

ADMINISTRATIVE AND CY-PRES JUDICIAL SCHEME MAKING: THE FATE OF THESE APPLICATIONS IN CANADA TODAY

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1. Introduction

One of the distinguishing features between the civil law and the common law is the role played by the courts in each system. In civil law jurisdictions the courts traditionally have determined the legal rights and wrongs between litigants, and only exceptionally responded to a party's request for a 'declaration' as to the state of the law. Since 1945, contrary to centuries-old tradition, statute in all civil law jurisdictions has been employed to add significantly to the local civil code, and statute has broken from tradition in conferring some discretion on the courts. But still the judicial climate is essentially one of interpreting code and statute, in determining disputes - declaring, as it were, as to what the law requires.

In the common law system on the other hand things have been different. The practice of the common law courts – King's Bench, Common Pleas, and Exchequer - was certainly in line with civil law court practice. This was true from the eleventh century to the late nineteenth century when, in England and then throughout the Commonwealth jurisdictions, all courts¹ were combined in the one centralised court. The 'forms of action' - the formulae in which permission to sue was granted by the administrative office of the Council's 'Chancery' – lent themselves to and maintained a similar approach, with the emphasis in the common law system, on adversarial litigation.

However, the approach of equity courts - the courts that grew out of the Chancery office itself - was always different, and this was so from the fourteenth century when they first appeared. The Lord Chancellor's Court was originated to customize the law it applied, basing its judgments, as well as its procedure, on the particular circumstances of the parties before the Court. So far as charitable trusts are concerned, it was with the growth of secular charitable giving and public (or charitable) trusts in the sixteenth century that the equity courts began positively to facilitate the creation and continuation of such trusts. The trust was solely created 'in equity', and the courts of equity were not restrained by common law court procedure from giving particular remedial relief to trust objects that benefited the public interest. If it was clear that charity was intended by the testator or settlor in his or her creation or attempted creation of such a trust, Chancery courts would advise the parties, design with their participation, and approve a scheme initially presented in outline by the concerned parties for making a trust effective. In the course of time a body of law concerning so-called administrative schemes and *cy-près* schemes

¹ Save in some jurisdictions, like New South Wales which for a century retained an independent Equity Court that was of the same stature, but independent of the new Supreme Court. The considerable reputation of the Equity Court, and of Sydney equity chambers, was recognized throughout the Commonwealth.

was developed. It was for administrative ends that judicial intervention was invoked when assistance was required in making an attempted trust gift managerially operative, and *cy-près* was relevant when trust purposes, either initially or later in the life of the trust, could not or could no longer be carried out, and new purposes were needed.

Historically schemes would be formulated, and are today formulated, when endowment (sometimes called perpetual) charitable gifts have been created. Such gifts may be made to further one or more of the purposes of a charitable organization, and are familiarly contained in a will or *inter vivos* instrument.

Indeed, in England by the end of the seventeenth century already judicial curative work was a regular part of the Chancery courts' charitable trust jurisdiction, and this inherent jurisdiction of Equity remained of significant importance, frequently invoked, until the last half of the twentieth century.

As part of the reception of English law this remedial curative jurisdiction was taken in the eighteenth and nineteenth centuries to common law Canada, to Australia and New Zealand, **to India**, to Hong Kong, Malaysia and Singapore, and indeed wherever the English common law tradition was carried. However, while since 1960 the Commonwealth jurisdictions of the United Kingdom and the Republic of Ireland, the states of federal Australia, New Zealand and Singapore have discussed and then legislatively provided for, developed and extended the inherent Chancery court powers, Canadian provincial and territorial jurisdictions of the same common law tradition have done nothing. In Canada in 2010 schemes can only be made under the English Chancery courts' historic inherent jurisdiction, with the uncertainties as to the extent of that jurisdiction that prior to 1960 also existed in the other countries and jurisdictions of the Commonwealth.

With the introduction in the last half of the twentieth century by many common law jurisdictions of state recognition and encouragement of charitable giving by way of tax incentives, the emphasis in giving has largely changed from the individual's testamentary gift for purposes to that same individual's donation of money, or other assets, to the already established charitable incorporated body or trust, with its own purposes.² This is so not only of *inter vivos* gifting, but of testamentary legacies and devises. As today's resident of these 'tax driven' jurisdictions is well aware, the consistent pattern of tax legislation across the common law world is to permit a deductibility of charitable gifts from tax owed by the donor or testator, or at least to allow a credit of some amount, if gifts are made to charitable organizations (corporations, trusts, or accepted unincorporated bodies) that are registered with the state authority. This means that, while the endowed or perpetual gift with a particular purpose or purposes may be in need of a scheme, court involvement has been more concerned with the modernity or responsiveness to contemporary need of institutional purposes.

² The gift may be directly for those purposes, or in endowment form for a purpose or purposes that fall within the charitable organization's purposes.

The founding documentation of these organizations will usually include terms enabling amendment at any time both of purposes and of the administrative machinery of the organization. But for small organizations having limited funds and little access to well-informed legal advice - and places of worship remain the greatest number of these organizations – the historic curative jurisdiction of scheme-making, now updated, can be of considerable value. In Canada, with no charity commissioners anywhere in the country that in foreign jurisdictions are legislatively empowered to assist these organizations, and no attempt anywhere across common law Canada to update the historic scheme-making remedial jurisdiction of the common law courts, the facility and use of the curative jurisdiction of equity is continually declining. To add to the plight, the inherent jurisdiction extends only to trusts, and therefore is of no assistance when, as is ever more frequently the case in all common law jurisdictions, the ‘charity’³ is incorporated. On top of that, there is now conflicting case authority in Canada on the scope and applicability of the courts’ inherent administrative scheme making power.

Today, while the Charities Acts in England and Wales between 1960 and 2006 have basically overhauled the administration of the law concerning charities, Canadians today find themselves reliant for reference on English case precedents that constitute the pre-1960 law in England and Wales. This therefore is a source of guidance of which there will be no further judicial consideration and to which additions will no longer be made. Moreover, as of fifty years ago those precedents have commenced aging.

It is as curious as unique a situation that the law of charity in common law Canada has been so ignored. Nevertheless, it is something that can be tackled by law reform bodies, and by those who have weight with governments and legislatures. A call for that awakening is what this paper aims to achieve.

2. **The scope of the historic curative jurisdiction in charity law**

(1) *The courts’ clemency towards charitable purposes*

The scheme making power was only one manifestation of the particular concern of the Equity courts in long ago England that trusts to further public benefit should not fail. During the time of the Reformation in the sixteenth century Equity was already prepared to encourage secular philanthropy. It had ruled that charitable trusts should be upheld and enforced, even though, for instance, *feoffees to uses* and later trustees had not been given valid common law title to the property to be applied to charity, or some other technical or formal rule of law had been breached. The Statute of Charitable Uses in 1601 encouraged Equity to expand its leniency, and in the seventeenth century the Lord Chancellor’s Court proved willing to validate charitable *uses* against the claims of the

³ This word, in professional as well as lay parlance, refers to any organization (or institution, if that term is preferred) that is dedicated to the furtherance of a purpose or purposes that are charitable in law. The organization may be structured in common law jurisdictions as a corporation or a trust, and it may directly dispense services (an operating charitable body) or engage in assembling funds with which an operating charity or charities can further purposes (a foundation). The term ‘charity’ would also describe in civil law jurisdictions a foundation, which is a personified body solely engaged in charitable activity as ‘charity’ is defined or understood in the jurisdiction in question.

testator's heir asserting common law invalidity, or that the named *feoffee* or trustee had no ability at law to hold title to the entrusted property. This practice often had the support of the judges of the common law courts. Though some common law judges, Coke C.J. being one, who were of a more technical mind, might have entertained some concern over these Equity orders, there is no sign that Equity was belligerently going its own way. No limitation statute, nor laches, could bar the enforcement of a charitable *use*, charitable legacies were granted a preferred payment position in an insolvency situation, and an attempt to avoid a charitable *use* by the wrongful sale of the property in question by any controlling party, even to a bona fide purchaser, was avoided by the setting aside of the sale.⁴

(2) *Administrative scheme making*

Such a scheme can be short and simple, or lengthy and carefully detailed. But for any charitable trust to fall within the courts' inherent scheme making jurisdiction, there must initially be an evident certainty that the donor/testator intended an exclusively charitable purpose or purposes. Indeed, within the law of charitable trusts the same rules and prohibitions apply as is the case with private trusts. It was in particular with regard to trustee powers that English courts of equity were prepared to go the extra mile in order to make the gift for public benefit both valid and efficacious. Take, for instance, trustee powers. The trust instrument might lack the conferment upon the trustees of the power of sale, of leasing, of mortgage, or of exchange. Equity was prepared to grant the power requested if it could be shown that were it not to do so the delivery of benefit that otherwise would flow to the public would be jeopardised. Although some relaxation took place in 1925 English legislation, it was not until the mid-twentieth century that statute made this generally possible in the case of private trusts.

