

**THE ATTACHMENT OF CHARITABLE PROPERTY  
AT LAW AND IN EQUITY:  
OR, WHY THE ONTARIO COURT OF APPEAL IN  
*RE CHRISTIAN BROTHERS OF IRELAND IN  
CANADA IS RIGHT AND ITS CRITICS ARE WRONG***

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*In Re Christian Brothers of Ireland in Canada, the Court of Appeal for Ontario explained why all of a charity's property—even property the charity holds in trust for charitable purposes—can be used to pay the charity's debts. The charity and trust bar think that the Court of Appeal's decision is in error. They think that without good reason the Court of Appeal gave creditors access to property held on a charitable trust in violation of the trustee indemnity principle.*

*In fact, it is the critics who are wrong. All property that is held by a charity, whether in trust or otherwise, is dedicated to a socially desirable purpose or purposes, not for the private benefit of any person or persons. For this reason, principles of law or equity that are based on private property rights—such as the trustee indemnity principle—cannot automatically be applied to property held for charitable purposes. When applied to property held for charitable purposes, the trustee indemnity principle, for example, prevents that property from being used to pay any liabilities. This is a form of charitable immunity, which has long been rejected in the law. This paper explains why, as a matter of well-established principle, logic and policy, charitable property—even property held in trust for charitable purposes—may be attached to pay for the charity's liabilities and must be so used once the charity becomes insolvent.*

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*Dans la décision Re Christian Brothers of Ireland in Canada, la Cour d'appel de l'Ontario explique pourquoi l'ensemble des biens d'un organisme de bienfaisance - même les biens détenus en fiducie à des fins de bienfaisance - peuvent être utilisés pour rembourser la dette de l'organisme. La jurists specialise en droit des organismes de bienfaisance et des fiducies croit que ce jugement est erroné. Elle estime que la Cour d'appel a donné aux créanciers, sans raison valable, accès aux biens d'une fiducie de bienfaisance en violation du principe de l'immunité des organismes de bienfaisance.*

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*Ces critiques sont fondées. Tout bien détenu par un organisme de bienfaisance, en fiducie ou autrement, doit être utilisé à des fins socialement souhaitables, et non au bénéfice d'une ou de plusieurs personnes. Pour cette raison, les principes de droit ou d'équité fondés sur les droits de propriété privée (notamment le principe de l'immunité des organismes de bienfaisance) ne peuvent être automatiquement appliqués aux biens détenus à des fins de bienfaisance. Appliqué aux biens détenus à des fins de bienfaisance, le principe de l'immunité des organismes de bienfaisance empêche ces biens de servir à rembourser des dettes. C'est une forme d'immunité qui est depuis longtemps rejetée par le droit. Le texte explique pourquoi les biens d'un organisme de bienfaisance - même les biens détenus en fiducie à des fins de bienfaisance - peuvent servir à rembourser les dettes de l'organisme et doivent l'être quand celui-ci devient insolvable. Il souligne qu'il s'agit d'un principe bien établi, conforme à la logique et aux politiques gouvernementales.*

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### I. Introduction

In the year 2000, the Court of Appeal for Ontario released a decision on the law of charitable liability and immunity. The decision is *Re Christian Brothers of Ireland in Canada*.<sup>1</sup> In that decision the Court held (1) that when the common law rejected the doctrine of charitable immunity it accepted that all of a charity's property may be used to pay its tort liability—including property the charity holds in trust for some or all of its charitable purposes; and (2) that when a charity is insolvent all of its property must be used to pay its debts—including property the charity holds in trust for some or all of its charitable purposes.

This is a controversial decision. It has led to many critical articles.<sup>2</sup> It has prompted the British Columbia Law Institute to write a report condemning the decision and seeking legislative reversal of it in British Columbia.<sup>3</sup> And it has caused the Ontario Bar Association's sections on Charities and Trusts to ask the Government of Ontario to reverse the decision by legislation too.<sup>4</sup> The controversy has arisen because the charity and trust bar believe that the Court of Appeal has done a revolutionary thing. They believe that by allowing charity-trustees and their creditors to

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<sup>1</sup> *Re Christian Brothers of Ireland in Canada* (2000), 47 O.R. (3d) 674, Feldman and Abella, J.J.A. (Doherty, J.A. concurring) [Court of Appeal], leave to appeal to the Supreme Court of Canada denied, [2000] S.C.C.A. No. 277 (application to re-consider denial of leave dismissed 23 May 2002), reversing in part (1998), 37 O.R. (3d) 367 (Gen. Div.) Blair J. The author of this paper was counsel to the Liquidator of The Christian Brothers of Ireland in Canada and argued the case for the Liquidator in the Ontario Court of Appeal and British Columbia Court of Appeal.

<sup>2</sup> Terrance Carter, "Case Comment: *Christian Brothers* Decision Exposes Charitable Trust Assets to Tort Creditors" (2001) 16:1 *The Philanthrop.* 28; Maurice C. Cullity, "The Charitable Corporation: A 'Bastard' Legal Form Revisited" (2000) 17:1 *The Philanthrop.* 17 at pp. 25-26; Kevin E. Davis "Vicarious Liability, judgment proofing, and non-profits" (2000), 50 U. T. L. J. 407; Note, *Re Winding-up of the Christian Brothers in Ireland in Canada* in [2000] 3 I.T.E.L.R. 34; David C. Simmonds, "The Trust Within the Charitable Corporation: A Victim of Judicial Policy Making?" (2001) 20 E. T. & P. J. 225; David Stevens, "'Bizzare' trusts decision should be overturned ASAP" *The Lawyers Weekly* (15 June 1999) 9; Donovan Waters "Special Purpose Trusts and a Corporate Trustee in Liquidation: The Story of Vancouver College and St. Thomas More Collegiate" (2003) 22 E. T. & P. J. 199; T.G. Youdan "Creditor Proofing Charities: What to do in Light of the *Christian Brothers* Decisions, 2<sup>nd</sup> National Symposium on Charity Law, Canadian Bar Association, April 14, 2004, and Terrance Carter, "Donor-Restricted Charitable Gifts: A Partial Overview Revisited II" (2004) 18:2 *The Philanthrop.* 121 at pp. 153-57.

<sup>3</sup> British Columbia Law Institute, *Report on Creditor Access to the Assets of a Purpose Trust* (2003) 22 E. T. & P. J. 214.

<sup>4</sup> Letter to the Attorney-General of Ontario by the Charity and Not-For-Profit Law section and the Trusts and Estates section of the Ontario Bar Association, dated August 2003.

use the charitable trust property to pay the trustee's liabilities, the Court set aside a fundamental doctrine of the law of trusts: the trustee indemnity principle. For its part, the Court said that it merely applied established legal doctrine, common sense and modern public policy to a straightforward problem involving the rights of creditors to get paid from the assets of a charity. The Court of Appeal's decision and the critical commentary on that decision are thus like two ships passing in the night: the critics object to the decision on the basis that it sets aside a principle of trust law and the Court of Appeal says that its decision has nothing whatever to do with trust law. Who is right?

The critics argue that trust law protects property held on a charitable trust from tort and other claims brought against the charity-trustee because in equity the property does not really "belong" to the charity. Some critics say that in equity this property is really owned by the charitable purpose to which the property is dedicated and other critics say that in equity the property is not really owned at all. But in all cases, they say that the creditor's claim to attach this property must flow through the charity-trustee's property rights in the trust property and the trustee does not have any such rights or any rights to use the property to pay for liability arising out of its wrongful acts. Following this analysis, then, a tort creditor of a charity-trustee is simply out of luck.

To a lawyer's ears this sounds like a compelling argument. The argument overlooks (or ignores) one important fact, however. All charitable property is held for the social benefit of the public, not for any private purpose or person. This is so whether the charity is constituted as a corporation or acts through natural persons operating as a board of trustees, and whether the charity holds the property used in its charitable mission absolutely or in trust for that mission or some part of it. Examined in this light, then, the question of how a charity's property is to be used is ultimately a matter for public policy to answer based on weighing the social benefit (or harm) of competing uses for the property. By parity of reasoning, the answer to the question of whether some or all of the charity's assets are to be protected from the claims of its creditors—including property the charity holds in trust for charitable purposes—is to be answered by reference to public policy as well. Accordingly, public policy, not the law of trusts determines whether property that is given to and held for the benefit of the public should be protected for the benefit of the public (or some subset of the public) at the expense of individual people harmed by the charitable endeavour to which the property was donated.

The critics and those who prefer the critics' analysis have trouble accepting that it is contrary to public policy to protect property held for charitable purposes from a charity's liabilities. Instead, they firmly believe

that trust-based theories for immunising charitable property are not incompatible with public policy and indeed advance social policy in the charitable sector. For this reason, we cannot resolve the debate over the Court of Appeal's decision without first understanding why it is that trust-based theories for immunising charitable property, compelling though they appear to be, are actually quite wrong and misleading *as a matter of established principle*. Then we can turn to public policy.

This paper addresses these issues, first, by analysing how the competing theories (the critics' and the Court of Appeal's) for attaching or protecting charitable property actually work when they have to be applied to the assets and liabilities of a typical charity that has committed significant torts. Then the paper moves to the law of trusts to see why principles drawn from the law of private or beneficiary trusts do not apply to property held in trust for charitable purposes. From this we can see that the entire body of law relating to charitable activity, and in particular, the law relating to charitable trusts, is derived from and based squarely in public policy. Once this is understood, then the resolution of the policy issues becomes self-evident. Finally, the paper demonstrates that when a charity becomes insolvent its affairs and assets are to be administered under federal insolvency law which does not specially protect property held in trust for charitable purposes. This latter point also explains why efforts in British Columbia and Ontario to modify provincial law relating to trusts or charities in order to protect their assets from creditors' claims are misguided. The paper ends by answering the question of who is right—the Court or the critics—by concluding that it is the Court, hands down.

## *II. A Hypothetical Charity*

The only time we have to consider the Court of Appeal's decision is when a charity's creditors come calling seeking to be paid from assets the charity claims cannot be used for that purpose. Therefore, we must begin the analysis by examining how creditors can attach charitable property. The following analysis revolves around the assets and liabilities of a hypothetical charity which owns and uses property in a manner common to charities generally. By using such a hypothetical example we can see how the Court of Appeal's decision and how the analyses of those who criticise the decision operate in concrete and practical terms without getting bogged down in a dispute based on the facts of *Re Christian Brothers of Ireland in Canada*, the case that led to the Court of Appeal's decision and this debate.

The following analysis will focus on a hypothetical animal welfare organisation in British Columbia—call it the British Columbia Humane Society. Assume that the Society, as with most non-profit organisations, is incorporated. The Society's corporate objects consist of the promotion of

the humane treatment of animals and related activities. Since objects such as these are charitable (in the strict or technical sense of the word<sup>5</sup>), the Society is a charity. Assume that one of the Society's animal control officers has picked up a pit bull terrier owned as a pet that was terrorizing a neighbourhood. Through his negligence, the animal control officer allowed the animal to escape from his vehicle. It attacked and badly mauled a young child. The child's parents sued the Society for negligence. The Society is found vicariously liable. The damages cannot be satisfied from the society's operating accounts but can be satisfied if the society sells or mortgages some of its assets. Then, let's assume that the Society incurs liabilities which outstrip the value of all of its assets, thereby making the Society insolvent. Perhaps the Society was holding a wild animal carrying a dangerous virus which it negligently allowed to escape causing wide-scale viral infection in the community, many deaths and enormous economic losses.<sup>6</sup>

Charities often incur liabilities like those in our hypothetical example. Hospitals, for example, frequently get sued for the negligence of their employees<sup>7</sup> and for this reason much of the charitable immunity case law involves hospitals.<sup>8</sup> Many charities have committed mass torts causing losses that vastly outstrip their assets. The Christian Brothers of Ireland in Canada committed such torts by abusing children, for example. And the Canadian Red Cross Society committed such torts by allowing blood products tainted with deadly viruses to infect large numbers of the public.<sup>9</sup>

Now let's consider which of the Humane Society's assets could be used to pay these liabilities. Assume the Society owns property in the City of Vancouver on which is located buildings used for administrative offices, pounds and veterinarian facilities. The Vancouver site was acquired by the Society and the buildings constructed mainly from money received by the Society after public appeals for donations for the establishment of a new

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<sup>5</sup> Following *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.) at 580 (Lord Macnaughten).

<sup>6</sup> By the way this is not a far fetched example. SARS appears to have been transmitted by civit cats and in the United States there has been an outbreak of monkey pox, a form of small pox, caused by gophers. The SARS outbreak in Toronto has costs hundreds of millions of dollars of economic damages as well as 40 or so deaths.

<sup>7</sup> E.g. *Pittman Estate v. Bain* (1994), 112 D.L.R. (4<sup>th</sup>) 257 (Ont. Gen. Div.) at 351; *supp.* reasons 112 D.L.R. (4<sup>th</sup>) 482.

<sup>8</sup> Cf. *Donaldson v. The Commissioners of the General Public Hospital in Saint John* (1890), 30 N.B.R. 279 (N.B.C.A.); *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820 (C.A.); *Lavere v. Smith's Falls Public Hospital* (1912), 26 D.L.R. 346 (Ont. C.A.); *Nyberg v. Provost Municipal Hospital Board*, [1927] S.C.R. 226; *Logan v. Waitaki Hospital Board*, [1935] 54 N.Z.L.R. 385 (C.A.); *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (D.C. Cir. 1942).

<sup>9</sup> *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Ont. Gen. Div.) (Q.L.).

facility of this nature in Vancouver. Assume too that the Society owns a farm in the Lower Mainland which it uses as a facility for caring for large animals, such as horses, or wild animals before they are returned to the wild. The farm was given to the Society by the former owner pursuant to an agreement with the Society which provides that the land is to be used by the Society exclusively for the care of large or wild animals. Let's also assume that the Society holds a substantial endowment that was given to it in a bequest from a person who loved pets. The terms of the will specified that the gift was to go to the Society by its proper name and provided that the capital is to be preserved in perpetuity and the income used for the feeding and care of family pets that are given to the Society or which it finds as strays, etc. In addition to these assets, assume that the Society owns or leases other property and equipment which it uses in carrying out its activities, such as trucks, computers, veterinarian equipment and the like. Finally, let's assume that the Society acquires most of its operating funds from anonymous donations, veterinarian services it provides to the public and from a contract it has with the Province of British Columbia pursuant to which the Society agrees to take care of stray or unwanted animals in the Lower Mainland as required by public bodies in British Columbia.

Charities often acquire property in the manner described above. Charities raise operating funds through public appeals, such as by putting coin boxes in stores in which people can deposit their spare change. Often they raise money by providing a service to the public that is consistent with their charitable objects and for which they charge (veterinarian services at a humane society or sales of donated clothing by the Goodwill). Sometimes charities operate with government grants or contracts (hospitals or the Red Cross's blood banks before its insolvency<sup>10</sup>) to enable a governmental purpose to be carried out at arm's length from the government. When charities need money for capital projects they will often specify the purpose for which they seek the donations in order to encourage giving. Whenever they can, charities will make arrangements with a single donor for a large gift to fulfil some need (such as a new building) often promising the donor something in return (such as putting the donor's name on the building).<sup>11</sup> Charities also receive gifts in wills for purposes specified by the deceased.<sup>12</sup>

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<sup>10</sup> *Ibid.* at para 5.

<sup>11</sup> *Cf. Brantford General Hospital Foundation v. Marquis Estate* (2003), 67 O.R. (3d) 432 (S.C.J.), Milanetti J.

