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REPORT ON

NON-CHARITABLE PURPOSE TRUSTS

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE COLIN GABELMANN
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
NON-CHARITABLE PURPOSE TRUSTS

As a general rule, a trust that is framed for the benefit of a purpose rather than a person is invalid unless the purpose is charitable. In law, charity is a narrow concept which excludes many activities beneficial to the public. In this Report, the Commission examines the rule and the anomalies that flow from it and concludes that the current limitations which the law places on the creation of non-charitable purpose trusts should be abolished.

The Report sets out recommendations and draft legislation to make it possible to create a fully enforceable non-charitable purpose trust. This would be a useful and flexible device that will facilitate long-term support for many worthwhile activities and allow individuals to order their affairs in ways the current law does not permit.

TABLE OF CONTENTS

I INTRODUCTION. 1
A. General. 1
B. The Working Paper. 1
C. Format of the Report. 2
D. Terminology. 2

II PURPOSE TRUSTS. 3
A. General. 3
B. The Three Certainties. 4
C. The Necessity of a Beneficiary. 4
1. The General Rule: The Object of a Trust Must be a Person. 4
2. The "Indirect Beneficiary" Principle in *Re Denley's Trust Deed*. 6
D. Perpetuity Issues: A Further Pitfall. 6
E. Limited Legislative Reform. 6
1. Invalid Purpose Trusts and Powers of Appointment. 7
2. Legislative Reform in Ontario. 7
3. Legislative Reform in British Columbia. 7
4. The Scope of Section 21. 8
F. Charitable Trusts. 9
1. General. 9
2. The Preamble to the Act of 1601. 9
3. The Classification in the *Pemsel* Case. 10
4. The Meaning of the *Pemsel* Categories. 11
(a) Relief of Poverty. 11
(b) Advancement of Education. 11
(c) Advancement of Religion. 12
(d) Other Purposes Beneficial to the Community. 13
5. The Requirement of Exclusivity for Charitable Trusts. 14
(a) The Rule of Exclusivity. 14
(b) Section 44 of the *Law and Equity Act*. 16
(c) The Interaction of s. 44 of the *Law and Equity Act* and s. 21 of the *Perpetuity Act*. 17
6. Charitable Trusts and the Rules Against Perpetuities, Inalienability, and Accumulations. 18
7. The Doctrine of Cy-pres and the Scheme-making Power. 18
(a) General. 18
(b) Impossibility. 19
(i) Initial Impossibility. 19
(ii) Supervening Impossibility. 20
(c) Impracticability. 20
(i) Initial Impracticability. 21
(ii) Supervening Impracticability. 21

(d) Non-Cy-Pres Schemes. . . . 21
G. Summary. . . . 22

III IS THERE A NEED FOR FURTHER REFORM? 24
A. General. . . . 24
B. The Case for the Non-Charitable Purpose Trust. . . . 24
C. The Case Against Further Liberalization in Relation to Purpose Trusts. . . . 26
D. Conclusion Regarding the Need for Further Reform. . . . 27
E. The Deficiencies of Section 21. . . . 28
1. Duration. . . . 28
2. Trust or Power. . . . 28
3. Mixed Charitable and Non-Charitable Objects. . . . 30
F. Summary. . . . 31

IV REFORM. . . . 32
A. General. . . . 32
B. Purposes as Trust Objects. . . . 32
C. Duration. . . . 34
D. Enforcement of Non-Charitable Purpose Trusts. . . . 35
E. *Cy-pres* and Non-Charitable Purpose Trusts. . . . 37
1. Alternatives to Cy-pres. . . . 38
2. Application of Trust Property According to Settlor's Directions. . . . 38
3. Resulting Trust. . . . 39
4. Application of Trust Property to a Charitable Purpose. . . . 39
5. Transfer to the Crown. . . . 40
6. The *Cy-pres* Solution. . . . 40
(a) General. . . . 40
(b) Transposing cy-pres to the Non-Charitable Sphere. . . . 41
(i) No Equivalent to General Charitable Intent. . . . 41
(ii) A More Relaxed Standard of Similarity. . . . 41
(iii) What If There Is No Similar Purpose?. . . . 43
F. Substitution of Objects On Grounds of Obsolescence or Expediency. . . . 44
1. General. . . . 44
2. Guidelines for the Court. . . . 46
(a) The Settlor's Wishes. . . . 46
(i) During the Settlor's Lifetime. . . . 46
(ii) Non-Charitable Purpose Trusts Under a Will. . . . 46
(b) The Views of the Trustees. . . . 47
(c) The Substituted Purpose. . . . 48
G. Variation of Administrative Powers. . . . 49
H. Who Should be Able to Apply for Variation of a Non-Charitable Purpose Trust?. . . 50
I. Trusts With Mixed Charitable and Non-Charitable Objects. . . . 50
1. Is there Still a Need for a Provision like Section 44 of the *Law and Equity Act*? 50
2. Mixed Purpose Trusts with Specific Non-Charitable Objects. . . . 51
J. Summary. . . . 53

V CONCLUSION . . . 54
A. General. . . . 54
B. List of Recommendations. . . . 54
C. Draft Legislation. . . . 56
D. Acknowledgments. . . . 56

APPENDIX A . . . 58
DRAFT NON-CHARITABLE PURPOSE TRUST LEGISLATION. . . . 58

APPENDIX B . . . 64
THE RULES AGAINST PERPETUITIES, INALIENABILITY, AND ACCUMULATIONS AS THEY RELATE TO PURPOSE TRUSTS. . . . 64
A. The Rule Against Perpetuities. . . . 64
1. The Basic Rule. . . . 64
2. Application of the Rule Against Perpetuities to Charitable Trusts. . . . 65
3. The *Perpetuity Act*. . . . 66
B. The Rule Against Inalienability. . . . 67
C. The Rule against Accumulations. . . . 68
D. Pension Plans, RRSPs and Other Exempt Trusts. . . . 68

CHAPTER I INTRODUCTION

A. General

Most people have some idea that a trust involves an obligation to hold property for the benefit of others. They would also be aware that a donor who makes a gift by means of a trust is able to stipulate how the property may be used, while this control is not present if an outright gift is made instead. This ability to impose obligations on the recipient of property makes the trust attractive to donors who want the greatest degree of assurance that their gifts will be used as they intended.

Philanthropists and other donors of substantial amounts often want to provide a long-term funding base for a variety of purposes. One way of doing this would be to create a trust. A trust for the furtherance of a purpose, as opposed to one for the benefit of specific persons, is known as a "purpose trust." There are restrictions on the ability to create purpose trusts. These depend mainly on whether the purposes chosen are charitable or not in the eyes of the law.

In British Columbia, trusts for the support of useful activities and institutions that are not classified as "charitable" are only permitted to exist for a limited time. The term "charity" is generally associated with non-profit organizations devoted to benevolent aims, which obtain their funds largely through voluntary gifts. Few would associate "charity" with a very archaic body of law based on the interpretation of an Act passed during the reign of Elizabeth I. Yet this esoteric lore exerts a profound influence over all non-profit activities. Institutions and activities that cannot be said to be analogous to those mentioned in the preamble to the 1601 Act are not considered charitable.

Given the phenomenal growth of the non-profit sector in recent times, the law relating to charitable and other "purpose" trusts needs to be re-examined. Worthwhile activities should not be deprived of proper access to an alternative source of funding, and there is nothing to be gained by continuing to allow new applications of the trust device to be blocked by archaic law. Prior reforms in this area have been hesitant and restrictive in scope. In this Report, the present law is examined in order to determine whether distinctions based on seventeenth-century legislation should continue to govern the ways in which purpose trusts can be employed. This is one of a number of issues in the law of trusts that are currently under review by the Commission. A related but separate project concerns trusts surrounding funds that are raised informally through appeals to the public.

B. The Working Paper

In November, 1991 the Commission published a *Working Paper on Non-Charitable Purpose Trusts* to elicit comment on tentative proposals for reform. The Working Paper advocated removing most of the restrictions now placed on non-charitable purpose trusts and making such trusts fully enforceable. The Commission received a number of responses to the Working Paper. All those who

commented approved of the concept of a fully enforceable non-charitable purpose trust. While the recommendations made in this Report are, in large part, similar to the proposals made in the Working Paper, the Commission has reached them after fully considering all the points raised in the responses.

C. Format of the Report

The Report contains four Chapters, and two Appendices. Chapter II contains a summary of the present law relating to non-charitable purpose trusts. Chapter III discusses the defects in the present law, while Chapter IV discusses the way the law should be reformed to remove those defects. Chapter V contains a list of the Commission's recommendations. Draft legislation illustrating how the recommendations could be implemented appears in Appendix A, and Appendix B provides background on certain legal rules mentioned in the Report.

D. Terminology

A person who creates a trust is called a *settlor*.[1] The act of creating a trust, and the trust itself, are sometimes referred to as a *settlement*. Both words appear frequently in this Report. The document used to create a trust is usually referred to as an instrument. This term is used in the Report also. The preamble to the *Statute of Charitable Uses*[2] is referred to simply as *"the preamble"* and the Statute itself as the *"Act of 1601."*

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1 Trusts are frequently created by wills. One who makes a will is known as a *testator*. For the most part, will trusts are governed by the same principles as trusts that operate in the settlor's lifetime. In this Report, the term *settlor* is used for the sake of consistency to refer to a person who creates a trust by any means.

2 43 Eliz. I, c. 4.

A. General

A trust is created when property is transferred to a person, called the "trustee," under terms or circumstances which compel the trustee to deal with the property only in specified ways. Usually the trustee must deal with the property for the benefit of another person or group of persons, called the *beneficiaries*. The beneficiaries may include the settlor or the trustee, but even when the trustee is also a beneficiary, the legal ownership of the property which the trustee has in order to carry out the trust remains separate from the interest which the trustee may have as a beneficiary. This separation of legal and beneficial ownership is the hallmark of the trust.[1]

Trusts can be created in numerous ways. They may be implied from the circumstances in which the property comes into the trustee's hands. In some cases they can be imposed by a court. In this Report, we are mainly concerned with trusts that come into being as the result of an intentional act of the settlor, and which are stated in express language.[2]

Most trusts are created for the benefit of specific persons or classes of persons. These are called private trusts. There are many occasions, however, when donors want their gifts to be used for purposes which do not necessarily benefit identifiable individuals. One owner may wish to donate money to a university, another to a church. Yet another may wish to donate land for a civic art gallery. Outright gifts can be made, but the donor would then have no assurance that the money or land will be used in the specified manner. This is because the essence of an outright gift is a relinquishment of ownership to the recipient. Mere expressions of desire as to the use of the property will likely be unenforceable.[3] If donors wish to ensure that the property they give is applied in specific ways of their own choosing, they may wish to make a gift by means of a trust. As long as the terms of the trust are valid in law, the trustee is bound to abide by them. The settlor's intentions find continuing expression in this way.

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1 The beneficial interest in trust property is often referred to as *equitable* because it was originally recognized only in the Court of Chancery, which administered the jurisprudence known as *"equity,"* while courts of law recognized only the legal title in the trustee and took no notice of trusts. Courts now administer law and equity simultaneously.

2 The terms "express," "implied" and "constructive" are not always used consistently by all writers in relation to the various categories of trusts, and so we avoid using them in this Report. *See* Waters, *Law of Trusts in Canada*, (2nd ed., 1984) 17-20; Megarry, *Snell's Principles of Equity* (27th ed., 1973) 99.

3 Expressions of desire or hope on the part of a donor (referred to as "precatory words") generally do not create a trust and the recipient will take absolutely, unless a contrary intention can be inferred. *See Re Keyes Estate; Keyes* v. *Grant*, [1928] 2 W.W.R. 295 (B.C.C.A); *Re Adams and Kensington Vestry*, (1884) 27 Ch. D. 394 (C.A.); *Lambe* v. *Eames*, (1871) 6 Ch. App. 597.

B. The Three Certainties

The essential requirements of a valid trust are sometimes referred to as the "three certainties:"

1. Certainty of *words*, or the terms of the trust.
2. Certainty of *subject-matter*, or the property that is the subject of the trust.
3. Certainty of *objects*, namely the persons whom or purposes which the trust is to benefit or sustain.

The settlor's intentions as to how the trustee is to deal with the trust property must be sufficiently certain in order for the trustee to carry them out. The property that is subject to the trust must be identifiable. Lastly, apart from charitable trusts, about which more will be said, the trustee must also know precisely for whose benefit the property is to be administered, or at least be in a position to determine who falls into the class of persons who will benefit.

The requirement for certainty of objects is key to an understanding of the historical aversion to purpose trusts that was noted in Chapter I. A trust is essentially a relationship between persons based on an obligation resting on the trustee and a corresponding right in the beneficiary to enforce the performance of the obligation. The settlor, having transferred the property to the trustee, is no longer its owner. The need for a beneficiary capable of taking steps against the trustee in order to enforce the trust gives rise to some constraints on the ways in which trusts can be used.

