under Bill 60, designated property owners will no longer have an automatic right to override a municipal council decision that a designated property should not be demolished. Under the current Heritage Act, even though a municipal council can deny a property owner's demolition request, it cannot ultimately prevent the demolition, since owners reserve the right to demolish after 180 days has passed from the date the municipal council denied the demolition application.[42] With this amendment, Bill 60 will remove private property rights, and extend demolition controls by municipalities, and in doing so will create a tension in terms of balancing the needs and rights of property owners and the community interest. Bill 60 partially addresses this reduction in property rights by introducing a new appeals mechanism for property owners and enhancing the jurisdiction of the OMB to preside over these appeals. This is discussed below.

It is important to note that Bill 60 will introduce onerous financial penalties for breaching a "no demolition" order. The amended legislation will allow for a $1M fine to "any person" who contravenes sections 34, 34.5, 42, 48.1 of the Heritage Act – which prohibits demolition under specified circumstances. This penalty would also apply to any "director or officer" who "knowingly concurs in such an act by the corporation."[43]

f) New appeal mechanism and extended jurisdiction of the Ontario Municipal Board

Section 34 of the Heritage Act will be amended to allow designated property owners the option to appeal the municipal council's refusal of the demolition request to the OMB. This

[41] *Supra* note 30, at subsections 31(5) and 29(5).
[42] *Supra* note 30, subsection 34(5).
[43] *Supra* note 37, s.69(3)

means that if a municipal council does not consent to a property owner's demolition request, or offers a conditional consent, the property owner has the option to appeal to the OMB[44] within 30 days[45] of receiving the decision. However, after holding a hearing the OMB will be empowered to make a final decision[46] on the demolition request and may either allow the appeal with or without conditions or dismiss the appeal. Dismissing the property owner's appeal will automatically prevent the demolition of the designated property. While an OMB decision does not preclude the property owner from making a demolition application in the future, the extended demolition controls discussed above will take away the automatic demolition right property owners have under the current Heritage Act.

g) Maintenance standards and guidelines

Under Bill 60, property owners will be required to comply with minimum standards for the preservation and up-keep of designated buildings. As a result, Bill 60 will provide municipalities with new powers to make by-laws prescribing minimum standards for maintenance and upkeep of the heritage attributes of all designated buildings.[47] In addition, Bill 60 will require designated properties that do not comply with these standards to be repaired and maintained to conform with the required standards.[48]

h) Transitional matters

It is important to note that if passed, the new legislative provisions will apply during the transitional period, unless a designated building is in the process of being demolished at the time the Bill receives Royal Assent.[49] As a result, the new provisions under Bill 60, including extended demolition controls, will apply to demolition requests submitted or approved prior to Bill 60 receiving Royal Assent, as long as the demolition process has not commenced.

[44] *Supra* note 37, subsection 34.1(6)
[45] *Supra* note 37, s.34.1(2)
[46] *Supra* note 37, 34.1(7)
[47] *Supra* note 37, paragraph 35.3(1)(a)
[48] S*upra* note 37, paragraph 35.3(1)(b)
[49] *Supra* note 37, subsection 37(4)

Property owners will then have a 30 day period within which to appeal a municipal council's decision to the OMB or 90 days during the transition period for property owners who have lost the demolition right afforded under the current Heritage Act.[50]

i) Ministerial oversight powers

In addition to the various measures discussed above, Bill 60 will give the Minister sweeping oversight powers to issue stop orders[51] preventing alterations, demolitions, and the removal of "any property" the Minister believes to be of "cultural heritage value or interest" to the province. Based on the wording of this provision, this power appears to apply to undesignated properties as well, whether the property was provincially or municipally designated, and regardless of prior municipal approval to alter, demolish or remove the property.

j) Heritage easement agreements

Private contracts play an integral role in developing controls on heritage properties. Therefore, if a property owner wishes to subject their property to these controls, it is possible to execute an easement agreement that commits the property owner and their heirs and assigns to protect the property without relinquishing title to it.

An easement in land requires the owner of the land to permit something to be done on the land or prevents the owner from doing something on the land.[52]Charitable and not-for-profit organizations can participate on both sides of the easement donation process, either as a donee (dominant tenement –benefit from an easement) or as a donor (servient tenement - own land that is subject to the easement). As property owners, they can enter into conservation easements, which are voluntary legal agreements with the Heritage Foundation to donate the parts of their property that are of historical interest. This gives the Heritage

[50] *Supra* note 30, subsection 34.2(1)
[51] *Supra* note 37, section 35.2
[52] Carter, Craig R. "Easements and Access" (October 22, 1999) Canadian Bar Association – Ontario Continuing Legal Education

Foundation a right to access and inspect the property to ensure the historical portions of the property are appropriately maintained.