<sup>12</sup> Sometimes, a person makes a gift in his will to a specified charitable purpose but fails to identify by name the charitable organisation that is to acquire the gift. If the testator gives the executors the power to select the organisation that is to take the gift they will do so, otherwise the executors will have to apply to the court for an order pursuant to the *cy-près* doctrine or the court's scheme-making power to vest the

### III. How Do A Charity's Liabilities Get Paid?

#### A. Under the Critics' Theory

The critics' theory is ostensibly based<sup>13</sup> on the Chambers decision of Blair J. in *Re Christian Brothers of Ireland in Canada* that was over-ruled by the Court of Appeal for Ontario. The Christian Brothers of Ireland in Canada ("CBIC") is a federally incorporated religious order which operated schools in Canada, and elsewhere, committed to the Roman Catholic religious mission of its founder, Edmund Rice. Over many decades members of CBIC grievously abused numerous boys entrusted to their care throughout Canada. Most of this abuse took place at the notorious Mount Cashel orphanage in St. John's, Newfoundland.<sup>14</sup>

In 1996, CBIC applied to the Ontario Superior Court of Justice for an order winding up its affairs under the *Winding-up and Restructuring Act*.<sup>15</sup> It made this application because it wanted to use its assets to pay for the liabilities it had incurred for the child abuse its members had committed. As part of the process of administering CBIC's affairs in liquidation, Blair J. had to decide whether any of the assets it owned were immune from its liabilities for child abuse. The assets in question included lands and buildings used by CBIC for its administrative functions, some of the property on which the Mt. Cashel orphanage was located, money in bank accounts, land used for retreats, buildings used to house members of the organisation and buildings used for teaching purposes.<sup>16</sup> Importantly, CBIC also owned the shares of two private corporations that operated religious schools in the Lower Mainland of British Columbia, Vancouver College Ltd. and St. Thomas More Collegiate Limited.<sup>17</sup>

After examining the various ways in which a charity can acquire its property, Blair J. concluded that property a corporate charity acquires from any source or for any purpose can be used to pay its tort liabilities except for property it holds in trust for charitable purposes.<sup>18</sup> Assets held by a charity in trust for charitable purposes, he held, can be used to pay the charity's tort liabilities only if the wrong for which the charity is liable

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property in a specific charity. See American Law Institute, *Restatement of the Law (Second)* (St. Paul, Minn: American Law Institute Publishers, 1959) §399; *Re Ulverston and District New Hospital Building Trusts*, [1956] Ch. 622 (C.A.); *Re Fingers Will Trusts*, [1972] 1 Ch. 286.

<sup>13</sup> As will be seen later in this paper, when analysed closely, the critic' theories are incompatible with Blair J.'s judgment.

<sup>14</sup> A description of these events is found in Blair, *supra* note 1.

<sup>15</sup> R.S.C. 1985, c. W-11.

<sup>16</sup> Blair J., *supra* note 1 at pp. 382-383.

<sup>17</sup> *Ibid.* at pp. 383-384.

<sup>18</sup> *Ibid.* at pp. 394-397.

arose out of the furtherance of the specific charitable purpose of the trust.<sup>19</sup> In his judgment, Blair J. thus attempted to distinguish between property acquired and held by a charity for “general” purposes and property acquired and held by it “in trust” for “specific purposes” and to provide different attachment rules for property held in each capacity. In applying that test to CBIC’s assets, Blair J. accepted that if the shares of Vancouver College Ltd and St. Thomas More Collegiate Limited were held on specific charitable purpose trusts then the shares and underlying assets of these two corporations could not be sold to pay for CBIC’s liabilities arising out of the operation of Mt. Cashel Orphanage.<sup>20</sup>

Since the distinction Blair J. drew between trust and non-trust assets sounds reasonable, let’s try to apply it in the context of the hypothetical Humane Society and its two types of liabilities. The first question that has to be answered is: which of the Society’s assets are held by it in trust for specific purposes? The second question is: was the liability of the Society incurred by it in carrying out or otherwise furthering the trust purposes for which any of these assets are held?

When we turn to the first question, it would appear, at least at first blush, that few of the Society’s assets would be regarded by a court as being held by the Society in trust. Indeed, the tenor of Blair J.’s judgment is strongly in this direction. Notwithstanding its tenor, however, the judgment actually left the door wide-open to permit a finding that property used by a charity for a specific purpose is held by it in trust for that purpose. We know how wide open the door was left because of the case of *Rowland et. al. v. Vancouver College Ltd*,<sup>21</sup> the companion case to Blair J.’s decision on charitable immunity.

During the winding-up of CBIC, representatives of Vancouver College Limited (each of whom were Christian Brothers) and St. Thomas More Collegiate Limited itself applied to Blair J. for permission to sue CBIC<sup>22</sup> in the Supreme Court of British Columbia for declarations to the effect that the shares of these two school corporations were owned by CBIC in trust for the specific charitable purpose of providing a Roman Catholic education to the Catholic community in the Lower Mainland of British Columbia. Blair J. granted the permission sought.<sup>23</sup>

<sup>19</sup> *Ibid.* at pp. 399h, 400f-g

<sup>20</sup> *Ibid.* at pp. 401d-402a.

<sup>21</sup> *Rowland v. Vancouver College Ltd.* (2000), 78 B.C.L.R. (3d) 87 (B.C.S.C.) (Levine J. as she then was), aff’d (2001), 94 B.C.L.R. (3d) 249 (B.C.C.A.), Hollinrake J.A. (Rowles J.A. concurring, Braidwood J.A. dissenting), leave to appeal to S.C.C. denied, [2001] S.C.C.A. No. 652.

<sup>22</sup> Pursuant to s. 21 of the *Winding-up and Restructuring Act*, no action could be brought against CBIC without prior approval of the Ontario Superior Court of Justice.

<sup>23</sup> That approval was granted in two orders dated 14 November 1997. One order

In the resulting litigation in British Columbia, Levine J. (as she then was) considered the history of the Christian Brothers' activities in British Columbia and the circumstances surrounding the establishment of the two schools. Her Ladyship reviewed evidence, stretching back almost a century, about what the people who made gifts of money or other property to the Christian Brothers' organisation in British Columbia intended when they made their gifts and what the Christian Brother's organisation intended to do with these donations. The evidence consisted of newspaper articles, fundraising circulars, plaques on buildings, letters written by people who donated property, internal memoranda of members of the Christian Brothers' organisation, residing in British Columbia and elsewhere, about the establishment and operation of these schools and details of how the assets making up the operations of the schools were used and the operations financed since they were acquired by the Christian Brothers. The trial took over three months and involved numerous parties and their counsel. The litigation was extraordinarily expensive to all parties.

The evidence in *Rowland et. al. v. Vancouver College Ltd* encompassed virtually every type of gift and method of raising funds imaginable: anonymous donations, gifts made for concrete purposes specified by the donor, conditional gifts, unconditional gifts, donations made pursuant to a fundraising campaign, and payments from other Christian Brother organisations. After reviewing the evidence surrounding these gifts Levine J. came to the conclusion that when the Christian Brothers solicited gifts to enable them to construct and operate two schools in the Lower Mainland, they and the people who gave their property to the Christian Brothers in relation to this purpose intended that the Christian Brothers would use the gifts to construct and operate these schools, which they did, and not use the money for other purposes. The court found that this common intention made CBIC a trustee of the shares of Vancouver College Limited and St. Thomas More Collegiate Ltd for the specific charitable purpose of providing a Roman Catholic education in the Lower Mainland of British Columbia.

As result of Levine J.'s decision, it is hard to see how any property that is owned by a charity and which is dedicated to some specific purpose through the common intention of the charity and its donors (even

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granted leave to four Christian Brothers to commence an action against Vancouver College Ltd. and CBIC for *inter alia* a declaration that the shares of the college are held by them as "trustees for the charitable purpose of operating Vancouver College in British Columbia as a Catholic school committed to the mission of the Christian Brothers". The other order granted leave to St. Thomas More Collegiate Ltd to commence an action against CBIC, *inter alia* for a declaration that its shares were held by in trust for the "charitable purpose of the establishment and carrying on of a Roman Catholic high school" at its municipal address.

anonymous ones) would not be treated as trust property.<sup>24</sup> Based on the authority of that decision, then, it is likely that the endowment, the farm, and the Vancouver facility of our hypothetical example would each be treated as trust property, held by the Society in trust for its specific charitable purpose. Therefore, the answer to the first question—which of the assets of the Humane Society would be held in trust for specific purposes—is easy to answer: virtually all of them!

Now what happens? The Society has money and other assets that are not held by it in trust and which it can use to pay its tort and other liabilities, but this property is insufficient to pay these liabilities in full. By reason of the trust finding, and pursuant to Blair J.'s decision, the directors of the Society could not unilaterally use the endowment, the farm and the Vancouver facility to pay these liabilities. For the same reason, the tort-victim—assuming he has a judgment in hand—could not simply seize these assets. At this point the directors or the creditors could apply to the court for an order under provincial law permitting the Society to use or the creditor to seize some of the trust property to pay the Society's tort liabilities, assuming that the liabilities could be funded from these assets. Were this application to be brought, following Blair J.'s analysis and the critics' theory, the court would then have to determine if the tort victim's injury arose out of the "furtherance" of the "specific" purpose of the charitable trust pursuant to which the assets in issue are held. If the injury for which the tort victim obtained his judgment did not arise out of the furtherance of any of the specific purposes for which the Society's holds its charitable assets in trust, then those assets could not be used to pay the judgment. The tort creditor would be out of luck.

Though answering the question of whether a wrong arose out of the "furtherance" of the purposes for which property is held would seem to be a fairly straightforward exercise, it is not. No matter what the circumstances of the tort and no matter what the purpose is for which the property is held in trust, one cannot answer the question without engaging in artificial verbal gymnastics. This is because before you can answer the question you first have to choose the level of specificity with which to analyse the "purpose," the "furtherance of the purpose" and the form of the tort. But there is no principled basis to select one level of specificity over another, as we can see by considering the assets of the hypothetical Society.

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<sup>24</sup> Indeed, following that decision, an action was brought in British Columbia seeking a declaration that the municipality of West Vancouver is a "trustee" of the "Chestnut Tree Trust" that was allegedly established when boy scouts planted chestnut trees in the municipality in the 1930's. In the law suit it is claimed that the municipality breached its fiduciary duty to the trees (really!) when it proposed to cut some of them down. See Colin Wright, "Lawsuit filed over W. Van Chestnuts" *North Shore News* (9 January 2004) online: < <http://www.nsnews.com> >.

It could be argued, for example, that none of the Society's liabilities were incurred in furthering the purposes for which the farm, the endowment or the Vancouver facility were given or established, as the case may be. For instance, the endowment was given to the Society for the purpose of caring for pets, and therefore it could be argued that using the endowment to pay the Society's liabilities for its negligent employee is not furthering that purpose; the donations to establish the Vancouver facility were given for the purpose of providing a facility for the Society to operate in Vancouver and therefore it could be argued that selling the facility to pay the Society's liabilities arising out of the acts of its employee is not furthering the purposes of the Society either (in fact doing so would likely harm the Society's ability to function at all); finally, the farm was given to the Society for the purpose of providing a facility to care for large or wild animals and therefore it could be argued that selling the farm to pay the Society's liabilities for its negligent employee is not furthering that purpose. Thus, on the basis of this reasoning, none of the Society's trust assets (which would be most of its assets) could be used to pay its tort liabilities.

Conversely, it could be argued that all the Society's liabilities arose out of furthering the purposes for which all the assets owned by the Society are held. Each of the Society's assets are held by it for the charitable purpose of caring for unwanted or harmful animals in the public interest. All the Society's tort liabilities arose out of misfeasance in attempting to further this purpose, after all. That is why the Society would be found vicariously liable in the first place. Thus, on the basis of this reasoning, all the Society's property could be used to pay for its tort liabilities.

On the other hand, it could also be argued that the Society's liabilities arose out of furthering only some but not all of the purposes for which the Society holds its assets in trust. For example, it could be argued that the Society's liability for the child's injuries could be funded from the capital of the endowment because the dog was a pet (even if not a very nice one!) and therefore its liability arose out of the furtherance of the purpose of caring for unwanted pets. But it could be argued that the farm could not be used to pay this liability because the tort arose out of the attempt to care for a pet, and not a wild animal or an animal that has to live on a farm. Maybe the farm, but not the endowment, could be used to pay the damages of those harmed by the virus since the animal that originally had the virus was a wild animal, not a pet. Perhaps, though, the Society's liability for the child's injuries and to those harmed by the virus could be funded from the Vancouver facility but not the Society's other assets, because the negligent employee was based out of that facility, and therefore it is furthering the purposes of that facility to pay for such liability. Thus, on the basis of this reasoning only some of the Society's property could be used to pay only some of its tort liabilities.

These examples demonstrate why it does not make any sense to require a tort victim to fit the form of wrongdoing that caused his damage into the “furtherance” of a “purpose” for which the charity’s property is held, if it is held on a charitable trust. In fact, it should be recognised that the exercise is entirely bogus. First of all, it is wrong in law. Tort law looks to the person who directly or vicariously caused the injury to pay for the damage he caused; it does not require that the person’s property have been used to commit the tort. Accordingly it is fundamentally wrong to make recovery for the tort dependent on the relationship between property and the tort or on the relationship between the purpose for which property is held and the tort.<sup>25</sup> Secondly, causing harm is the antithesis of any charitable purpose therefore it is a logical absurdity to attempt to make a charitable purpose encompass the wrongdoing or to find that the wrongdoing furthers a charitable purpose or that the wrongdoing was a failed attempt to further a charitable purpose.

In fact, all that one is doing by engaging in this exercise is applying the old *Salmond* test<sup>26</sup> for vicarious liability to the assets of the charity rather than to the legal entity itself by using language relevant to property instead of language relevant to liability. Under the *Salmond* test employers are vicariously liable for torts committed by employees that fall within their “scope of employment” but not for torts arising from unauthorised acts that are not connected to acts the employer has authorised.<sup>27</sup> Applied to property, this test would make property exigible to pay for tort liability falling within the scope of the purpose for which the property is owned but not for wrongdoing that is not connected to that purpose. The Supreme Court of Canada rejected this test in *Bazley v. Curry*.<sup>28</sup>

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<sup>25</sup> The BCLI believes that Mr. Justice Braidwood’s hypothetical example of a trustee of two schools in his dissenting judgment in *Rowland et. al. v. Vancouver College Ltd*, *supra* note 21 answers the point, but it does not. In the highly unlikely event that an individual person would act as described in Justice Braidwood’s example, that person would first have to be found vicariously or directly liable for some wrong and have no other assets but the two buildings and their revenues with which to pay the liability before the problem would arise. The trustee’s wrong may have caused damage to a person who had contact with either property or none. For example, if when driving from the “Protestant” building to the “Jewish” building the trustee ran over someone in his car, would that person be refused compensation from both assets because he was associated with neither? The answer is “no”. As explained in response to a similar argument in relation to the Mersey Docks and Harbour Board trustees, “it is not because they have more duties to discharge that they are less liable for the consequences of their negligence”, *Gilbert v. The Corporation of Trinity House* (1886), L.R. 17 Q.B.D. 795 at 800.

<sup>26</sup> From *Salmond and Heuston on the Law of Torts*, 19<sup>th</sup> ed. By R.F.V. Heuston and R.A. Buckley (London: Sweet & Maxwell, 1987).

<sup>27</sup> *Ibid.* at p. 220.

<sup>28</sup> [1999] 2 S.C.R. 534. In *Doe v. Bennett*, 2004 SCC 17, the Supreme Court

For all of these reasons, when Blair J.'s theory in *Re Christian Brothers of Ireland in Canada* is coupled with Levine J.'s ruling in *Rowland et. al. v. Vancouver College Ltd.*, most of the assets of every charity will be immunised from their liabilities. At the very least, this coupling would make the exercise of getting at those assets so difficult as to provide virtual immunity. Charities would quickly learn how to structure their activities around "specific charitable purpose trusts" that would be defined in such a way that liability for their negligence could not easily be regarded as having been "furthered" by the "purpose" for which the property is held. Full charitable immunity would thus be created by the back door in the guise of applying trust law.