C. The Necessity of a Beneficiary

1. The General Rule: The Object of a Trust Must be a Person

Before 1979, British Columbia courts would not enforce a trust that did not have a human being or a corporation as a beneficiary unless it was a charitable trust or one which fell into a small category of exceptions to the general principle that the objects of a trust must be persons.[4] That principle was derived from the law of England, along with most of the law relating to trusts. There it had been affirmed in a well-known case in 1805 that "there must be somebody, in whose favour the Court can decree performance."[5] The reasoning was that in the absence of a beneficiary, there was no one with a sufficient interest in the property as to be able to sue the trustee and bring about the enforcement of the trust by the court.[6]

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[4] In law, the term "person" comprises both human beings and corporations.

[5] *Morice* v. *Bishop of Durham*, (1805) 9 Ves. 399, 405, 32 E.R. 656, 658.

[6] A settlor who had transferred property to a trustee would no longer have any proprietary right in the subject-matter of the trust and so would not have standing to bring the trustee before the court. The settlor's personal representative would stand in no better position. While this is the traditional view, there are indications that the law may be changing: *see* Ch. IV, n. 19.

During the rest of the nineteenth century and part of the twentieth, this rule was relaxed to a certain extent. Trusts under wills for the maintenance of graves and monuments[7] and the care of particular animals were held to be valid.[8] Certain other kinds of purpose trusts were occasionally upheld as well.[9] In one case a trust for the furtherance of fox hunting was upheld.[10]

By the 1950's, courts had returned to the stricter view that trusts lacking specific, or at least identifiable, human or corporate beneficiaries, were invalid.[11] The cases dealing with graves and animals and other instances in which non-charitable purpose trusts had been upheld were dismissed as being anomalous[12] if they were correctly decided at all. Thus, trusts with such objects as the promotion of ethical standards in journalism[13] and the trust created by George Bernard Shaw's will for the reform of the English alphabet were struck down.[14] One usually unstated reason for the resistance to any further relaxation of the requirement for human or corporate beneficiaries was the economic impact of the tax concessions given to charitable trusts. Courts were reluctant to weaken the tax base by opening the door to new kinds of purpose trusts which might be eligible for tax-exempt status.[15]

2. The "Indirect Beneficiary" Principle in *Re Denley's Trust Deed*

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7 *Pirbright* v. *Salwey*, [1896] W.N. 86; *Re Hooper*, [1932] 1 Ch. 38; but see *Re McLellan*, (1914) 7 O.W.N. 447 (S.C.). In Nova Scotia, trusts for the perpetual maintenance of tombs and monuments are validated by statute: *Trustee Act*, R.S.N.S. 1989, c. 479, s. 66(1).

8 *Re Dean*, (1889) 41 Ch. D. 552.

9 In *Re Endacott*, [1960] 1 Ch. 232 (C.A.) the list of "valid" non-charitable purpose trusts given by Morris and Leach in *The Rule Against Perpetuities* (1956) was accepted: (1) trusts for the erection or maintenance of monuments or graves; (2) the saying of masses in jurisdictions where these are not regarded as charitable; (3) the maintenance of particular animals; (4) trusts for unincorporated associations; (5) miscellaneous cases. The category of trusts for unincorporated associations must now be considered doubtful in light of authoritative decisions that suggest these trusts are valid only if the association allows the members to dispose of the property as they see fit and if they can be construed as being for the benefit of persons who are members as of the time of the gift. Trusts that are for the benefit of present and future members, or simply for the non-charitable purposes of the association, are void (apart from any statutory validation) as infringing the rule against perpetuities: *Leahy* v. *Attorney General*, [1959] A.C. 457, 484 (P.C.) (N.S.W.).

10 *Re Thompson*, [1934] Ch. 342. The reason behind this holding may have been that there were residuary beneficiaries under the will who would be entitled to apply to the court for the fund if it were not being used as the settlor intended. Thus there was a means through which the court's aid could be invoked to indirectly enforce the trust. *See Re Astor's Settlement Trusts*, [1952] Ch. 534, 545-546.

11 *Supra*, n. 10.

12 *Re Astor's Settlement Trusts, supra*, n. 10; *Leahy, supra*, n. 9.

13 *Re Astor's Settlement Trusts, supra*, n. 10.

14 *Re Shaw*, [1957] 1 All E.R. 745 (Ch. D.).

15 *See* Bright, "Charity and Trusts for the Public Benefit - Time for a Re-Think," (1989) *The Conveyancer and Property Lawyer* 28, 32.

In 1969, an English court held in the case *Re Denley's Trust Deed*[16] that a trust could have an object phrased as a purpose, as long as an identifiable class of persons benefited from it, directly or indirectly.[17] In other words, an ostensible purpose trust may be valid if it is in reality a trust for the benefit of persons.[18] *Denley* has been followed in Canada.[19] While more trusts are now likely to be upheld on the strength of the "indirect beneficiary" principle than might have been the case earlier, *Denley* does not represent a wholesale abandonment of the original rule that the objects of a non-charitable trust must be persons.

D. Perpetuity Issues: A Further Pitfall

Lack of a beneficiary was not the only basis for striking down purpose trusts. Since a purpose could continue forever, and the policy of the law was to prevent restrictions on the ability to deal with property from lasting for too long a time, the potentially indefinite duration of non-charitable purpose trusts was commonly mentioned in the cases as an additional reason for holding non-charitable purpose trusts to be invalid.[20] Settlements which fell into the anomalous class of "valid" non-charitable purpose trusts for maintenance of graves and animals were only upheld if their terms did not allow them to last longer than a legally defined period known as the "perpetuity period."[21] The rules concerning the perpetuity period are explained in Appendix B.

E. Limited Legislative Reform

1. Invalid Purpose Trusts and Powers of Appointment

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16 [1969] 1 Ch. 373.

17 The trust must also satisfy the rules respecting remoteness of vesting and indefinite duration. *See* Appendix B.

18 The kind of non-charitable purpose trust that is the subject of this Report is truly impersonal, existing only to fulfil a purpose and not necessarily to benefit any person or class of persons. It is to be distinguished from trusts of the *Denley* kind. Business trusts may have objects worded as purposes, like the objects of a corporation. They can be used as vehicles for investment or security. A unit trust, for example, is an investment device in which the beneficiaries are investors whose equitable interests in the trust fund are measured in terms of "units" based on contribution towards the invested capital. Security arrangements involving the holding of pledged assets by a trustee for the benefit of bondholders and other creditors are common. A trust may also be employed to safeguard contributions of capital towards a business venture pending the formation of a company. Less frequent, but not unknown, is the use of a trust as a means of carrying out a business venture in lieu of incorporation. Trusts of this kind would probably fall within the *Denley* principle, *supra*, n. 16. While appearing to be purpose trusts, they would be in reality for the benefit of a particular class of persons, such as investors, creditors or co-venturers in a commercial enterprise.

19 *Keewatin Tribal Council Inc.* v. *City of Thompson and Provincial Municipal Assessor*, [1989] 5 W.W.R. 202 (Man. Q.B.).

20 *Chamberlayne* v. *Brockett*, (1872) 8 Ch. App. 206.

21 *Re Dean, supra*, n. 8.

In the wake of decisions to the effect that purpose trusts were inherently invalid unless they were charitable, it was suggested that trusts with purposes as objects could be treated as valid powers of appointment.[22] A *power* is an authority to dispose of or deal with property. The holder of a power need not have any rights of ownership in the property itself. A *power of appointment* allows the holder to determine which members of a group or class of persons are to receive property, or a beneficial interest in it. In the context of purpose trusts, the "appointment" would consist of the trustee applying the property towards the object chosen by the settlor. Thus, if the trust were treated as a power of appointment, the trustee could carry out the settlor's intentions even though the trust itself was unenforceable, or so the theory went. This position had been accepted in the United States.[23]

In a series of cases in the 1950's, however, the English courts repeatedly rejected the argument that an invalid trust could give rise to a valid power.[24]

2. Legislative Reform in Ontario

In 1965 the Ontario Law Reform Commission recommended that non-charitable purpose trusts should be permitted for the full period allowed under the perpetuity rules,[25] with the court having discretion to declare them void if it appeared that the settlor would rather have had the trust not take effect at all than be effective only for a limited period. It revised this recommendation the following year, suggesting instead that the period of validity be restricted to 21 years.[26] This reform was enacted into law in Ontario in 1966 as section 16 of *The Perpetuities Act, 1966*.[27]

3. Legislative Reform in British Columbia

In 1979 legislation dealing with non-charitable purpose trusts came into force in British Columbia, based on the Ontario model. It now appears as section 21 of the *Perpetuity Act*:[28]

> 21. (1) A trust for a specific noncharitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may

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22 *See* Sheridan, "Trusts for Non-Charitable Purposes," (1953) 17 Conv. 46, 63.

23 American Law Institute, *Restatement of Trusts* 2d, s.124.

24 *Re Astor's Settlement Trusts, supra*, n. 10; *Internal Revenue Commissioners* v. *Broadway's Cottages Trust*, [1955] Ch. 20, 36; *Re Endacott, supra*, n. 9 at 246.

25 Ontario Law Reform Commission, *Report on the Rule Against Perpetuities* (1965) 40-41.

26 Ontario Law Reform Commission, *Report on The Perpetuities Act*, 1965 [Supplementary Report on the Rule Against Perpetuities] (1966) 10-11.

27 S.O. 1966, c. 113 (now R.S.O. 1990, c. P.9).

28 R.S.B.C. 1979, c. 321. The legislation was enacted as s. 21 of the *Perpetuities Act*, S.B.C. 1975, c. 53, s. 21. Proclamation was delayed until 1 January 1979.

be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor within a period of 21 years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific noncharitable purpose is not fully expended within a period of 21 years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person who would have been entitled to the property comprised in the trust, if the trust had determined at the expiration of the 21 year period, is entitled to that unexpended income or capital.

(3) Nothing in this section applies to any discretionary power to transfer a beneficial interest in property to any person without the furnishing of valuable consideration.

Section 21 applies to trusts taking effect after December 31, 1978.[29]

The adjective "specific" in the Alberta counterpart to section 21 has been interpreted as meaning "certain" in the sense in which objects of trusts and powers are required to be certain.[30] If this is also the meaning of the British Columbia provision, as seems likely, the apparent effect is to allow the trust property to be used for the settlor's purpose for 21 years if that purpose is phrased in terms clear enough to enable the settlor's real intention to be discerned. Whether the section validates the trust itself for a period of 21 years, or instead converts the trust into a power of appointment, is somewhat unclear. This issue is discussed later in the Report.

4. The Scope of Section 21

Section 21 applies only to *non-charitable* purpose trusts. Charitable purpose trusts require no remedial legislation to ensure their validity or longevity. They are permitted to exist in perpetuity. For centuries, they have been given a special, and privileged, status in the law of property. In order to grasp what is meant by "non-charitable" purposes and arrive at an understanding of the scope of section 21, it is necessary to understand which purposes are legally classified as charitable. This is

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29 *Ibid*., s. 25. As s. 25 restricts the application of the Act, except for ss. 16(2), 22 and 24(3) to "instruments" taking effect after December 31, 1978, it appears that the older law continues to apply to non-charitable purpose trusts created otherwise than by an instrument. Trusts may be created merely by declaration. A purpose trust created by declaration may therefore be void unless charitable. While trusts of this kind would likely be rare, it is doubtful whether this uneven effect was intentional.

30 *Wood and Whitebread* v. *The Queen in Right of Alberta*, [1977] 6 W.W.R. 273 (Alta. S.C.). The test of certainty of objects of trusts or powers is that it must be possible to determine whether a given individual falls into the class of persons who are to benefit from the trust or power in question. *See McPhail* v. *Doulton*, [1971] A.C. 424 (H.L.); *Jones* v. *T. Eaton Co.*, [1973] S.C.R. 635, 651. In *Wood and Whitebread, supra*, this test was described as one of "linguistic or semantic certainty," and was adapted to a purpose trust by asking whether the terms of the trust were clear enough to determine whether a given use of the property would qualify as a valid execution of the trust.

the focus of the next section in this Chapter.

F. Charitable Trusts

1. General

Charity nearly eludes definition. In a very general sense, it denotes an activity, or an institution, that is useful to society as a whole or to a substantial segment of it, and which is sustained through the voluntary dedication of private resources to public purposes. This notion lies at the root of both the popular and the legal concepts of charity. The legal view of what is encompassed by the words "charitable purposes" is nevertheless quite distinct from popular understanding.