A feature of the inherent jurisdiction is that it has what the courts themselves have described as ill-defined borders.⁵ As was the traditional approach of equity courts in all their proceedings, historically they approached arguments that charitable trusts be exempted from one consequence or another at law very much on an individual case basis. This had much to commend it over the 'forms of action' approach of the common law, but it led to a lack of clarity as to the circumstances in which the courts will refuse to intervene. Though policy favoured a lenient attitude towards charitable giving, how much leniency nevertheless was too much? The probable indecisive reply no doubt generated the humour of the eighteenth century wag who defined equity as the length of the Lord Chancellor's foot.

The undetermined lengths to which the courts could take their benign inherent jurisdiction in favour of charitable trusts is well evidenced by the views of different courts as to whether "the general jurisdiction"⁶ included trustee requests that equity courts extend the investment powers of charitable trustees. In *Re Royal Society's*

⁴ For a full account of the Equity courts' upholding of charitable *uses* and trusts, see Gareth Jones, *History of the Law of Charity, 1532-1827*, C.U.P., 1969.

⁵ *Re Royal Society's Charitable Trusts*, [1956] Ch. 87, at p. 91.

⁶ *Ibid.*

*Charitable Trusts*⁷ the Court was of the view the courts did have such a power. And the Court then exercised it. However, in *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society*,⁸ while that Court expressly did not disagree with the earlier view in *Re Royal Society's Charitable Trusts* concerning the administrative jurisdiction of the courts in connection with charitable trusts, it preferred alternatively to employ an available statutory power to extend investment powers. Yet neither court hazarded a statement as to where administrative scheme making does not extend, and why it was the Court in question was confident or hesitant in assuming jurisdiction over investment powers. Certainly the statute in question⁹ in each of these cases is explicit in providing for adjustment of an investment power. And in a period like the later 1950s and 1960s, when inflation was high and the value of fixed interest investments was declining annually, it was undoubtedly for the public benefit that charitable trustees applying for court orders be permitted to invest in quality equity (or growth) stocks. Courts throughout the Commonwealth recognized this.

Something of the same lack of certainty in discerning the scope of both administrative and *cy-près* schemes exists in determining where the border lay between them. Broadly, *cy-près* is concerned with trusts purposes (or trust objects, of which purposes are a kind) that cannot be put into effect because the purposes cannot be carried out. Something needs to be done to supply purposes that do not have this problem. However, in *Re Robinson*¹⁰ the Court noted that schemes are “not necessarily, or ... generally a scheme for the application of the fund *cy-près*.” There is no need for a *cy-près* scheme, said the Court, when, because the donor has not “described his wishes in clear terms”, “it is necessary to fill up a number of details”. *Cy-près*, it was said, is not relevant where the court is doing no more than “completing the trusts to carry out objects”. Nor is it relevant for administrative scheme making when the stated objects are not clear, but the donor’s intention as to objects is discoverable. In *Re Gott; Glazebrook v. University of Leeds*¹¹ the Court observed that it had the

“jurisdiction to settle a scheme for administration – I am not referring to *cy-près* schemes – and it is settled practice that these schemes may deal, not only with methods of administration, but also with, and define, the substance of the trust.”

The “substance of the trust” must mean the purposes of the trust. What the court cannot do with an administrative scheme is vary or change the clearly described purposes (or objects) of the charitable trust in question.

⁷ *Ibid.* Followed in *Re Royal Naval and Royal Marine Children's Homes Portsmouth; Lloyds Bank Ltd. v. Attorney-General*, [1959] 1 W.L.R. 755.

⁸ [1959] Ch. 220.

⁹ Trustee Act, 1925, 15 and 16 Geo. 5, c. 19, s. 57 (Eng.).

¹⁰ [1931] 2 Ch. 122, at p. 128.

¹¹ [1944] Ch. 193, at p. 197.

When it acts with regard to administration the court seeks with a scheme to complete the half finished design of the donor's trust. For instance, a gift by way of trust¹² is made to an organization for a particular purpose, and the stated purposes of the organization are general, all its moneys being held in one fund. The scheme will complete the trust by supplying the terms for a separate trust of the intended purpose and the particular fund. Alternatively, the named trustees are the officers of an unincorporated body. The scheme will define the required manner of appointment and retirement of trustees. A further instance exists when a will creates a charitable trust in perpetuity, i.e., an endowment trust, for described objects, but leaves the trustees with no directions as to the distribution of the trust fund. A scheme will spell out how discretion is to be exercised, effectively limiting it by providing directions as to the separate disbursement of income and, where unusual circumstances permit, capital. And when trustees die, or refuse to act, an administrative scheme will provide for the present and the future as to the appointment of new trustees.¹³ But there is a line. Where a will leaves property on such charitable purposes, or for such charitable organizations, as X shall appoint, and X fails to appoint, it is arguable that the scheme is either administrative or *cy-près* when the court provides purposes in the absence of a chosen purpose. This is because there is no supply of new purposes or organizations. Yet in order to make the charitable gift work, the court is designing a modus for determining which purposes are to be advanced.¹⁴

(3) *Cy-près* scheme making

Though less often invoked, the inherent power of the equity courts with regard to *cy-près* is more evidently thematic than administrative scheme making. To describe *cy-près* shortly, it might be said that at the moment when the *inter vivos* or testamentary charitable trust would come into force, there is no way in which the declared purpose or purposes can be carried out, or during the lifetime of the trust there comes a time when the purposes of an endowment trust can no longer be carried out. *Cy-près* is all about supplying trust purposes (or objects) in place of those the donor or testator chose.¹⁵

¹² An outright charitable gift, i.e., not created by way of trust, is not within the courts' inherent jurisdiction. The Crown, receiving it as *parens patriae*, nevertheless allows the imperfectly designed gift for public benefit to be made operative, and does so historically under the Sign Manual.

¹³ When the terms are expressed in general language, e.g., to a church "for the glory of God", if the gift is not held to be absolute, an administrative scheme will particularize the purposes to be pursued by the church authorities. It may remove defects (ambiguity, or deficiency) in the description of purposes, or provide trustee management arrangements, how the trust monies shall be applied to further the purposes, or even the manner in which previous mismanagement is to be corrected. It may determine what description of persons is intended to benefit from the stated purposes

¹⁴ *Re Willis*, [1921] 1 Ch. 44 (C.A.). The Court of Appeal concluded that, where a general charitable intent is found, the mode of carrying the purpose into effect is not, on the basis of the authorities, part of the gift. In this case, residue having been left to "such charitable institution or society" as a pre-deceased named individual should select, the court in a *cy-près* scheme could make that choice.

¹⁵ The roots of the *cy-près* jurisdiction are thought to exist in canon law, and to have been derived by canon law from an interpretation of Roman civil law. It appears in the doctrine applied by the ecclesiastical courts in the mediaeval period, before - probably in the sixteenth century - Chancery courts took over this area of law.

Again, however, it is interesting to see what apparent overlap there is between the respective contents of reported administrative and *cy-près* schemes. At what point does the clarification of stated purposes pale into the imposition of different purposes? Problematic though it is to define each area of scheme making, it is singularly difficult to discover in judgments or the commentators' texts how and where the dividing line is to be drawn. And this is surprising because, as will be seen, the applicant for a *cy-près* scheme must show, if there is a problem before the trust can come into effect, that the donor/testator had a general charitable intent, as opposed to an intent to further the particular chosen purpose only. Such general intent is not needed if the application is for an administrative scheme, and this leads one to think it is the variation of purposes, or the adoption of new purposes, that attracts the general charitable intent doctrine.

Two basic questions arise with respect to *cy-près* scheme making. First, when will the courts regard purposes as initially incapable, or no longer capable, of being carried out? The second is whether, and if so how far, the choice of the donor or testator as to the preceding purposes is to govern the nature of the substitute purposes that the scheme provides.