This result is the *only* practical consequence of the theory on behalf of which the critics advocate. Waters, for example, thinks that charities should be able to hold property on endless sub-trusts, like Russian dolls, with purposes nesting inside purposes, in order to limit the exposure of the charity's property to tort damages.<sup>29</sup> Carter thinks that charities need to be able to render their assets immune from their tort liabilities, and goes so far as to reject completely the idea that charities can be liable in tort.<sup>30</sup> Davis wants charities to be able to judgment proof their assets.<sup>31</sup>

### *B. Under the Court of Appeal for Ontario's Judgment*

The Court of Appeal for Ontario rejected Blair J.'s theory in its entirety, explaining that His Honour had simply applied concepts underlying the old and rejected charitable immunity case law to the assets of a charity by using trust law:

Once he [Blair J.] had determined that there is no doctrine of charitable immunity in Canada, it became redundant to then analyze whether the assets are held on trust in order to determine if they are exigible to pay the claims of tort victims of the charity in the context of the winding up of the charitable corporation. Because a charity is not immune from liability to those who have suffered wrong at its hands, either through its trustees, employees or other agents for whom the charity is responsible, the assets of the charity, be they beneficially owned or be they "trust funds", are available to respond to those liabilities. That has been the law of Canada for almost a century. It is neither necessary, nor logically probative, to examine each asset of the charity on an individual basis to determine its availability to be answerable for the debts of the charity on a wind-up, based on whether that asset is held in trust for one or more charitable purposes. To do

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recently reaffirmed their approach in *Bazley*. For a different view, though, see *Lister v. Hesley Hall Ltd.*, [2002] 1 A.C. 215 (H.L.) and *Dubai Aluminium Co Ltd. v. Salaam*, [2003] 2 A.C. 366 (H.L.).

<sup>29</sup> Waters, *supra* note 2 at pp. 207, 209.

<sup>30</sup> Carter, *supra* note 2.

<sup>31</sup> Davis, *supra* note 2 p. 440.

so is to re-introduce into our law the rejected doctrine of charitable immunity by resurrecting the equally rejected trust fund theory.<sup>32</sup>

The Court of Appeal recognised that the directors of a charity have at least three obligations to balance.<sup>33</sup> One is to ensure that the charity carries out its charitable mission and uses its assets for that mission and not for other purposes. Another is to ensure that the charity honours its commitments to those from whom it received property. A third is to ensure that the charity pays its debts, including its debts to those whom it injures through tortious wrong-doing.<sup>34</sup> The Court of Appeal accepted that the directors of a *solvent* Charity have to balance these objectives under the ultimate supervision of the court.<sup>35</sup> The Court accepted that the administrator of an *insolvent* charity, however, must sell all the charity's assets—including those it holds in trust for a purpose—and use the proceeds to pay the charity's creditors.<sup>36</sup>

Therefore, to apply the Court of Appeal's decision to the Society, one must first consider whether its liabilities outstrip its assets; in other words, whether the liabilities make an otherwise solvent charity insolvent. In the case of the child who was mauled by the dog, the Society can pay the liability from its assets without becoming insolvent. Accordingly, pursuant to the decision of the Court of Appeal, the directors would have to decide how the Society can best (i) pay the damages, (ii) keep the Society operating, and (iii) honour its obligations to its donors (in this case those people who gave money to establish the Vancouver facility, who donated the farm and who established the endowment), in that order. The Society's directors would not want to sell the Vancouver site because it is a core asset of the Society without which it could not carry out its charitable mission. It is likely that the directors would not want to sell the farm for the same reason. However, they would want to liquidate the endowment to pay the tort liability since they could do so without impairing the Society's ongoing mission. Following the reasoning of the Ontario Court of Appeal, the Society would apply to the court on notice to the Attorney-General seeking an order permitting it to use the endowment for the purpose of paying its tort liabilities as being in the best interests of the Society overall. Based on the facts of this hypothetical example and applying the decision of the Ontario Court of Appeal, the court to whom the application was brought would certainly approve that request. Thus, the asset most likely to be found a "specific charitable purpose trust" under Blair J.'s analysis, and

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<sup>32</sup> Court of Appeal, *supra* note 1 at para 28.

<sup>33</sup> See also, Note "The Non-Immunity of Charitable Trust Property" (2003) 119 L.Q.R. 49, by the same author.

<sup>34</sup> See in particular Court of Appeal, *supra* note 1 at para. 42

<sup>35</sup> *Ibid.* at para. 92.

<sup>36</sup> *Ibid.* at paras. 28, 107.

most likely under that analysis to be protected from the Society's liabilities, would be the asset most likely to be used to pay the Society's liabilities under the Court of Appeal's analysis.

Different considerations would apply in the case of the Society's liabilities for the harm caused by the virus, however. In this circumstance, the Society's liabilities would exceed all of its assets, including the farm, the endowment and the Vancouver site as well as its other property. Since the Society would be insolvent, its affairs would be administered under federal insolvency law (the *Bankruptcy and Insolvency Act*,<sup>37</sup> the *Companies' Creditors Arrangement Act*,<sup>38</sup> or the *Winding-up and Restructuring Act*<sup>39</sup>). As held by the Ontario Court of Appeal (and in particular the concurring judgment of Doherty J.A.), none of the charitable purposes for which the property owned by the Society would otherwise be used can take precedence over the rateable distribution of that property to the Society's creditors under normal insolvency principles. Accordingly, all the Society's property, including property it holds in trust for some or all of the charitable purposes it pursues, must be used to pay its debts in accordance with the scheme of the relevant act.

To apply the reasoning of the Ontario Court of Appeal, no one is required to ask how the charity came to acquire its property or to twist the charitable purposes for which a gift was given into purposes that permit the donated property to be used to pay the Society's debts. If the charity is *solvent* and it wants to use property that it holds pursuant to some use restriction to pay its debts, the charity only has to show that it is more beneficial to it as a whole to use this property to pay its obligations rather than any other of its property. If the charity is *insolvent*, however, all of its property *must* be used to pay its debts as a matter of law.

The Court of Appeal's decision is simple, easy to apply, consistent with precedent and properly distinguishes between a charity that is solvent (and thus subject to provincial property law) and insolvent (and thus subject to federal insolvency law) and conforms to modern and established public policy. So what's the problem? Well, the problem is a red-herring, some straw men and a dispute over modern public policy.

#### *IV. The Red Herring of Trust Law*

##### *A. Focussing the Debate*

The debate over trust law that took place before Blair J. in the Ontario Court of Appeal, and the one that we are now having in the academic

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<sup>37</sup> R.S.C. 1985, c. B-3, as am. by S.C. 1992, c. 27.

<sup>38</sup> R.S.C. 1985, c. C-36, as amended.

<sup>39</sup> *Supra* note 15.

literature, is actually quite simple. Perhaps that is why it causes so much confusion. When we debate whether trust law protects charitable property we are really debating whether the trustee indemnity principle drawn from the law of private trusts is applicable to public trusts.<sup>40</sup>

The trustee indemnity principle is an exception to the immunity rule in equity that prohibits a trustee from using the property he holds in trust to pay his own liabilities and prohibits the trustee's creditors from attaching this property as well. The indemnity principle permits a trustee to use the trust property to pay any liabilities he incurred in administering the property of the trust and in some cases also allows the trustee's creditors to attach the trust property, either directly<sup>41</sup> or indirectly by subrogating their right to the trustee's. The indemnity principle, however, does not permit trustees or their creditors to use the trust property to pay for a trustee's *wrongful* acts arising out of the administration of the trust. In Canada, the trustee indemnity cases are represented by *Jellett v. Wilkie*<sup>42</sup> and *Kimniak v. Anderson*<sup>43</sup> amongst others.<sup>44</sup>

The trustee indemnity principle gave birth to the doctrine of charitable immunity in *Duncan v. Findlater*<sup>45</sup> and *Feoffees of Heriot's Hospital v. Ross*.<sup>46</sup> In those cases, the House of Lords accepted that a tort victim had no recourse against property held in trust by charity-trustees because the trustees had no right to indemnify themselves from the trust funds to pay for their wrongful acts. These cases accepted that the trustee indemnity principle applied to charitable (public) trusts like they did to beneficiary (private) trusts. In *Heriot's Hospital*, for example, Lord Campbell said:

It seems to have been thought, that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, and justice, and common sense... Damages are to be paid from the pocket of the wrong-doer, not from a trust fund.<sup>47</sup>

Everyone who has considered the issue (including the critics<sup>48</sup>)

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<sup>40</sup> John Mowbray et al., eds., *Lewin on Trusts*, 17<sup>th</sup> ed. (London: Sweet & Maxwell, 2000) at 1-24 says "public trusts and charitable trusts may be considered in general as synonymous expressions" and H.G. Hanbury and R.H. Maudsley, eds., *Modern Equity*, 13<sup>th</sup> ed. by Jill E. Martin (London: Stevens & Sons, 1989) at 372 say "[c]haritable trusts are public trusts".

<sup>41</sup> *Bennett v. Wyndham* (1862), 4 De G.F. & J. 259 (C.A.).

<sup>42</sup> (1897), 26 S.C.R. 282.

<sup>43</sup> (1929), 63 O.L.R. 428(C.A.).

<sup>44</sup> *E.g. Staniar v. Evans* (1887), 34 Ch. D. 470; In *Re Raybould*, [1900] 1 Ch. 199. (1839), 7 E.R. 934 (H.L.).

<sup>46</sup> (1846), 8 E.R. 1508 (H.L.).

<sup>47</sup> *Ibid.* at 1512.

<sup>48</sup> *E.g. Waters, supra* note 2 at p. 205; Youdan, *supra* note 2 at p. 6.

accepts that the doctrine of charitable immunity is no more, having been laid to rest by *Mersey Docks and Harbour Board Trustees v. Gibbs*.<sup>49</sup> They disagree, however, on what it means to reject charitable immunity. This disagreement manifests itself over the answer to the question of whether the trustee indemnity principle applies to trustees in respect of property they hold for public purposes as it does to property they hold for persons. This question has led to two different answers, supported by five different theories leading to three different results. No wonder the debate is so hard to understand and resolve! Before considering these answers and theories, though, we first need to understand why the trustee indemnity principle exists in the first place. Then we can analyse the various theories advanced by the critics and in the judgments of Blair J. and the Court of Appeal to determine if the trustee indemnity principle is or should be applied to property held in trust for charitable purposes.

### *B. What is the Basis of the Trustee Indemnity Principle?*

Under the law of debtor and creditor, a creditor can seize any of the debtor's property subject to the superior rights of any other person, such as a person with equitable property rights in the same asset. As the Court of Appeal for Ontario said:

It is the duality of ownership which compels the rule in debtor/creditor law that where a trustee is subject to a judgment obtained in respect of an act done in his or her personal capacity and not in connection with the administration of the trust, the property held by the trustee not for him or herself but for the beneficiaries of the trust is not answerable for the personal debts of the trustee...<sup>50</sup>

This genuine duality of ownership interests explains why the immunity rule exists. A creditor of a trustee ordinarily does not have recourse against the property the trustee holds in trust for the beneficiary because this property is, effectively, the beneficiary's property.<sup>51</sup> Since the beneficiary's equitable rights are superior to the trustee's legal rights, the beneficiary's rights are also superior to any claim which the trustee's creditors have to the property held by the trustee for the beneficiary. Therefore, a court exercising equitable jurisdiction will grant an order to prevent a creditor of a private trustee from seizing the trust property in

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<sup>49</sup> [1861-73] All E.R. Rep. 397 (H.L.).

<sup>50</sup> Court of Appeal, *supra* note 1 at para 53.

<sup>51</sup> Although beneficial property interests, strictly speaking, are not *in rem* rights, they are effectively proprietary because a court exercising equitable jurisdiction will grant a remedy to protect a beneficiary's interests in an asset against everyone but an innocent purchaser for value and without notice of the beneficiary's interests. See *Snell's Equity*, 30<sup>th</sup> ed. by John McGee (London: Sweet & Maxwell Ltd., 2000) at para. 2-02; *Lewin on Trusts*, *supra* note 40 at para. 1-20.

satisfaction of the trustee's personal debts. As a corollary, the court will not permit the beneficiary's creditors to have access to the trustee's personal property. On the other hand, because a beneficiary has equitable property rights in the trust property, a court of equity will also make an order to ensure that the beneficiary's creditors have recourse against this property.<sup>52</sup> The immunity rule therefore exists because the trustee and the beneficiary have distinct and separate property interests and consequently they and those who deal with them or claim through them are subject to the same interests.

The trustee indemnity principle arises out of the fact that sometimes the trustee incurs a liability that is properly the beneficiary's liability but for which the beneficiary cannot be held responsible because he does not have any legal or equitable relationship with the creditor. In this case, a court of equity will permit the trustee, who is directly liable, to pay for this liability from the assets he holds in trust. Generally the liabilities for which the trustee can obtain an indemnity are contractual but they can also be tortious. *Bennett v. Wyndham*<sup>53</sup> is an example of a case where the trust fund was made liable to pay for the trustee's tortious liability. Therefore, where the beneficiary incurs liability *directly* to a creditor, a court of equity will allow the creditor *directly* to attach the property held in trust to pay the beneficiary's debt. Where the beneficiary incurs liability *indirectly*, through the trustee's actions on his behalf, a court of equity will allow the trustee, who is *directly* liable to the creditor, to indemnify himself from the trust property and the court may also allow that creditor to attach the property *indirectly* by subrogating himself to the trustee's right of indemnity.

If the trustee indemnity principle did not exist then some liabilities incurred on behalf of a beneficiary could not be satisfied from the beneficiary's assets. Some of the beneficiary's assets would be immune from his liabilities, in other words. A beneficiary's interest in assets held in trust for him, for example, would be immune from liabilities the trustee incurred for his (beneficiary's) benefit. This follows from that fact that since the people dealing with the trustee have a legal relationship only with the trustee himself, they can look only to the trustee for payment of liability owed them by the trustee. The fact that the trustee is acting as a trustee when incurring liability to those people does not give those people any claim against the beneficiary. Generally a trustee has no contractual relationship with the beneficiary entitling the trustee to an indemnity or reimbursement. And generally a trustee acts without the beneficiary's

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<sup>52</sup> Through equitable execution. *Ideal Films, Ltd. v. Richards*, [1927] 1 K.B. 374 (C.A.); see also C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1995) at pp. 414-439.

<sup>53</sup> *Supra* note 41.

consent. Thus, absent the indemnity principle, a trustee will rarely have recourse against the beneficiary for liabilities the trustee has incurred on the beneficiary's behalf. Consequently the indemnity principle operates in equity like an agent's right of indemnity from his principal operates in law.

The trustee indemnity principle makes perfectly good sense in the context of a trust of property for a beneficiary. The rule of immunity ensures that the trustee's and beneficiary's interests in the property are kept separate and the indemnity principle ensures that their liabilities are kept separate too. As a result, the property held in trust is always available to pay the beneficiary's direct or indirect liabilities but is never available to pay the trustee's. However, when one wishes to apply the immunity rule and the trustee indemnity principle to property held in trust for charity, one is immediately confronted with this problem: *a public trust does not have any beneficiaries.*

As explained by the Privy Council, the essence of a charitable trust is that it is a trust for the promotion or advancement of social purposes rather than a trust for individual beneficiaries.<sup>54</sup> This is the defining characteristic of a charitable or public trust after all. Through the use of a public trust property is conveyed *for purposes not to persons*:

When a testator creates, or purports to create, a new charitable trust, in contra-distinction to making a gift to an existing charity, he does not seek to confer a beneficial interest on any person. He seeks to dedicate part of his estate to a purpose and, in legal theory, the Sovereign, as *parens patriae*, has the right to compel a testator's personal representatives to set aside the assets directed or required to meet that purpose.<sup>55</sup>

Although it is true that members of the public will ultimately derive a benefit from property held on a public trust, neither the public nor anyone else, such as the Crown, is a beneficiary of the property held on such a trust.<sup>56</sup> As Harman J. said:

To state the matter in that way [that the public at large are the beneficiaries of a charitable purpose trust] to my mind shows up as a *reductio ad absurdum* the nonsense of alleging that there is any beneficiary in any meaningful sense of that word under a public charitable trust of that nature. It seems probable to me that in almost all charitable trusts there are no individual beneficiaries...No 'right' properly so-called ever vests in any member of the public individually under a charitable trust. Equally plainly, nobody has a property right under a public charitable trust and nothing can be said to vest in them at any date, present or future.<sup>57</sup>

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<sup>54</sup> *Latimer v. The Commissioner of Inland Revenue*, [2004] U.K.P.C. 13 (Lord Millett at para 29).

<sup>55</sup> *Re Belling*, [1967] Ch. 425 at 432 (Pennycuik J.).