Today, most of the jurisprudence concerning charitable purposes arises from the tax treatment of charitable organizations and charitable gifts, but the general law of charitable purposes, as developed over the centuries, remains important. It is relevant in determining whether or not an organization is eligible to be a registered charity and receive gifts that attract the charitable tax credits and deductions available under the *Income Tax Act*.[31]

The law of charity is pervaded by a central theme: the dedication of private wealth for public, rather than private, benefit. The historical justification for the privileged status given to charitable dispositions of property, which continues to be valid today, is that charitable giving reduces the need for expenditures from the public purse.[32] Public benefit in itself, however, is not sufficient to qualify an activity or a disposition of property as charitable in law. It must meet other criteria which can only be understood in their historical context.

2. The Preamble to the Act of 1601

The law of charity is rooted in the destruction of the monasteries and other Church institutions in the course of the Reformation in sixteenth-century England. Before that time, education, the relief of the poor, and the care of the sick, were mainly the preserve of the Church. Dispersal of Church wealth led to the secularization of alms-giving. The standard technique through which a donor could ensure that money or other property given for worthy purposes was applied only for those purposes was the use, the ancestor of the modern trust.[33] When a gift was made subject to a use, the transfer did not confer absolute rights of ownership, but instead carried with it the obligation to utilize the property only for the purposes stated by the donor.

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[31] S.C. 1970-71-72, c. 63. The definition of "registered charity" appears in s. 248(1) of the *Income Tax Act*, and covers charitable trusts that obtain registration.

[32] Waters, *supra*, n. 2 at 570.

[33] Waters, *ibid*., 501-502; Hemphill, "The Civil Law Foundation as a Model for the Reform of Charitable Trusts Law", (1990) 64 Austr. L. J. 404, 405-406.

Abuses nevertheless occurred. In 1601 an Act was passed authorizing the appointment of commissioners to investigate and correct the misappropriation of charitable uses.[34] That Act contained a preamble listing various kinds of common charitable uses.[35] The listing of "good, godly and charitable uses" in the preamble became the foundation of the legal concept of charity. Over the following centuries, courts in England and in Canada have consistently maintained that only purposes which are analogous to those stated in the preamble to the Act of 1601 can be considered charitable.[36]

3. The Classification in the *Pemsel* Case

The charitable uses mentioned in the preamble to the Act of 1601 were classified into four categories in a leading English case in 1891, *Commissioners for Special Purposes of Income Tax* v. *Pemsel*.[37] The *Pemsel* list is as follows:

1. The relief of poverty.
2. The advancement of education.
3. The advancement of religion.
4. Other purposes beneficial to the community, not following within the first three heads.

In Canada the *Pemsel* classification is frequently referred to as an authoritative list of the classes of charitable purposes.[38]

4. The Meaning of the *Pemsel* Categories

The *Pemsel* classification was actually a summary of case law concerning the purposes which had been found to be analogous to those listed in the preamble. Numerous judicial decisions both

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34 43 Eliz. 1, c. 4.

35 The list of uses in the preamble was: (a) the relief of aged, impotent or poor persons, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, (b) the repair of bridges, ports, havens, causeways, churches, sea-banks and highways, (c) the education and preferment of orphans, (d) the relief, stock or maintenance for houses of correction, (d) the marriage of poor maids, (e) the support of young tradesmen, handicraftsmen and persons decayed, (e) the relief or redemption of prisoners or captives, (f) the aid or ease of poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes. The reference to "fifteens" concerns a tax levied on one-fifteenth of the value of a person's movable property.

36 *See, e.g., Morice* v. *Bishop of Durham, supra*, n. 5; *Leahy, supra*, n. 9 at 457; *Guaranty Trust Company of Canada* v. *Minister of National Revenue*, [1967] S.C.R. 133.

37 [1891] A.C. 531, 583 (H.L.).

38 *Guaranty Trust Company of Canada* v. *Minister of National Revenue, supra*, n. 36. The position may be slightly different in Ontario as a result of the definition of "charitable purposes" in the *Charities Accounting Act*, R.S.O. 1990, c. C.10, s. 7. *See Re Laidlaw Foundation*, (1984) 48 O.R. (2d) 549, 13 D.L.R. (4th) 491, 18 E.T.R. 77 (Div. Ct.). *See also* a comment on Laidlaw by D.W.M. Waters at 18 E.T.R. 120, in which the desirability of a statutory definition of "charity" is discussed.

before and after *Pemsel* have added many qualifications to the broad terms used to describe the four categories.

(a) Relief of Poverty

Only relief of actual physical or economic need is covered by this category. A trust having prevention of poverty as its object would not be considered charitable. Similarly, lobbying activity on behalf of the poor would probably be considered non-charitable.[39]

As with all charitable dispositions, trusts for the relief of poverty must not be intended solely to benefit specific persons. If the settlor intended particular needy individuals to benefit, the trust would most likely be classified as a trust for the benefit of those individuals, rather than a charitable one. The requirement of public benefit is applied much less stringently, if at all, in connection with trusts for the relief of poverty. The fact that only a limited number of poor persons can benefit from a trust does not prevent it from being charitable.[40] For example, a settlor might establish a trust for needy single parents in a particular municipality, or one for needy persons who attended the same school as the settlor, and these would be characterized as charitable.

(b) Advancement of Education

"Education" in the context of charity chiefly means intellectual education, or development of the mind.[41] It may also extend to the improvement of a branch of knowledge.[42] Charitable trusts may be created for the benefit of a school or university, or for scholarships for study at these institutions.[43] Both teaching and research carried on at these institutions constitute charitable activity.[44]

It is possible that trusts can also be created for the funding of training in a particular profession or trade, although the question may arise as to whether such a trust has the public character required

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[39] Lobbying would most likely be considered a "political" activity in the sense of being aimed at change in the law or social policy: *see Re Patriotic Acre Fund*, (1951) 1 W.W.R. 417, 428, [1951] 2 D.L.R. 624, 634; *Re Public Trustee and Toronto Humane Society*, (1987) 60 O.R. (2d) 236 (H.C.).

[40] *Jones* v. *T. Eaton Co. Ltd.*, [1973] S.C.R. 635; *Re Wedge*, (1968) 67 D.L.R. (2d) 433 (B.C.C.A.). In the past, even trusts for the relief of the settlor's "poor relations" have been held to be charitable, as long as it was clear that the trust was for the benefit of relatives as a class and not particular individuals. *See Re Scarisbrick's Will Trusts*, [1951] Ch. 622 (C.A.).

[41] *Wood and Whitebread* v. *The Queen in Right of Alberta, supra*, n. 30 at 284.

[42] *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General*, [1971] 3 All E.R. 1029 (Ch.); *Wood and Whitebread* v. *The Queen in Right of Alberta, supra*, n. 30 at 284.

[43] *Wilson* v. *Toronto General Trusts Corporation*, [1954] 3 D.L.R. 136 (Sask. C.A.).

[44] *Re Spencer*, (1928) 34 O.W.N. 29 (S.C.).

of a charitable trust, or is merely for the benefit of those engaged in that economic activity.[45]

Cultural activities not associated with formal education now tend to be considered charitable in England under the heading of "education,"[46] although it is doubtful whether this would have been the case in the past. There are few Canadian cases on this point, but a trust to aid in the publication of the work of "an unknown Canadian author" has recently been upheld as being in furtherance of education.[47]

It is clear that dissemination of information alone, and efforts to influence public opinion through information, does not qualify as "education" in a charitable sense.[48] This is very significant for the many organizations and lobby groups devoted to heightening public awareness of particular social issues.

(c) Advancement of Religion

Trusts can be established for the construction and maintenance of houses of worship,[49] missionary work[50] and religious education.[51] The support of clergy is a charitable purpose as well.[52] Not all religious activities are charitable, however. While the courts do not concern themselves with the merits of differing religious beliefs and traditions, some element of activity directed outward into the community is probably required in order to characterize a religious purpose as charitable, even if it merely encourages religious worship. Trusts for purely contemplative religious orders are not charitable.[53]

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45 *Seafarers Training Institute* v. *Williamsburg*, (1983) 39 O.R. (2d) 370 (Div. Ct.); Waters, *supra*, n. 2 at 564-565.

46 *Royal Choral Society* v. *Inland Revenue Commissioners*, [1943] 2 All E.R. 101 (C.A.).

47 *Re Shapiro*, (1979) 27 O.R. (2d) 517 (H.C.); *see also Senecal* v. *The Queen*, (1984) 3 D.L.R. (4th) 684 (F.C.T.D.). Some public benefit is still required, and not merely the pursuit of aesthetic qualities for their own sake. The key factor in the *Royal Choral Society* case was that the activities of the society were directed towards raising the artistic sensibility of society as a whole. In *Re Quinn*, (1984) 52 B.C.L.R. 273 (C.A.) a trust for the production of a work which portrayed "the beautiful" was held void. *Re Shapiro, supra*, was distinguished on the ground that the settlor had included a requirement of publication, which was absent in the *Quinn* will trust.

48 *Positive Action Against Pornography* v. *Minister of National Revenue*, [1988] 2 F.C. 340 (C.A.); *Re Toronto Humane Society, supra*, n. 39; *Toronto Volgograd Committee* v. *Minister of National Revenue*, [1988] 3 F.C. 251 (C.A.).

49 *Re Boyd*, (1924) 55 O.L.R. 627 (C.A.).

50 *Re Long*, (1930) 37 O.W.N. 351.

51 *Re Holmes*, (1916) 10 O.W.N. 354; *Re Anderson*, [1943] O.W.N. 303.

52 *Re McDonagh*, (1920) 18 O.W.N. 154; *Re Mountain*, (1912) 4 D.L.R. 737 (Ont. C.A.).

53 *Gilmour* v. *Coats*, [1949] A.C. 426 (H.L.); *Leahy, supra*, n. 9.

(d) Other Purposes Beneficial to the Community

This last category of the *Pemsel* list does not comprise every purpose that could conceivably be of public benefit. The question whether a given purpose is charitable under this head depends on a finding that it is analogous to one that has already been declared to be within the spirit of the preamble.[54]

The principal criterion for determining whether a gift is charitable in the miscellaneous category is, understandably, benefit to the community at large or to a substantial segment of it. For example, a trust for disaster relief in British Columbia would almost certainly be considered charitable. A trust of land for either a hospital or a public park has been upheld,[55] as has one for the building of a non-sectarian community hall.[56]

Activities directed at influencing governments or altering laws are not charitable even if a sizeable segment of society might approve of the aims in question. These are considered "political" aims, which are not permitted to be among the main objects of a charitable trust.[57] The rationale for holding these aims non-charitable is said to be that courts are not capable of deciding whether or not a given social or legal change would be beneficial.[58] It would be hard to exaggerate the importance of this aspect of charity law for the non-profit sector in Canada. The characterization of efforts directed at influencing public opinion and governmental policy or bringing about legal changes as "political" prevents many non-profit organizations whose principal objects consist of these activities from obtaining status as a "registered charity." This denies them the ability to issue receipts for contributions that will enable donors to claim a tax credit or deduction from their income. Thus it is much harder for these organizations to obtain funding on an annual basis than it is for charitable organizations.[59]

"Benefit to the community" is not a static concept, however. The process of analogy by which the courts determine whether a given purpose is charitable is sufficiently flexible to allow the fourth

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[54] *Scottish Burial Reform and Cremation Society* v. *Glasgow City Corporation*, [1968] A.C. 138, 154.

[55] *Cox* v. *Hogan*, (1925) 35 B.C.R. 286 (C.A.).

[56] *Re Vernon Estate*, [1948] 2 W.W.R. 46 (B.C.S.C.).

[57] *Re Patriotic Acre Fund, supra*, n. 39; *Toronto Volgograd Committee, supra*, n. 48.

[58] *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406, 442 (H.L.).

[59] These principles are not always applied evenly by the taxation authorities. The designation of some organizations as "registered charities" for tax purposes could well be questioned on the basis of traditional charity law. The *Income Tax Act, supra*, n. 31 now allows registered charities to devote part of their resources to political activities without endangering their status, if those activities are "ancillary and incidental" to their charitable purposes and do not include support for or opposition against a candidate for office or a political party: ss. 149.1(6.1), (6.2). Thus registered charities can take part in campaigns to raise public awareness and make representations to government in regard to issues that are related to their main purposes, subject to restrictions on the proportion that expenditures on these activities bears to the total expenditure of the registered charities. These activities would normally be "political" in the charity law sense.

category of the *Pemsel* list to evolve as social conditions and attitudes change.[60] A trust for the funding of amateur sport has been upheld, since physical activity is now seen as promoting health in the community.[61] Similarly, a native organization having as its main purposes non-profit broadcasting, training native persons in communications technology, and the publication of a non-partisan newspaper devoted to matters of concern to aboriginal peoples in British Columbia, has been held to be charitable. Since these activities had an educational element and would preserve and advance aboriginal culture, the objects of the organization would be beneficial to an identifiable section of the population. This was sufficient to bring the objects of the organization within the fourth head of the *Pemsel* classification.[62]

5. The Requirement of Exclusivity for Charitable Trusts

(a) The Rule of Exclusivity

Before recent statutory intervention, a charitable trust would fail if any part of the trust property could be used for a non-charitable object. This rule was applied relatively strictly, and incongruously so, in light of the public benefit that was supposed to be derived from gifts to charity.[63] The rule that charitable trusts had to be exclusively charitable created many pitfalls for settlors and their advisors.