In addition, the *Conservation Lands Act*[53] empowers not-for-profit heritage organizations and trustees of charitable foundations to acquire and hold natural heritage conservation easements on properties as part of their conservation programs.

k) Easement agreements and impact on property rights

The distinction between a heritage designation and an easement is that an easement is a more comprehensive intrusion on and assignment of property rights, given that it:

(i) can be registered against the land. This is not effected by a by-law enacting process, instead the terms of the easement can be registered on the title in the local Land Titles Office, which preserves the easement;

(ii) runs with the land[54] and therefore, binds present and future owners regardless of when or how title to the property is acquired;

(iii) ensures demolition control.

Charitable organizations must be mindful that valid grants of easement registered in the Ontario Land Registry System expire forty years after first being registered, unless a notice of claim is registered to preserve the easement.[55]

l) Municipal tax reduction for heritage properties

There are tax incentives available for designated properties or those subject to easement agreements. Any owner of a property or portion of a property that is designated or subject to an easement agreement can get a special tax rebate or refund. This may be between 10% and 40% of the taxes for municipal and school purposes levied on the property, that are attributable to "eligible" buildings and land used in connection with the eligible heritage

[53] *Conservation Lands Act*, RSO. 1990, c. C.28 , s.3(1)(g).
[54] *Supra* note 30, at s.22(2)
[55] *Registry Act* . R.S.O. 1990, c. R.20, s. 113(1)(2)

property.[56] These incentives are not automatic so property owners must be mindful of the time lines and application processes involved.

m) Income tax treatment of easements

Subsection 248(1) of the ITA[57] defines property to include a property right of any kind whatever. Since an easement registered against land is a right, it would be considered to be property. [58] A gift of property, including easement donations, to certain institutions may qualify as tax credits when donors file their returns. For example, the Government of Canada has a special agreement with The Heritage Canada Foundation which gives the Foundation the right, as an agent of the crown, to receive property in trust for the Crown. As a corollary to this agreement, any gift of property rights made to the foundation in trust for the Crown, receives the same tax treatment as a gift made directly to the Crown.

The tax implications of any gift depends on several criteria, as prescribed by CRA,[59] such as whether it is a gift to a registered charity or other qualified donee as defined under the ITA, including the government of Canada, a province, a territory, a municipality, and a municipal or public body performing a function of the government in Canada,; or a gift of eco-logically sensitive land. A brief explanation of the tax implications for gifts to the various recipients are as follows.

i) Gifts to registered charities and other qualified donees

A tax credit can be claimed based on the eligible amount of the gift to a qualified donee. Generally, all or a part of the eligible amount of the gift can be claimed, up to the limit of 75% of the donor's net income for the year. It may be possible to increase this limit if capital property (including depreciable property) is donated.

[56] *Municipal Act, S.O. 2001, c. 25* s. s.356.2(3)
[57] Significant amendments to the ITA have been proposed by a Notice of Ways and Means Motion (Bill C-33) introduced on December 6, 2005, but which are beyond the scope of this paper.
[58] West Coast Environmental Law Foundation. "Here Today, Here Tomorrow." (1994) http://www.wcel.org/wcelpub/5110/5110apxa.html.
[59] Canada Revenue Agency. "Gifts and Income Tax" P113(E) Rev. 04 (2004). http://www.cra-arc.gc.ca/E/pub/tg/p113/p113-e.html.

ii) Gifts to the Government of Canada, a province or territory

A tax credit can be claimed based on the eligible amount of the gift to the Government of Canada, a province, or a territory. If the gift was agreed to in writing before February 19, 1997, the amount that qualifies for the tax credit is 100% of the net income of the donor for the year. In all other cases, the amount that qualifies for the tax credit is limited to 75% of the net income of the donor.

iii) Gifts of ecologically sensitive land

A tax credit can be claimed based on the eligible amount of a gift of ecologically sensitive land. This includes a covenant or an easement, made to the Government of Canada, a province or territory, a Canadian municipality, a municipal or public body performing a function of the government in Canada, or a registered charity that the Minister of the Environment has approved. The Minister of the Environment has to certify that the land is important to the preservation of Canada's environmental heritage. The Minister will also determine the fair market value of the land.

