

A REVIEW OF THE NEW B.C. CHARITABLE PURPOSES PRESERVATION ACT

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A. INTRODUCTION

The long-awaited *Charitable Purposes Preservation Act* (the “CPP Act”) was proclaimed in force by British Columbia’s provincial government on March 8, 2007.¹ The *CPP Act*, originally introduced in October 2004, is intended to address uncertainty surrounding the protection of donations that have been given for a specific charitable purpose, and seeks to prevent such donations from being used for objects other than those intended by the donor. This *Charity Law Bulletin* will review the background of the *CPP Act*, summarize its content, and provide a brief commentary on its significance for charitable organizations in British Columbia and the rest of Canada.

B. BACKGROUND TO THE CHARITABLE PURPOSES PRESERVATION ACT

The *CPP Act* was first introduced as the B.C. Legislature’s response to the legal confusion that arose following a saga of cases involving the Christian Brothers of Ireland in Canada (“Christian Brothers”). These cases sparked concern over the lack of protection provided to special purpose charitable property when the charity responsible for the property is subject to the financial claim of a third party.

¹ *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59 [“CPP Act”]. The full text of the *CPP Act* is available at http://www.leg.bc.ca/37th5th/3rd_read/gov63-3.htm.

The cases were the subject of previous *Charity Law Bulletins* (No. 3² and No. 24³) and were also discussed in a two-part article entitled *Donor Restricted Charitable Gifts: A Practical Overview Revisited*.⁴ In general, the cases concern the Christian Brothers, a worldwide Roman Catholic teaching order that operated a number of schools and orphanages throughout Canada. The Christian Brothers were found guilty of criminal charges and held liable for civil damages relating to sexual, physical and emotional abuse that had been carried out by its members at the Mount Cashel School, a facility owned and operated by the Christian Brothers in St. John's, Newfoundland. The claims for damages against the Christian Brothers far exceeded their general corporate assets and totalled an estimated \$67 million.

Being incapable of fulfilling these claims, the Christian Brothers made application to be wound up, and in July of 1997, the liquidator asked the court for advice and direction on legal questions relating to whether certain charitable assets could be used to satisfy tort claims. Specifically at issue was the question of whether two of the Christian Brother's schools (which were located in B.C.) were assets that could satisfy these claims. The schools had been established by Christian Brothers through donations and were purportedly held in trust by them for the purpose of Catholic education.

The Ontario Court of Appeal held that all assets of a charity, whether they are owned beneficially by a charity or they are held by the charity pursuant to a special purpose charitable trust, are available to satisfy claims by tort victims upon the winding-up of the charity – even if the basis for the claims has no relationship to the property in question.⁵ The Supreme Court of Canada denied leave to appeal in this decision, allowing the law to remain in what many viewed as an unsatisfactory state. This left charities with great concern over their inability to protect their charitable trust property from possible creditors.

The *Christian Brothers* decision undermined one of the primary means by which charities raise monies from donors: special purpose charitable trusts. Special purpose charitable trusts can include endowment funds, scholarship funds, building funds, 10-year gifts under the *Income Tax Act*, donor advised funds placed with

² Terrance S. Carter, "Supreme Court's Refusal to Grant Leave to Appeal in Christian Brother Case Prejudices Charities" in *Charity Law Bulletin No. 3* (26 March 2001), available at www.charitylaw.ca.

³ Terrance S. Carter and R. Johanna Blom, "Update on Christian Brothers" in *Charity Law Bulletin No. 24* (30 September 2003), available at www.charitylaw.ca.

⁴ Terrance S. Carter. "Donor-Restricted Charitable Gifts: A Practical Overview Revisited II, Parts I and II." *The Philanthropist* Vol. 18, No. 1 & 2. (2003).

⁵ (*Re*) *Christian Brothers of Ireland in Canada* (2000), 47 O.R. (3d) 674 (C.A.), rev'g (1998), 37 O.R. (3d) 367, application for leave to appeal to the Supreme Court of Canada dismissed 16 November 2000 [*Christian Brothers*].

community foundations and testamentary gifts where the testator imposes restrictions on the use of funds. The principal attraction in making these types of gifts is the donor's ability to ensure that his or her gift is used for a certain purpose. However, the decision in *Christian Brothers* jeopardized this donor input by placing special purpose property at risk of being used towards the entirely different purpose of satisfying a charity's liabilities, even where they are unrelated to the special purpose charitable trust.