The first question is answered by saying the courts will assume *cy-près* jurisdiction where it is impossible to put the purposes into effect. The case of *Attorney-General v. Ironmongers' Company*¹⁶ is always given as an example. There the testator bequeathed a fund for the redemption of Barbary slaves, but at the time of the testator's death slavery had been abolished on the Barbary Coast. A more familiar instance of impossibility is where there never was an organization that the testator¹⁷ attempts to name or he describes in his will, and another instance is where the identified organization existed when the testator executed his will, but it has ceased to exist by the time of his death. The nationalization of formerly private hospitals by the then government in England between 1945 and 1950 caused many charitable trusts to be no longer capable of being carried out.

A so-called supervening impossibility (as opposed to an initial impossibility) occurs when the purpose described or the organization that is identified ceases to exist after the instrument of gift, usually a will, has taken effect. An organization may be wound down and closed for lack of support, or for financial reasons. Closure may have occurred because the charitable object has ceased to exist, or for other reason has stopped operating. A charity whose object is to support the XYZ school is in this position when the XYZ school is terminated by the owners; a charity to secure protection of an environmental feature, such as a grove and woodland of old trees, finds ultimately that it is not needed – the public authority has set up a publicly funded commission to perform this task. It may be that the trust object or purpose for which the testamentary gift provides has been met, but surplus monies remain. Further expenditure upon the chosen purpose is impossible.

Impossibility can occur because of changes in public policy. Charitable trusts creating and funding scholarships in educational institutions, restricted, for instance, to white

¹⁶ (1840), 2 Beav. 313; (1844), 10 Cl. & F. 908 (H.L.).

¹⁷ Rarely are *inter vivos* donors caught in this situation.

persons or to non-Roman Catholics, would today be held contrary to public policy, and *cy-près* be ordered if the restrictive provisions cannot simply be deleted. In either case it is therefore impossible to apply the funds supplied by the testator to his stipulated object.

There are occasions where the inherent jurisdiction may be taken by the courts to the very limits of ‘impossibility’, and that is where it would be ‘highly impracticable’ to give effect to the instructions of the *inter vivos* donor or the testator. An instance of this would occur if the gift was for the provision of new cribs in the babies’ ward of a children’s hospital, and when the deed of gift or the will takes effect the ward has just been fitted out with new cribs. The other needs of the hospital, and indeed the needs of that same age group of child, may be several, and also costly to put in place. A *cy-près* scheme could be approved by the court in these circumstances.

The second question is answered by saying that times have changed. Seventeenth century judicial considerations were inclined towards the approach that ‘near’ the character of the testator’s chosen purposes was sufficient in recognizing the testator’s intent in describing his purposes. During the following centuries, however, ‘as near as possible’ came to be viewed as more appropriate. As previously noted, the *cy-près* doctrine had been taken by Chancery as a rule of construction from the ecclesiastical courts, so, without any originating ideas of their own about *cy-près*, it was likely that equity courts would have given prime attention to the intent of the particular testator or donor. In any event the result of the preference for ‘as near as possible’ is that it is not only impossible to secure approval of a proposed scheme when purposes are substituted that fall within a different head of charity, e.g., the advancement of religion as opposed to education,¹⁸ the kind of persons who are to be benefited and the manner in which that benefit is to be expressed tend to dominate the formulation of substituted purposes (or the trust objects). Would the testator, having a ‘general charitable intention’, have stood back when he became aware of initial impossibility, and let his mind wander further afield to the needs generally of his fellow man? This question seems never to have been asked in the Equity courts. Perhaps the explanation is that intent scrutinized in a courtroom is perceived through eyes that see the search for meaning as a process involving construction of the words and phrases the maker of the gift has employed. It is a linguistic study.

The need for proof that the testator or donor has an intent to donate to charity to the exclusion of his or her heirs was insisted upon by equity courts. In the inherent jurisdiction ‘general charitable intent’ is the key to the availability of a court approved scheme if the purpose or purposes are impossible to carry out or are highly impractical. If the intent of the gift maker is restricted to the particular charitable institution he has selected, and the gift cannot initially take effect, the assumption is made that the gift maker intends at this point to prefer his heirs over charitable giving. Strangely enough, if the purpose or purposes become impossible to discharge or highly impractical after the endowment gift has taken effect and has been in operation, the equity courts have not taken the same position. At this point it is conceived that the charitable fund in question

¹⁸ The heads of charity are relief of poverty, advancement of education, advancement of religion, and other purposes that are within the spirit of the ideas there apparent and also beneficial to the public.

has already been partly expended upon charitable activity, and the heirs have already been excluded. The dedication to charity is therefore complete. No proof of general charitable intent is required.¹⁹

Since the *Statute of Charitable Uses* in 1601, the charitable *cy-près* jurisdiction has been exercised many times over the centuries, and there is a wealth of English case law on the subject, let alone that of other Commonwealth jurisdictions. For the purposes of the present paper there is no particular advantage to be had in examining the various ways in which case law over the centuries has permitted scheme making. Nevertheless, a reading of the case law is well worth while if one is to appreciate this unique historic equity judicial willingness to come forward and assist private giving for the benefit of the public.²⁰

3. Reforms to scheme making in England, Australia and New Zealand

(1) *England and Wales*

In the second half of the nineteenth century those who were interested began to be aware that many charitable trusts in England and Wales, probably running into the thousands, had purposes that were the product of a social and economic past, and not infrequently held funds that inflation over the years had reduced to trifling amounts, quite unable to sustain their obsolescent purposes. Some of these perpetual endowment trusts – for, of course, the perpetuity rule did not apply to charitable trusts – were of considerable antiquity, created by testators in the seventeenth or eighteenth centuries.²¹ Purposes in existence were frequently of limited utility in meeting public needs, because the particular geographical area known to the testator and the lives of persons in the community at that location had changed, sometimes beyond recognition from the scene the testator had known. Populations had migrated to towns, and, if trusts were for community members, within urban areas the work and educational needs of the migrants were quite different. In some respects conceptions about meeting public needs had also changed. For instance, during the later nineteenth century informed opinion no longer considered it to constitute the relief of poverty for trustees to hand over monies indiscriminately to poor persons, unconcerned as to who acquired the monies, and what they did with it. These were known as ‘dole’ charities. Trusteeship itself was a concern, because, though the obligation to ensure trustees were honest was upon the Attorney General, no one was charged to see trustees were active, prudent and thoughtfully

¹⁹ The distinction is that general charitable intent is required in the circumstances of *initial impossibility*, but no such intent is required in a situation of *supervening impossibility*.

²⁰ For the inherent jurisdiction older editions of English charity law texts are inevitably more informative than those written after the reforms of the *Charities Act*, 1960, had changed the practice of the *cy-près* scene. Reference may be made to G.W. Keeton and L.A. Sheridan, *The Modern Law of Charities*, 2nd ed., 1971, for the inherent jurisdiction, and articles on the subject there cited.

²¹ The *Charitable Trusts Act*, 1858, introduced the statutory position of Charity Commissioners, and these Commissioners were given scheme making powers, but only to the extent of the courts’ jurisdiction. See Keeton and Sheridan, *ibid.*, at pp. 16-18, on the statutory powers of the Commissioners. Unfortunately, the Commissioners’ critical remarks in annual reports throughout the century concerning out of date purposes, and trustee inactivity in seeking change, had little impact on governments and politicians.

informed about their trusteeship. Often trustees had died and no successors had been appointed, or the current trustees of the particular trust could not be traced or were unknown.