For a gift of a covenant or an easement, the fair market value of the gift will be the greater of the fair market value otherwise determined of the gift, or the amount of the reduction of the land's fair market value that resulted from the gift. The fair market value of the donated property, as determined or re-determined by the Minister of the Environment, will apply for a 24-month period after the last determination or re-determination. If a gift of the property is made within that 24-month period, it is the last determined or re-determined value that would be used to calculate the eligible amount of the gift, whether the gift is claimed as a gift of ecologically sensitive land or as an ordinary charitable gift. Unlike claims for gifts to registered charities, qualified donees and the government of Canada, the province or a territory, a claim for this type of donation is not limited to a percentage of the donor’s net income.

G. MUNICIPAL ISSUES

1. Zoning

It is important for real estate practitioners acting for charities or not-for-profit organizations to enquire regarding the present and future uses intended for the property, and assist the client in verifying whether the property in question is properly zoned for such use. This is particularly important since many charities, such as churches, are increasingly using their facilities for more than simply places of worship (i.e. child care facilities, schools, soup kitchens, etc.). Therefore, real estate practitioners should co-ordinate with their clients to ensure that all their intended uses of the property will not conflict with zoning requirements, including parking requirements, for the intended use.

2. Municipal Tax Assessment

While the premise of the *Assessment Act* [60] is that all real property in Ontario is liable to assessment and taxation,[61] and that the municipality in which the property is located will assess and value all real property and tax the owner on its current value, the *Assessment Act* provides that some properties are exempt from taxation.[62] These include:

(a) Cemeteries or burial sites;

(b) Land owned by a church or religious organization;

(c) Land a church or religious organization leases from another church or religious organization;

(d) Land owned, used and occupied solely by public educational institutions;

(e) Land owned, used and occupied solely by a non-profit philanthropic organization;

(f) Land used and occupied by public hospitals;

(g) Land owned, used and occupied by charitable institutions;

[60] *Assessment Act*, R.S.O. 1990, c. A.31.
[61] Jack Walker & Jerry Grad, *Ontario Property Tax Assessment Handbook*, 2nd ed. (Aurora: Canada Law Books Inc) at 2-1
[62] *Supra* note 60, s.3.

(h) Conservation lands

The two main criteria that must be satisfied in order to qualify for tax-exempt status under s.3 of the *Assessment Act* are ownership and occupation of the property. However, each of the categories under this section has distinct requirements that must be satisfied in order to qualify for tax exempt status. For some categories, ownership alone suffices while in other instances more than ownership and occupation are required in order to qualify for exempt status. Some of the issues raised in the case law as the courts define different threshold requirements for the more contentious exempt categories are discussed below.

a) Church lands includes lands "connected with places of worship"

This category exempts lands owned by churches and religious organizations and extends to "places of worship and lands used in connection with it". Therefore, it is challenging to determine the meaning of "lands connected with places of worship" and the scope of this exempt category. The prevailing principle that the courts have applied in determining whether a location is a place of worship is the "predominant use" test. Therefore, to qualify for tax exempt status under this category there must be some connection between the use of the location and the spiritual nature and purposes of the church. In the case law, examples of "lands connected with places of worship" and therefore exempt lands include a church operated camp, even though the church occasionally rented small portions of the camp to church members and others[63] as well as an apartment in the church's basement where the church's care taker resided.[64]

It is also important to note that a church can also claim an exemption:

(i) For church buildings even if they remain vacant and unoccupied.[65] It is not necessary that the owner occupy the land to qualify for this exemption.

[63] Re *Baptist Convention of Ontario and Quebec* and *Kanata (City)*, 51 O.R. (2d) 400
[64] *Trustees of Centenary United Church* v *Regional Assessment Commissioner Regions No. 19 (Re)* (1979), 27 O.R. (2d) 790
[65] *Regional Assessment Commissioner of Region 31 and Corporation of Synod of Toronto and Kingston – the Presbyterian of Canada* (1974), 4 O.R. (2d) 773 (H.C.J.)

(ii) For church property that is used and assessed as a business – as long as the property is predominantly used to educate students, even though the business may employ full time employees.[66]

b) Philanthropic organizations[67]