The decision also generated much concern among legal commentators, as reflected in a 2003 report by the British Columbia Law Institute Committee on the Modernization of the *Trustee Act*'s, entitled "Creditor Access to the Assets of a Purpose Trust" (the "Report").⁶ The Report described the *Christian Brothers* decision as a "serious distortion of the law of trusts" and challenged its legal correctness. It also explored the potential undesirable results of the decision and recommended that legislative intervention was necessary to prevent the *Christian Brothers* decision from becoming part of Canadian law.

B.C. was the first province in Canada to legislatively respond to the concern over the *Christian Brothers* decision. Its response was the *CPP Act* which, as stated, finally came into force on March 8, 2007.

C. CONTENT OF THE CHARITABLE PURPOSES PRESERVATION ACT

The *CPP Act* has not changed or replaced the B.C. common law of trusts. Instead, its effect is to provide additional protection where donors intend to provide a gift for a specific charitable purpose. To receive this protection, a gift must qualify under the *CPP Act* as "discrete purpose charitable property". To qualify, the donated property in question must be:

1. given to a charity for a specified charitable purpose (whether or not it is stated to be given in trust);
2. identified with certainty by the donor, either expressly or through some formula or method; and,
3. donated with the express or implied intention that it will be kept and administered by the charity separately from any other property, and used exclusively to advance the specified charitable purpose, rather than to assist or support the charity generally or to assist or support the charity in advancing any of its goals, purposes or objects.⁷

⁶ The report is available at <http://www.bcli.org/pages/projects/trustee/CreditorPurpose.pdf>.

⁷ *Supra* note 1, s. 2.

If property donated to a charity meets these requirements, the charity will have no beneficial interest in the property and it will be protected from any seizure or attachment to satisfy a debt or liability of the charity, except those debts or liabilities incurred by the charity in “advancing, or in attempting or purporting to advance, the discrete purpose for the property”.⁸

The *CPP Act* also imposes obligations on charities holding discrete purpose charitable property. Such property will only retain its character as discrete purpose charitable property if and for so long as the charity keeps, uses, and administers the property in accordance with the intention of the donor and exclusively for the advancement of the discrete purpose.⁹ In addition, the charity must keep, administer, and use the discrete purpose property separately from all other property. This requires charities to maintain records quantifying the property and identifying its discrete purpose. The *CPP Act* also clarifies that although discrete purpose charitable property must be administered separately, decisions respecting that property can be made at the same time as decisions respecting other property of the charity.¹⁰

Under the *CPP Act*, charities are also obligated to comply with any relevant court orders concerning the discrete purpose charitable property. The Act confers broad authority on the courts in relation to discrete purpose charitable property. If a charity holding discrete purpose charitable property is unwilling or unable to meet its obligations under the *CPP Act*, the court may make whatever orders it considers appropriate, including transferring the property to a new charity.¹¹ Where the recipient charity goes into bankruptcy or is the subject of a winding-up order and the trustee in bankruptcy, liquidator, or receiver cannot fulfil their obligations or find another charity to do so, the court, must make such arrangements.¹² In making such an order, a court may require the new charity to advance the same discrete purpose as applied to the former charity, but the legislation also allows the court to designate another charitable purpose that it considers to be consistent with the original discrete purpose.¹³

Where discrete purpose charitable property is transferred by court order to another charity, the new charity will be subject to the same obligations imposed on the former charity in relation to its use of the discrete

⁸ *Supra* note 1, s. 2(4).

⁹ *Ibid.*, s. 3(1).

¹⁰ *Ibid.*, s. 2(2).

¹¹ *Ibid.*, s. 3(3), (4).

¹² *Ibid.*, s. 4(1).