<sup>56</sup> *Latimer*, *supra* note 54.

<sup>57</sup> *A-G v. Cocke*, [1988] 2 All E.R. 391 (Ch. D.) at 394 (Sir Jeremiah Harman J.).

Moreover, the Crown's power to enforce trust duties in the public interest does not make the Crown a beneficiary either. The Crown's property interest in charitable property arises only when the property is *bona vacantia* or is given simply "to charity". In the first of these cases, the Crown's property interest is not encumbered by a trust and in the second of these cases the Crown's property interest arises as constitutional *trustee*, not as a beneficiary.<sup>58</sup>

For this reason, then, the theories that underlie the various arguments about whether or how the trustee indemnity principle should be applied to charitable trusts have to come to grips with the differences between trusts for people and trusts for social purposes. Some theories deal with these differences by disregarding them and others by differentiating them. The Court of Appeal differentiates between them, for instance. Waters' disregards them. Indeed, he finds it "puzzling" that the Court of Appeal would differentiate between private and charitable (public) trusts when considering the indemnity and subrogation rights of trustees.<sup>59</sup> As one might imagine, how these theories treat the differences between purposes and people leads to very different results for the creditors of those harmed by the tortious misconduct of charitable trustees.

### *C. Theories, Theories Everywhere*

#### *The trustee indemnity principle applies to charitable trusts*

Cullity, Waters, and Davis argue that the trustee indemnity principle applies equally to property held in trust for charitable purposes as it does for property held in trust for a beneficiary. Their arguments, though, are based on three different theories of when, if ever, property held in trust for charitable purposes can be used to pay the trustee's liabilities. One or more of these theories underlie all trust-based arguments for rendering charitable property immune from tort claims, and therefore it is convenient to address these theories by seeing how they underlie the respective arguments of these authors.

Cullity's argument is that a creditor can only attach property which his debtor owns *beneficially*. The argument holds that the debtor-trustee becomes a beneficial owner of the trust property only when the right of indemnity exists. Otherwise, a trustee has no beneficial interest in the trust property:

Moreover, as the trustee is not the beneficial owner of the trust assets, creditors and other parties with whom the trustee contacts can only have recourse to the trust assets by way

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<sup>58</sup> Halsbury's *Laws of England*, 4<sup>th</sup> ed. (2001 reissue), Vol. 5(2), at para. 457.

<sup>59</sup> Waters, *supra* note 2 at p. 206.

of subrogation to the trustee's right of indemnity...The limited immunity to which I referred follows inexorably from the fact that a trustee does not own the trust property. The beneficial interest of the trustee *qua* trustee is limited to, and coextensive with its right of indemnity out of such property.<sup>60</sup>

This argument is thus based on the negative proposition that unless a Court of Equity accepts that the debtor owns the relevant property then that property cannot be used to pay the debtor's liabilities.

Attractive though it sounds, this argument is based on the idea that property held on a charitable trust is not really owned at all because this property has no beneficial owner. By definition, the trustee is not a beneficial owner. By definition the trust purpose is not a beneficial owner either. Since only the beneficial owner's property can be used to pay for his liabilities, property that has no beneficial owner is rendered completely immune from tort liability. Therefore, the logical (and practical) result of Cullity's analysis is that property held in trust for charitable purposes can *never* be used to pay tort liability.<sup>61</sup> Accepting this argument, then, means that property held in trust for social purposes is completely immune from tort liability. Thus, this argument is simply the doctrine of charitable immunity expressed in the terminology of property rights.

Waters, like Cullity, argues that the trustee indemnity principle applies to property held on a charitable trust:

Whether the trust fund may be looked to for damages awarded to the creditor depends upon the trustee's indemnity rights from the fund—rights to which the creditor is subrogated. Subject to the trust document's provisions otherwise, the trustee may recover damages awarded against him or her from the trust if, but only if, the trustee was not acting in breach of trust when the trustee incurred the obligation to the creditor.<sup>62</sup>

The consequence of Waters' argument, like Cullity's, is that property held in trust for charitable purposes is fully immunised from any liabilities that arise out of the charitable trustee's breach of trust, such as his tort liabilities in most circumstances. Waters supports his argument with a different theory than Cullity does, though. Whereas Cullity's theory was based on the negative proposition that unless the right of indemnity applies a trustee never owns the trust property and thus neither he nor his creditors can use it to pay his debts, Waters' theory is based on the positive proposition that charitable property is owned by the trust purpose as if it were a person-beneficiary and thus can be used only to pay the *purposes'* liabilities. Water's expresses this concept most clearly when he says that

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<sup>60</sup> Cullity, *supra* note 2 at pp. 25-26.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Supra* note 2 at 206.

the assets of charitable trusts are:

notionally “owned” by the purpose or purposes of that trust, and therefore cannot be seized by creditors whose claims arise out of activities in furtherance of other purposes. (If “purposes” are thought of as “beneficiaries”, it is easier to understand the ownership here.).<sup>63</sup>

In other words, since a trustee has no right to pay his debts from property that is owned by someone else—a beneficiary in the case of a private trust and the “purpose” in the case of a charitable trust—property held on a charitable trust is immune from the trustee’s personal liabilities, such as his tort liabilities. The other side of this proposition, though, is that a creditor of a charity trustee can use the trust property to pay for liability arising out of the purposes of the charitable trust in the same way as a trustee can indemnify himself for liability he incurs at the behest of a beneficiary. Waters’ theory thus endows the charitable purpose with the same rights and liabilities as a person-beneficiary.

Finally, Davis’ argument is that when the House of Lords rejected charitable immunity in *Mersey Docks and Harbour Board Trustees v. Gibbs*<sup>64</sup> their Lordships were actually *extending* the trustee indemnity principle to permit charity trustees to indemnify themselves for wrongful conduct arising out of the “purposes” of the trust, but not otherwise:

A crucial feature of the decision in *Mersey Docks* is that the plaintiffs sought to recover funds held for the same purposes that the trustees were pursuing when they harmed the plaintiff. Therefore, this decision stands for the proposition that assets held subject to charitable trusts are available to satisfy claims that arise from actions taken by the trustees in the course of pursuing the trust’s purposes.<sup>65</sup>

Applying the trustee indemnity principle to charitable trusts in this way means that before property held in a charitable trust can be used to pay a creditor’s claims, the creditor must demonstrate how the charitable purpose was furthered by the tort—a logically impossible task as the analysis earlier in this paper shows. Unlike Cullity’s and Waters’ arguments, however, Davis’ is not directly based on any theory of trust law.<sup>66</sup> Rather, it is based on his (mis)reading of *Mersey Docks and Harbour Board Trustees v. Gibbs* and on the proposition that that decision did not set aside the immunity principles advanced in *Duncan v. Findlater*<sup>67</sup> and *Feoffees of Heriot’s Hospital v. Ross*.<sup>68</sup>

<sup>63</sup> *Ibid.* at p 205.

<sup>64</sup> *Supra* note 49.

<sup>65</sup> Davis, *supra* note 2 at p 431.

<sup>66</sup> Although indirectly it is based on the same theory as Waters’ argument.

<sup>67</sup> *Supra* note 45.

<sup>68</sup> *Supra* note 46.

*The trustee indemnity principle does not apply to charitable trusts*

It might surprise you to be told that both Blair J. and the Court of Appeal for Ontario agree that the trustee indemnity principle, which is applicable to private trusts, does not apply to charitable trusts. Since their respective judgments are based on diametrically opposite theories of why this is so, however, the judgments lead to completely different results.

Blair J. reviewed the history of the doctrine of charitable immunity and concluded that the doctrine had been set aside in Great Britain over 140 years ago by the House of Lords in *Mersey Docks and Harbour Board Trustees v. Gibbs* and had never found a home in Canada.<sup>69</sup> His Honour concluded, however, that the rejection of charitable immunity applied only to the charitable enterprise itself, and not to the assets, if they were held on trust. Accordingly, His Honour held that a charitable enterprise is not immune from tort liability for the reason only that its objects are charitable, but that its assets might be immune, depending on how they are held.

At the asset level, Blair J. accepted that under normal debtor and creditor principles a charity can use all property it holds for its charitable purposes to pay its liabilities, except for property it holds in trust for charitable purposes. His Honour recognised, though, that applying the trustee indemnity principle to property held by a charity in trust for charitable purposes would lead to full immunity in the property. Therefore, he refused to apply the charitable indemnity principle to property held in trust for such purposes:

In spite of the accepted proposition of debtor/creditor and insolvency law that property held in trust is not normally available to satisfy personal judgments against the trustee [citing *Jellet v. Wilkie*<sup>70</sup> and *Kimniak v. Anderson*<sup>71</sup>], however, I do not accept that charitable purpose trust property in the hands of a charitable corporation may never be exigible at the instance of judgment debtor tort victims with legitimate claims against it ...In fact, I hold to the contrary.<sup>72</sup>

In his reasons, Blair J. explains that he had considered extending the trustee indemnity principle from the law of private trusts to encompass liabilities incurred by a charity trustee in tort, but rejected this solution in favour of the direct attachment of the trust property by those injured by the torts of the trustee.<sup>73</sup> He reached this conclusion because direct attachment

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<sup>69</sup> Blair J. *supra* note 1 at pp. 386e-389c.

<sup>70</sup> *Supra* note 42.

<sup>71</sup> *Supra* note 43.

<sup>72</sup> Blair J., *supra* note 1 at p. 390d.

<sup>73</sup> "A direct approach to the attachment of trust property is preferable." *ibid.* at p. 400e.

was fairer to the tort creditor:

Do these principles [the trustee indemnity principle] fit, and does this rationale apply, however, when the trust objects are a charitable *purpose* (as opposed to person beneficiaries) and when the claim is against the trustee not in relation to the trustee's personal or other affairs, but in relation to the wrongs done—for which the trustee is liable—in the context of the charitable purpose itself? In my view, they do not. The liability of the trustee is not something that arises extraneous to the trust; rather, it is embedded in the furtherance of the charitable purposes in question. I can think of no legal, equitable or policy reason why the trust property should not be exigible in such circumstances. To hold that the trustee is personally liable only—and leave it to the trustee to attempt to claim indemnity from the trust—is of little comfort to the tort victims with legitimate claims where the trustee's own assets are insufficient to compensate for the claims.<sup>74</sup>

The rule that Blair J. created to permit the direct attachment of charitable trust property was the rule discussed earlier in this paper: property held in trust for charitable purposes is exigible only for a wrong that was “perpetrated within the framework of the particular charitable purpose in question...”<sup>75</sup>

In spite how Blair J.'s decision reads, however, it is not really a decision about the trustee indemnity principle at all. It is really a decision about the immunity rule. Since exigibility is the opposite of immunity, His Honour's rule for determining when property that is held in trust for charitable purposes can be used to pay tort liability (is exigible for such liabilities, in other words) is equally a rule about when such property cannot be so used (when the property is immune, in other words). Blair J.'s rule of exigibility, then, is just a modification of the immunity rule. In this modified form, the immunity rule prohibits access to property held on a charitable trust by all creditors except for those whose claims arose out of the furtherance of the purpose for which the property its held. In other words, His Honour accepted that when dealing with property held in trust for charitable purposes, immunity is the rule and exigibility is the exception. Property held in trust for charity is immune from the trustee's tort liabilities, except in those circumstances delineated by Blair J. His Honour established those circumstances by applying his equitable jurisdiction (because trusts are creatures of equity) and public policy.<sup>76</sup>

Blair J.'s judgment is thus based on three assumptions. The first is that the rejection of the doctrine of charitable immunity applies to the charitable enterprise, and not also to its assets. The second is that the

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<sup>74</sup> *Ibid.* at p. 399c-f.

<sup>75</sup> *Ibid.* at p. 400f.

<sup>76</sup> *Ibid.* at p. 397g-398f.

immunity rule applies only to charitable trusts like it applies to private trusts. And the third is that in order to give tort creditors any access to property held on trust for charitable purposes, a court has to use its equitable jurisdiction and public policy to fashion a new rule permitting such access. In reversing Blair J.'s decision, the Court of Appeal rejected these assumptions.<sup>77</sup>

The Court of Appeal explained that Blair J. had failed to recognise that when the law rejected charitable immunity it rejected its application both to the enterprise and to its assets, and in doing so also rejected all theories based on trust law which had the effect of immunising charitable property from tort liability:

In other words, the question of charitable immunity was not raised and resolved as a hollow issue addressing only whether judgment could be registered against a charitable corporation or Board of Trustees. The immunity issue addressed and decided that the funds of the charity, held by the board or by the corporation as the case may be, are available to satisfy the tort claims. The fact that they may be held on charitable trusts by the trustees, does not make those funds immune from execution.<sup>78</sup>

The Court of Appeal reached its decision, as had Blair J., by reviewing the history of the doctrine of charitable immunity and explaining the implication of the doctrine's rejection for property held in trust for charitable purposes. Like Blair J., the Court of Appeal accepted that the doctrine of charitable immunity had been rejected in Great Britain by *Mersey Docks and Harbour Board Trustees v. Gibbs* and had never formed part of the law of any Canadian jurisdiction.<sup>79</sup> Unlike Blair J., however, the Court of Appeal recognised that charitable immunity arises out of a misapplication of the immunity rule of private trusts to public trusts, which, when applied to a public trust, leads to full immunity for the property held in trust.<sup>80</sup> Once this error was recognised then it was easy to see that all property held and used by a charitable enterprise for its charitable activities is fully exigible for the enterprise's tort liabilities, whether or not it holds the property in trust for some or all of its charitable objects. As explained by the Court of Appeal:

The courts in England and Canada have fully considered the issue of whether the fact that the charity trustee hold the charity's funds in trust, means that those funds are required to be used only directly for the charitable purposes for which they are held, and not indirectly to compensate tort victims for wrongs done in the operation of the charity.

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<sup>77</sup> Court of Appeal, *supra* note 1 at para. 28.

<sup>78</sup> *Ibid.* at para 43.

<sup>79</sup> *Ibid.* at paras. 29-40.

<sup>80</sup> For the same reasons that apply to Cullity's theory, discussed above, in the text accompanying note 2.

Our courts have firmly rejected the “trust fund theory” of immunity which had earlier been articulated by Lord Cottenham in the *Duncan, supra*, and *Heriot’s Hospital, supra*, cases.<sup>81</sup>

*The rejection of charitable immunity, then, is a rejection of the application of the immunity rule of private trusts to property held in trust for charitable purposes.* Consequently, the trustee indemnity principle has no application to property held in trust for charitable purposes because this principle is an exception to a rule which itself does not apply to trustees of charitable property. If the rule does not apply, logically the exception to the rule cannot apply either. It is otiose. Since Blair J.’s rule of exigibility simply replaced the trustee indemnity principle with a modified immunity rule, Blair J. had let in by the back door a rule that had been rejected at the front:

With respect to Blair J., in my view he erred by proceeding to answer the second question, whether the assets of a charity are exigible to satisfy tort claims, by analyzing that issue separately, embarking on a trust analysis of the way charities hold their assets. In my view, by doing so he simply re-addressed the same immunity issue by asking the question in a different manner.<sup>82</sup>

It is for this reason that both Blair J. and the Court of Appeal can agree that the trustee indemnity principle does not apply to trustees holding property in trust for charitable purposes, but reach very different conclusions about why this is so and also reach very different conclusions about what this means to the creditors of a charitable trustee.

### *V. Setting Aside the Straw Men*

#### *A. There is no Magic in the Word “Trust”*

Those who say that trust law prevents a tort victim from attaching property held on a charitable trust do so for reasons of ownership. They say that the person who holds property in trust for a charitable purpose does not own the property, either because the property is really un-owned (e.g. Cullity) or because it is really owned by the charitable purpose (e.g. Waters) and therefore the property cannot be used to pay for damage caused by the torts this person commits. To the extent that some people say that trust law permits a tort victim to attach property held on a charitable trust, they do so for reasons of ownership as well. They implicitly follow Waters’ theory and say that because the “purpose” really owns the property the property can be liable only for its own torts. Trust law, then, is being used as a type

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<sup>81</sup> Court of Appeal, *supra* note 1 at para. 42.