In order to qualify for tax-exempt status under this category, a philanthropic organization must satisfy more stringent criteria than required for churches and religious organizations. It must not only be non-profit, but the land must be occupied, the applicant must have intended to use the land for education or as a seminary, the inhabitants must dedicate themselves to that purpose, and the entire property must be used for that purpose.[68]

c) Cemeteries and burial sites

Cemeteries and burying grounds automatically qualify for tax exempt status as long as they are consented to under the *Cemeteries Act* and are used for interment of the dead.[69] If the cemetery owner can establish that the premises require fairly constant superintending to maintain and landscape the premises, the section of the premises occupied by a superintendent and gardener's house as well as green houses will also be exempt from taxation.[70] A cemetery owner can also apply to the municipality to have taxes levied against any eligible or non-exempt portions of the property reduced, cancelled or refunded if he has insufficient funds available for care and maintenance of the premises.[71]

d) Charitable institutions

The *Assessment Act* requires that a more comprehensive criteria than ownership and occupation be satisfied in order to qualify for exemption under this category. Some institutions like the Canadian Red Cross and the St John's Ambulance Association,

[66] *Oshawa Missionary College* v *City of Oshawa* (Re) [1964] 1 O.R. 307 (H.C.J)
[67] *Supra* note 60, paragraph 5, s.3(1)
[68] *Augustinian Fathers (Ontario) Inc. (Re)* (1985), 52 O.R (2d) 536 (H.C.J.)
[69] *Supra* note 60, paragraph 2, s.3 (1).
[70] *Trustees of Toronto General Burying Grounds v Township of Scarborough* [1959] 1 O.R. 514 (H.C.J.)
[71] *Supra* note 56, at s. 357(2)

automatically qualify for tax exempt status. In order for other charitable institutions to qualify for this exemption, they must:

(i) own the land;

(ii) be supported in part by public funds; and

(iii) use the land for the purposes of relief of the poor or any similar purpose but not a profit-making purpose.[72]

It is worth noting that there is no strict requirement in the *Assessment Act* that the land must be owner-occupied and in the earlier case law, in defining the meaning of the word "occupied" for the purposes of this category, exempt status is premised on the land being used for the organization's charitable purposes. In addition, if the property is used incidentally for other purposes,[73] this will not necessarily detract from its exempt status as long as the controlling purpose remains the alleviation of the economic hardship suffered by the poor. To increase the likelihood of qualifying under this category, it is important that the organization has a specific mission statement which directly specifies its purpose as "relief of the poor" as opposed to a vague or general one. An organization is more likely to bring itself within the scope of this exemption if it includes a means test as one of the criteria to disbursing its benefits.[74] These principles from the case law are still relevant to current property owners in their decision making.

e) The importance of using the land for the relief of the poor

A recent case that addressed the relevance of using land for the relief of poverty in determining whether the charity "occupies" the land and therefore qualifies for tax exemption is *Ottawa Salus Corporation v. Municipality Property Assessment Corporation et al.*[75] The issue before the Court of Appeal was whether the Divisional Court judge erred in purposively interpreting the word "occupied" in paragraph 12 of s.3(1) of the *Assessment Act*. The

[72] *Columbus Boy's Camp v. OPAC Region No. 16*, [2001] O.J. No. 4984
[73] *Cencourse Project Inc v. Ontario Regional Assessment Commissioner, Region 27,* [1992] O.J. No. 524.
[74] *Canadian Mental Health Association* v OPAC, [2002] O.J. No. 2199
[75] *Ottawa Salus Corporation v. Municipality Property Assessment Corporation et al* [2004] O.J. No. 213

Appellant ("MPAC") argued that the 1998 amendments to paragraph 12, section 3(1) narrowed the scope of the exemption and therefore the property must be strictly owner-occupied in order to maintain its tax exempt status.

At the Court of Appeal, MacPherson J. interpreted the word "occupied" against the backdrop of the organization's purpose to relieve poverty, and held that since the tenants, though third parties, had a connection to the charity and were the recipients of the charity's work to relieve poverty, "occupation" for the purposes of the exemption does not require actual or exclusive occupation by the charitable institution. If the property is being used directly by the charity to further its objective of relieving poverty, this is sufficient to satisfy the requirements under this category and qualify for tax exempt status.

f) Tax rebate for charities from the business occupancy tax

In addition to the realty tax exemptions, the municipality provides a special rebate for "eligible" charities if they occupy commercial or industrial property.[76] Generally, a charity is eligible if it is a registered charity under the ITA. The *Municipal Act* goes on to state that such rebate shall be at least 40% and describes various program requirements and options.[77]

This process typically involves the municipality passing a by-law entitling registered charities to an exemption of at least 40% on their property taxes. Applications for rebate must be made between January 1 of a particular year and the last day of February of the following year. Municipalities are required to issue half of the rebate payment to a charity within 60 days after the receipt of the charity's application. The balance of the rebate is payable within 120 days of the receipt of the application, with adjustments (if any) being made after the issuance of the final tax bill(s) for the year.