It was only with the post-1945 election of a government that was committed to major economic and social reform, and in particular after the Nathan Report on Charity²² appointed in 1950 had reached the public, that the problems just discussed in the administration of charitable trusts were taken seriously. With funds committed to the public benefit, these trusts' problems were finally recognised as failings that had pressing need of being put right. The most obvious lack was that, since the Chancery courts had always felt their jurisdiction for scheme making could properly not go beyond impossible or highly impractical purposes, obsolescence of purposes was the concern of no one. The Nathan Report recommended considerable expansion of the *cy-près* jurisdiction,²³ and in the *Charities Act*, 1960, expansion was introduced. In section 13(1) of the Act a *cy-près* application of charitable funds by the courts was authorized in the following circumstances:

1. when the purposes of the gift, in whole or in part, are “fulfilled” or are incapable of being further carried out in accordance with the directions the testator gave, and in “the spirit of the gift”; or
2. where the purposes provide a use for only part of the fund that has been donated; or
3. where merger of two or more separate gifts dedicated to similar purposes would lead to more effective results, the merged funds being then used “in the [original] spirit of the gift” to further “common purposes”; or
4. where the donor-defined area of the gift is no more, or the class of beneficiaries or the area chosen is no longer “suitable”, given “the spirit of the gift”, or is it practical in terms of its administration; or
5. where the original purposes, in whole or in part, (i) have otherwise been adequately provided for, (ii) are no longer charitable, or (iii) have “ceased in any other way to provide a suitable and effective method of using the [gifted] property ... regard being had to the spirit of the gift.”²⁴

Also, for the first time in England and Wales the Charity Commissioners, as well as the courts, were empowered to approve schemes. On those occasions when the terms of gifts

²² *Report of the Committee on the Law and Practice relating to Charitable Trusts*, H.M.S.O. Cmd. 8710, December, 1952.

²³ *Ibid.*, ch 9 ‘The *Cy-près* Doctrine and the Alteration of Trusts’. The need for significant change was clearly detailed by the Committee, but seen in retrospect it is arguable that the nature and scope of the power to be given the courts for the removal of “obsolescence” was not as well developed.

²⁴ Section 14 of the Act dealt with the problem, exemplified by the difficulty in *Re Gillingham Bus Disaster*, [1958] Ch. 300, where a public appeal, supported in large part by unidentified, anonymous donors, resulted in substantial funds being held by the trustee. Because of the availability of road accident liability insurance, significant donated funds were surplus to need, while the fund purposes were not within the definition of charity, and therefore within the inherent jurisdiction. A modus of scheme making was now provided by the Act.

presented complexity, or issues of law were involved, the emphasis was still to remain on judicial scheme making, but now scheme-making was seen for what is - administration.

Scheme making by both the courts and the Charity Commissioners was now extended to all “charities”. That is, no longer did it matter what *legal mechanism*, corporation or trust, is adopted in order to further the charitable objects; what matters only is that the objects of the endeavour are indeed ‘charitable’. The entire provisions of this ‘*Charities Act*’ were made applicable to all legal forms of giving to charity and the bringing about of the charitable distribution of assets.

In the further reforming *Charities Act*, 1993, section 13(1) of the 1960 Act was reproduced word for word.²⁵

Analysis of the 1960 and 1993 language against the background of pre-1960 *cy-près* case decisions reveals that in large part the five circumstances described in section 13 are confirming what the courts have already established as being *cy-près* opportunities. It was observed shortly after the 1993 Act became law²⁶ that prior to 1960, if the courts could find no impossibility or high impracticability, it did not matter that carrying out the original purposes would be inexpedient, uneconomic and inefficient. This situation, the observation ran, “was to a certain extent remedied” by the 1960 and 1993 legislation. Other commentators shared this implied criticism that the 1960 Act and then the 1993 Act had been too conservative and hesitant in tackling the task of providing an adequate method for ensuring that charities and charitable donations are responding to contemporary public need. And in *Re Lepton’s Charity*,²⁷ heard eleven years after the 1960 Act had come into force, a Chancery court held that “the spirit of the gift”, which appears in 1, 3, 4 and 5 of the above *cy-près* list, meant the basic donative intent underlying the original gift as a whole. This again was the intent that Chancery courts prior to the Act would determine under the inherent jurisdiction.

The difficulty is that ‘updating’ *cy-près* scheme-making can be seen from two different points of view. The classic viewpoint is that taken by the courts, namely, that what should be done is governed by the gift maker’s intent and a close analysis of the language the maker has used. *Cy-près*, as we have seen, has been held to mean ‘as close as possible’ to that original intent. When the donor’s intent was the crucial criterion in making any change, the courts were not going to condone imaginative licence. The counter view - held by many since the Nathan Report²⁸ - is that the emphasis should be placed upon the present day circumstances in which those original purposes are functioning. The search is for what substituted purposes would accommodate the changed community setting and financial environment. In other words, an objective assessment is what is needed; ‘how can the beneficiaries and their need that the donor

²⁵ For a discussion concerning the interpretation of the *Charities Act*, 1993, c.10, s. 13(1), see *Tudor on Charities*, 8th ed., 1995, and now 9th ed., 2003, London, at paras. 11-046 to 11-050. For English thinking prior to the *Charities Act*, 2006, concerning further reform of *cy-près*, see *ibid.*, para. 11-068.

²⁶ *Ibid.*, at para. 11-045.

²⁷ [1972] Ch. 276, 285A; [1971] 1 All E.R. 799.

²⁸ *Supra*, note 22.

had in mind, or the public benefit that the charity's purposes reflect, be most effectively assisted in today's circumstances with the funds available?'

The *Charities Act*, 2006, was the vehicle for changing the Charity Commissioners,²⁹ of mid-nineteenth century origin, into a corporation, the Charity Commission.³⁰ Considerable change of statutory emphasis flowed from this introduction of corporate status, and one of the areas reviewed was scheme-making which was now to be handled almost entirely by the new administrative capabilities of the corporation.

In section 15 the term, "the spirit of the gift", a term employed hitherto to describe when four of the five listed *cy-près* situations could be invoked,³¹ was replaced by "in appropriate circumstances", and that in turn, it was provided, means that both "the spirit of the gift" and "the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes" are to be examined by the body with jurisdiction to make changes. It is too early to say whether in practice this duet of required considerations will move the assessments of the future more into the objective sphere. Indeed, the opportunity to consider prevailing circumstances already existed. In *Re Hanbey*³², under the inherent jurisdiction, both the founder's intent and "the social utility" of the charity's objects were considered. However, the new language is greeted by the Charity Commission with a very helpful pamphlet directed to charities who will be affected by the Commission's *cy-près* decisions.³³

In section 18 the 2006 Act adds other considerations that are to be undertaken when *cy-près* schemes are being considered, and these considerations extend to the merger of charities and their funds, and the ability of a living donor to request the return of his original fund if his purposes have "failed".

(2) *New Zealand*

With the *Charitable Trusts Act*, 1957,³⁴ as amended, New Zealand embarked on a complete statutory overhaul of the law and practice concerning charities, the administration by charities of their funds, and charitable giving by corporations and individual members of the public. Part III of that Act concerns schemes in general, and Part IV 'schemes in respect of charitable funds raised by voluntary contribution'.

With regard to public appeals and the occurrence of surplus funds (the substance of section 14 of the *Charities Act*, 1960, in England), as well as the scope of the inherent *cy-*

²⁹ Three in number, of whom two must be qualified lawyers.

³⁰ It also broke with the practice of the past four centuries by introducing a statutory descriptive list of old and new heads of charity.

³¹ *Supra*, note 27.

³² [1956] Ch. 264.

³³ See the website of 'The Charity Commission for England and Wales', and the *Operational Guidance: Application of Property Cy-près: the Law and How it should be Applied*, reference OG 2 A1 – 18 March 2008. A second Operational Guidance (OG 2 B2 – 18 March 2008) deals with *The Use of the Cy-près Doctrine where there are Secondary Trusts*.

³⁴ No. 18.

près jurisdiction, the *Charitable Trusts Act* in section 40 extended scheme making to circumstances where it is “inexpedient” to carry out the existing charitable purposes. Schemes are also approved if the fund available is inadequate to meet the purpose, the purpose has already been provided for, or the purpose is illegal or useless or uncertain. In all of this, the ‘expediency’ of change was the departure from previous inherent jurisdiction practice. And there was another distinctly new note. Proof of ‘general charitable intent’ is no longer required.

In support of the section 40 provision it is confirmed³⁵ that the manner in which the trust is being administered may be prescribed or varied. And charitable corporations are covered by the Part IV provisions. Where monies have been assembled from members of the public for a particular purpose, as in an appeal, contributors are entitled to know of any application for a change of purpose, and to have meetings called when the proposals can be discussed., and a scheme be agreed upon. This is also something for which the English legislation provides in detail.