Mixed charitable and non-charitable purposes can arise in a number of ways. The most obvious example is that of a list of objects in the trust instrument, some of which are charitable and some not.

Gifts to organizations are another fertile source of mixed purposes. A gift may be made to an organization on trust to be used for the purposes stated in its constitution.[64] These may not be

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[60] *Scottish Burial Reform and Cremation Society* v. *Glasgow City Corporation, supra*, n. 54.

[61] *Re Laidlaw Foundation, supra*, n. 38. This decision involved the application of the *Charities Accounting Act, supra*, n. 38, s. 7 rather than the *Pemsel* test. The definition of "charitable purpose" in the Act is similar to the *Pemsel* classification, however.

[62] *Native Communications Society of B.C.* v. *Minister of National Revenue*, [1986] 3 F.C. 471 (C.A.). By contrast, a trust for the promotion of Welsh culture was held non-charitable in England in 1947: *Williams's Trustees* v. *Inland Revenue Commissioners*, [1947] A.C. 447 (H.L.).

[63] Occasionally an imperfect charitable trust would be saved if the court was able to find a basis for apportioning the trust property between the invalid non-charitable objects and the valid charitable ones. Sometimes the non-charitable objects could be characterized as being ancillary to the charitable ones, or as the means of achieving the charitable objects, and the trust could also be saved in these cases. *See Guaranty Trust Company of Canada* v. *Minister of National Revenue*, supra n. 36; Ontario Law Reform Commission, Report on the Law of Trusts (1984) 436-437.

[64] A gift to an incorporated organization, made without any mention of a trust, would take effect as an absolute gift. This is because the organization would have a legal personality, and so could hold title to property: *Re Delaney Estate*, (1957) 26 W.W.R. 69 (B.C.C.A.). A gift made to an incorporated organization in trust "for its purposes," however, might create a purpose trust. The purposes would be those stated in the organization's constitution. A

exclusively charitable, as in the case of a club which takes part in community service activities, but also exists for the benefit of its own members.

Another possible source of invalidity is a discretion given to trustees to divide the trust fund among several institutions. If the institutions that may receive a portion of the fund are not all charitable, the discretionary trust will fail.

Many trusts have failed because the settlor has used a compendious term to describe trust objects like "philanthropic," "benevolent," or "public," either by itself or linked with the adjective "charitable" by the words "and" or "or."[65] While these broad terms terms may include charitable purposes, they extend beyond what is viewed as charitable in law.[66]

The use of terms such as "philanthropic" and "benevolent" to describe trust objects does not necessarily lead to invalidity if the context makes it clear that the settlor had exclusively charitable objects in mind. If the presence of the word "charitable" can be seen as confining the scope of the broader term, it is sometimes possible for a court to uphold the trust. This is more likely to happen if the settlor uses the conjunctive "and" instead of the disjunctive "or," but in all cases the validity of the trust depends on whether the settlor's words show an intention to benefit only charitable objects.[67]

The following are examples of trusts which would probably be void due to the mixture of charitable and non-charitable objects, apart from the effect of any validating legislation:

> "to my trustees on trust for charitable and benevolent causes in the City of Vancouver as they in their absolute discretion select"
>
> "to my trustees for charitable or worthy causes only"
>
> "to my trustees on trust to be divided by them in their discretion among the Oak Bay Senior Citizens Home, Oak Bay United Church and the New Democratic Party"

In the first case, the trustees can choose between "charitable" and "benevolent" causes as they see fit and there is nothing to indicate that "charitable" cuts down the wider meaning of "benevolent." In the second, "charitable" and "worthy" causes are alternative and are given equal importance by the settlor. There is no sign of any intention to restrict the use of the trust property

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gift to an unincorporated charitable organization takes effect as a trust for the purposes of the organization: *Re Finger's Will Trusts*, [1972] Ch. 286; *Re Vernon's Will Trusts*, [1972] Ch. 300, 303.

65 One notorious example of the failure of a trust due to the mixing of charitable and other objects involved the phrase "charitable or benevolent" in the Diplock will: *Chichester Diocesan Fund and Board of Finance (Inc.)* v. *Simpson*, [1944] A.C. 342 (H.L.).

66 *See* Waters, *supra*, n. 2 at 601-603; Ontario Law Reform Commission, *supra*, 435.

67 Waters, *ibid*., n. 32 at 602-603.

to charitable purposes alone. In the last case, two of the possible objects are charitable, namely the senior citizens home[68] and the church, but the third is not.[69]

One aspect of the problem of mixed purposes is addressed by section 44 of the *Law and Equity Act*.[70]

(b) Section 44 of the Law and Equity Act

This provision states:

> 44. Where a person gives, devises or bequeaths property in trust for a charitable purpose that is linked conjunctively or disjunctively in the instrument by which the trust is created with a noncharitable purpose, and the gift, devise or bequest would be void for uncertainty or remoteness, the gift, devise or bequest is not thereby invalid but operates solely for the benefit of the charitable purpose.

The section saves the trust by requiring, in effect, that the non-charitable purposes be ignored.[71] It applies when a charitable object of a trust is joined by "and" or "or" with a non-charitable one. It may apply as well when the linkage of objects is produced by running several adjectives together, either with or without commas, as in "worthy charitable causes" or "public, benevolent, charitable causes."

Section 44 does not cover situations in which charitable and non-charitable purposes become mixed other than through conjunctive or disjunctive linkage. For example, it probably would not apply to rescue a trust with a purpose described by a single compendious term which could apply to either category, such as a trust for carrying out "benevolent works," or a gift in trust to an organization which has both charitable and non-charitable functions. In cases not covered by section 44, the traditional rule requiring exclusively charitable objects apparently persists.

(c) The Interaction of s. 44 of the Law and Equity Act and s. 21 of the Perpetuity Act

As section 21 of the *Perpetuity Act* allows a non-charitable purpose trust to take effect as a power for 21 years instead of failing for uncertainty, and prescribes what is to happen to any remaining trust property at the end of that period, it may be asked when section 44 of the *Law and Equity Act* would come into play. If trusts for a non-charitable purpose are permissible at least for

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68 *Re Wright*, (1917) 12 O.W.N. 184; *Re Machin*, (1979) 9 Alta. L.R. (2d) 296 (D.C.); *Minister of Municipal Affairs* v. *Maria F. Ganong Old Folks Home*, (1981) 129 D.L.R. (3d) 655 (N.B.S.C., App. Div.). Benefiting the aged is a charitable purpose mentioned in the preamble to the Act of 1601.

69 If possible, the court will attempt to uphold a gift in trust to or for an organization which has mixed purposes by characterizing the non-charitable purposes as ancillary to the charitable ones: *Guaranty Trust Company of Canada, supra*, n. 36. Obviously, this is not possible in the case of a political party.

70 R.S.B.C. 1979, c. 224.

71 It is not entirely clear whether s. 44 requires the entire trust property to be applied to the charitable object, but that is likely to be the meaning. Cf. Waters, supra, n. 2 at 607.

a limited time, the mixing of charitable and non-charitable purposes should not result in a trust failing altogether. On the surface, the temporary validation of non-charitable purpose trusts by section 21 seems to conflict with the exclusive dedication to charitable purposes required by section 44. More than one answer to this conflict is possible.

One rule of interpretation holds that where there is a conflict between two statutory provisions, the later one may govern. Section 21 was enacted later than section 44.[72] If this rule is applied, section 44 would only operate when section 21 does not validate the non-charitable purposes. Section 44 would be restricted to cases in which a court holds a non-charitable purpose trust void under section 21(1) of the *Perpetuity Act* because it considers that doing so would be closer to the settlor's intention than allowing the trust to persist for only a limited period. If the non-charitable purpose of a trust held to be void on this basis is mixed with charitable ones, the traditional rule requiring that a charitable trust must be exclusively charitable would operate. This would invoke section 44, which would save the charitable portion of the trust.

Alternatively, it could also be that section 21 does not apply at all where there are mixed objects. On this view, section 44 is the more specific provision, and section 21 is the general one which must give way in the specific situation to which section 44 relates. If so, a non-charitable purpose trust is valid only when it stands alone. When the settlor includes a non-charitable purpose among other objects which are charitable, and the objects are linked together with the words "and" or "or", the trust property will be used only for the charitable objects.

Judging from the language of section 21, the second answer appears more likely to be correct. Section 21 refers only to non-charitable trusts. It contains no explicit indication that it converts an imperfectly constituted charitable trust into a temporarily valid non-charitable trust. Section 44, on the other hand, was clearly intended to salvage flawed charitable trusts. Yet this analysis is not entirely satisfactory either, since the term "non-charitable" can be used to describe trusts with mixed objects as well as trusts having exclusively non-charitable ones.

Whatever the correct view of the interaction of these two provisions may be, they do not fit together easily.

6. Charitable Trusts and the Rules Against Perpetuities, Inalienability, and Accumulations

Trusts, like other dispositions of property, are subject to rules that are intended to prevent restraints on the exercise of rights of ownership from continuing for excessively long periods. The policy of the law for many centuries has been that property should be freely transferable. It is generally thought that restraints on transferability which keep property out of the marketplace have negative economic effects. The rules against perpetuities, accumulations, and inalienability limit the degree to which these restrictions can be imposed. They represent a compromise between the general concern that property should be freely transferable and another well-entrenched value,

[72] S. 21 was originally enacted by S.B.C. 1975, c. 53. S. 2(38) of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213, the forerunner of s. 44 of the *Law and Equity Act*, was introduced by S.B.C. 1964, c. 27, s. 3.

namely that owners should be free to set the terms on which they dispose of their property.

The continued existence of these rules has been criticized as an anachronism.[73] The rules against perpetuities and accumulations have been abolished in Manitoba[74] and substantially modified in a number of other jurisdictions, including British Columbia. The *Perpetuity Act* of British Columbia introduced a number of changes in the application of the perpetuity and accumulations rules to charitable trusts as well as to other dispositions of property, but these reforms are not readily understandable without an explanation of the pre-existing law. The original rules and their statutory modification are explained in Appendix B.

Charitable trusts enjoy a certain degree of exemption from the full rigour of the rules in light of the public benefit that the law anticipates will result from them, though the exemption is not complete. The most significant concession given to charitable trusts is that they are not subject to the so-called rule against inalienability or perpetual duration.[75] Exemption from this rule allows charitable trusts to last forever.

7. The Doctrine of Cy-pres and the Scheme-making Power

(a) General

When a private trust cannot be carried out because it is invalid on legal grounds, or becomes impossible to fulfil due to circumstances which were not foreseen by the settlor, the trustee is normally said to hold the trust property under a resulting trust for the benefit of the settlor or the settlor's estate. Usually the trust will be wound up by transferring the trust property back to the settlor.

If a charitable trust cannot be fulfilled, the trust property may in some circumstances be used for other charitable purposes, rather than reverting to the settlor under a *resulting trust*. This requires a court order approving an alternative scheme for the application of the trust property. The principle that allows the court to substitute other objects for a charitable trust, and the jurisdiction to make such an order, are known as *cy-pres*.[76] In exercising this jurisdiction, the court seeks to find

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[73] *See* Waters, *supra*, n. 2 at 287. The merits of retention, abolition, or further modification of the perpetuity, accumulation and inalienability rules are beyond the scope of this Report, but the discussion of the rules here should not be taken as implicit approval by the Commission of their preservation.

[74] S.M. 1982-83-84, c. 43, ss. 2, 3.

[75] An explanation of this rule also appears in Appendix B.

[76] C*y-pres* must be distinguished from the jurisdiction exercised when a court approves a scheme of charitable objects for a trust when the settlor merely states the property is to be given to trustees "for charity," "for charitable work," or indicates in some other manner that the property is to benefit exclusively charitable purposes, without specifying them. This scheme-making jurisdiction flows from the principle that no trust fails for uncertainty of objects as long as the intention was to confine the objects to charity: *see Re Gott*, [1944] Ch. 193; *Re Robinson*, [1931] 2 Ch. 122, 128-129; *Re Fallis*, [1947] 2 W.W.R. 883 (Sask. C.A.); *Re Quinn, supra*, n. 47; Waters, *supra*, n. 2 at 513. The jurisdiction to approve non-*cy-pres* schemes for charitable objects is discussed

objects as close as possible to those intended by the settlor. Since the legal notion of charity is one of a private dedication of property to public uses, the court respects the settlor's original intention to the greatest extent possible.[77]

Cy-pres applies only when a valid charitable trust is or becomes impossible or impracticable to fulfil. It does not come into play when an attempt to create a charitable trust fails for legal reasons such as violation of the rule against perpetuities or lack of exclusivity.