[76] *Supra* note 56, at s.361(1)
[77] *Ibid*., s.361(3)2.

H. RESTRICTED PURPOSE TRUSTS AND THE DOCTRINE OF CY-PRES

It is not unusual for charities, especially religious charities such as churches, to hold property subject to a restricted purpose, whereby, for instance, a donor agrees to provide real property to the organization on the condition that it only be used for a certain purpose. It is important for the real estate practitioner, especially when representing a charity that is selling such property, to be able to advise their client regarding the property subject to the restricted purpose. For example, does the restricted purpose cease to have effect when the property is sold? Does the restricted purpose run with the land? Do the proceeds from the sale continue to be subject to the restricted purpose? This section of the paper will deal with such questions that may confront the real estate practitioner dealing with religious and institutional properties. A 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.

1. What Is the Definition of a "Charitable Purpose?"[78]

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[79] 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[80] 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

[78] For more information, please see Carter, Terrance S. "Donor Restricted Charitable Gifts – A Practical Overview Revisited II" *The Philanthropist*, Vol. 18, No. 1 & 2 (2003). http://www.charitylaw.ca/articles.html.
[79] American Law Institute, *Restatement (Second) of Trusts* (Washington, D.C.: 1959), para. 348.
[80] Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ministry of the Attorney General, 1996), p. 395.

> 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.

2. 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:[81]

(a) 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.

(b) 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.

(c) 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.[82]

(d) 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 consideration 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

[81] *Ibid*., pp. 395–414.
[82] See Waters, D.W.M. *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), p. 502.

period.[83] 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.

(e) 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.

3. 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.[84] 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.[85] As well, this issue has been further confused in Ontario as a result of section 1(2) of the CAA, which states that a charitable corporation is a trustee of its property for purposes of the CAA. American legal authorities have commented upon this grey area of the law as follows:[86]

> 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.

[83] *Perpetuities Act*, R.S.O. 1990, c. P-9, s.16.

[84] 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 *The Philanthropist*, V. 17 N. 3.

[85] For a discussion of the divergent case law on this topic, see *supra*, note 80, 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.].

[86] Scott, A.W. *The Law of Trusts*, 4th ed. By W.F. Fratcher, vol. 4A (Boston: Little, Brown & Company, 1989), para. 348.1, pp. 23–25.

> 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. 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.[87]

> 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.[88]

This position was confirmed by the Ontario Court of Appeal in Christian Brothers Ont. C.A.[89] The British Columbia Supreme Court also came to the same conclusion involving the assets of the

[87] Christian Brothers Gen. Div., *supra* note 85, at 390–91.
[88] *Ibid*., at 392.
[89] Christian Brothers Ont. C.A., *supra*, note 85, at 701–702.

Christian Brothers located in that province.[90] 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.[91]

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. Notwithstanding the above, property 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.

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[90] Christian Brothers B.C.S.C., *supra*, note 85, 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.

[91] Christian Brothers Gen. Div., supra, note 85, at 392, concurred with in Christian Brothers Ont. C.A., *ibid*., at 702.

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.

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 Snell[92] 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."[93]

4. 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.

[92] Snell, Principles of Equity, 28th ed. (1982), p. 145.
[93] Supra, note 82, p. 503.

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

(a) restrictions pertaining to religious doctrine, i.e., requiring that the property be used only for individuals who subscribe to a particular religious doctrine;

(b) restrictions pertaining to use, i.e., limiting the property to a particular use, such as use for a church, cemetery or seminary; and

(c) 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 paper.)

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.

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.[94] 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*[95] 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.[96]

[94] Christian Brothers Gen. Div., *supra* note 85, at 520.
[95] *Attorney-General for Queensland v. Cathedral Church of Brisbane* (1977), 136 C.L.R. 353, at 371 (H.C. of A.).
[96] *Ibid*., at 358–359.

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. [emphasis added][97]

Where land that is subject to a charitable trust is transferred, the proceeds of the sale will remain subject to the terms of trust.[98] 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.

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[97] *Ibid*., at 372.

[98] 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* note 85, at 410.

5. What Happens When There Is a Failure of a Donor Restriction?

Donor-restricted charitable gifts will fail when a restricted term in a special purpose charitable trust becomes impossible or impractical, a condition precedent or subsequent is unfulfilled, or a limited interest in a determinable gift comes to an end. Depending upon the nature of the donor-restricted charitable gift, different consequences will ensue, bringing with them the option of different levels of court involvement in dealing with the failure of the restrictions.

a) Failure of a conditional gift

As indicated above, when a gift that is given to a charity is subject to a condition precedent and the condition is unfulfilled, then the gift fails to take effect but, when a gift subject to a condition subsequent is given to a charity and the condition is unfulfilled, the gift will revert to the donor (subject to the possibility that the donor included a gift over to another charity which was to take effect if the condition failed).