(4) *Australia (Queensland)*

Under the *Charitable Funds Act*, 1958,³⁶ as amended, the state of Queensland deals with public appeals where for one reason or another monies collected from both identified and anonymous contributors remain unexpended on the object of the appeal. Section 5 adopts as one of seven circumstances for the “alteration” of purposes, those purposes that have become “inexpedient”. Otherwise it follows the English legislation by making express reference to inadequate property to carry out the purposes; to purposes otherwise taken care of; to surplus funds remaining after the carrying out of purposes; to purposes that have ceased to exist; to purposes that are uncertain, unidentifiable or insufficiently defined;³⁷ and to purposes that are illegal. The word, ‘inexpedient’, is the element that goes beyond the inherent jurisdiction, but it must be said that, as with the New Zealand legislation, the Act offers nothing as to what is intended by this word and in particular how far ‘inexpediency’ may be carried. ‘Inexpediency’ in the Concise Oxford Dictionary is given the meaning non-advantageous or unsuitable.³⁸

With regard to ‘occasions for applying property *cy-près*’, in its *Trusts Act*, 1973,³⁹ s. 105, Queensland adopts, almost word for word, section 13 of each of the *Charities Act*, 1960, reproduced in the *Charities Act*, 1993. To be noted, however, is section 105(2) which by contrast with New Zealand retains general charitable intent. Initial failure of the purposes of the gift cannot be rectified, therefore, without proof of such an intent.

³⁵ In section 41.

³⁶ No. 56.

³⁷ This is the traditional area of administrative scheme making.

³⁸ Lacking a charity commissioner, Queensland in this Act adopts the idea of the appointment “from time to time” of “a certifying officer” whose duty it is to examine each proposed scheme before it comes before the court.

³⁹ No. 24.

(5) *Australia (Western Australia)*

In the *Charitable Trusts Act* of 1962,⁴⁰ as amended by the *Charitable Trusts Amendment Act*, 1998,⁴¹ the state of Western Australia largely followed in its section 7 the earlier legislation of Queensland and New Zealand with regard to when schemes may be proposed. As in New Zealand, however, ‘general charitable intent’ is expressly stated to be no longer a requirement. And in the amending Act of 1998 the *Act* provides that small trusts may be terminated, and the property of two or more charitable gifts may be combined for expenditure upon similar purposes. The Attorney General has a clear, mandated role with regard to schemes, which by the 1998 *Amendment Act* was extended to final approval powers. The 1998 changes to the 1962 *Act* (Part III) have given Western Australia an overall well organized structure for scheme making and approval.

(6) *Australia (Victoria)*

In Victoria the *Charities Act*, 1978,⁴² amended by several Acts until the latest of 2005, devotes its Part I to ‘The Application of the Cy Près Doctrine to Charities’. This State, like Queensland, chose to adopt in its 1978 legislation, section 2(1), the circumstances for *cy-près* – named as such in this *Act* – that were adopted by the 1960 Act in England. There is silence as to general charitable intent. So, again like Queensland, it retains that inherent jurisdiction requirement.

Cy-près schemes where donors, many anonymously, have contributed to an appeal is dealt with in this *Act*, as in New Zealand, Queensland and Western Australia. The Attorney General of the State of Victoria has the power to approve schemes, and the State Governor in Council is given the power to raise dollar limits that limit the Attorney General’s authority to sanction schemes. The court power continues, of course, and is the senior of the two approval processes.

(7) *Australia (New South Wales)*

The *Charitable Trusts Act* of 1993,⁴³ amended in 1999 as to the powers of the Attorney General of the State, covers the same subject-matter as that to be found in the legislation of other States, but has two features that are of especial interest. The first concerns the circumstances in which *cy-près* schemes may be made. It states in section 9(1) that those circumstances – not set out - “include” situations “in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust.”

It seems apparent the State legislature saw no need to confirm seriatim the inherent jurisdiction circumstances found in other Commonwealth legislation, and considered that

⁴⁰ No. 82.

⁴¹ No. 7.

⁴² No. 9227.

⁴³ No. 10.

that provision in the 1960 Act in England, namely, section 13(1)(e)(iii), was the only provision in that list that extended the courts' *cy-près* powers.

The second concerns 'general charitable intent'. Section 10 states that the Act does not change the case law, but provides there is a presumption that such an intent exists, unless there is evidence in the trust instrument to the contrary.

As in legislation in other jurisdictions, original purposes include those that have been the subject-matter of later schemes or subsequent regulation.

(8) *Australia (Tasmania)*

In a novel organization of trusts legislation, Tasmania combines in the *Variation of Trusts Act*, 1994,⁴⁴ the alteration of the terms of both private and charitable trusts. So far as charitable trusts are concerned, section 5(2) provides, like New Zealand, that, if it has become "inexpedient" to carry out original purposes, a scheme variation may be approved by the court or the Attorney General. The grounds for *cy-près* application are those of the *Charities Act*, 1960 and 1993, in England, with the slight word change that Queensland introduces. Section 5(4) expressly retains the requirement under the inherent jurisdiction of a general charitable intent.

Public appeals that result in property that cannot be expended upon the appeal object are dealt with in section 11.

(9) *Australia (South Australia)*

The *Trustee Act*, 1936,⁴⁵ section 69B, as amended in 1996⁴⁶ and 2003, also adopts the language of section 13 of the *Charities Act*, 1960, and therefore of the *Charities Act*, 1993, in England. This section lists the circumstances in which a scheme may be approved, but subsection 6 adds that the approver must be satisfied that the variation "accords, as far as reasonably practical, with the spirit of the trust; and ... is justified in the particular circumstances of the particular case". Schemes may be approved by both the court and the Attorney General, the latter having the customary position in Australian legislation of being subject to a monetary limit to the schemes the office may approve. No reference is made to general charitable intent, so this feature of the inherent jurisdiction remains unchanged.

(10) *Singapore*

Hong Kong is in the active process of rethinking its trust and charity law. Singapore for its part has adopted the now well-known English 1960 reform. Section 21 – 'Occasions for applying property *cy-près*' – of the Singapore *Charities Act*, 1995,⁴⁷ follows word for

⁴⁴ No. 52.

⁴⁵ No. 2270.

⁴⁶ *Trustee (Variation of Charitable Trusts) Amendment Act*, 1996, No. 50.

⁴⁷ No. 37.

word the 1960 English legislation.⁴⁸ Section 22⁴⁹ of the same *Charities Act* also follows in the main section 14 of the English *Charities Act*, 1960.⁵⁰

A summary of post-1959 statutory intervention in scheme making

In the jurisdictions that have legislated reform the pattern has been to follow England and Wales in reducing to a list the circumstances in which schemes may be approved. New South Wales is the exception in not listing permitted change. They have statutorily organized the discursive case law of the centuries, and extended moderately the *cy-près* jurisdiction. It seems clear that the really significant move in 1960 was to enable schemes to be sought when the original purposes, plus subsequent changes made to them in later schemes, have “ceased ... to provide a suitable and effective method of using the property” in question, “regard being had to the spirit of the gift.” Of all the section 13 language of the 1960 and 1993 English legislation, New South Wales considered this the only language that warranted adoption. The remainder of section 13, it appears to have been thought, simply put case law into statutory form.

The second significant move was taken in 2006 in England and Wales’ *Charities Act* when Parliament at Westminster provided that “the spirit of the gift”, a term considered judicially to refer to the donor’s intent on the creation of the gift,⁵¹ was to be considered by the scheme-making authority with the aid of a new criterion. The new yardstick is, “the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes”. This, finally, brings *cy-près* down to the time when the proposed scheme of alteration is being considered.

The deliberate retention of the ‘basic intent’ of the testator or donor as an element to be considered in any scheme making situation may explain the retention by England and Wales of the need of ‘general charitable intent’ in instances of initial failure. Four out of six of the reforming States in Australia also retain general charitable intent. Of particular interest is the New South Wales provision that the onus of proof of such intent existing is reversed. That is to say, the burden of showing that the testator or donor had no general intent to donate to charity is upon the party or parties who, on initial purpose failure being established, oppose the making of a *cy-près* scheme.⁵² It is curious that of the reform jurisdictions that would retain general charitable intent, either in its original case law form or as a presumption of law, none questions why such an intent should be

⁴⁸ Save for the omission of s. 13(4) of the *Charities Act*, 1960, giving retroactivity to the section.

⁴⁹ I.e., application of surplus monies given anonymously, or, with the donor’s disclaimer, following a public appeal.

⁵⁰ Subsections (2) and (6) are novel introductions of detail into the 1960 format. In the 1985 Revised Edition of Singapore statutes sections 21 and 22 are numbered 11 and 12.