(b) Impossibility

Fulfilment of a charitable trust may be impossible when the trust is created or it may become impossible afterwards due to supervening circumstances. *Cy-pres* is applied somewhat differently, depending on whether the case is one of impossibility at the creation of the trust or one of supervening impossibility. The distinction between initial and supervening impossibility depends on whether the conditions making it impossible for the original trust to be performed according to the literal meaning of its terms are present before or at the time when the legal title to the trust property passes to the trustee, or whether they occur afterwards.[78]

(i) Initial Impossibility

A will may name a particular charitable organization to receive a fund in trust for its purposes, but the organization may never have existed or may cease to exist in the settlor's lifetime. In either case, the particular trust which the settlor desired to create would be impossible to fulfil at the time the trust provision in the will came into effect on the death of the settlor.[79]

When it is apparent that a charitable gift on trust is impossible to carry out from the time the settlor desired the trust to take effect, a court will look for a *general charitable intent* on the part of the settlor. It will try to determine whether the settlor's overriding concern was that the property be used for charity generally or for one of the four categories of charity in the *Pemsel* classification,

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later in this section under the heading (e) "Non *cy-pres* Schemes."

[77] The strictness of the *cy-pres* doctrine has been relaxed by legislation in England, New Zealand and Western Australia to expand the court's *cy-pres* powers with regard to the selection of alternative objects: *Charities Act*, 1960, 8&9 Eliz. II, c. 58, s. 13 (Engl.); *Charitable Trusts Act, 1957*, Repr. Stat. N.Z. 1908-1957, No. 1, s. 32, *Charitable Trusts Act, 1962*, Stats. W. Aus. 1962, No. 82, s. 7. In British Columbia, numerous provisions allowing greater leeway in the substitution of alternative objects may be found in legislation creating various foundations. *See* Appendix B, n. 21.

[78] Waters, *supra*, n. 2 at 626.

[79] If the charitable purposes of the recipient organization can still be fulfilled despite the organization having ceased to exist, there is no initial impossibility and *cy-pres* is not required: In *Re Finger's Will Trust, supra*, n. 64 at 295. There is also no basis for invoking *cy-pres* if the recipient organization, on its dissolution, has the power to divide its assets among its members. In that case, a resulting trust would likely arise and the settlor or the settlor's next of kin could claim it. *See* Waters, *supra*, n. 2 at 626.

rather than only in the specific manner stated in the instrument.[80] In other words, the question asked is: Would the settlor have dedicated the property to charity in any event or did the settlor only wish the property to be applied to the particular charitable purpose originally chosen?

If the court finds that the settlor had no general charitable intent, the property will be held on resulting trust and will ultimately be returned to the settlor or the settlor's estate. If, on the other hand, the court finds the settlor's overriding intention was to dedicate property to charity, it can substitute another charitable purpose as close as possible to the one originally chosen by the settlor.

(ii) Supervening Impossibility

If a church receives funds on trust for the maintenance of the building and the church is subsequently destroyed, supervening conditions have prevented the original trust from being carried out any further. The trustees still have trust capital in their hands, however. What can they do with it?

In the case of a supervening impossibility like this one, the dedication of the trust property to charity has already occurred, so the court does not look for general charitable intent on the part of the settlor.[81] Instead, the court will substitute another charitable object as similar as possible to the original one.

(c) Impracticability

Impracticability is another ground on which charitable trusts may be varied. Situations may arise in which it is still theoretically possible to carry out the terms of a charitable trust, but the purpose of the trust is unlikely to be effectively served due to a change in circumstances not foreseen by the settlor. The principle that the substituted objects must conform to the greatest extent possible to the original ones still holds, however. A court will not re-deploy trust property merely on the basis of its own opinion as to how the public interest could best be served.[82]

(i) Initial Impracticability

Impracticability may occur at the time a charitable trust is to commence. For example, a trust may be created under a will for the construction of a hospital in a particular locale, but by the time the will takes effect, another hospital has already been built.

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[80] Maurice and Parker, eds. *Tudor on Charities*, 7th ed. (1984) 233-234.

[81] The rationale for applying *cy-pres* in cases of supervening impossibility or impracticability even in the absence of general charitable intent is that once property has vested in charity, it belongs to charity forever: *Re Faraker*, [1912] 2 Ch. 488 (C.A.); Waters, *supra*, n. 2 at 626. If there has been a less than complete dedication to charity, such as would be the case if there was a gift over on the cessation of the charitable purpose, *cy-pres* would not apply.

[82] *Re Weir Hospital*, [1910] 2 Ch. 124 (C.A.). The court does have a wider discretion to provide charitable objects when the settlor intended to create an exclusively charitable trust, but does not provide enough detail about the object to enable the intention to be put into effect. *See* the heading (d) "Non-*cy-pres* Schemes."

Another variety of initial impracticability occurs when the trust fund is too small to allow the trustee to accomplish the purpose stipulated by a settlor. This is quite likely to happen under a will trust when the will was made many years before it takes effect.[83]

When it is impracticable to carry out the terms of the trust at the time the trust is to come into being, the court may substitute other objects for the trust if it finds that the settlor had a general charitable intention.

(ii) Supervening Impracticability

When the circumstances making the trust impracticable arise after the trust instrument takes effect, *cy-pres* is applied in a similar manner as in cases of supervening impossibility. General charitable intent is not required on the part of the settlor, but as in all cases, the court will not depart from the settlor's original concept any further than it must in finding a new application for the trust property.

*(d) Non-Cy-Pres Scheme*s

Unlike other trusts, a charitable trust will not fail for uncertainty of objects. As long as it is clear that the settlor intended to create an exclusively charitable trust, that intention will not be defeated by an insufficient description of the charitable objects, nor by an insufficient description of the means by which the property is to be applied in order to achieve them.[84]

For example, a will might state that part of the estate is given to trustees to be used simply "for charity," without stating any further details as to how the property is to be distributed. In such a case the court is able to approve a scheme for the application of the property to charitable purposes.[85] In doing so, the court essentially supplies the charitable objects which the settlor has omitted.[86]

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[83] *Re Holmes, supra*, n. 51 at 626.

[84] Waters, *supra*, n. 2 at 611; *Re Etter's Will*, (1967) 61 W.W.R. 427, 431 (Sask. Q.B.).

[85] *Philpott* v. *St. George's Hospital*, (1859) 27 Beav. 107, 112, 54 E.R. 42, 44 (Ch.). In *Re Gilbert Estate*, (1913) 4 O.W.N. 771 the court approved a scheme for what may have been such a general charitable bequest. It should be noted that the court's jurisdiction depends on the existence of a trust or an obligation in the nature of a trust. If property is given outright rather than to a trustee, the power to impose a scheme belongs to the Crown rather than to the court. *See* Waters, "Case Comment: *Re Centenary Hospital Association*," (1990) 9 *The Philanthropist* 3, 14; *Moggridge* v. *Thackwell*, (1803) 7 Ves. 36, 86, 32 E.R. 15, 32. In England, the Charity Commissioners are empowered by s. 18 of the *Charities Act 1960*, 8 & 9 Eliz. 2, c. 58 to exercise the same jurisdiction and powers as the court in regard to establishing a scheme for administering charitable trusts, if the trustees ask them to do so or if the court directs the establishment of a scheme. In 1989 the U.K. Government announced its intention to amend the *Charities Act, 1960* to allow the Commissioners to exercise their scheme-making powers even without an application by the trustees, if the public interest in the effective deployment of the trust fund so required. *See* Home Department, *Charities: A Framework for the Future* (Cmnd. 694, 1989) 29.

[86] In a number of cases settlors have indicated that specific charities and charitable purposes would be designated at another time or in another document, and then failed to make the designation. The court may approve a scheme in these situations, as long as it is satisfied the settlor intended to devote property to charity exclusively. *See Re*

Where there is some indication in the instrument as to the nature of the charitable purposes intended by the settlor, the court will select charities in order to conform as closely as possible to the apparent intention. For instance, there have been many cases in which charitable organizations have been misnamed in the trust instrument. When this occurs, the court attempts to determine the precise organization which the settlor intended to receive the funds, and approves the distribution of the property accordingly.[87]

Even where the court is careful to select objects in accordance with the evident intention of the settlor, however, the court's imposition of a scheme in cases of insufficient description of charitable objects in the trust instrument is not an example of *cy-pres*.[88] *Cy-pres* is invoked when the charitable objects are described with sufficient certainty, but are impossible or impracticable to carry out. Courts do not always distinguish clearly between true *cy-pres* and other schemes for the application of trust property to charitable purposes.[89]

G. Summary

Formerly, the requirement that there be some person who could enforce a trust against the trustee prevented the possibility of a trust for a purpose. The sole exception, apart from a few anomalies, was in the sphere of charity. Trusts for charitable purposes could be created, but the range of charitable purposes was restricted by the preamble to the Act of 1601. Even today, in order to be charitable a purpose must be analogous to the purposes found in the preamble, at least to some degree.

Statutory reform in British Columbia in relation to purpose trusts has been limited in scope. The principle that trusts with mixed charitable and non-charitable purposes are void has been moderated by section 44 of the *Law and Equity Act*. This provision allows the charitable portion of a trust to stand when non-charitable objects are linked conjunctively or disjunctively with charitable ones, but it does not save all mixed-purpose trusts.

Trusts for non-charitable purposes can now be created by virtue of section 21 of the *Perpetuity Act*, which states that they take effect as powers. Their duration is limited to 21 years, however, and they may still be held void by a court if it finds the settlor would have preferred the trust not take

Leslie, [1940] O.W.N. 345 (H.C.). In *Re Quinn, supra*, n. 47 a will directed that the residue of the estate was to be divided among charities according to a letter of instruction. No letter of instruction was ever found. It was held that the will created a trust. A fair inference from the decision is that the court was prepared to use its power to approve a scheme of distribution after the Attorney-General had an opportunity to be heard with regard to its terms. A scheme was established in *Re Hyman Estate*, (1921) 19 O.W.N. 420 (H.C.) where the will stated the residue of the estate was to be used for charitable purposes as designated by the court.

[87] *See Re Dickson*, (1923) 24 O.W.N. 161 (H.C.); *Re Etter's Will, supra*, n. 84.

[88] *Re Robinson, supra* n. 76 at 128-129; *Re Gott, supra*, n. 76 at 197; *Re Etter's Will, supra*, n. 84.

[89] Waters, *supra*, n. 2 at 612.

effect at all rather than endure only for a limited period.

Despite the enactment of section 21, the law of charitable purposes is still relevant in determining whether a trust for a purpose can last indefinitely or must be confined to 21 years' duration.

A. General

Three major influences shape the climate for philanthropy today: taxation, fiscal restraint, and participatory democracy. Of these, taxation is no doubt the most significant. Patterns of giving are governed to a great extent by the availability of an income tax credit or deduction,[1] and recipient organizations are vitally concerned with maintaining the status of "registered charity" that enables them to receive gifts that attract these concessions.

Despite the pervasive effects of the tax structure, the other two influences should not be ignored. As governments find it increasingly necessary to curtail funding for research, the arts, athletics, and many groups whose activities might be described generically as "social activism," the importance of privately-sourced funding grows. While opinions differ greatly on the merits of public funding for activities that are peripheral to basic governmental functions, private giving gives rise to much less controversy.

This Chapter canvasses the arguments for and against expanding the ability to fund non-charitable activities through a purpose trust beyond the limits of section 21 of the *Perpetuity Act* and reaches a conclusion on the desirability of further change in this area of the law.

B. The Case for the Non-Charitable Purpose Trust

Until the middle of the twentieth century it might have been true that donors did not look much further than the traditional categories of charity in making wills or in their annual giving. Churches, schools and universities, relief of the poor or aged, and miscellaneous community purposes for which fundraising campaigns would occasionally be held, occupied most of the field. Today, however, there are innumerable non-profit organizations competing for donations.

The law of charity is not inflexible, but its notion of public benefit is still fairly narrow. Public benefit, insofar as charity is concerned, consists of the substitution of private resources for public funding in areas where public expenditure would otherwise be needed. It is coloured somewhat by the first three categories of the *Pemsel*[2] classification and is tied to the process of analogy through which the courts determine if a given purpose is charitable within the meaning of the Act of 1601.[3] Under the law as it stands in British Columbia, this concept of public benefit would probably not

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1 Individual donors receive a tax credit for qualifying gifts, while corporate donors continue to receive a deduction in computing taxable income: *Income Tax Act*, R.S.C. 1970-71-72, c. 63, ss. 110.1, 118.1.