<sup>82</sup> *Ibid.* at para 44.

of shorthand to encapsulate the rights and liabilities applicable to property held in trust for charity based on an analogy with the rights and liabilities applicable to property held in trust for a beneficiary. The analogy treats the charitable purpose like a beneficiary, which of course is a fiction.

One should be suspicious whenever legal analysis relies too heavily on analogies and fictions. When a lawyer or judge uses an analogy he is relying on a legal principle that does not directly apply to a situation to explain a result (for example, the statement I made above—that the trustee indemnity principle is like an agent's right of indemnity from his principal—is an analogy: I am analogising a principle in equity to a rule of law). Although analogies often have explanatory power, one has to guard against applying the analogy as if it were the idea itself (for example, you can not take from my analogy that any principles from the law of agency apply or have anything to do with the trustee indemnity line of cases).

Legal fictions are more dangerous still. By using a legal fiction a judge (lawyers don't get to use them!) applies principles that have nothing whatever to the problem in order to resolve it. For example, quasi-contract is a fiction. At one time courts attempted to explain the remedies that operated to prevent unjust enrichment by using the fiction of a contract. But the fiction quickly led to anomalous results, such as decisions denying the remedies available under quasi-contract to cases based on facts that could not have supported an actual contract.<sup>83</sup> It took many years before courts found their way out of the thicket of improbable and unfair results caused by using the fiction of a contract to explain a remedy that had nothing to do with an agreement or bargain. The same thing happened to corporations with charitable objects. For many years courts analogised these corporations to charity trustees and treated these corporations like they were trustees of their property for their corporate-charitable objects. The doctrine of charitable immunity arose out of the use of similar analogies and fictions in the early 19<sup>th</sup> century.<sup>84</sup>

For this reason, therefore, it is not particularly helpful to base an analysis of public trusts around analogies with private trusts. Indeed, it is harmful to clear thinking to base an entire body of legal reasoning around an analogy, which is what one does by treating a charitable trust like a beneficiary trust. It leads to absurd conclusions, like positing that fiduciary duties can be owed to trees or that concepts can own property. In fact, there are only two reasons to analogise a trust for purposes to a trust for persons. One reason is out of the habit of seeking an analogy to an express private trust when considering the trust concept at all. This is just sloppy thinking.

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<sup>83</sup> *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.) at 415, 417 (Viscount Haldane).

<sup>84</sup> Some of this law is described Cullity, *supra* note 2 and in David R. Wingfield, "The Short Life and Long After Life of Charitable Immunity in the Common Law" (2003), 82 Can. Bar Rev. 315.

The other reason is because one wants to protect a trust purpose like the property interests of a beneficiary are protected. As we will see later, this is a policy argument dressed up like a legal one.

The reason why one cannot automatically look to the law applicable to express private trusts for the answer to every question involving the trust concept is because the word “trust” is used in many different contexts for many different things, only some of which are based on express private trusts. That is why, as pointed out by *Lewin On Trusts*<sup>85</sup> (and most other leading texts on trusts), “[t]rusts are easier to describe than to define”. In *Kinloch v. Secretary of State for India* the House of Lords said “there is no magic in the word ‘trust’. In various circumstances, it may mean many things...”<sup>86</sup>

The word “trust” can describe the formal requirements that have to be met to enable a person to convey property to a person whom the transferor does not want to receive legal title or who could not hold legal title – an express trust. The word can describe the circumstances that will permit a person who conveyed property in law to get it back in equity – a resulting trust. The word can describe the circumstances that will permit a court to impose on a person the obligation to hold for and to convey property to someone else – a constructive trust. The word can describe a type of property, as in, “John has a trust”. Finally, the word can describe the obligations that rest upon the person described as a “trustee.”<sup>87</sup>

The word “trustee,” in turn, can describe a person who has legal or, in some cases, equitable, title to property which must be held for the benefit of someone else, even though the particular duties of that person can vary depending on the circumstances that led his becoming a trustee. For example, a trustee under an express trust will normally have more extensive duties than a person on whose property a constructive trust has been imposed. The word “trustee” can also describe a person who has duties of good faith but who otherwise has no legal or equitable property rights to the asset in relation to which the person is described as a trustee. For example, for many years, directors of companies were described as trustees despite their not holding any title to the corporate property.<sup>88</sup>

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<sup>85</sup> *Supra* note 40 at p. 1-01.

<sup>86</sup> (1882), 7 App. Cas. 619 (H.L.) at 630.

<sup>87</sup> From *In re Scott*, [1948] S.A.S.R. 193 at 196 (Mayo J.) cited in *Lewin on Trusts*, *supra* note 40 at para. 1-02.

<sup>88</sup> *Palmer's Company Law*, 12<sup>th</sup> ed. by A.F. Topham and A.R. Llewelin-Taylor (London: Stevens and Sons, Ltd., 1924) at 189. Since that time it has been accepted that directors are fiduciaries, not trustees: *Re City Equitable Life Insurance Company, Limited*, [1925] Ch. 407 at 426 (Romer J.) and L.C.B. Gower, *Gower's Principles of Company Law*, 6<sup>th</sup> ed. by P.L. Davies and D.D. Prentice (London: Sweet & Maxwell, 1997) at p. 598. In *Selangor United Rubber Estates (No.3) v. Craddock*, [1968] 2 All

Conversely, an executor of an estate in the course of administration is not a trustee despite having only nominal legal title because no one, including the executor, has any beneficial title to the property in administration and thus no separate equitable ownership rights exist.<sup>89</sup>

In each of these cases, the words “trust” or “trustee” describe different aspects of the body of law comprehended by the trust concept.<sup>90</sup> It is therefore not possible to describe any particular jural relation merely by calling it a “trust” or a person a “trustee”. Indeed, it can be quite misleading to do so, as the above examples demonstrate. For this reason it is neither theoretically nor empirically sound to conclude that any particular legal consequence arises merely because a person is affixed with the label “trustee” or property is affixed with the label “trust property”. Context matters.

### *B. There is Magic in Ownership, However*

We are trying to determine if a creditor with a tort judgment is prevented from executing against property held by the debtor as trustee for a charitable purpose on the grounds that, because the property is held in trust, the debtor does not really own it. Since the trust concept has given so much trouble in this context, we should go directly to the root concept, ownership, and discuss the creditor’s rights by reference the rights and liabilities of ownership.

The incidents of ownership in the common law world were described in 1961 by A.M. Honoré, in his article “Ownership”<sup>91</sup>. This is accepted, in the academic literature at least, as the seminal word on the subject.<sup>92</sup> The incidents of ownership consist of 11 things relating to an asset, either corporeal or incorporeal. They are as follows:

- (1) The right to possess;
- (2) The right to use;

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E.R. 1073 at p.1092, however, Ungoed-Thomas J. accepted that directors are trustees for the benefit of the company’s property under their control, though not “identically with trustees of a will or marriage settlement.”

<sup>89</sup> *Ayerst (Inspector of Taxes) v. C. & K.(Construction) Ltd.*, [1976] A.C. 167 (H.L.) at 178 (Lord Diplock).

<sup>90</sup> Tony Honoré, *The South African Law of Trusts*, 3<sup>rd</sup> ed. (Cape Town: Juta, 1985) at §1.

<sup>91</sup> Found in A.G. Guest, ed, *Oxford Essays in Jurisprudence: a collaborative work* (Oxford: Clarendon Press, 1961).

<sup>92</sup> The philosophical basis of property rights is also usefully explained in Lawrence C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul Ltd, 1977); see also, David Lametti, “The Concepts of Property: Relations through objects of Social Wealth”(2003) 53 U.T. L. J. 325.

- (3) The right to manage;
- (4) The right to the income;
- (5) The right to the capital;
- (6) The right to security;
- (7) The power of transmissibility;
- (8) The absence of term;
- (9) The prohibition on harmful use;
- (10) Liability to execution; and
- (11) Residuary character.<sup>93</sup>

There are three things about ownership that are important to our discussion.<sup>94</sup> The first is that all of these incidents must be owned by some one or combination of people. Just as nature abhors a vacuum, the law abhors any “gap” in ownership. The law of property and especially the body of law relating to future interests is dependent on this principle. Property law is complicated because of the various ways in which ownership can be divided and subdivided between people and it is made even more complicated when equitable interests are engrafted onto the legal. But no matter how complex things get, there is *always* a person in whom one or more of these incidents is (or will be) vested and there is *never* an incident of ownership that remains (or will remain) unvested. This is probably the most significant aspect of ownership for the purposes of our discussion, at least. For it is because of this reason that some identified or identifiable person must always have the right to possess an asset, the right to the capital represented by it or the right to income from it, and all other incidents of ownership as well.

Some incidents of ownership are not rights of ownership, however. Instead they are the opposite: liabilities of ownership. Liability to execution, is one such example, and the most crucial for our purposes. An owner of property is liable to have his rights of property taken from him to pay for his liabilities. If his interest consists only of the right to the income of an asset, this right is exigible by his creditor. If his interest consists only of the right to the capital of some thing this right is exigible by his creditor. If his interest consists only of the right to possess, this right is exigible by his creditor. If his interest consists of all three rights, then combined they are exigible for his debts too. The legal system does not permit a person to be liable for a debt but allows his property to be immune from being attached to pay for that liability. Were any rights of property immune from

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<sup>93</sup> This list is taken from Becker, *ibid.* at p. 19 but is derived from Honoré’s analysis.

<sup>94</sup> When considering these issues, and property rights generally, it is useful to keep in mind the logical system for describing legal relations developed by Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions: as Applied in Judicial Reasoning*, edited by Walter Wheeler Cook (New Haven: Yale University Press, 1919).

being attached to pay the liabilities of the right-holder (i.e. the owner) then there would be a gap in property. The property would not be fully owned.

The second thing is that the incidents of ownership are independent of each other. This is so whether the juridical source of a right is legal or equitable. Therefore, one cannot determine what the content of any particular right is from the content of any other right or from its source in either law or equity. The specific content of any right of ownership can thus be known only empirically, not *a priori*. We know this instinctively when we are dealing with legal property interests, for instance. If a lawyer is asked by someone with legal title to Whiteacre to describe his property rights in Whiteacre, the lawyer cannot give an answer without knowing the factual context surrounding that person's interest and by considering the various incidents of ownership in relation to that context (maybe the person has only a life interest, or maybe he owns it in fee simple, or maybe his ownership consists of the reversion after a long-term lease). This is also the case even if the ownership interest arises in equity, although the analysis is necessarily complicated by the existence of the legal and equitable interests. If all you know is that Mr. Tipple is the trustee and Mr. Bloggs is the beneficiary and that Whiteacre is the asset, for example, you still need to know the factual context before you can determine how any of the incidents of ownership in relation to Whiteacre are divided between Messrs. Tipple and Bloggs, and hence what their respective property rights in Whiteacre are. You cannot know from just this description, for example, whether Mr. Tipple is the trustee of the capital or income or both of Whiteacre.

Therefore, when one wants to know what property is available to pay either Mr. Blogg's or Mr. Tipple's debts, one must seek the answer in empirical inquiry, not theoretical analysis. Again by way of illustration, if you wanted to know to what extent Mr. Blogg's property is liable for debts incurred by Mr. Tipple, it is of no help whatever just knowing that Mr. Tipple is the trustee and Mr. Bloggs is the beneficiary and that Whiteacre is the asset subject to the trust. The relationship between Messrs Tipple and Bloggs could be that of a bare trustee and beneficiary, for instance, where the beneficiary is treated like a principal at law and the trustee is treated like an agent.<sup>95</sup> In that case, all of Mr. Blogg's assets are liable for debts Mr. Tipple incurred on his behalf, and not simply his interest in Whiteacre. Conversely, the relationship could be a paradigmatic trust-beneficiary relationship. In that case, only Mr. Blogg's interest in Whiteacre is liable for Mr. Tipple's debts and then only to the extent of the trustee indemnity principle described above. On the other hand, the trust deed could specify that Mr. Tipple's interest in Whiteacre extends to his using it to pay some

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<sup>95</sup> *Trident Holdings Ltd. v. Danand Investments Ltd. et al.* (1988), 64 O.R. (2d) 65 (C.A.) at 73-74, 77 (Morden J.A.).

of his liabilities, even those that would not ordinarily be recoverable by him out of Whiteacre pursuant to the trustee indemnity principle.

The third thing that has to be noticed is that these elements do not include a “purpose.” The purpose for which property is owned or the use to which it is put is not one of the incidents of ownership. A purpose or use is an object of ownership only. For this reason, a purpose is not and cannot be treated as a property right or as a negative aspect of a right of ownership. A “purpose” cannot be affixed to an asset, like a brand, restricting the lawful use to which the property can be put by any one who happens to own it only to that purpose. For example, although the farm in our hypothetical example describes a parcel of land by its use as a farm, in reality, the farm consists of rights of ownership to a parcel of land which can be used for any lawful use for which it is by nature capable. It could be used as a site for constructing a factory, for instance, or turned into building lots, or dug up in order to extract minerals, or left fallow.

### *C. Property does not Always Have to Have an Owner in Equity too*

When one argues, as Cullity does for instance, that a trustee’s creditors can attach only the trustee’s *beneficial* interest in the trust property one is really making an argument about ownership. The argument is based on the idea that only rights of ownership recognised in equity matter. Following the logic of the argument, then, the only property rights that are exigible are those that are owned beneficially. Consequently, if there is no owner of the beneficial interest, then the property is immune from being seized to pay any debts.

Most lawyers would intuitively agree with this argument. If we dig deeper into the ownership concepts that support this argument, however, we can see that the argument gets the law backwards. The correct proposition is this: the incidents of ownership recognised in law govern *unless* equity recognises different incidents in the same or different people. After all, equitable estates can and do merge in legal estates leaving the legal property interests intact but eliminating the equitable ones. This merger can affect third parties whose rights would be different were the equitable estate to continue.<sup>96</sup> For this reason, a trustee’s creditors can attach the trustee’s legal interest in property *unless* a Court of Equity says otherwise. A Court of Equity will say otherwise if the property is held in trust for a beneficiary (the immunity rule). A Court of Equity will not say otherwise, though, if the property is held in trust for charitable purposes. In that case Equity watches from the sidelines as the creditor asserts his rights against the trustee’s legal ownership in the charitable property. That this is so is beyond debate. The Court of Appeal confirmed that this has been the

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<sup>96</sup> E.g. *Re Douglas* (1884), 28 Ch. D. 327.

law for over 140 years. As a matter of legal empiricism, the Court is unquestionably correct.<sup>97</sup> This section of the paper explains why this result must be theoretically correct too.

The common law and equity have been administered by one court since the *Supreme Court of Judicature Acts* of 1873 and 1875 in England<sup>98</sup> and their counterparts in other common law jurisdictions.<sup>99</sup> This administrative fusion<sup>100</sup> allows lawyers and judges to resolve a problem involving legal or equitable claims by going immediately to the controlling proposition, whether its source is law or equity, rather than going through the exercise of asking what the position is at law and what the position is in equity before determining what the answer to the question is, and whether the court in which the question is raised has the jurisdiction to give the correct answer.<sup>101</sup> Nevertheless, this fusion has not changed the relationship of law and equity. As a matter of jurisdiction, equity and equitable principles are supplementary to the rules of law. Equity is a “body of rules or principles which form an appendage to the general rules of law, or a gloss upon them”.<sup>102</sup> As stated by Lord Chancellor Wright, equity “does not destroy the law, nor create it, but assist it”.<sup>103</sup>

Over many centuries equity has developed principles for when it will exercise its jurisdiction to grant an *in personam* order to protect interests that are not otherwise protected at law. In a broad sense, the maxims of equity define this jurisdiction.<sup>104</sup> Equity will exercise its jurisdiction, for example, to protect an interest in property that equity recognizes but the law does not. Where a court of equity recognises that a person has an ownership interest in a given asset and protects that interest against all others except for an innocent purchaser for value and without notice of the equitable interest, that person has a beneficial interest in the asset. That

<sup>97</sup> See Wingfield, *supra* note 84.

<sup>98</sup> *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict., c. 66, (1873); and *An Act to Amend and Extend the Supreme Court of Judicature Act, 1873*, 38 & 39 Vict., c. 77, (1875).