⁵¹ *Supra*, note 27.

⁵² The B.C. Law Institute has recommended (*A Modern Trustee Act for British Columbia*, 2004, BCLI Report No. 33) that general charitable intent be abolished. It was so persuaded because of the frequent paucity of evidence as to whether the testator (or lifetime donor) on creation of the gift had a particular or general intent. The policy proposal was therefore to mandate a general intent unless a gift over or a reversion is introduced by the testator or lifetime donor on the failure of purposes. See the draft section 65, and commentary thereto.

relevant at the would-be commencement of that period, but irrelevant where purposes become impossible to implement or highly impracticable during the period of the endowment.

None of the reforming jurisdictions has addressed administrative inherent jurisdiction scheme making as such, because – as it would appear – the inherent court power to remedy charitable trust inadequacies is so widespread throughout the compass of charity law that its replacement, where necessary, calls for statutory structuring at different places in the legislation and in different ways.

Scheme making in connection with funds that cannot be expended on previously announced purposes following public appeal has been introduced, first in 1960 in England, and later in three of the Australasian reforming jurisdictions.⁵³ It is also present in the Singapore legislation. This was a necessary legislative task. However, a concern remains with regard to non-charitable gift giving. Public appeals may be for purposes that do not fall within the definition of ‘charity’ or are not for the public benefit. Scheme making should clearly be available whether the Good Samaritan is seeking with his resources to relieve the needy individual, whether or not that relief falls within the borders of legal ‘charity’.⁵⁴

4. Scheme making in Canada

In Canada, as in Australia, the taxing power is shared by each unit authority⁵⁵ and the federal authority, but because the federal power is trans-national and international in its effect taxation is predominantly a federal power. The taxation of charitable gifts and organizations leads to a very active involvement between the Canada Revenue Agency on the one hand and donors, deceaseds’ estates, and charitable organizations on the other.

Charity law, however, is sovereign to the unit (province or territory). This means that it is for the province or territory to determine what purposes are charitable, to what extent and in what manner relief shall be given to ‘charities’ from unit taxation, when, if at all, property taxes shall be born by premises concerned with charitable activity, and what monitoring and remedial provision there shall be vis-à-vis the administration of ‘charities’ and the failure or obsolescence of their purposes. While local taxation issues have received legislative attention, it has to be said that no interest has been shown by Canadian provincial and territorial jurisdictions in the contemporary law of charity and charitable organizations. Definition of ‘charity’ for the purposes generally of the law of charity, and also the manner in which ‘charities’ are to be administered, have been ignored topics. Apart from some now fairly antiquated *Acts*, each of limited scope, in

⁵³ Queensland, Victoria, and Tasmania. Provision for the situation where surplus monies remain following a public appeal (see, *supra*, note 24) can be found in the draft BCLI *Trustee Act*, *ibid.*, section 66.

⁵⁴ For Australia and Australian legislation, see further H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts*, 3rd ed., looseleaf, chapter 20 (Vol. 2), relevant State legislation being reproduced in Vol. 3.

⁵⁵ The ‘unit’ in Canada is the province or territory. In the U.S.A. it is state, in Australia state or the Northern Territory, and in Switzerland canton.

Ontario, and local property tax legislation in most provinces, there is nothing. The Commonwealth activity since 1959 has altogether passed by common law Canada.

As a result the concept of what is charitable in nature is a matter of the traditional case law, and *de facto* falls to be considered by the Tax Courts for the purposes of the *Income Tax Act (Canada)*. Scheme making is not a concern of that *Act*, and therefore the inherent jurisdiction of the old Chancery courts concerning scheme making, received by courts in Canada as part of English law, remains in force, together with a handful of Canadian reported cases, as the only law on the subject that we have.

Neither administrative scheme making, nor *cy-près* scheme making, is a subject that comes more than once in a while before our courts, but, if it does, as with any other matter concerning the inherent jurisdiction, Canadian courts like to go back to pre-1960 English case law. Those cases, as earlier noted, are now seriously aging, and this creates problems. For instance, there is no easy line to be drawn between the two areas of scheme making, but it can matter because, as we have seen, a general charitable intent is needed if there is an initial impossibility in the purposes to be furthered by the gift or the charity. Where is the line to be drawn between construing the charitable purposes that the testator or donor intended but left nebulous, and devising new purposes for an instrument whose existing purposes, though charitable, are wanting? It mattered in *Re Killam Estate*⁵⁶ in Nova Scotia, and in *Re Stillman Estate*⁵⁷ in Ontario. Both cases concerned endowment trusts. And these courts came to different conclusions as to where the line lay.

(1) *Re Killam Estate*

In this case the will of the benefactress, Dorothy Killam, who died in 1965, had created a trust of a substantial sum in favour of five major Canadian universities and the Canada Council for the Arts. The trust was perpetual in character; the testatrix made it expressly clear that the beneficiaries were to receive “income only”. Income was to be provided on an endowment basis principally for salaries of professorial chairs and other academic employees, plus student scholarships. The trustees made a practice of providing from the trust as regular an annual income stream as possible in order that the beneficiaries might plan ahead with respect to funding salaries and scholarships. The trustees were advised that in the investment climate of the time – the later 1980s and the 1990s – a 5% return post-inflation was reasonable aim for them to adopt, and this figure plus the steadiness of income return the beneficiaries welcomed.

However, to produce a 5% income return each year the trustees found that high yielding securities were of a fixed interest nature, which caused with inflation the erosion of the trust capital. That is, 5% today, but a gradual decline thereafter in value produced. The trustees had turned at this point to an investment policy of total return – prudent maximization of all avenues of investment without regard to whether the return is in the form of income or capital – with the belief that in a vigorous market they would have a

⁵⁶ (1999) 185 N.S.R.(2d) 201, 38 E.T.R.(2d) 50.

⁵⁷ (2004), 5 E.T.R.(3d) 260.

better chance of reaching the desired 5% income return. In fact, they found that, with equity stock experiencing capital growth, but low dividend payments, total return produced an actual income of less than 5%. With the agreement of all the beneficiaries, the trustees now applied to the Nova Scotia court for consent that out of the total return each year a percentage of 5% be paid to the beneficiaries.

This scheme proposal was therefore for a percentage trust (or unitrust, as the U.S. calls it). The endowment feature is retained, but income is fixed at a percentage reflecting the average interest and average dividend return on the market. To avoid volatility, but retain adjustability to the average income return, the percentage is normally reviewed every three years. The proposed Killam scheme in fact gave the beneficiaries the additional right to have the trustees withdraw from the percentage trust, if the beneficiaries so desired. The advantage of such an arrangement is that it divorces trust investment from trust distribution, but income and capital remain as distinctive features of the testator's trust structure. It simply converts the income right from what the fund actually produces each year to a market average income figure over a period of years.⁵⁸

Kennedy C.J.S.C. considered that the first question before him was whether the proposed scheme was concerned with administration or the introduction of new trust purposes. On this question he concluded that the purposes of the trust were not in issue. So that ruled out *cy-près* scheme making. The next question concerned the move from actual income and actual capital growth (or decline) to a market-determined percentage of income from a total return of income and growth. Did that lie within the inherent jurisdiction's administrative scheme making power?

There were no Canadian precedents even remotely on the subject, and therefore the Court turned to the English case law. It was noticed that Wilberforce J., a leading equity judge, had approved in *Re University of London Charitable Trusts*⁵⁹ the formation of a common fund out of a number of distinct trust funds. The beneficiary was in each case the University. And investment of a percentage of the common fund was also approved in securities other than those of the then legal list of trustee permitted investments. Kennedy C.J.S.C. noted Wilberforce J.'s observation that the administrative convenience and the saving of costs in having one common fund would be lost if non-legal list investments were not approved.⁶⁰

However, it was Peter Gibson J.'s words in *J.W. Laing Trust Stewards' Co. Ltd. v. Attorney-General*⁶¹ that particularly persuaded the Nova Scotia Court that the scope of the inherent jurisdiction was sufficiently broad to allow the Court to approve the proposed Killam administrative scheme. In *Laing Trust* the *inter vivos* trust donor stipulated that the charitable trust was to be terminated 10 years after his death. Income during the trust years had been paid regularly, and, since the size of the trust fund had

⁵⁸ To cope with a sudden, substantial market downturn, like that of 2008, the trust instrument may include a provision to the effect that the market experience itself triggers an average income reassessment.