Where the donor has clearly stated that the gift is to fail if the condition is unfulfilled, it will not be possible, on the failure of the condition, to use the general scheme-making power of the court, such as a *cy-près* application, as *cy-près* applications are only available for unconditional gifts. These would include absolute gifts which were never subject to conditions, as well as those gifts that were subject to a condition of acquisition, i.e., a condition precedent, which has been fulfilled.[99]

The general inability of the court to intervene and extend the donor's initial charitable intent is a major drawback in having donors use conditional gifts. It is therefore important for a charity that accepts or encourages conditional gifts to ensure that the donor is aware of the general inability of the court to grant relief if a failure of the condition occurs, as well as the importance of including a gift-over to another charity in that eventuality.

[99] Tudor on Charities, 8th ed., Jean Warburton and Deborah Morris (London: Sweet & Maxwell, 1995), p. 432.

b) General liberal court interpretation

Other than a failure of a donor restriction involving a condition precedent or a condition subsequent (which does not occur often), the general rule is that where a gift to a charity would otherwise fail due to vagueness, impossibility, impracticality or general uncertainty, the court is able to exercise an inherent jurisdiction to interpret the gift in a liberal and lenient manner. In *Weir v. Crum-Brown*,[100] the Court held that "there is no better rule than that a benignant construction will be placed upon charitable bequests."

In its Report on the Law of Charities,[101] the Ontario Law Reform Commission explained that the courts have exercised a liberal interpretation in a variety of cases, including where donors have stated their intentions ambiguously by incorrectly naming or describing a recipient charity[102] or overlooking the fact that a named recipient charity had been amalgamated with another charity between the time that the will was drafted and the time of the donor's death.[103] In these cases, the courts have taken a generous view of the donors' words to "look for the true intention and, where possible, salvage the gift."[104]

c) Failure of a special purpose charitable trust

A special purpose charitable trust will fail where the donor's restriction is either impossible or impractical to comply with or where the means of carrying out the special purpose charitable trust can no longer be realistically accomplished. In those situations, the charity must seek the assistance of the court in exercising its general scheme-making power through either a *cy-près* court application or the imposition of an administrative scheme (both of which are discussed in more detail below).

[100] *Weir v. Crum-Brown*, [1908] A.C. 162, at 167, 77 L.J.P.C. 41 (H.L.), p. 127.
[101] *Supra* note 80, p. 401.
[102] *Clapper (Re)*, [1910] 2 O.W.N. 111 (H.C.J.); *Hogle (Re)*, [1939] 4 D.L.R. 817, [1939] O.R. 425 (S.C.).
[103] *Stewart* (Re); *Royal Trust Co. v. Stewart* (1958), 13 D.L.R. (2d) 654 (B.C.S.C.); Ogilvy v. Ogilvy, [1953] 1 D.L.R. 44, [1952] O.W.N. 625 (H.C.); Gordon (Re) (1965), 52 D.L.R. (2d) 197, [1965] 2 O.R. 05 (H.C.J.); *Hunter* (Re) (1973), 34 D.L.R. (3d) 602, [1973] 3 W.W.R. 197 (B.C.S.C.).
[104] Picarda, Hubert. *The Law and Practice Relating to Charities*, 2nd ed. (London: Butterworths, 1995), p. 202.

Notwithstanding well-established law to the contrary, the boards of many charities believe that a charity somehow has an inherent right to unilaterally vary the terms of a donor restriction or to interpret liberally what the applicable restriction means. Alternatively, many charities that receive a testamentary gift that is subject to restrictions believe that the executor of the estate also has an inherent ability to unilaterally vary or interpret liberally the donor's restrictions. Neither of these assumptions is correct. Only the courts can vary the terms of a restricted special purpose charitable trust based upon the court's inherent scheme-making power:

> It is not for the directors or trustees of a charity to deal with the funds on their own authority, even with the direction or approval of the original donor.[105]

This means that to vary a donor-restricted charitable gift, an application must be made for a *cy-près* order. Any unilateral attempt to vary a donor-restricted charitable gift based only upon the consent of the donor, with the charity acting on its own without first obtaining the necessary court approval, would likely constitute a breach of trust and must therefore be carefully avoided notwithstanding the time and expense of making the necessary court application.