<sup>99</sup> Such as the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and the *Courts of Justice Act*, R.S.O. 1990, c. C-43.

<sup>100</sup> This is sometimes, albeit mistakenly, regarded as having fused the substantive rules of law and principles of equity into a single substantive body of jurisprudence. See P.V. Baker “The Future of Equity” (1977) 93 L.Q.R. 529; Paul M. Perell, *The Fusion of Law and Equity* (Toronto: Butterworths, 1990); Philip Henry Pettit, *Equity and the Law of Trusts*, 8<sup>th</sup> ed. (London: Butterworths, 1997) at pp. 9-11.

<sup>101</sup> Andrew Burrows, “We Do This At Common Law But That In Equity” (2002) 22 O.J.L.S. 1.

<sup>102</sup> *Snell’s Equity*, *supra* note 51 at para. 1-03 citing *Lord Dudley and Ward v. Lady Dudley* (1705), Prec. Ch. 241 at 244 (Sir Nathan Wright L.K.).

<sup>103</sup> *Lord Dudley and Ward*, *ibid*.

<sup>104</sup> *Snell’s Equity*, *supra* note 51 at para. 3-01.

person has an equitable property interest, in other words. Where a court of equity recognises that a person has an interest in a given asset but protects that interest only in limited circumstances, that person has but a mere equity.<sup>105</sup> A mere equity is not considered to be proprietary even though in many circumstances the interests of a person with a mere equity would be protected in the same way as a legal property interest. For example, as against the owner of a legal estate, a person may have an equitable right of possession that is functionally indistinguishable from a lessee's right of possession even though the juridical basis for the rights, the ability to assign them and the effects on third parties are completely different.<sup>106</sup> The principles of Equity, therefore, do not require that at all times and in respect of all assets equitable property interests exist concurrently with legal property interests.

Ownership, then, is not a dualistic concept such that in relation to a given asset one must always ask 'who is the owner at law and who is the owner in equity' before any legally meaningful determination of ownership can be given.<sup>107</sup> Rather, unless a court of equitable jurisdiction accepts that some of the incidents of ownership in relation to some thing are vested in a person other than the one with legal title, no beneficial interests exist. Property can lack a beneficial owner.<sup>108</sup> It's that simple. Property that is owned subject to a trust for a charitable purpose, for example, is not subject to separate legal and equitable property interests because no person other than the trustee has any property rights in that property. To argue, as Cullity does, that property held in trust for a purpose cannot be seized because there are no beneficial interests that can be attached by a creditor is in reality to argue that the property is un-owned simply because it is held for a purpose. But the property is owned. All the rights and liabilities of ownership are vested in the trustee and none in anyone else. Property held for a charitable purpose—even if it is held for such a purpose through an express trust—is not the subject of separate equitable proprietary interests thus rendering it immune from execution.

Waters takes a different tack. As quoted above, he says that the assets of a charitable trust are owned by the charitable purpose. He claims that a trust for a charitable purpose can exist in a manner that is entirely self-referential and self-contained because the trust "is a discrete fund of assets dedicated to the fund's own purposes."<sup>109</sup> Property held on such a trust is therefore never exigible for tort liability because there is no principled way

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<sup>105</sup> *Ibid.* at pp 6-7, 23-27; Hanbury and Maudsley, *supra* note 40 at pp. 17-22.

<sup>106</sup> *National Provincial Bank v. Ainsworth*, [1965] A.C. 1175 (H.L.).

<sup>107</sup> *Ayerst v. C. & K.(Construction) Ltd.*, *supra* note 89 at 177H-178A (Lord Diplock).

<sup>108</sup> *Wood Preservation Ltd. v. Prior*, [1969] 1 All E.R. 360 at 367 (C.A.).

<sup>109</sup> Waters, *supra* note 2 at p 204.

of getting inside the circle of 'the property is owned by the purpose for which it is owned'. Waters' theory has the advantage of accepting that all property must have an owner, but at the expense of introducing an absurdity into the law: that the owner can be a purpose.

It is absurd to treat a charitable purpose like a person because no matter how concretely it is defined a purpose is merely a concept, an idea. Concepts or ideas are abstractions. They are not the object of legal or equitable rights. Only people can have such interests. Since a concept or an idea can have no interest in property recognized by a court of law or a court of equity, no property rights can ever vest in the charitable purpose.<sup>110</sup> Again, it's that simple.

#### *D. Donor Intent does not Matter*

The fact that trusts for purposes do not eliminate the trustee's legal rights or create separate beneficial property rights in the purpose is not a new idea. Indeed, in the seminal charitable immunity cases, *Duncan v. Findlater*<sup>111</sup> and *Feoffees of Heriot's Hospital v. Ross*,<sup>112</sup> the House of Lords recognised property held in trust for charitable purposes could not be rendered immune from the trustee's tort liability based on the distinction between legal and equitable property rights. So they looked for another justification. The one they fastened on was donor intent. In particular, their Lordships fastened on the idea that a person who donates his property in trust for charitable purposes is presumed to intend that the property so donated be used solely to further the good works contemplated by the gift and not also used to pay damages caused by the trustee's tortious misconduct and thus it would violate this intent to allow the property to be used to pay tort liability. In regard to this presumption Lord Cottenham said that "[t]o give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose."<sup>113</sup> Lord Campbell said that "[s]uch a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated."<sup>114</sup>

Even though these cases were overruled by the House of Lords over 140 years ago, people who argue that property held in trust for charitable purposes is immune from the trustee's tort liabilities still base their

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<sup>110</sup> *Re Hunter* (1973), 34 D.L.R. (3d) 602 (B.C.S.C.), McIntyre J. (as he then was).

<sup>111</sup> *Supra* note 45.

<sup>112</sup> *Supra* note 46.

<sup>113</sup> *Ibid* at 1510.

<sup>114</sup> *Ibid* at 1512.

arguments on the idea that the law must save the property for the purposes intended by the donor. This idea is easily seen in one of case comments of the Court of Appeal's decision where the decision is criticised because "donors will [now] be reluctant to give large gifts directly to charities when no assurance can be given to donors that such special purpose charitable trusts will be immune from present or future creditors of the charity."<sup>115</sup>

In effect, those who advocate for the immunity of property held in trust for charitable purposes imply into the gift (usually by finding that the gift is made in trust for that purpose) a negative term prohibiting the use of that gift to pay some or all of the charity's liabilities. The idea, found in Blair J.'s judgment that the gift can be used to pay some liabilities (those incurred in "furthering" the specific charitable purpose for which the gift was given) simply expresses the implied prohibition in a different way. The donor is impliedly *prohibiting* the gift to be used to pay any of the donee's liabilities except for those liabilities the donor is impliedly *permitting* to be paid from his gift based on the expressed purposes for which the property is given. This presumption thus operates as a form of use restriction binding on the donee (and through him his creditors) by restricting the lawful use of the property to that use specified by the donor.

For the purposes of this discussion, let's accept as true the presumption that a donor would not want his gift used to pay the donee's debts and take it a step further. Let's make it an express term of the gift. After all, a presumption of intent could hardly have greater legal effect than expressed intent, could it? So, would a court ever enforce such a term? In other words, would a court ever allow a person who makes a gift of his property to prohibit that property from being used to pay the donee's liabilities? The answer is "no".

The most fundamental reason why the answer is "no" is this one. A person's *motive* in transferring property does not affect property rights. Should your parents, for example, give you money to enable you to purchase a house in the country because they wanted your children to grow up in the country rather than in the city, you could not tell your creditors that they could not sell the house to pay your debts because the money to buy the house was a gift from your parents to provide a place for their grandchildren to live. Neither would you be able to do so if your parents gave you the money on trust for that purpose. You might have difficulty in spending the money for a different purpose—that would depend on the terms of the gift<sup>116</sup> – but once the money (or a title deed to the house) was in your hands your creditors could seize it in payment of your debts. In other words, the law is not in thrall to a donor's motive even if the court actually knows or can plausibly infer what the donor's motive, intent or

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<sup>115</sup> Carter, *supra* note 2 at p 31.

<sup>116</sup> G.H.L. Fridman, *Restitution*, 2<sup>nd</sup> ed. (Scarborough: Carswell, 1992) chap. 8.

objective is. As expressed by the Privy Council in *Latimer*, in the case of a charitable trust, “the question is not, what was the settlor’s purpose in establishing the [charitable] trust? but what are the purposes for which trust money may be applied?”

In the context of creditors’ rights, it is well-established that an agreement made to enable a debtor to transfer his assets out of the reach of his creditors is unenforceable as a fraud on creditors.<sup>117</sup> It is equally well-established that no one can create a trust of property or convey legal title to property “with a proviso that the interest of the beneficiary shall not be alienated.” or that “the interest shall not be made subject to the claims of creditors.”<sup>118</sup> Were it otherwise, then a person who gives his property away would be able to nullify the rights of innocent third parties to the property as a term of the gift. That person, for example, could determine which of the donee’s creditors could have access to the property or that none of them could. In technical terms, it would allow a person who donates property to remove from the incidents of ownership of the donee the incident of liability to execution.

It is equally clear that in the charity context such a proviso would also be repugnant as creating an immunity contrary to the general law. One of the best quotes in this regard is from *Basabo v. The Salvation Army, Incorporated*<sup>119</sup> an early American case rejecting trust-based theories for immunising charitable property. The court held that:

But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by the general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the

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<sup>117</sup> *Re Harrison, Ex parte Jay* (1880), 14 Ch. D. 19 at 26 (Cotton L.J.); *Borland’s Trustees v. Steel Brothers & Co.*, [1901] 1 Ch. 279 at 291 (Farwell J.); *Canadian Imperial Bank of Commerce v. Bramalea* (1995), 33 O.R. (3d) 692 (Gen. Div.) Blair J.

<sup>118</sup> *Lewin On Trusts, supra* note 40 at p. 5-109. See also Arthur Underhill, *Law Relating to Trusts and Trustees*, 15<sup>th</sup> ed. by David J. Hayton (London: Butterworth’s, 1995) at p. 184; N.C. Cameron, ed., *Garrow’s Law of Trusts and Trustees*, 4<sup>th</sup> ed. (Wellington: Butterworths, 1972) at pp. 72-76; *The South African Law of Trusts, supra* note 40 at §§ 91-92 and the cases cited therein in each text. As a general matter a protective discretionary trust (“a spendthrift trust”) does not amount to a fraud on insolvency law because the insolvent never has any property rights in or rights to acquire any property of the trust *corpus*; however once any of the trust property passes from the trustee to the beneficiary the beneficiary’s creditors can seize that property. The American position on spendthrift trusts depends on the law of the particular state. See Henry J. Lischer, Jr. “Domestic Asset Protection Trusts: Pallbearers to Liability” (2000) 35 Real Prop. Prob. & Tr. J. 479.

<sup>119</sup> 35 R.I. 22 at 40, (S.C.R.I., 1912).

operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people.<sup>120</sup>

In fact, had the legal system never relaxed the rules relating to charitable gifts to permit such gifts to pass on trust, there would be no question of immunising from creditors property conveyed or used for charitable purposes. A living person seeking to benefit the public, for example, would have to give his property away during his life-time to a natural or corporate person with the legal capacity to accept the gift and the intention to spend it within the perpetuities period on the purposes the donor intended. Before the gift was made the donor's creditors would be able to seize the property in payment of that person's debts. After the gift was made the donee's creditors would be able to seize the gift, even if the donee had covenanted with the donor to spend the money as the donor wished. A person seeking to benefit the public after he died would have to make a precatory gift in his will to a named person whom the testator hoped would apply the gift as the testator wanted. The estate's creditors would, as always, have a first claim to the property. The creditors of those persons receiving the gift under the will would be able to seize the property and this would be so even if the donee intended to respect the testator's wishes. Indeed, the examples described in this paragraph represent uncontroversial law for all gifts other than charitable ones—no matter how altruistic and beneficial to the public the gifts might be. It is only when the gift is made on trust for the benefit of a charitable purpose that people start thinking that different rules do or ought to apply in order, of course, specially to protect the donated property from the claims of creditors.

## *VI. It's All Policy, From Beginning To End*

### *A. What is the Purpose of a Charitable Trust?*

Charitable trusts are Equity's way of ensuring that a gift which is (i) ineffective at Law *and* (ii) made exclusively for charitable purposes can nevertheless take effect, all in the public interest. In essence, through the device of a trust, equity permits an interest in property to pass to a donee who is incapable of receiving *legal* title in the property so given.<sup>121</sup> For this reason, a court of equity will allow property to be given in perpetuity for purposes beneficial to the community (charitable purposes in the strict sense of the word) whereas a court of law will not allow such a conveyance

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<sup>120</sup> *Ibid.* at p. 35; *Cohen v. The General Hospital Society of Connecticut*, 154 A. 435 at 194 (Conn. C.A. 1931).

<sup>121</sup> For example, by converting a gift in perpetuity to an unincorporated association into a gift in trust for the purposes of the association if those purposes are exclusively charitable, *Leahy v. Attorney-General of New South Wales*, [1959] A.C. 457 at 479 (P.C.), Viscount Simonds; *Berry v. St. Marylebone Corporation*, [1957] 3 All E.R. 677 (C.A.).

to take effect, or will require the property so conveyed to be disposed of within the perpetuities period.<sup>122</sup> For this reason too, a court of equity will ensure that a gift made simply to a charitable purpose, rather than to a legal entity by name, can still take effect by having the court find a legal entity compatible with the charitable purpose which can take title to the property.<sup>123</sup> A court of equity will also ensure that if the legal entity disappears after the gift has taken effect the property will be given a charitable home through the court's scheme-making power, rather than going to the Crown *bona vacantia* or to the donor or his successors. Finally, a court of equity will ensure that property given to charity will be applied for the intended charitable purposes.<sup>124</sup>

Where a charitable gift can take effect legally, however, there is no reason for the legal system to concern itself with whether the gift also takes effect equitably through a trust. To put this slightly differently, if title to a gift of property can pass to the donee in law there is no reason for equity to construe the gift as a gift in trust. Equity does so only to save a gift that would otherwise fail.<sup>125</sup>

This is a subtle, but very important point, so let me explain it more fully by using the hypothetical Humane Society as an example once again. Since the Society is a corporation, it has a perpetual existence and the ability to hold property and incur obligations in perpetuity.<sup>126</sup> Therefore, the person who gave the farm to the Society could pass title in Law and without any need for Equity. The terms of the gift (to use the farm to care for large or wild animals) is a valid term of a gift, binding on the Society for as long as it exists as either a contractual stipulation in law or enforceable against the Society in order to prevent unjust enrichment (which can sound in law or in equity).

So long as the gift of the endowment was made to the Society by its proper legal description, "The British Columbia Humane Society", it too can take effect legally. Property in the gift would pass under the will to the

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<sup>122</sup> *Morice v. Bishop of Durham* (1805), 32 E.R. 947 (Eldon L.C.).

<sup>123</sup> Through the use of the *cy-près* doctrine and the court's scheme-making power, *Restatement (Second) of the Law of Trusts*, *supra* note 12 at §399; *Re Ulverston and District New Hospital Building Trusts*, *supra* note 12; *Re Fingers Will Trusts*, *supra* note 12.

<sup>124</sup> *Re Public Trustee and Toronto Humane Society* (1987), 60 O.R. (2d) 236 (H.C.J.) at 244 (Anderson J.).

<sup>125</sup> *Leahy v. Attorney-General of New South Wales*, *supra* note 122.

<sup>126</sup> Until the Mortmain laws were set aside in most jurisdictions in the early 20<sup>th</sup> century, religious and other charitable corporations could not hold property indefinitely without a special licence from the Crown, which is one of the reasons why charitable gifts were held in trust. See A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property*, 2d ed. (Toronto: Canada Law Book, 1985), §3103.3.