2 *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531, 583.

3 43 Eliz. 1, c. 4.

extend to many activities which a substantial number of people believe to be worthy of support, but which are not customarily funded from public sources. Many of these are cause-oriented. These activities are directed primarily towards social and legal change, which would almost certainly remove them from the domain of common law charity.

The position taken by the tax authorities regarding charitable status is not binding on the courts for all purposes. The definition of charity at common law determines whether a given activity is capable of being supported through a trust. Securing "registered charity" status for income tax purposes does not necessarily allow an organization to accept endowment funding if a court determines that the organization's objects are not truly charitable. Under the general law of property, non-charitable bodies cannot be funded in perpetuity through a trust.

While the endowment model is a less significant means of financing charitable activities than annual fundraising campaigns, it is far from dead.[4] The inability to enjoy endowment funding puts non-charitable bodies at a serious disadvantage in relation to charities. The disadvantage is compounded by the fact that non-charitable bodies find it difficult to gain access to other means of fundraising that are sometimes made available to charitable organizations, such as lotteries and similar games of chance.

It is becoming increasingly difficult to justify a distinction in treatment based on the presence or absence of an aim that is "political" in the sense used in the law of charity. Today even traditional charities engage in lobbying and efforts to motivate public opinion in regard to a change in public policy or legislation. This has received limited recognition in the *Income Tax Act*,[5] which now allows registered charities to engage in non-partisan political activities that are incidental to their charitable activities without endangering their status.[6] When the lines between what is charitable and what is not have been blurred to this extent, there is no justification for preventing lawful non-profit bodies from obtaining funding through a trust.

Endowment funding, rather than dependency on annual campaigns for non-deductible donations, is well-suited to the needs of non-profit activities outside the boundaries of charity. By their very nature, charitable causes usually attract a wide base of support. The emotional factors that lead the public to donate generously to charities are present less often in appeals on behalf of a non-charitable activity. Support for non-charitable causes is drawn from those who are informed with respect to the particular issue in question and who have formed an opinion on it. Those engaged in raising funds for a non-charitable purpose must target their appeal carefully to a narrower audience and try to elicit substantial individual donations. They cannot rely on a large number of small donations.

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4 Waters, *Law of Trusts in Canada* (2nd ed., 1984) 628.

5 *Supra*, n. 1.

6 *Ibid*., ss. 149.1(6.1), (6.2).

Donors of substantial means might be more easily attracted if they could make full use of the trust mechanism. An organization accepting a fund on trust cannot vary the objects of the trust unilaterally, but the use of funds acquired by outright gift can change without the donor's consent if, for example, the objects of the recipient organization are altered.

While section 21 of the *Perpetuity Act*[7] opens the door to endowment funding of non-charitable activities, the limited duration it allows greatly restricts the use of the endowment model. If freed from the constraints imposed on it by section 21, the non-charitable purpose trust could be an economically useful alternative for sustaining many worthwhile activities that must now compete for governmental funding that is becoming ever more scarce.[8]

C. The Case Against Further Liberalization in Relation to Purpose Trusts

It has been known since very early times that when property was withdrawn from the stream of commerce for too long a time by restraints on its alienation or use, detrimental economic effects would follow. Private trusts restricting the use of property were subject to rules which effectively limited their duration. They were also subject to termination if all the beneficiaries consented to the winding up of the trust and demanded the transfer of the property.[9]

Charitable trusts were allowed to continue indefinitely because they relieved the need for public spending. The common law concept of charity represented a consensus as to the kinds of activities which were inherently of benefit to the community, and to a large extent this is still true. The base on which such a consensus could be achieved is necessarily a narrow one. There is no uniformity of opinion as to whether particular non-charitable, non-profit activities are publicly beneficial. In fact, many of them are highly controversial. What is seen as responsible environmental concern by some, for example, may be considered as a form of economic sabotage by others.

Many non-charitable purpose trusts would serve only the whims of the settlor. There is no

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[7] R.S.B.C. 1979, c. 321.

[8] One potential use for a purpose trust would be to maintain a fund for environmental reclamation or potential liabilities associated with environmental harm. By establishing a trust fund and making periodic additions to it, a commercial enterprise could build up reserves to meet its obligations. Since the fund would not be the property of the company and could not legally be mixed with the company's liquid assets, regulatory authorities would be assured that the fund could not be diverted to other ends. Given the prominence of environmental concern, some might argue that a trust of this kind would now be considered charitable.

[9] This is known as the rule in *Saunders* v. *Vautier*, (1841) 4 Beav. 115, 49 E.R. 282, *aff'd*, Cr. & Ph. 240, 41 E.R. 482. The *Trust and Settlement Variation Act*, R.S.B.C. 1979, c. 413 now allows the Supreme Court to consent on behalf of incapacitated, unborn and unascertained beneficiaries. *See also Report on the Land (Settled Estates) Act* (LRC 99, 1988).

shortage of examples of attempts to create eccentric trusts.[10] Others would merely subsidize special interest groups without a broad base of support in public opinion. While trusts for purposes that are actually harmful to society, such as agitation against religious minorities or the propagation of the settlor's racist views, would probably be void as being against public policy,[11] the increased scope for controversial objects may lead to a greater volume of litigation and ill-feeling between various segments of the population.

The taxation system is unfavourable to non-charitable purpose trusts for a number of reasons. Transferring property to a trust may produce capital gains taxes for the settlor and may also attract goods and services tax. Trusts are subject to high rates of income tax, and many deductions that can be claimed by individuals are unavailable to them. In addition, trusts are deemed to dispose of their assets every 21 years, which can lead to taxable capital gains.[12] When almost all giving is based on tax considerations governed by federal law, does it make sense to alter the provincial law of trusts to further accommodate philanthropic objects that are not charitable at common law, and thus are unable to fit into the tax exemption?

Section 21 of the *Perpetuity Act* represents a compromise. It allows the creation of non-charitable purpose trusts, but avoids the negative effects of tying up capital and other resources for excessive periods. Those who accept these arguments would say that the concession need not be widened.

D. Conclusion Regarding the Need for Further Reform

There are significant advantages in allowing the creation of purpose trusts with non-charitable

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[10] In *Brown* v. *Burdett*, (1882) 21 Ch. D. 667, executors were directed to brick up the entrances and windows of the testatrix's house and leave it for 20 years exactly as it was at the time of her death. *Re Gwyon*, [1930] 1 Ch. 255, concerned an attempt to create a trust to provide knickers for boys with a legend on the waistband. In *Re Hummeltenberg*, [1923] 1 Ch. 237 a will contained a trust for the founding of a college for training spiritualist mediums. A recent British Columbia case, *Re Millen Estate*, (1986) 22 E.T.R. 107 (S.C.) concerned a trust for establishing an annual award for a lyric and a prose composition which "portrays the beautiful." No standards of beauty were prescribed by the settlor, and no provision for publication was made in order to add the winning compositions to the general body of literature.

[11] The courts are empowered by the general law to strike down terms of property dispositions that clash with overriding social values to such an extent that they would almost universally be considered harmful. Such property dispositions are said to contravene public policy. While courts have traditionally been very hesitant to invoke this power in relation to private trusts except with regard to certain categories of restrictions on the use of property, recent cases show an increased tendency to draw guidance from expressions of social values in the constitution, treaties, and general legislation. In *Canada Trust Company* v. *Ontario Human Rights Commission*, (1990) 74 O.R. (2d) 481, 69 D.L.R. (4th) 321 (C.A.), the Ontario Court of Appeal gave precedence to the values of racial, sexual and ethnic equality in striking down the discriminatory terms of a racially restricted educational trust. *See also Re Lysaght*, [1966] 1 Ch. 191.

[12] S.C. 1970-71-72, c. 63, s. 104(4). Amendments have been proposed to allow the deferral of the deemed disposition for the duration of the interests of certain classes of beneficiaries. This concession would not apply to impersonal purpose trusts. *See* Department of Finance Release No. 91-018, 11 February 1991. (Notice of Ways and Means Motion tabled 19 June 1992.)

objects. In the view of the Commission, the increased opportunity for access to long-term funding for philanthropic purposes which this kind of trust offers outweighs the objections that can be made against it.

Of course, the fact that non-charitable trusts would be fully taxable, and would yield no tax credit or deduction for the settlor, is a disincentive to their creation. There is no reason why the tax structure has to dictate the availability or non-availability of the mechanisms that are open to a donor under the law of property, however. Arguments against increased scope for non-charitable purpose trusts based on the opportunity for self-indulgence in the creation of outlandish trusts are really based on the proposition that such trusts allow property to be tied up indefinitely in a possibly useless manner. These arguments lose much of their force when it is realized that most trust funds consist nowadays of invested capital. The existence of a trust no longer means that assets must be drawn out of the stream of commerce, as it might have done in the past when trusts of land were much more common.

Non-charitable purpose trusts have already won partial acceptance. Since 1979, it has been possible to create them in British Columbia. Section 21 of the *Perpetuity Act* is a flawed instrument, however. The restraints it imposes on the full potential of this kind of trust should be removed.

E. The Deficiencies of Section 21

1. Duration

The limited duration allowed by section 21 is too short if the trust is serving a useful purpose.[13] If a purpose trust has ceased to be useful, there ought to be a means of varying it so that the fund is usefully deployed. Twenty-one years may have been chosen as a maximum duration only because it represents the common law perpetuity period determined without reference to lives.[14] The arbitrary time limit in section 21 catches both obsolete and useful trusts.

2. Trust or Power

The section is obscure with respect to whether a non-charitable purpose trust takes effect for 21 years as a trust or as a power. It states that the trust "shall be construed as a power" and also states that "the trust is valid" to the extent that it is exercised within 21 years. Does the section intend that the disposition take effect as a trust, a power in the nature of a trust, or only as a power

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[13] In Waters, *supra*, n. 4 at 288, the period of 21 years in s. 21 and its counterparts in the legislation of other provinces is referred to as "curiously arbitrary."

[14] This would seem to be the case with s. 16 of the *Perpetuities Act* of Ontario, on which s. 21 is modelled. *See* Chapter II, n. 27. The Ontario Law Reform Commission noted that "strong representa-tions" were received that non-charitable purpose trusts, if permitted at all, should last 21 years at the most: *Report on the Perpetuities Act [Supplementary Report on the Rule Against Perpetuities]* (OLRC 1A, 1966) 10. While the Report does not give details as to the substance of the representations, we would disagree on this point with those who made them.

of appointment?[15] The distinction may be important.

Example

> A settlor establishes a trust for the purpose of encouraging patriotism. The trust requires the trustees to distribute the capital and income from time to time as they see fit among several named, but unincorporated, associations having patriotic aims. In order to stay within the limits of section 21, the terms of the trust state that all the trust property and any accumulated income from it is to be expended within 21 years. The trustees make no distributions whatsoever, and the fund sits idle. After a number of years go by, members of the associations apply to the court for an order requiring the trustees to take action.

If section 21 reverses the previous law and validates the trust for a 21-year period, the court should be able to enforce the trust. This flows from the supervisory jurisdiction which the court has over all trustees.

If the section allows the trust to take effect as if it were a power of appointment with the character of a trust, such that the trustees were under a duty to exercise the power, the court would again be able to ensure that the duty was carried out. It might do so by removing the trustees and appointing new ones willing to perform it, or by approving a scheme of distribution for the trust fund.[16]

On the other hand, if section 21 converts this non-charitable purpose trust into a power of appointment only, the court could not compel the trustees to carry out the settlor's intentions at all.[17] This is because a power of appointment is only an authority to deal with property in a certain way, but not an obligation to do so. An additional reason for the court's inability to act against the delinquent trustees would be that there is no valid trust to enforce, since a non-charitable purpose trust cannot exist apart from legislation.

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[15] In *Wood and Whitebread* v. *The Queen in right of Alberta*, [1977] 6 W.W.R. 273, 281 (Alta S.C.), it seemed clear to the court that the Alberta equivalent of s. 21(1) "converts the disposition into a power." If so, why does the section also say that "the trust is valid" to the extent that it (or the power into which the trust is transformed) is exercised within 21 years?

[16] A power coupled with a duty to exercise the power is sometimes called a *trust power*. A trust power will be exercised by the court if the trustee fails to exercise it. This may be done either through the appointment of a new trustee or by approving a scheme of distribution: *McPhail* v. *Doulton*, [1971] A.C. 424, 456-457 (H.L.). There is very little distinction, if any, between a trust power and a discretionary trust. *See* Waters, *supra*, n. 4 at 75-76; Harris, "Trust, Power and Duty," (1971) 87 L.Q.R. 31, 33. Under a private discretionary trust, the trustee is empowered to distribute capital or income among named persons or members of a class, and has the discretion to determine which members of the class are to receive, the amount each is to receive, and the timing of the distributions. A discretionary purpose trust would allow the trustee to determine the manner in which the property should be applied to fulfil the purpose, as well as the timing and the extent of the expenditures. For an example of a discretionary charitable trust, *see Re Johnston; Brown* v. *National Victoria and Grey Trust Company*, (1985) 20 E.T.R. 209 (Man. Q.B.).