There are two situations, however, in which court approval to vary a donor restricted charitable gift may not be necessary. The first situation is where a *cy-près* court application is not successful and the gift reverts to the donor in circumstances where there is no gift-over to another charity. The second situation results in the same effect, but is due to the failure of either a condition precedent or a condition subsequent where there is a reversion to the donor. In both situations, the donor would be able unilaterally to reissue the gift to the intended charity once the gift had been received back and at that point either new donor restrictions could be established or the gift could be reissued without any restrictions being imposed.

[105] *Supra* note 99, at p. 245-6. See also *supra* note 104, at p. 367.

d) *Cy-près* scheme-making power

Cy-près is a shortened form of the phrase "cy-près comme possible", which, in Norman French, means "as near as possible."[106] The *cy-près* doctrine is generally stated as follows:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[107]

Whether the court will be able to exercise a *cy-près* scheme will depend upon whether the failure is an initial failure or a subsequent failure. With an initial failure, the court will be able to intervene and apply the charitable property *cy-près* only if it can find a general charitable intention of the donor. This becomes particularly difficult in relation to public fundraising campaigns. If a surplus results from a public fundraising campaign for a particular charitable purpose and the charity is unable to use the monies for its publicly stated purpose, the court will be able to apply the remaining surplus to another charitable purpose only if it can find that the donors, many of whom may be anonymous, had a general charitable intention and did not limit their gifts to the specific project to which the fundraising campaign was directed. The primary problem involved with public surpluses resulting from public fundraising campaigns is therefore determining whether or not a general charitable intent can be found.[108]

To avoid the complexities and costs of making a *cy-près* court application and the possibility that the court may not find a general charitable intention in relation to a surplus in a public fundraising campaign, a charity should clearly state that any surpluses resulting from a fundraising campaign for a particular project will be used to further the general charitable purposes of the charity.

[106] Bogert, George G. *The Law of Trust and Trustees*, 2nd ed. (St. Paul: West Publishing, 1964), para. 431, p. 490.

In the event of a subsequent failure of a special purpose charitable trust, the court will apply the *cy-près* doctrine where it can be shown that there is a supervening impracticality or impossibility, without finding a general charitable intent. This is, of course, subject to the requirement that the gift not contain a provision for a gift-over by the donor.[109]

Some examples of both initial and subsequent failures which can result in the application of the *cy-près* doctrine involving special purpose charitable trusts are:

(i) insufficiency of subject matter, i.e., where the amount of the gift is too small to accomplish the intended purpose;[110]

(ii) where there is no suitable site available to carry out a designated building program;

(iii) the gift is made to a nonexistent charity;

(iv) the gift is made to a misdescribed charity;

(v) the gift is made to a charity which has ceased to operate;

(vi) the gift is made to a charity which has amalgamated with another charity, unless the letters patent of the amalgamated charity specify how the funds from the predecessor charity are to be applied;

(vii) the gift is made to a charity which has changed its charitable objects between the time that the will was made and the testator's death;

(viii) the trust property is unsuitable for the designated charitable purpose;

(ix) the gift is surplus to the needs of the designated charitable purpose;

(x) the gift is refused by the charity;

(xi) the charity is dissolved; or

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[107] For a thorough discussion of the convoluted issues involved in applying the *cy-près* doctrine to surpluses from public fundraising campaigns, reference should be made to James Phillips, "The Problem of Surpluses in Funds Raised By Public Appeal" (1990), *The Philanthropist*, Vol. 9, No. 1, p. 3.

[108] Supra note 80, at pp. 403 and 405.

[109] *Young Women's Christian Association Extension Campaign Fund* (Re), [1954] 3 W.W.R. 49, at 52 (Sask. K.B.).

[110] *Supra* note 99, p. 394; see also Ford, H.A.J. and Lee, W.A. *Principles of the Law of Trust*, 3rd ed. (North Ryde, N.S.W.: LBC Information Services, 1996); see also Waters, supra note 82, pp. 620–621.

(xii) there is a surplus of capital or income remaining after the charitable purpose has been carried out.

e) When will a *cy-près* scheme not be available?

There are a number of situations in which a *cy-près* scheme will not be available to assist a charity upon a failure of a donor-restricted charitable gift:

(i) Conditional gifts: A *cy-près* scheme will not be available if the gift fails because a condition precedent or a condition subsequent has not been fulfilled.

(ii) Lack of an impracticality or impossibility: A *cy-près* scheme will not be available unless the court is satisfied that the restrictions in question are either impractical or impossible to be carried out.

