
THE CHARITABLE GIFTS ACT: A COMMENTARY

*By Donald J. Bourgeois**

A. INTRODUCTION

The *Charitable Gifts Act* – what is it? Perhaps more importantly, why is it?

The *Charitable Gifts Act* is administered by the Ontario Public Guardian and Trustee and is concerned with the operation of business activities by charitable organizations. It limits charitable organizations from owning businesses or undertaking business activities. It is a short statute that is primarily concerned with ensuring that charitable organizations do not carry on business. It discourages charitable organizations from placing funds at risk in the capital markets. For example, a charitable organization may not own more than 10 per cent of the shares of a business. If the charitable organization receives a gift or bequest in excess of 10 per cent, the directors or trustees are to dispose of the surplus within seven years in an orderly manner.

B. THE ACT'S HISTORY

The statute was initially enacted in 1949 in Ontario. The Hon. Leslie M. Frost, then Treasurer and later Premier, provided three reasons for introducing the limitations. Two were related to succession duties and taxation – the province had an interest in encouraging people to donate portions of their estate to charities and in ensuring that charitable purposes were being carried out by organizations that were tax exempt. The third rationale was to ensure that there were safeguards in place so that the charitable intent is carried out. Mr. Frost was of the view that a problem arises when a business either in its entirety or a controlling interest is given to a charitable foundation or trust.

* Donald J. Bourgeois, B.A., LL.B., is counsel to Carters Professional Corporation on charitable matters.

What prompted this legislation? Joseph E. Atkinson was the publisher of the Toronto Star for almost 50 years. At the time of his death in 1948, the shares of the Star were valuable. In his will, shares were donated to the Atkinson Charitable Foundation, which had been established by Mr. Atkinson in 1942. It is assumed the fact that the Star had a “liberal bent” and the government, about which Mr. Atkinson and the Star were critical, was conservative is irrelevant to the question of “why this legislation?”

C. THE ACT TODAY

Regardless of the reason for the *Charitable Gifts Act*, there are a number of problems with the legislation. The legislation is not clear and indeed, the Ontario Law Reform Commission (OLRC), in its 1996 report entitled “Report on the Law of Charities,” commented on the obscurity of the language. It is far from clear what the scope of the statute is. For example, what amounts to an “interest” for purposes of the legislation? What is considered to be a “business”? What types of transactions are covered? What types of legal entities are covered? Even the Public Trustee commented in 1983 that the legislation requires clarification.

Does the *Charitable Gifts Act* require just clarification? Or should it be repealed? Is there a continuing role for the statute? Does it fulfill any public policy purpose? If so, what is that public policy purpose? The Ontario Law Reform Commission questioned its utility and appropriateness in the 1996 report. The OLRC recommended the repeal of the legislation and its replacement by more appropriate legislation that would govern investments in businesses by charities.

There may very well be public policy purposes that justify some prohibition or limitation on ownership of businesses. For example, it is likely a legitimate public policy to ensure that charitable organizations carry out, over all, charitable activities and are not merely a shell for business activities. Charities do have privileges, such as exemption from many taxes. There is potential for abuse. But charities also have a legitimate need to earn revenues to carry out their charitable activities and to advance their charitable purposes. Charitable activities take money.

Charities may also be involved in legitimate business activities that are related to their charitable activities. For example, a charitable theatre may rent out its costumes to earn revenue to buy costumes for the next production; a social service agency that provides training may operate a restaurant using the trainees where the money from sales to the public is used to support the training programs. These “business activities” are

related to the charitable objects. But the approach also exposes the charity to liability. A business corporation owned by the charity may be a legitimate way to carry out the charitable activities, raise funds for those charitable activities and limit exposure to risk by the charity. And, as a business corporation, the “business” would be subject to taxation.

D. CONCLUSION

The issue of charities owning businesses is not a simple one. There are likely other legitimate public policy reasons to govern or regulate charities owning businesses. The federal *Income Tax Act* places limitations on business activities by registered charities. But after 60 years of the *Charitable Gifts Act*, it is time to reassess whether the approach taken in 1949 remains the appropriate one and achieves a balance for the 21st century and its realities. The fact that no other province has followed Ontario’s example with their own *Charitable Gifts Act* is telling.