[17] *McPhail* v. *Doulton, supra*, n. 16 at 456-457.

Possibly the reference to powers in section 21 was only intended to reverse the effect of the English cases holding that an invalid trust cannot be treated as a valid power to use the property for the settlor's purpose. There is little advantage in creating an unenforceable trust.[18]

In any event, the reference in section 21 to a power to appoint the trust property is unnecessary and confusing.

3. Mixed Charitable and Non-Charitable Objects

If section 21 was intended to remove the "mixed purposes" traps that are not disarmed by section 44 of the *Law and Equity Act*, it may not succeed in doing so.[19]

Example

> A donor gives property to the president of the Rotary Club of Lodestone Heights in trust to be used exclusively for the purposes of the Club. Those purposes, as stated in the Club's constitution, are partly charitable (service within the community) and partly non-charitable (arranging for guest speakers at luncheon meetings of the members.)

It is clear from the stipulation that the gift was "in trust" and "to be used exclusively for the purposes of the Club" that the donor intended the gift to be subject to a trust. The donor did not intend that the president or the members of the Club should take beneficially. The trust is not exclusively charitable, however, as non-charitable objects are included among the purposes of the Club.

Would the trust be validated by section 21? Since it fails as a charitable trust, it can be described as non-charitable. This might bring section 21 into play.

On the other hand, the trust is partly charitable. If "non-charitable" in section 21 means "lacking charitable objects," section 21 may be entirely out of play, since the section refers only to "specific, non-charitable trusts." If this interpretation is correct, the whole trust probably fails, since it is one in which the objects are described compendiously ("for the purposes of the Club"), rather than one in which charitable and non-charitable objects are linked conjunctively or disjunctively.

The uncertainty as to whether s. 21 is applicable to imperfect charitable trusts should be

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[18] S. 124 of the *Restatement of Trusts 2d*, which inspired s. 21(1) of the *Perpetuity Act*, does contemplate an unenforceable trust. See comment to s. 124, American Law Institute, *Restatement of Trusts 2d* (1959) 263. Unlike s. 124 of the Restatement, however, s. 21(1) of the *Perpetuity Act* states that "the trust is valid" to the extent it is exercised within 21 years.

[19] *See* Chapter II, under the heading "(c) The Interaction of Section 44 of the *Law and Equity Act* and Section 21 of the *Perpetuity Act*." *See also* Waters, *supra*, n. 4 at 610-611.

removed.

F. Summary

While arguments can be mounted for and against validating non-charitable purpose trusts, the ability to create a trust of this kind provides opportunities for sustainable funding on the endowment model for many non-profit activities which are not legally charitable.

Section 21 of the *Perpetuity Act* is not a satisfactory source of validity for non-charitable purpose trusts, however. It unduly limits their duration and is unclear as to the manner in which these trusts take effect. Its applicability to trusts that are not wholly charitable or wholly non-charitable, and that are not of the kind of mixed purpose trust that appears to be covered by section 44 of the *Law and Equity Act*, is uncertain.

Further reform is needed to remove these ambiguities and to make the non-charitable purpose trust a more useful device.

A. General

The non-charitable purpose trust is a statutory creation. Without legislation to breathe life into a trust that would otherwise be void for lack of a human, corporate, or charitable object, it would not exist at all. The key provision, section 21 of the *Perpetuity Act*,[1] validates trusts with non-charitable purposes as objects but stops short of placing them on an equal footing with charitable purpose trusts. Since we have concluded that potentially useful applications of the non-charitable purpose trust are restricted by the deficiencies of section 21, it is appropriate to consider the replacement of that section by clearer legislation.

In arriving at a satisfactory provision to replace section 21, a number of the questions arising from the analysis in Chapters II and III need to be addressed. Should there be any limits placed on the nature of the objects in order to prevent whimsical and eccentric trusts which have no social benefit? Should there be any limits on the duration of non-charitable purpose trusts? How are trusts of this kind to be enforced? Should the *cy-pres* doctrine be extended?

B. Purposes as Trust Objects

We expect that the non-charitable purpose trust would chiefly be used as a funding device for activities that are seen by at least a segment of popular opinion as serving socially desirable goals, though lying outside the charitable sphere. Should the non-charitable purpose trust then be limited to objects of a "public" nature?

Requiring the trust purpose to be "public" would likely give rise to many disputes over the validity of trusts of this kind, much like the type of litigation which has always surrounded trusts with mixed charitable and non-charitable objects. Relatives of the settlor or those opposed to the goals the settlor intended to achieve might be motivated to challenge the trust on the basis that its object is not "public" in character. It is probably better to take the risk of some eccentric dispositions of property than perpetuate the kinds of problems generated by the invalidity of mixed purpose trusts. Trusts that are truly anti-social can be struck down on grounds of public policy.[2]

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1 R.S.B.C. 1979, c. 321.

2 The courts are empowered under the general law to strike down dispositions of property on grounds of public policy if they clash with overriding social values to an extent that is actually harmful to society. Such trusts are said to be contrary to public policy. *See* Chapter III, n. 11.

California allows a trust to be created for any purpose not illegal or contrary to public policy.[3] In Bermuda, where legislation validating non-charitable purpose trusts has recently been enacted, the objects of such a trust must not be immoral, contrary to public policy, or unlawful.[4] The Bermudan legislation is heavily influenced by Liechtenstein law,[5] which prohibits "immoral" trusts.[6]

A lack of restriction on the kinds of purposes for which a trust may be created does not remove the need for certainty in the language used to create the trust. The trustee and the court must be able to know what has to be done in order to carry out the trust. Relaxation of the requirement of certainty is justified in the case of charitable trusts only because the legal concept of charity provides guidelines for the court in providing objects that the settlor has not described with precision.[7] Outside the boundaries of charity, there is nothing to guide the court in making assumptions on the settlor's behalf. The "three certainties" of words, subject-matter, and objects should, therefore, apply to non-charitable purpose trusts.

In the view of the Commission, the only restrictions on the nature of the objects of a non-charitable purpose trust which must be imposed are these: the purposes stipulated by the settlor must be certain, in the sense that it is possible to determine what the settlor intended the trust to accomplish, and those purposes must not be unlawful or contrary to public policy.

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3 The California *Probate Code*, Cal. Stats. 1990, c. 79, s. 15203. S. 15204, added in 1986 by Cal. Stats. 1986, c. 820, s. 40, provides that a trust created for an indefinite or general purpose is not invalid for that reason alone if it can be determined that a particular use of the property comes within the settlor's purpose. S. 15204 was intended to "harmonize the law of trusts and powers in the interest of effectuating settlor intent" and to reverse earlier case law, typified by *In re Sutro's Estate*, (1909) 102 P. 920 (Cal. S.C.) holding purpose trusts void unless they were exclusively charitable: California Law Revision Commission, *Recommendation Proposing the Trust Law* (1985) 527-528. Long before the enactment of s. 15204 American law had accepted the notion of an unenforceable purpose trust operating as a valid power: *see* Chapter II, under the heading "1. Invalid Purpose Trusts and Powers of Appointment."

4 *Trusts (Special Provisions) Act, 1989*, s, 13(1)(a).

5 *See Report of the [Bermuda] Law Reform Committee on Trust Law Reform* (1989) 7. Liechtenstein is the only country in continental Europe to embrace a concept similar to the trust in English law, with its separation of legal and beneficial ownership. In addition to the private trust or "Treuhand," however, Liechtenstein law also permits trusts with features unknown in England and common-law Canada. In particular, it allows the formation of a purpose trust with legal personality. This is termed a "trust enterprise" ("uneigentliches Treuunternehmen") and is frequently used for commercial purposes. Foundations ("Stiftungen") with separate legal personality may also be formed for private or charitable purposes. Coupled with a favourable tax structure, the various kinds of trusts and trust-related entities that can be created under Liechtenstein law have played a large role in making that country an international financial centre. *See* Batliner, "Commentary on Liechtenstein Company Law," (1982) 14 Case W. Res. J. Int'l L. 613, 624-639.

6 The prohibition against immoral juridical acts under European civil law systems corresponds broadly to the invalidation under the common law of transactions that are contrary to public policy. Compare article 13 of the former Quebec *Civil Code*, which stated that "no one can by private agreement, validly contravene the laws of public order and good morals."

7 *See* Chapter II under the heading "(e) Non-*Cy-pres* Schemes" in relation to the court's ability to approve charitable schemes when the settlor exhibits an intent to dedicate trust property to charity, but does not state the charitable objects specifically.

The Commission recommends that:

1. *It should be possible to create a valid and enforceable trust for a non-charitable purpose.*

2. *There should be no restrictions on the range of purposes for which a non-charitable purpose trust can be created except that the purpose must be*

   (a) certain,

   (b) lawful, and

   (c) not contrary to public policy.

C. Duration

Should any limit be placed on how long a non-charitable purpose trust can last? If this kind of trust is seen as a philanthropic vehicle allowing for long-term funding, it seems counterproductive to place a maximum duration on it when its analogue, the charitable trust, can last forever.

Some of those who commented on the Working Paper supported a limit on the duration of non-charitable purpose trusts. No doubt some non-charitable purpose trusts will eventually cease to be useful. A trust to establish a sanctuary for an endangered wildlife species, for example, might become obsolete if the species came to be protected by statute. On the other hand, the categories of charity may be said to transcend time. The needs to which they correspond seem to be perennial.

Some countries that allow purpose trusts limit their duration, while others do not. Liechtenstein, for example, imposes no upper limit.[8] Bermuda has chosen 100 years as the maximum duration for any purpose trust, charitable or non-charitable.[9] The 21-year limit now in force in British Columbia is quite short by comparison.[10]

One alternative would be to replace the present 21-year limit by the extended perpetuity period of 80 years.[11] That is a significantly long period in human affairs and would probably allow most purpose trusts to fulfil their objects. Over a period of 80 years, conditions are likely to change to the extent that many purpose trusts would become obsolete.

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8 Batliner, *supra*, n. 5 at 630.

9 *Supra*, n. 4, s. 13(1).

10 *Perpetuity Act, supra*, n. 1, s. 21(1).

11 *Ibid*., s. 6(b).

A further alternative would be to require the settlor to specify a date for the termination of the trust in the instrument used to create it.[12] A maximum duration might be imposed by legislation, within which the settlor could select a lesser period.

The view of the Commission is that a maximum duration for non-charitable purpose trusts should not be prescribed by legislation. Any limit that is imposed would be purely arbitrary. It would bring useful trusts to an end as well as obsolete ones. There does not seem to be any reason to object to a maximum duration prescribed by the settlor, however. The settlor should be free to specify a point in time when, or an event on which, the trust will terminate.[13]

The Commission recommends that:

3. *Non-charitable purpose trusts should not be subject to a maximum duration, other than a maximum duration specified in the instrument or declaration creating the trust.*

D. Enforcement of Non-Charitable Purpose Trusts

The absence of a beneficiary under a purpose trust means that some method of enforcement must be substituted if the trust is to be effective. In fact, the lack of a person who could sue a defaulting trustee was the traditional basis for holding non-charitable purpose trusts void.[14]

Charitable trusts can be enforced by the Attorney General acting on behalf of the Crown as the protector of the public interest.[15] Governmental enforcement could be adapted to non-charitable purpose trusts as well. Enforcement of purpose trusts through state mechanisms alone is likely to be unsatisfactory, however. Governments may be reluctant to intervene in what they may perceive to be essentially private matters. They may be unwilling to devote resources to policing trusts when no identifiable person stands to lose anything through a trustee's default. Governments may also be hostile to the objects of some purpose trusts.

The Bermudan legislation on purpose trusts requires the settlor to appoint a person in the trust

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[12] This is a feature of the Bermuda legislation: supra, n. 4, s. 13(1)(e).

[13] A stipulation of this kind would be subject to s. 20 of the *Perpetuity Act*, which renders provisions causing trusts to terminate subject to the rule against perpetuities, as modified by the Act. If the end of the stipulated duration, or the event which causes the trust to automatically terminate, occurs outside the maximum period allowed by the Act (usually 80 years), the stipulation regarding duration would be void and the trust would continue to endure. *See* Appendix B.

[14] *Morice* v. *Bishop of Durham*, (1805) 10 Ves. 522, 32 E.R. 947. *See* the heading "C. The Necessity of a Beneficiary" in Chapter II.