(iii) Legislative intervention: The ability of the court to apply a *cy-près* scheme is subject to the overriding right of the legislature to impose by legislation whatever terms and conditions it considers appropriate in relation to a particular charitable purpose.[111]

(iv) Capital endowments: A capital endowment involving a capital amount that is held in trust by the charity with only the income being available for a particular purpose, such as a scholarship fund, cannot be made the subject of a *cy-près* application. The primary reason is that the charity is holding the property in trust and has only a beneficial interest in the income from the endowment fund.[112] Even if the charity were considered to have title to the capital (which it does not), the present scope of what the courts regard as an impossibility or impracticality does not encompass a situation where the charity is seeking to apply the capital in a different or more effective application.[113]

The other reason why a *cy-près* scheme is not available for a capital endowment fund is that the donor has clearly indicated an intention that the capital not be disbursed but instead be held in perpetuity. As such, the indefinite duration of a capital endowment fund takes precedence over the cause of advancing a charity effectively.[114]

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[111] See *McMichael v. Ontario* (1997), 154 D.L.R. (4th) 50, 36 O.R. (3d) 163, 105 O.A.C. 161 (C.A.), leave to appeal to S.C.C. refused 159 D.L.R. (4th) vii, 227 N.R. 395n.
[112] *Supra* note 80, at p. 429.
[113] See *Baker* (Re) (1984), 11 D.L.R. (4th) 430, 47 O.R. (2d) 415, 17 E.T.R. 168 (H.C.J.); *Bell* (Re) (1980), 112 D.L.R. (3d) 573, 29 O.R. (2d) 278, 7 E.T.R. 129 (H.C.J.).
[114] *Supra* note 80, at p. 431.

f) Administrative scheme making power

Closely related to a *cy-près* power, the court may also exercise a scheme-making power where adherence to the administrative terms of a trust would disrupt the specific purpose of the charitable trust.

The normal situation where the court will permit deviation from administrative terms is where a change in circumstances makes adherence to the original administrative terms impossible or impractical. A recent application of the administrative scheme-making power of the court involved the Barnes Foundation in Pennsylvania where the donor, Dr. Albert Barnes, included in the declaration of trust creating the foundation, provisions which severely limited the investment policy of the foundation's endowment funds and strictly forbade charging entrance fees to his Impressionist painting collection, the construction of new buildings for the collection, and the sale or loan of any of the paintings under any circumstances short of physical deterioration. Due to the inability of the trustees to administer effectively and protect the paintings, the court allowed a variation of the administrative terms of trust to permit the collection of entrance fees and the loaning of pictures to other museums, so that sufficient money could be earned properly to care for and maintain the collection.[115]

It is interesting to contrast the negative reaction in the United States to a relatively minor variation in the administrative terms of trust involving the Barnes Foundation with the Canadian public's general lack of concern about the wholesale imposition of different charitable purposes involving the McMichael Collection in Ontario.[116] Canadians as a whole appear to be much more comfortable with the authority of both the legislature and the courts to interfere in special purpose charitable trusts. However, it is interesting to note that although the Government of Ontario was successful in dismissing the legal action commenced by the McMichaels alleging breach of contract, the Government of Ontario on

[115] Chris Abbinanet, "Protecting 'Donor Intent' in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation" (1997), 145 U. Pa. L. Rev. 665 p. 683.
[116] *Supra* note 111

its own decided later to reinstate the original terms of the gift from the McMichaels pursuant to an act entitled the McMichael Canadian Art Collection Act 2000.[117]

[117] *McMichael Canadian Art Collection Act* 2000, R.S.O. 1990, c. M. 4.

I. CONCLUSION

The goal of this paper has been to provide real estate practitioners with an overview of some of the more important issues to consider when dealing with charitable or non-profit organizations considering selling or purchasing property, with a particular emphasis on religious and institutional properties. In doing so, the paper has attempted to address ways in which real estate practitioners can be proactive in advising such clients by understanding the fundamental issues they face based on their unique organizational structures and means of acquiring, managing, controlling or transferring real property.

Therefore, even subtle distinctions in an organization's corporate structure, the content of its constating documents, the ways in which they are defined under the various statutes, impact how they can acquire and convey real property. There are some general limitations placed on the way charitable and non-profit organizations carry out real property transactions. In addition, there are specific rules and conditions regarding holding and conveying land that applies to some types of charities or non-profit organizations and not to others. However, it is most important to point out that these limitations are less likely to impede these organizations' scope of operation if charitable and not-for-profit organizations, with the assistance of their real estate practitioner, can adequately plan their real estate transactions.