⁵⁹ [1964] Ch. 282.

⁶⁰ No one appears to have considered the width of the respective terms of investment for each fund, now combined as one.

⁶¹ [1984] Ch. 143.

increased significantly after the death, the trustees asked that the 10 year termination be deleted. The alternative was to pay considerable sums to each of the beneficiaries on the termination date, and nothing at all thereafter. This, they said, was of no benefit to these beneficiaries, and inappropriate. Mr. Justice Gibson agreed, and, noting that the purpose(s) of the trust were not in question, so that the *cy-près* jurisdiction could not be invoked, asked himself the question whether he had administrative scheme making jurisdiction. On that subject he opined that administration is a process that goes “to the mechanics of how the property devoted to charity is to be distributed.”⁶² And he described the judicial discretion involved in the inherent jurisdiction concerning administrative schemes as “considering whether it is expedient to regulate the administration of the charity”.⁶³ In that regard the court should take into account all the circumstances of the charity before the court.

Kennedy C.J.S.C. then turned to an eminent past High Court Australian judge, Dixon J., for a description of ‘expediency’ as “expediency in the interests of the beneficiaries”,⁶⁴ and considered that those interests would be seriously threatened if the broader power was not permitted to the trustees. The Chief Justice concluded that the manner of distribution of trust property, as well as investment authority, “lie within the width of the unlimited inherent administrative scheme of jurisdiction”.⁶⁵ What the authorities are saying, he observed, is that “the Killam case concerns merely the way in which funds flow to the existing purposes”.⁶⁶ The total return scheme was therefore approved, “although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute ‘income only’.”⁶⁷

(2) *Re Stillman Estate*

A different view was taken in this case⁶⁸ of the relationship between the *cy-près* jurisdiction and the administration jurisdiction, and the possible scope of the latter. In *obiter* remarks Cullity J. of the Ontario Supreme Court explained why he declined to agree with *Re Killam*.

Again this was an application by trustees of an endowment trust for approval of a scheme which would put into effect total return as opposed to the investment powers in place that were aimed distinctively at income return and capital appreciation. The trust, of many years’ standing, had not been earning sufficient income to meet the federal *Income Tax Act* disbursement requirements of the time, and the sum needed to meet those requirements had grown to a considerable figure. The penalty consequences of not meeting the disbursement level were dire, and, if the trust was to continue to benefit the charitable organization beneficiaries concerned, something had to be done. The trustees,

⁶² *Ibid.*, at p. 153.

⁶³ *Ibid.*

⁶⁴ *Supra*, note 57, at p. 61 (ETR).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at p. 63 (ETR).

⁶⁸ *Supra*, note 57.

having no power under the terms of the will to encroach on capital, proposed total return as a means on a planned basis of meeting the problem.

The judgment of Cullity J. can be said to contain two notable conclusions. The first is that, though total return investment was not a trust *purpose* and though purposes were not to be varied by the proposed scheme, total return could be approved under the *cy-près* jurisdiction. The second, explained in the *obiter* remarks, is that the administrative scheme making jurisdiction does not extend to approval of a total return scheme when it is the intent of the testator as creator of the trust that income only may be drawn upon.

On the first question of whether a *cy-près* scheme could be made, the Court concluded that the endowment trust terms, which gave no trustee distribution access to capital, were in the circumstances ‘impracticable’. The *cy-près* and administrative scheme jurisdictions were then distinguished, and this was done on the basis of when the administrative jurisdiction of the court alone permits a scheme to be approved.⁶⁹ The Court continued: “Where the directions of the donor have become impracticable, as here, I do not think it matters whether they are to be characterized as relating to the purposes of the Trust or merely to the mode by which they are to be achieved. The jurisdiction to substitute other directions will exist in either case.”⁷⁰ ‘Impracticability’, it was considered, would ground either a *cy-près* or an administrative scheme. With regard to both schemes, the judgment continued, the courts have sought, in rectifying the problem, to keep as closely as possible to the intent that the testator or settlor had had. And no precedent had been produced for the Court’s examination where, for purposes of an *administrative* scheme, the court had departed from a clear testamentary or donor choice of ‘income only’ in a perpetual or endowment trust.

On the second issue, the Court’s *obiter* observation was that, if there had been no ‘impracticability’ in the instant case, it would have hesitated on grounds of expediency (which the *Killam* court had adopted) or of desirability to approve an administrative scheme that departed from an ‘income only’ intent. It might indeed be that the object of such a variation is the obtaining of greater trust efficiency. However, *J.W. Laing Trust Stewards’ Co. Ltd. v. Attorney General*⁷¹ was not an endowment case; it concerned only the timing of the distribution of capital. The Court continued that there is no precedent for the *Re Killam* decision, and for any court to extend the administrative scheme making judicial power to the point that, where if *cy-près* is not available, nevertheless an administrative scheme can be approved, would be to extend very far the entire scheme making jurisdiction. *Cy-près* applications would be otiose.

Having been able to find ‘impracticability’ in the *Stillman* circumstances, the Court therefore preferred to rely on the *cy-près* jurisdiction to approve a total return scheme.

⁶⁹ Instead of on the basis of variation of purpose(s) and administrative machinery.

⁷⁰ *Supra*, note 57, para. 33.

⁷¹ *Supra*, note 61.

(3) *The result of the two decisions*

These two decisions are now part of the case law concerning charitable trusts in Canada, pointing in different directions and each carefully and forcefully argued. Outside the borders of Nova Scotia and Ontario the trustees of a charitable trust who wish to move to total return investment with regard to the charity's own immediately distributable assets or the funds it holds tied up in endowment trusts, and who lack instrumental power to make that change, are in a puzzling position as to how to present their case for scheme approval. In a nutshell, does variation of income from actual annual income return, to an annual percentage reflecting average income return, violate the intent of the testator or lifetime donor who stipulates 'income only'? If 'income only' requires actual annual income return, and the advantage of total return investment is not considered by the court to create 'impracticability' as against traditional income and capital return, there appears from the Ontario decision to be no jurisdiction in the court to approve a total return scheme.

Re Stillman was decided six years ago. The provincial and territorial legislatures remain silent.

5. **Legislative reform in Canada**

(1) *Is there a need for legislation?*

Since the days when the body of charity law was formed, sovereign in Canada to each province, charity has changed from sole concentration on the philanthropic individual's testamentary, and occasionally *inter vivos* gifts, to a dominating concern with charitable organizations, and gifting by individuals and corporations to these, mostly corporate, entities. To put it popularly, charity is all about two things: one, 'charities' obtaining registration status with the Canada Revenue Agency, and keeping within the operational rules set out by the *Act* and the Agency; secondly, the issue of charitable gift receipts by donee registered organizations, so that federally tax determined credit can be had against taxable income by donors or their estates. In order to secure tax credit, gifts are made today to registered organizations, and such organizations will often have been legally advised what provisions should appear in the corporate or trust formative documents to deal with the purposes of organizations or endowment trusts that are no longer of utility. These provisions will deal with the possible cessation of the organization, the variation of obsolescent purposes or objects, and the range of changed circumstances that traditionally has given rise to invocation of the inherent *cy-près* jurisdiction when it was the terms of the gifts of individuals that significantly constituted the law of charity.

This means that of the three areas with which charity law has traditionally been concerned, only the definition of charity retains substantial interest. And even there the federal tax authorities may expressly enumerate in the *Income Tax Act* those 'borderline' activities that will be regarded for tax purposes as valid charities.

Some say the reason why there is no legislation in Canada is that, because federal taxation has 'taken over the subject', the provinces and territories have no interest in charity law. Other than in connection with local property tax legislation, the provinces and territories have a very limited stake in charity matters. So far as law practitioners are concerned, they rarely have reason to apply or research the traditional charity law that is sovereign to each province and territory. For all charitable organizations the 'action' lies in relations and dealings with the CRA, and the rules there set by the Agency. What else, one is asked, could otherwise explain the enormous gap within the Commonwealth that now exists between its various member jurisdictions? At one end is the United Kingdom charity legislation, and especially the creation of an independent incorporated Charity Commission monitoring and assisting 'charities', great or small, in every way. Then there is the well-ordered legislation in Singapore, New Zealand and of almost all the States of Australia, with provisions in several states dictating the role of the local Attorney General in lieu of a Commission. At the other end of the spectrum is the situation in any Canadian common law jurisdiction.