¹³ *Ibid.*, s. 4(1)(b).

purpose property.¹⁴ The new charity will also be required to pay from the transferred property any debts or liabilities arising from the “actual, attempted or purported advancement by the former charity of the discrete purpose that applied to that property before the order.”¹⁵ These debts are to be paid in full if possible, or rateably otherwise.¹⁶

The *CPP Act* applies to all discrete purpose charitable property, whether it was donated before or after the coming into force of the *CPP Act*.¹⁷ Thus, all donations made in the past (in B.C.) that fulfil the *CPP Act*'s definition of discrete purpose charitable property will be protected.

D. COMMENTARY ON THE CHARITABLE PURPOSES PRESERVATION ACT

The *CPP Act* directly addresses the concerns that arose following the *Christian Brothers* decision. It provides both donors and charities with some assurance that special purpose charitable property will be protected from claims against the charity that are unrelated to the special purpose charitable property. However, the *CPP Act* also creates some potential uncertainties.

In this regard, while it is clear that this Act applies in B.C., it is not clear whether the *CPP Act* will apply to donors or charities involving situations that do not take place solely within the B.C. jurisdiction. This is because the *CPP Act*'s definition of both “charity” and “donor” make no reference to a method for determining when a charity or donor will be found within the geographic jurisdiction for the application of the *CPP Act*. This could leave charities and donors in an uncertain position concerning whether interprovincial donations involving special purpose gifts will be protected under the *CPP Act*. For example, if a charitable organization operating in B.C. accepts discrete purpose charitable property from a B.C. resident, but the head office and bank account of the charity is located in Ontario, will the *CPP Act* apply to that gift?

There is also concern that the treatment of discrete purpose charitable property in the *CPP Act* may be overly broad. Section 2(1) of the *CPP Act* provides that a gift of discrete purpose charitable property can be brought within the Act “whether or not the property is stated to be given in trust.” Additionally, s. 3(2) applies the law of trusts in B.C. to all discrete purpose charitable property, including (presumably) that which was gifted in a

¹⁴ *Ibid.*, s. 3(5), 4(2).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, s. 6.

way other than by trust. In noting that the wording in this portion of the *CPP Act* is extremely broad, Professor Donovan Waters has suggested that the wording of the *CPP Act* may result in the law of trusts applying to non-trust gifts, such as a conditional or determinable gift.¹⁸ Features of trust law, like the courts' administrative and *cy-pres* scheme-making powers, could then be applied to these gifts, regardless of the reality that they are not trusts.

Conversely, despite this broad wording, some special purpose charitable gifts which deserve protection may not fit within the *CPP Act*'s definition of "discrete property." For example, because property must be gifted for a specified charitable purpose from the outset, gifts such as donor advised funds, which involve the donor periodically providing advice concerning what general or special purpose will be furthered with the gift, will potentially fall outside the *CPP Act*'s protection. Further, if the donor fails to express his/her intention that the property be kept and administered separately, or if the charity does not hold and administer the property separately, the *CPP Act* may not recognize the property as protected, or may recognize that it is protected but transfer it to another charity. This can place a substantial burden on charities and donors.

E. CONCLUDING COMMENT

The *CPP Act* attempts to address the concerns raised by the *Christian Brothers* decision and provide some measure of certainty to donors and charities by ensuring that donations given for a specific charitable purpose will be preserved exclusively for that purpose. Charities across Canada should be aware of the *CPP Act*, as its application may extend to charities located outside British Columbia but who fundraise within the province. Charities should determine if any gifts that have been made to them in the past may qualify as discrete purpose charitable property. Further, these charities should also familiarize themselves with the *CPP Act*'s criteria and the potential weaknesses that were discussed above so that they may work with future donors, specifically those that express the desire to gift property for a certain purpose in B.C., and ensure that future gifts are protected.

As a final note, while the *CPP Act* has its limitations, it is encouraging to see that the B.C. legislature has taken steps to attempt to rectify the concerns and problems created by the *Christian Brothers* decision. Other

¹⁸ See Donovan Waters, "Special Purpose Charitable Trusts: Protection in B.C. and Beyond" (Paper presented to the Ontario Bar Association and the Continuing Legal Committee of the Canadian Bar Association, May 2005) [unpublished] at 27.

jurisdictions in Canada may now want to consider whether they wish to emulate B.C. in this regard, introducing their own legislative remedies to the consequences of the *Christian Brothers* decision.



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