Society like any other of the testator's dispositions, private or charitable (beneficiaries receiving the testator's house, for instance, would receive legal title to the house, not the house in trust). The terms of the gift of the endowment to the Society (to hold the capital of the gift in perpetuity and use the income only to care for pets), although not a contractual term (because the testator, being dead, has no legal capacity to contract) would nevertheless be binding on the Society should it accept the gift with knowledge of these terms. In other words, the Society could not simply accept the gift on those terms and spend the money however it wished. The Society's obligation to use the gift in accordance with its terms is the same whether the gift is described as a gift in trust for those terms or simply a gift on those terms. In both cases the court on application made by the Attorney-General (presumably after being contacted by an interested party, like some of the directors in the *Toronto Humane Society* case<sup>127</sup>) could restrain any future breach of the terms of the gift and provide a remedy for any past breaches without first having to decide if the gift was a trust. All the court would have to decide is whether the terms on which the gift was made are terms binding on the Society or not—just like with any gift.

On the other hand, if the testator made a gift for a charitable purpose but without naming the Society at all, say a gift “of the capital in perpetuity with the income to care for pets”, once the court identified the Society as the proper recipient of the gift, then pursuant to a *cy-près* application, the Society would take title to the gift just as if it were named in the will in the first place.

There are many, many cases which explain why it is that gifts which can take effect legally do not become gifts in trust merely because they are charitable or merely because they have characteristics that *could* be regarded in Equity as constituting a trust. Frequently these cases arise as a contest between the greedy next of kin and the testator's intention to give his property for some altruistic purpose, rather than to his next of kin. The next of kin argue, first, that the gift, being for some purpose, *has* to take effect as a gift in trust and, second, because the terms of the gift are not those which will be enforced by a court of equity (for example the testator's altruistic purpose is not charitable in the strict sense of the word) the gift must fail and the property pass to the next of kin. Courts have not succumbed to the false logic of the next of kin's arguments in these types of cases. Rather, the courts inquire whether the gift can take effect without the interposition of equity. If it can, it does.

The leading case in this regard is *Bowman v. Secular Society, Limited*,<sup>128</sup> in which Lord Parker said: “But it is one thing to establish a gift

<sup>127</sup> *Supra* note 125.

<sup>128</sup> [1917] A.C. 406 (H.L.) at 435 (Lord Dunedin), 440 (Lord Parker) and 478 (Lord Buckmaster).

(which would otherwise fail) on the ground that it is charitable, and quite another thing to avoid a gift which would otherwise be good on the ground that it creates an unenforceable trust.”<sup>129</sup> A more recent case on this point is *Re Recher's Will Trusts*,<sup>130</sup> where a gift in a will was made to an unincorporated association with altruistic but not charitable purposes. It was argued in this case that the gift could only take effect as a trust for charitable purposes and because the objects of the donee association were not charitable, in the strict sense of the word, the gift must fail. The court accepted that since the gift could take effect legally it did not fail on the grounds that it could not take effect equitably as a charitable trust.

Historically, Equity could accomplish the above objectives only if the property was subject to a trust because Equity's jurisdiction arose only if property was given in trust, not because it was given for a charitable purpose. For this reason, for many years courts believed that their supervisory jurisdiction over charities (whether the charity was organised through a board of trustees or a corporation with charitable objects), or their ability to exercise their scheme making power, depended on the existence of a charitable trust. Consequently, in order to obtain jurisdiction over them, courts treated corporations with charitable purposes as charitable trusts. You can see evidence of this belief (or more properly confusion) in an oft-cited 1966 article by E.J. Mockler, “Charitable Corporations: A Bastard Legal Form”.<sup>131</sup> This belief has now been laid to rest in England<sup>132</sup> and Canada,<sup>133</sup> (though not in Australia<sup>134</sup> or some American states<sup>135</sup>) where it is now accepted that the jurisdiction of the

<sup>129</sup> *Ibid* at 441.

<sup>130</sup> [1972] Ch. 526 (Brightman J., as he then was), *approv'd Conservative and Unionist Central Office v. Burrell*, [1982] 2 All E.R. 1 (C.A.).

<sup>131</sup> (1966) C.B.A. Papers 229.

<sup>132</sup> *Liverpool and District Hospital v. Attorney General*, [1981] 1 All E.R. 994 (Ch. D.) at 1009-1010 (Slade J.).

<sup>133</sup> Blair J., *supra* note 1 at p. 390; Cullity, *supra* note 2.

<sup>134</sup> In Australia a charitable corporation is still deemed to hold its assets as trustee for its charitable objects: *Sir Moses Montefiore Jewish Home v. Howell & Co. (No. 7) Pty Ltd.*, [1984] 2 N.S.W.L.R. 406 at 416 (Kearney J.); *Sydney Homoeopathic Hospital v. Turner* (1959), 102 C.L.R. 188 (H.C.A.) at 221 (Kitto J.); *Attorney-General for Queensland v. Cathedral Church of Brisbane* (1977), 136 C.L.R. 353 (H.C.A.) at 371 (Jacobs J.); G.E. Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) at pp. 377-382; H.A.J. Ford, and W.A. Lee, *Principles of the Law of Trusts*, 2<sup>nd</sup> ed. (Sydney: The Law Book Company, 1990) at paras. 2042-2043. The Australian law was rejected as being contrary to the English and Canadian position in Blair J., *supra* note 1, *appl'd Rowland v. Vancouver College Ltd.*, *supra* note 21 at paras. 89-90.

<sup>135</sup> The American position varies by state and also depends on whether property has been given to a corporation absolutely, in trust or for a restricted purpose, *cf.* A.W. Scott and W.F. Fratcher, *Scott on Trusts*, 4<sup>th</sup> ed. (Boston: Little Brown and Company, 1989) Vol. IVA at §348.1.

court depends upon the dedication of property to charity, not the existence of a trust.

Accordingly, there is actually very little that is functionally accomplished by adding the words “charitable trust” to a description of property. A charity organised as a corporation (as most now are) must have exclusively charitable objects. A charity so organised can only acquire and use property in accordance with its charitable objects. This is basic to the law of corporations. Because they have perpetual existences, corporations can hold property in perpetuity and enter into perpetual obligations as of right. Again, this is basic to the law of corporations. Therefore, a gift can be made to a charitable corporation in perpetuity and perpetual terms can be imposed on the gift without resorting to a trust. So long as a corporation has charitable objects a court can supervise its conduct and even exercise its scheme-making power without first having to find a trust. This is basic to the court’s jurisdiction over charity. Thus, about the only function a charitable trust fulfils in modern law that is not fulfilled more directly by other legal principles are these: it allows the court to save charitable gifts that would otherwise fail; it permits natural people (such as the members of an unincorporated religious society) to hold charitable property in perpetuity; and it requires judicial review of the charitable-trustee’s actions in any cases where there is doubt about what the trustee has done or wishes to do with the property.

### *B. How Charitable Trust Property is Used is a Matter for Public Policy to Determine*

Through charitable trusts, then, Equity permits property to be conveyed for and supervised in the public benefit. These functions do not require for their efficacy that the property so conveyed or so supervised be protected from claims made against the charity-trustee arising out of its tortious or other liability. The property can be conveyed for charitable purposes and its use supervised whether or not the property is ultimately protected from creditors. Therefore, there is nothing inherent in the law’s use of the charitable trust concept that mandates either charitable liability or charitable immunity.

What is inherent in the charitable trust concept, however, is public policy. Charitable trusts and the overall regulation of charitable activity all exist for reasons of public policy and *for no other reason*. A gift for charity is a gift “to a general public use.”<sup>136</sup> It is therefore for the public good (*pro bono publico*), that a court of equity relaxes the prohibitions in law and equity that would otherwise have the effect of impeding or preventing people from making charitable gifts of their property for an indefinite

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<sup>136</sup> *Jones v. Williams* (1767), 27 E.R. 422 (H.L.) at 422 (Lord Camden L.C.).

duration.<sup>137</sup> Since such gifts are for the use of the public, it is for the public good that the courts will supervise the conduct of the actions of the owners or managers of the charitable property.<sup>138</sup> To put this in a slightly different way, issues about what is to happen to property that is donated to a charity are decided by reference to general principles of law relating to property, to gifts, and to the control of charitable activity based on the public interest, not by reference to abstract principles drawn from the law of trusts, and especially not by reference to principles designed to protect the property rights or interests of private persons.

The mere addition of the word “trust” to a description of property that is held for charitable purposes is not dispositive of any of these issues. It is the public interest that is dispositive, however. For this reason, a court will not uphold the terms of a charitable gift where the achievement of the donor’s objective, no matter how well-intentioned, is to the public disadvantage<sup>139</sup> even when a gift appears to meet one of the heads of charity described by Lord Macnaughten in *Pemsel’s Case*.<sup>140</sup> If a gift is in design charitable but in nature “against the policy of the law” equity will intervene, refuse to implement the donor’s plan, but apply the gift to some other charitable purpose.<sup>141</sup> Consistently, a court of equity will enforce the terms of a charitable gift even if the gift will be used only to pay the donee’s debts *contrary* to the inference that the donor would not have wanted or planned for the property to be used in this manner.<sup>142</sup>

Consequently, the answer to the question of whether property dedicated to charitable purposes can be used to pay a charity’s liabilities does not revolve around the trust concept at all, but rather revolves around the public welfare. The argument over trust law is simply a stalking horse for the question of whether property donated or used for charitable purposes should be protected from claims made against the charity. Indeed, if one scratches the surface of many of the arguments against the Court of Appeal’s decision, one quickly ends up with arguments over the benefits of protecting charitable property for those

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<sup>137</sup> *Morice v. Bishop of Durham*, *supra* note 123.

<sup>138</sup> *Toronto Aged Men’s and Women’s Homes v. Lyl True Blue and Orange Home*, [2003] O.J. No. 5381 (S.C.J.) (Q.L.), Cullity J. (changing the method of calculating the income from a charitable trust).

<sup>139</sup> *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31 (H.L.) at 63 (Viscount Simonds).

<sup>140</sup> See, for example, *Canada Trust Co. v. Ontario Human Rights Com’n* (1990), 69 D.L.R. (4th) 321 (Ont. C.A.), Robins J.A. (altering the terms of a charitable trust which no longer conformed to Canadian public policy).

<sup>141</sup> *Ibid.*

<sup>142</sup> *Re ARMS (Multiple Sclerosis Research) Ltd.*, [1997] 2 All E.R. 679 (Ch.D.) at 684-85 (Neuberger J.).

who benefit from the property, with the question of trust law left behind.<sup>143</sup>

### *C. Should Charitable Property be Protected from Tort and Other Claims?*

The public policy contest over protecting charitable property is a contest between the general public welfare and the welfare of individual members of the public. Since every charitable purpose is simply a specific version of one of the heads of charity described in *Pemsel's Case*,<sup>144</sup> the contest is between those members of the general public who might in the future derive a benefit from the charitable property because the circumstances in which they find themselves can fit within the logical boundaries of the charitable purpose for which the property is dedicated, and those members of the public harmed by the charity to which or to whom (in the case of a charity operating as a board of natural trustees) the property has been entrusted.<sup>145</sup>

Who has the better claim to the charitable property? In *Bazley v. Curry* the Supreme Court of Canada held that the general public cannot benefit at the expense of individual members of the public, calling the contrary proposition a form of “crass and unsubstantiated utilitarianism”,<sup>146</sup> which of course it is. The Court of Appeal for Ontario pointed out that the courts which rejected charitable immunity have accepted that this is so:

I do not discern that an inconsistent application or result was ever intended by the House of Lords in *Mersey Docks* or by the courts that followed its authority. Those courts recognized that the public who were intended to benefit from the charity's operations would have to lose out when judgments were executed against property held on trust by the trustees of the public institution.<sup>147</sup>

Every case which involves the question of protecting charitable property from the claims of creditors ultimately reduces itself to this contest. For example, the litigation in the Christian Brothers' liquidation over the schools in British Columbia was such a contest: known persons harmed by the Christian Brothers' organisation were pitted against unknown persons who in the future would benefit from the Christian

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<sup>143</sup> For example, the protection of charitable property is the theme of both Davis and Stevens' articles, *supra* note 2 and underlies Waters' thesis as well, also *supra* note 2.

<sup>144</sup> *Supra* note 5.

<sup>145</sup> *I.R.C. v. Baddeley*, [1955] A.C. 572 (H.L.) at 590, 592 (Viscount Simonds); *Re Wedge* (1968), 67 D.L.R. (2d) 433 (B.C.C.A.) at 449 (McFarlane J.A.); G. Susan Plowright, “Public Benefit in Charitable Trusts” (1975) 39 *The Conveyancer* 183.

<sup>146</sup> *Supra* note 28 at para. 54 (McLachlin J. as she then was).

<sup>147</sup> Court of Appeal, *supra* note 1 at para. 68.

Brothers' charitable assets. The Christian Brothers' organisation was liable to pay damages to the people it harmed and it could not do so without selling all of its educational establishments; people who sought a Christian Brothers education for their children wanted the Christian Brothers' educational establishments preserved for that purpose. The starkness of this contest was revealed by the fact that most of those people harmed by the Christian Brothers lived in St. John's, Newfoundland and Labrador and those people who would benefit from the Christian Brothers' educational establishments lived across Canada in Vancouver, British Columbia. If we consider the hypothetical Humane Society with assets located in one place only, though, we get the same result. The contest in that case is between those people residing in the Lower Mainland of British Columbia who were harmed by the Society and those people in British Columbia who regard animal welfare as socially desirable (the animals do not have a stake in the matter), or those people who need facilities to care for animals they cannot care for privately. All these people, both those harmed and those who will benefit from the charitable property, are members of the public. Their entitlement to obtain a benefit from the charitable property arises from their membership in the body politic, and their relationship to the charity that owns the property, and not from any other fact.

Once it is recognized that the use of charitable property to pay damages is an issue for public policy, then it must equally be recognized that the only policy sustainable in a democratic society is that courts cannot protect such property for the benefit of the public at the expense of individual members of the public. Courts have no warrant to decree that a person must suffer so that others may gain. Each person is entitled to be afforded by a court his lawful due. Nothing in the law of trusts compels a different result. As explained by the leading American case on this topic:

The 'trust fund theory' comprehends all that is involved in 'public policy,' with only an apparent difference in approach. This is true likewise of 'respondent superior' and 'implied waiver'. In any event the result is a departure from general, and we think right, principles of liability. The differences in foundation do not affect even the extent of the departure.<sup>148</sup>

Public policy thus mandates that those people harmed by the actions of a charity—no matter how organised—have a greater entitlement to its property to compensate them for their losses than those people who would benefit from the property were the charity to continue unencumbered by such liabilities.

Accordingly, the belief that property held for charitable purposes is or

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<sup>148</sup> *President and Directors of Georgetown College v. Hughes*, *supra*, note 8 at 825.

can be protected from the charity's liabilities is actually a product of misguided public policy borne of a desire to protect the charitable property for the benefit of the public. These arguments are each based on utilitarian grounds: that public policy should encourage charitable giving because such giving benefits society and that in order to obtain such social benefits charitable property needs to be protected from the tortious misconduct of charities. The hypothesis supporting these arguments is that people will give less if their gifts are exposed to the tort liabilities of the charity to which they make their donations. Therefore, it is suggested that to encourage giving the property so donated should be protected from the charity's liabilities arising out of the misconduct of its agents and employees.

This hypothesis suffers from the philosophical defects common to all utilitarian arguments: the individual is forced to give disproportionately to the common welfare and thus the loss of an individual's happiness becomes a means to society's overall welfare.<sup>149</sup> Yet, even if the philosophical impediments are disregarded, there is no evidence that this hypothesis is true in relation to charitable giving overall. For example, some states in the United States grant immunity to charities.<sup>150</sup> However, there is no readily available statistical evidence that demonstrates that the rate of charitable giving is greater in immunity states than in the majority of states with no charitable immunity.<sup>151</sup> If, and it is a big if, there is a moral case for protecting some charitable property at the expense of a tort victim on the utilitarian ground that the public is better off over-all because the rate of charitable giving is thereby enhanced, one would expect that the case would be made on cogent evidence of this fact, not supposition.