A new provincial legislative re-ordering of the inherent scheme making jurisdiction, one is told, can certainly be suggested. But it is really a question of who would be interested. Charity law for the most part has lost relevance; the *Income Tax Act* and administrative tax practice have taken its place.

That's one approach. Though possibly somewhat cynical, it leaves a disconcerting feeling that it may be realistic. Nonetheless, it is difficult to believe that the provinces and territories (the units) of Canadian federalism intend to abandon their sovereignty over charity law. It is also apparent, looking to jurisdictions with charity legislation, that the tax authorities elsewhere in the Commonwealth share with the Canada Revenue Agency an equal concern that the taxation subsidies extended to donors' gifts to charities, and to charities themselves, not be abused.

Permanent or endowment trusts evidently remain possible sources of difficulty requiring a clarified and modern scheme making jurisdiction. Charitable organizations with obsolescent purposes, and no internal remedial empowerment, are another concern.

Charities in Canada are mostly organized as corporations under Corporation Acts, or as charitable or non-profit organizations incorporated under legislation like the Society Act of British Columbia. Some will be organized as trusts, but there seems an increasing tendency for these to be the smaller organizations of some antiquity, frequently associated with particular church communities in the advancement of religion or social welfare endeavours associated with religious belief. Others will be organized as neither, but be unincorporated organizations operated on the basis of contract whose assets are held on trust for those persons identifiable at any time as the acknowledged participants in the organization. Each of these organizational modes will have purposes, and over the course of years purposes may become antiquated in conception or emphasis, no longer reflecting the inclinations and contemporary values of current 'members'. Purposes may be overtaken by later changes in society or the economy, or indeed in the law.

Sometimes variation in language is enough, but at the other extreme a total overhaul of objects of the organization may be needed.

It seems clear that the first thing required of legislation is a widening of the inherent judicial jurisdiction so that it can be invoked by all organizations engaged in the discharge of charitable - and also non-profit – objects, whatever the legal nature of the organization.

There will be today a smaller number of charitable and non-profit organizations that lack powers to vary, terminate or recompose their purposes. However, the situation where there is no such power or adequate power is by no means uncommon. This is where equity courts with the inherent jurisdiction traditionally came to the help of charitable gifts in donors' wills, but where in the current age legislation is needed. Universities are well acquainted with testamentary gifts for annual scholarships dedicated to one particular subject matter or another, and religious organizations with endowment gifts for the physical adornment of the place of worship; such gifts may have come to reflect the interests and values of yesterday. Whatever policy decisions the federal authority may take toward obsolete or obsolescent organizational objects or purposes, it has no sovereignty to consider, draw up, and approve schemes.

(2) *What form might legislative change take?*

Should the distinction between administrative schemes, and purpose (*cy-près*) schemes, be abolished? It is evidently controversial whether the proposed scheme concerns the administrative powers and arrangements of the trust, or the objects (or purposes) that the charity is pursuing.⁷² Legislation on the scheme making powers seems so often to fail to make it clear whether it is dealing with administrative scheme making at all. Administration is seen rather as an aspect of the requirement of certainty. The fact that the legislation expressly governs *cy-près* schemes does not necessarily assist in answering the question of whether administrative schemes are otherwise governed. For instance, a general reference only to a head of charity may be in issue because it does not spell out purposes that are to be implemented. A gift in a will may say, 'to further public education in my town'. The supply of specific purposes may be included under the *cy-près* provisions of the governing legislation, but such a supply is more in the nature of administrative scheme making. The scheme does not remove the old, and replace with the new, but fills a blank in the will. Nevertheless, while the prevailing practice in the reform jurisdictions is to retain the broad dichotomy of administration and of purposes, it seems this is but a nod to the traditional distinction existing in the inherent jurisdiction. There is no clarification of where one aspect of the former inherent jurisdiction ends and the other begins. In the absence of explanatory governmental speeches in the legislature, the courts are left to cope as best they can.

⁷² In *Re Stillman Estate*, *supra*, note 57, paras. 32-33, the Court drew attention to the difficulty of allocating problems as between ends and means, but noted that there are specific situations in which it matters whether the problem is one of ends or means.

There will be different opinions, but the more persuasive recommendation is that there should be an abandonment of the terms, administration and purposes, and that the legislation should list the circumstances that are to enable parties to apply for scheme making. This would include the circumstances the courts themselves have recognized, but also include circumstances that occur in modern conditions, such as the merger of charities, the change of legal structuring from trust to corporation, or the provision of contemporary organizational powers. It may be useful to categorize schemes straddling administration and purposes, thus essentially emphasizing the types of schemes for which application can be made.⁷³

In the absence of a charity commission in any Canadian jurisdiction, thought might be given to defining and mapping out the obligations and powers of the provincial jurisdiction's Attorney General (or Public Trustee as delegate of that jurisdiction). The Australian legislation is well worth consulting in this regard. Should the empowerment of the Attorney General's department or the Public Trustee's office in any province or territory be extended to the conferment upon that department or office of the power, following the hearing of representations and successive consultation, to approve at least less complex scheme applications in *lieu* of the courts? In this way the legislation would assist charities, as elsewhere in the Commonwealth, by cutting costs and avoiding the delays of the court process.

Legislation can usefully structure the procedure of the scheme making process. Who should undertake the application to the court or other approving body? Should there be a monitoring authority which would see that applications that need to be made are being made? Does the designated authority (court or other) approve of a scheme presented to the authority, with such variations, great or small, as the authority thinks appropriate? Or is a scheme outline to be submitted, and the content of the scheme be determined in one or more sessions of discussion with a master of the court or the empowered public officer?

As we have seen, when it is not possible or is wholly impracticable as of the gift taking effect to implement the purposes of the testator or other donor, case law requires the existence of a general charitable intent in the testator or donor before a *cy-près* scheme can be approved. If instead the purposes fail, for one or other legislatively described reason, Once the gift has taken effect and is operative, but purpose failure occurs, those applying for approval of a scheme are not required by the case law to establish the gift maker had a general charitable intent. Reforming Commonwealth jurisdictions are divided on what shall be done with a subsequent failure. The policy principally adopted is to retain the requirement; some jurisdictions have abolished it outright. Recent years have seen the adoption of a more relaxed retentionist position; as we have seen in New South Wales, a presumption is legislatively created that general charitable intent exists, and the burden of proof is thus switched to those who oppose the making of a scheme. This is an interesting attempt to meet the concern about honouring donor intent, as well as handle the problem of a paucity of evidence as to what that is that intent. Yet another

⁷³ The legislation might confirm that the approval of a scheme does not prevent parties applying later for one or more revised schemes, if that proves necessary.

innovation, at any time when purposes fail, is to invite the living and capacitated donor to determine whether the value of the gift as of the moment when that gift would have taken effect should be returned to the donor, or be applied *cy-près*.⁷⁴

The variety of approaches taken in the legislation to general charitable intent – understandable in itself - may exemplify an indecision throughout the common law jurisdictions as to what it is we are attempting to achieve in the twenty-first century with the character of our law of charity. Is it, as of old, a first concern for the intent of those who give? Or is it today the efficacy of subsidized private sector organizations⁷⁵ in the contribution they make to the social and economic structure of the modern Western democratic state? Both are significant concerns.

When clarifying and reforming legislation is on the statute book in such a number of easily referenced Commonwealth jurisdictions, and when what is needed by way of reform is not a demanding policy task, it is difficult to understand why within Canada such a difference of interpretation with regard to the inherent jurisdiction, as the Nova Scotia and Ontario judicial decisions demonstrate, would simply be left where it is. It is worth recalling that the issue in both cases was total return investment by each charitable trust. There is little that is more contemporary than this issue.

Any legislative scheme making to rectify failure, obsolescence or inadequacy in a charity's documentation, or in the endowment trusts administered by charities, should be simply and shortly stated, easily invoked, and its design should be mindful of the burden of legal costs to the applying charity, donor or testator's estate. After all, it is worth remembering that we are concerned here with the gift of private resources by community minded persons for the public benefit. Even if 'tax planned', the altruism of such donors is increasingly an indispensable part of the society in which most of us wish to live.

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⁷⁴ Extension of this election to the personal representatives of the deceased donor's estate appears not to have won support.

⁷⁵ And the efficacy of tax deductible or tax credited gifts to such organizations.