In any event, the utilitarian argument fails on its own terms. Although in the public's mind businesses are mainly responsible for socially irresponsible conduct and harmful acts, over the past two decades or so in Canada the non-profit sector has been far more likely to cause harm by mass torts than the business sector. In the 1980's the Canadian Red Cross Society was responsible for causing the injury and deaths of thousands of people in Canada due to blood products tainted with deadly viruses.<sup>152</sup> In the year 2003 in Toronto hospitals (many of which are owned by charities)

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<sup>149</sup> There are many anti-utilitarian philosophical works such as John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

<sup>150</sup> For a survey of American charitable immunity and non-immunity states see 15 *Am. Juris.* (2d) (1976) §§ 189-209.

<sup>151</sup> It is always hard to prove a negative. However, in all the litigation over charitable immunity in *Re Christian Brothers of Ireland in Canada* no one was able to adduce such evidence and in a thorough search of the relevant data bases I was not able to locate any such evidence.

<sup>152</sup> *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151; *Re Canadian Red Cross Society*, *supra* note 9.

failed to control the outbreak of SARS even after they were aware of their role in its spread. Churches and religious organisations have been responsible for child abuse stretching back decades and harming literally thousands of children across Canada. In the same period, non-denominational private schools have tolerated abuse within their walls. Public utility commissions have allowed members of the public to be poisoned with water contaminated by bacteria causing numerous deaths and other long-term injuries.<sup>153</sup>

It is therefore impossible to demonstrate on utilitarian grounds that protecting charitable property from the consequences of charitable misconduct will enhance utility. Rather, it should be beyond debate that the non-profit sector needs to operate under rules that foster care, not neglect, and rules which give organisations dedicated to the public welfare the same flexibility in dealing with their liabilities as any other organisation in society enjoys. For too long charities and other organisations with altruistic aims have operated under the misguided assumption that the ordinary rules of liability for wrong-doing did not apply to them, even though they did. Indeed, in the BCLI's report there is no reference to protecting the public from charities that cause harm. The entire thrust of the report is protecting charities from the consequences of the harm they do cause. This is entirely backwards. Charities exist to serve the public welfare, not their own. Yet those advocating immunity seem to think that charities exist for their own purposes and that it would be a tragedy were any charity forced to cease its activities because people would no longer give their property to it as a result of its liabilities.

It is only when charities, their officers and employees *and* assets are exposed to the same consequences of tortious wrong-doing as those of private organisations that they will undertake the same risk management strategies as those other organisations do. Sound policy thus requires that all assets owned and used by a charity as part of its charitable mission must be available to pay the charity's tort liabilities. There are two ways to accomplish this objective.

The first way is by making directors of charities understand that their charity can go "out of business" just like a profit-making enterprise can and that it is not possible for the charity to shelter assets from liabilities such that a new charity can emerge from the ashes of the old with many of the same assets. It is clear that recently charities have begun engaging in risk management activities which they never before thought necessary. This change is solely a reaction to the fact that it is now understood that any charity, no matter how large or socially desirable its activities are, can be forced to close due to tort liabilities.

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<sup>153</sup> See The Honourable Dennis R. O'Connor, Commissioner, *Report of the Walkerton Inquiry*, (Toronto: Queen's Printer, 2002).

The second way is by recognising that people who donate property to a charity would rather the property be used for some direct charitable activity and not to be used to pay the charity's tort liabilities. Therefore, people are less likely to donate to charitable organisations which they regard as incurring unacceptable liability risks. This fact is frequently used by the charitable sector in support of the proposition that property donated to a charity should be protected from tort liability.<sup>154</sup> But actually this observation about the conduct of donors should lead to the opposite conclusion: that the donated property be liable for the charity's misconduct, not that it be made immune.

Donors of property, like consumers of products, want quality. In the same way that car manufacturers with poor J.D. Power and Associates<sup>155</sup> rankings of their company's products will have trouble convincing consumers to part with their money in exchange for a car from that manufacturer, charities with a record for misconduct will have trouble convincing people to donate their money to that charity. Over time, charities that cannot manage their risk of causing harm (i.e. those which cause too much harm) will fail due to a lack of resources. This is as it should be. It is a great disservice to the public welfare to allow charities which would otherwise fail, to survive by allowing some or all of their property to be protected. The American case law rejecting charitable immunity, especially *President and Directors of Georgetown College v. Hughes*,<sup>156</sup> contains extended discussions of the importance, from a public policy perspective, of ensuring that charities are motivated to take care, not protected from the consequences of their harm. They are so motivated, as the American case law points out, only when *all* their property is potentially available to pay for their tortious misconduct. As some charitable enterprises fail, new ones will emerge to carry out the charitable activity formerly performed by the failed charity. The quality of charitable activity in society will thereby be enhanced because the successful charities will fill the gap left by the unsuccessful ones and will do so either with more care or with resources sufficient to absorb any liabilities they incur. Again, this was the experience with the Canadian Red Cross Society. It is now out of the blood bank business, as it should be because of its incompetence in managing blood products. The blood bank system in Canada is now managed by a more competent body and one that can pay any liabilities that it might incur in the management of its charitable activities.<sup>157</sup> Canadian welfare has thus been enhanced by making the Canadian Red Cross Society liable for its tortious misconduct. Equally, by forcing the Christian Brothers' in Canada to liquidate all their assets (their

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<sup>154</sup> See the quote at the beginning the BCLI's report *supra* note 3.

<sup>155</sup> Online: < <http://www.jdpower.com> >.

<sup>156</sup> *Supra* note 8.

<sup>157</sup> *Re Canadian Red Cross Society, supra* note 9.

educational establishments were sold to the local Roman Catholic community in Vancouver), the welfare of Canadians over all has been enhanced because the Christian Brothers' organisation no longer functions in Canada, nor should it, given its conduct.

The other aspect of policy relevant to the functioning of the charitable sector is flexibility. No matter how careful they are, charities, like all other social organisations, will from time to time act negligently. Where the costs of the negligence can be borne by the charity, it is important that the directors of the organisation have the ability to decide how best to manage the liability. The way to do this is to ensure that all the assets owned and used by the charity in its charitable mission are potentially available to pay the charity's debts. The directors, who are in the best position to know, can decide whether any assets should be sold or mortgaged to pay for the liabilities without regard to whether these assets were given to the charity for any specific purpose. The only caveat, of course, is that if the charity is both solvent and subject to an obligation over the use to which it can put an asset, then the directors should be required to apply to the court for permission to subordinate such an obligation to the best interests of the charity—paying its debts—as identified by the directors.

When we look at the reasoning and outcome of the Court of Appeal's decision, it is apparent that the decision accords with sound policy. On the other hand, the critics are advocating a result which is manifestly contrary to sound policy. They say that the law relating to charitable activity must licence harm without responsibility, either by directly immunising charities or their property from their tortious misconduct<sup>158</sup> or by doing so indirectly.<sup>159</sup>

### *VII. Insolvency Law Trumps, As Always*

When a charity becomes insolvent its affairs fall to be administered under federal insolvency law. Depending on the nature of the charitable enterprise (incorporated or unincorporated) and whether it was established under federal or provincial law, it can be liquidated under either the *Bankruptcy and Insolvency Act* ("BIA") or the *Winding-up and Restructuring Act*. Alternatively, it can seek a compromise with its creditors under the BIA or the *Companies' Creditors Arrangement Act* ("CCAA"). Canada has had experience in dealing with insolvent charities under the *Winding-up and Restructuring Act* (in the case of *Re Christian Brothers of Ireland in Canada*) and the CCAA (in *Re Canadian Red Cross Society*).

In the *Christian Brothers* case, the Court of Appeal held that under the *Winding-up and Restructuring Act* all the assets of the insolvent charity, including assets the charity held in trust for some or all of its charitable

<sup>158</sup> *E.g.* Davis, *supra* note 2.

<sup>159</sup> *E.g.* Stevens or Waters, *supra* note 2.

purposes, had to be liquidated in order to pay its liabilities.<sup>160</sup> This result was compelled by section 93 of the *Winding-up and Restructuring Act* which provides that “[t]he property of the company shall be applied in satisfaction of its debts and liabilities”. For the reasons given by the Court of Appeal in *Re Christian Brothers of Ireland in Canada*,<sup>161</sup> the property of a corporation with charitable objects includes property that the corporation holds in trust for some or all of these objects. Therefore, the federal scheme of distribution under the *Winding-up and Restructuring Act* does not make any exception for assets held by an insolvent charity in trust for charitable purposes by carving such assets out of the pool of assets available to the charity’s creditors.

Although this issue has not been faced under the *BIA*, the result under the *BIA* should be the same as under the *Winding-up and Restructuring Act*. Section 67 of the *BIA* provides that, subject to the exceptions enumerated in that section, all of the bankrupt’s property shall be divided amongst his creditors. Subsection 67(1)(a) of that act exempts from administration property held in trust for “any other person” under common law definitions of trust<sup>162</sup> but does not exempt property held in trust for purposes. Although subsection 67(1)(b) of the *Act* exempts from the definition of the bankrupt’s property divisible amongst his creditors property that is exempt from execution or seizure under the laws of the province where the property is situated and within which the bankrupt resides, for the reasons given by the Court of Appeal, the common law does not exempt property held by a charity in trust for charitable purposes from execution. Therefore, the *BIA* does not exempt property held on a charitable trust from the being distributed to the creditors of a bankrupt charity-trustee.

There is nothing particularly surprising about this. Trust assets are not carved out of the pool of assets of an insolvent deposit-taking institution either. For example, all the liabilities of a federally administered trust company are ranked in accordance with section 374 of the *Trust and Loan Companies Act* (Can.).<sup>163</sup> The deposit liabilities (i.e. whether on trust or not) rank equally as a third charge on the trust company’s assets.

The reason for this result, both in the case of a deposit taking institution or a charity, is to ensure equality of distribution of the insolvent estate to persons of like degree. In the case of a deposit taking institution, the deposit liabilities must rank equally even if the deposit creditor is a

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<sup>160</sup> Court of Appeal, *supra* note 1 at paras. 105-108 (Doherty J.A.).

<sup>161</sup> And also explained in Wingfield, *supra* note 84.

<sup>162</sup> *Supra* note 37 (Subsection 67(2) provides that subject to the exceptions found in subsection (3), provincial or federal law that deems certain property to be held by the bankrupt in trust do not apply under subsection 67(1)(a)).

<sup>163</sup> S.C. 1991, c. 45.

beneficiary of a trust. It is easy to see why this must be so. The relationship of the beneficiary to the trust company is that of creditor and debtor, as it is with any account-holder. To give effect to the trust liability over the other deposit liabilities would be to prefer one group of creditors over another without reason. So the law does not do so. In the case of a charity, should the property used to advance one of the charity's charitable objects be specially protected the members of the public who might derive a benefit from the protected property would be preferred over all other members of the public, again without reason. The fact that a charity, such as our hypothetical Humane Society, might be established under provincial law or that it might hold assets under provincial law as a charitable trustee, in no way alters this result.

The federal scheme also applies even if the insolvent charity's purposes can continue without the legal entity itself. For example, should the hypothetical Humane Society become insolvent and be forced to stop carrying out its activities, could the endowment, the farm or the Vancouver site continue to be used to fulfil their respective charitable purposes even in the absence of the Society itself? The answer is simple. Of course they could. But this can be said of any property. A machine making widgets, for example, can still make widgets even if the company that owns the widget factory goes out of business. The fact that property *can* be used for any purpose permitted by law for which it is by reason of its nature capable says nothing about whether it *must* be used for any particular purpose. Neither does this say anything about whether the property can be sold by the owner or his creditors and the proceeds used to pay his debts. The suggestion that the purposes must continue whilst the charity itself dies is just a backhanded way of avoiding federal insolvency law (and immunising the charity's assets from its liabilities) by shifting the subject property from an insolvent charity to a solvent one.

Despite the suggestions made by the BCLI, provincial legislatures do not have the competence to enact legislation that would exempt property held on charitable trusts in their provinces from being liquidated and distributed under the *BIA* or the *Winding-up and Restructuring Act*. In *Husky Oil Operations v. Canada Minister of National Revenue*<sup>164</sup> the Supreme Court of Canada had to decide whether provincial law of general application could determine the status and ranking of creditors under federal bankruptcy law. The Court held that, although provinces can define concepts like "trust" or "secured creditor" however they wish, their provincial definitions cannot have the purpose *or* effect of determining the rights of creditors to the assets held by the person under federal insolvency law.<sup>165</sup> Therefore, provincial trust law cannot deny certain members of the

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<sup>164</sup> [1995] 3 S.C.R. 453 (Gonthier J.)

<sup>165</sup> *Ibid* at 481-486.

public the right to benefit from property of an insolvent charity (creditors of the charity, who will almost certainly consist of people injured by the charity's tortious misconduct) for the benefit of other members of the public (those people residing in the province who benefit from the mission to which the charitable property was dedicated).<sup>166</sup>

The alternative would be the balkanized bankruptcy regime the Supreme Court warned against in *Husky Oil*.<sup>167</sup> Under the alternative, once a charity became insolvent, a trustee in bankruptcy or a liquidator would not be able simply to look to the scheme of distribution under the relevant federal insolvency statute. Rather it would have to hold a hearing to determine how the creditor's claims arose in relation to each asset and whether those claims arose in relation to assets held by the charity in trust for its charitable purposes—which is not a task required of them under federal insolvency law. And if the charity is a national charity, such as the Canadian Red Cross Society or The Christian Brothers of Ireland in Canada, then there would be a different distribution of property in different provinces depending on how provincial law treated charitable property or defined the rights of creditors to property held on a charitable trust. This would lead to some unsecured creditors receiving less than a rateable distribution of the insolvent charity's property and others receiving more depending on where in Canada the assets are located and the creditor resides.<sup>168</sup>

### VIII. Conclusion

Many people would like to find a middle ground between full immunity or full exigibility for charitable property and they look for this middle ground in the law of trusts. But there is no middle ground. Charitable property is either preserved at the expense of tort victims or it is not. This is so whether the property is held for charitable purposes absolutely or in trust or whether

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<sup>166</sup> For this reason, provincial efforts to protect charitable property in their provinces from the effects of a charity's insolvency should not survive challenge under section 15 of the *Charter of Rights and Freedoms* (denying people the equal protection and equal benefit of the law without discrimination) in addition to not surviving challenge under division of powers doctrine. One of the ironical consequences, of course, of provincial law protecting the property of a *solvent* charity located in that province, would be that creditors would be more likely to seek the liquidation of the charity under federal insolvency law to obtain access to a greater pool of assets. Thus charities, such as our hypothetical Humane Society, that would continue to function if they themselves could decide which of their assets had to be sold to pay their debts, would be forced to cease their operations entirely because of provincial law that was ostensibly designed to protect them!

<sup>167</sup> *Supra* note 165 at 483.

<sup>168</sup> That was the outcome sought by Braidwood J.A. in the British Columbia Court of Appeal in his dissent in *Rowland et. al. v. Vancouver College Ltd*, *supra* note 21.

the charitable purposes are described in broad and general terms or in narrow and specific ones. The middle ground that is being sought would permit access to charitable property for some tort victims but not others based on some combination of donor intent, trust law, or what have you, all designed to preserve the property for some “purpose”. Consequently, the middle ground will always leave some people harmed by a charity without a remedy in order to protect property used by the charity for others. The middle ground is thus an illusion.

Once title to property has passed to a charitable body by way of gift, will, trust, contract or whatever, the decision about what is to happen to that property is exclusively a decision for public policy to make. This follows from the dedication of that property to the common welfare and is so even if this dedication is accomplished by means of a trust.

In answer to the question: “can a charity’s creditors attach its property to pay their claims?” the policy choice is easy to state and simple to resolve. On one side are people with private claims against the charitable body that holds and uses that property as part of its charitable mission. On the other side are those known and unknown people who form part of the group of those who could derive some benefit from the property. Since public policy does not allow the second group to profit at the expense of the first, using any theory of law or equity to reach that result is contrary to law, not supported by it. Therefore, when a charity’s creditors come calling it is pointless to inquire into how the charity came to hold its property or whether it is obligated by way of a trust or otherwise to use the property for particular charitable purpose before permitting the creditors to attach this property. They can do so as a matter of law merely because the charity is liable to them and has title to the property. This is what the Court of Appeal for Ontario held in *Re Christian Brothers of Ireland in Canada*. The decision is correct, hands down.