[15] *Wallis* v. *Solicitor-General for New Zealand*, [1903] A.C. 173, 182 (P.C.). In Ontario the role of the Attorney-General in the protection of charities has effectively been delegated to the Public Trustee by the *Charities Accounting Act*, R.S.O. 1990, c. C.10.

instrument to enforce the trust. The trust instrument must also contain a means of appointing a successor for the enforcer.[16] While this is one means of ensuring as far as possible that there will always be a person with an interest in the enforcement of the trust, governmental involvement must be relied upon in any event in the case of inaction on the part of the enforcer. This is, in fact, recognized in the Bermudan legislation, which provides for steps to be taken by the Attorney General to procure the appointment of an alternate enforcer.[17]

While the settlor of any trust may appear to have as much interest as anyone in seeing that the terms of the trust are carried out, a settlor is not generally able to sue the trustee in order to enforce the trust. The reasoning behind the settlor's inability to sue is that once the ownership of the trust property has been transferred to the trustee, the settlor has no further interest in the subject-matter of the trust, and no obligation is owed to the settlor by the trustee. Instead, the obligation is owed to the beneficiary.

In the case of a purpose trust, there is no beneficiary in the usual sense. For this reason it is appropriate to allow the settlor to enforce it.[18] This may not be as radical an innovation as may once have been thought, since it has been held that a person who transfers money earmarked for a specific purpose to another person may, under some circumstances, sue that other person for breach of trust if the money is applied otherwise.[19]

Relying on the settlor alone to enforce the trust is not a sufficient answer. The need to enforce it may arise long after the settlor's death. Of course, the personal representative of the settlor could be empowered to represent the settlor's interest in the performance of the trust. This may appear to be an obvious solution at first glance, but it does not suffice if default by the trustees occurs long after the distribution of the rest of the settlor's estate. In addition, the personal representative may be in sympathy with disgruntled relatives of the settlor who might have fared differently if the settlor had not wanted to create a non-charitable purpose trust, and so will have little desire to take legal action to enforce it. One comment on the Working Paper suggested that personal representatives might even use the power in order to interfere with the administration of the trust, and that for this reason the settlor's personal representative should not have an unconditional right to initiate proceedings. The Commission recognizes this as one possible danger in allowing the personal

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16 *Trusts (Special Provisions) Act, 1989, supra*, n. 4, s. 13(1)(e).

17 *Ibid*., s. 13(2), (3), (4).

18 *See* Harris, "Trust, Power and Duty," (1971) 87 L.Q.R. 31, 37.

19 *See Carreras Rothmans Ltd.* v. *Freeman Matthews Treasure Ltd.*, [1985] Ch. 207, 224. This was a case of the *Quistclose* kind, however, in which the person transferring funds to another for a specific purpose, such as the payment of certain debts, also derives an indirect benefit from the operation of the trust arising from the transfer. In such a case the provider of funds might be considered a settlor and a beneficiary at the same time. *See Barclays Bank Ltd.* v. *Quistclose Investments Ltd.*, [1970] A.C. 567 (H.L.). It has been argued that these cases do not give rise to any new kind of trust which the settlor can enforce directly: Millett, "The Quistclose Trust: Who Can Enforce It" (1985), 101 L.Q.R. 269. Whether or not *Quistclose* or *Carreras* indicates a movement away from the rule that the settlor cannot enforce the trust, our position remains that enforcement of non-charitable purpose trusts by the settlor is an appropriate mechanism which the law should accommodate. *See* Harris, *ibid*.

representative to be an enforcer as of right, but not one great enough to warrant depriving the personal representative in this instance of the ability to do what the settlor could have done, if alive.

Another approach to the problem of enforcing non-charitable purpose trusts might be borrowed from the *Charities Accounting Act* of Ontario.[20] This Act allows the court to make an order for the enforcement of a charitable trust on the application of any two or more persons.[21] Widening the class of potential enforcers in this way makes it much less likely that neglect or bad faith on the part of trustees will go unchecked. The requirement that at least two persons must apply is a safeguard against frivolous allegations of breach of trust, but these can be deterred by other means. A requirement that the court be satisfied that an applicant have a sufficient interest in the due performance of the trust would guard against officious interference in its administration. Awards of costs could be used as a further means of discouraging unfounded applications.

Enforcement of a purpose trust is likely to be better ensured by permitting more than one potential enforcer. A combination of all the approaches to enforcement discussed above is possible.

The Commission recommends that:

4. *The Supreme Court should be empowered to make an order that it considers just for the proper enforcement of a non-charitable purpose trust on the application of:*

   (a) the settlor,

   (b) a person appointed specifically by the settlor to enforce the trust,

   (c) the personal representative of the settlor,

   (d) a trustee,

   (e) the Attorney General, or

   (f) any person appearing to the Court to have a sufficient interest in the enforcement of the trust.

E. *Cy-pres* and Non-Charitable Purpose Trusts

1. Alternatives to Cy-pres

It may be impossible or impracticable to fulfil a non-charitable purpose at the time a trust

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[20] *Supra*, n. 15.

[21] *Ibid*., s. 10.

comes into being, or it may become so after the trust has already been partly carried out. When this happens in connection with a charitable purpose trust, *cy-pres* can sometimes be invoked to vary the objects and thus keep the trust in existence for the benefit of charity. Is it appropriate to apply *cy-pres* to non-charitable purpose trusts? This question is best answered after examining the alternatives to a *cy-pres* application of the trust property.

Assets of a purpose trust that is not capable of being fulfilled could be dealt with in many ways other than by modifying the trust on a *cy-pres* basis, but most could be described as a variation on one of the following themes:

1. Let the property be applied according to the settlor's directions, if any.

2. If the settlor gives no directions as to how the property should be used if the original purpose is impossible or impracticable, let the trustee hold the property on resulting trust for the settlor or the settlor's estate.

3. Apply the property to a charitable purpose.

4. Transfer the property to the Crown.

These alternatives will be discussed in turn.

2. Application of Trust Property According to Settlor's Directions

It is open to the settlor to specify what should happen if the initial object of a trust cannot be effectively fulfilled. The trust instrument may substitute another object, or stipulate that the trust should end and the property be transferred back to the settlor or the settlor's estate. (The trustee would hold the property under a resulting trust until the transfer was completed.) Such a direction should be equally valid for non-charitable purpose trusts as it is for private trusts.

Directions of this kind by the settlor may sometimes run afoul of the rule against perpetuities, as modified by the *Perpetuity Act*.[22] If the directions are valid, however, it is fully consistent with

[22] If the circumstances which cause the settlor's direction to take effect arise inside the perpetuity period, as modified by the Act, there is no problem. If they arise outside the modified perpetuity period, the direction would likely be void, since it would have created a contingent interest or the possibility of a resulting trust that would vest beyond the time allowed. S. 20(1) of the *Perpetuity Act* makes possibilities of resulting trusts following the cessation of a non-charitable object subject to the modified perpetuity rule. S. 9 of the Act, which permits the variation of the gift to give effect to the general intention of the settlor "within the limits of the rule against perpetuities" as a last resort to save the interest, might not be of much use when the initial purpose trust has endured beyond the modified perpetuity period and events have therefore established that the gift over for another purpose cannot vest within the period. As s. 9 has had very little judicial consideration, it is difficult to foresee how far the courts are willing to go in employing it. It might be argued that the substitution of a new purpose for the original one should enjoy the same exemption from the rule as that enjoyed by a gift over from one charity to another, since it is merely an extension of the original intention and involves no shift in beneficial title from one person to another. As the rule applies even to a charitable gift over following the termination of a non-charitable interest, however, it would likely be applied to a gift over from one non-charitable purpose to another. *See*

the general law of trusts to allow them to govern the ultimate disposition of the trust property.

3. Resulting Trust

If there is no direction by the settlor as to what is to happen when a non-charitable trust fails, a resulting trust would arise and the trust property would find its way back into the settlor's estate. This may sometimes be an acceptable consequence in the case of non-charitable purpose trusts as well. For example, a will may set aside part of the estate in trust in order to maintain a pet animal during the rest of its life. This is obviously a trust with a purpose limited in time, and a fair inference would be that the trust property is to "result" to the estate when the trust had served its purpose. Once again, the *Perpetuity Act* may present an obstacle if the resulting trust arises outside the modified perpetuity period.[23]

On the other hand, it might also be argued that most settlors who create a purpose trust would not wish to have any further claim on the trust assets and, if they do, they are free (apart from the effects of the rule against perpetuities and the *Perpetuity Act*) to make it a term of the settlement that the assets shall revert to the settlor under specified circumstances. The absence of any stipulation of this kind, in a case where the trust may conceivably endure forever, shows an intention to alienate the assets permanently in favour of the object of the trust.

Even within the limits of the modified perpetuity rule, a resulting trust could require the re-opening of estates long after the original trust was created, and the distribution of assets among next of kin whom the settlor never intended to benefit. This would certainly run contrary to the original concept of the settlor.

For these reasons, the resulting trust is less than ideal as a means of disposing of the assets of failed non-charitable purpose trusts, unless it is apparent from the terms or nature of the settlement that the settlor intended the trust property to "result" to the estate.

4. Application of Trust Property to a Charitable Purpose

This would not be a form of cy-pres, since the original non-charitable object would not necessarily resemble the charitable one assigned by the court. Instead, the court would modify the trust by substituting charitable objects, or simply give the property outright to a charitable organization without reference to the settlor's original purpose.

Dealing with the property of a failed non-charitable purpose trust in this manner would allow the assets to be used in a way which society in general would consider useful. Giving to charity is a familiar way of dealing with property that is not being used for any other purpose. It would also be in keeping with the concept of a trust for an impersonal object rather than for the benefit of

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Appendix B.

[23] S. 20(1). *See* n. 22, *supra*, and Appendix B.

specific persons. For these reasons, some settlors might be satisfied with this solution.

On the other hand, the re-dedication of the property by the court would be an act of an organ of the state, done without considering the settlor's wishes. In selecting a non-charitable object for the original trust, the settlor chooses not to dedicate the trust property to charity. This alternative would replace the settlor's values with those of the broad mainstream of society, as they are perceived by the court. The court is not necessarily in a better position than the settlor to decide the way in which the settlor's property should be used.

5. Transfer to the Crown

When the settlor gives no direction as to what should be done with the property, the assets could be treated as if they were ownerless. Property lacking an owner is normally acquired by the Crown.[24]

Outright transfer to the Crown would enable the government of the day to use the assets in accordance with its own priorities, however.[25] This would be offensive to many settlors, particularly those who create trusts for purposes that do not coincide with governmental policies. On the other hand, if settlors knew that this was the "default" option, they would be more likely to make careful provisions in the trust instrument to avoid it.

In the view of the Commission it would not be in keeping with the concept of a purpose trust to simply turn over the property to the Crown on the failure of the original purpose, unaffected by any continuing obligation to administer it for the benefit of some goal of the settlor's choosing. Another solution, inspired by cy-pres, would permit the re-dedication of the trust assets.

6. The *Cy-pres* Solution

(a) General

The advantage of *cy-pres* variation from the settlor's point of view would be that the concept of a sustained fund for an impersonal purpose would be maintained, and any new objects chosen by the court would be selected so as to correspond as closely as possible with the original ones. The other options discussed above for dealing with the assets in the absence of directions from the settlor do not allow for this. Most settlors could probably live more easily with the notion that a court may attempt at some point to resuscitate a failed or ineffective trust by substituting new objects, rather than merely administer last rites and wind it up. After all, there already is statutory authority for

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[24] When this occurs, the property is said to escheat. Although the term "escheat" originally applied only to real property which reverted to the Crown, it is commonly used in relation to both real and personal property. When lacking an owner, personal property is referred to as *bona vacantia*. The *Escheat Act*, R.S.B.C. 1979, c. 111 governs escheats and the collection of *bona vacantia* in this Province.

[25] The *Escheat Act, ibid*., ss. 11-13, confer wide powers of disposition in relation to escheated property and *bona vacantia*.

extensive variation of private trusts. Section 9 of the Perpetuity Act allows the variation of private trusts in order to prevent their failure due to a violation of the rule against perpetuities.[26] Those uncomfortable with the idea could make settlements that prescribe what should be done with the trust assets if the initial objects prove unattainable or are overtaken by subsequent events.[27]

Our view is that some form of variation of non-charitable purpose trusts along *cy-pres* lines should take place when their objects are, or become, impossible or impracticable. Thus, no substitution of objects would take place when the settlor has given a legally valid direction as to what should happen if the original purpose proves to be impossible or impracticable, or if it is possible to infer the settlor's intention as to the ultimate disposition of the trust property.

The Commission recommends that:

5. Where the object of a non-charitable purpose trust is or becomes impossible or impracticable and the settlor's intention as to the ultimate disposition of the trust property cannot be inferred from the trust instrument, the court should have jurisdiction to substitute a new purpose for a non-charitable purpose trust.

As *cy-pres* is so closely associated with the legal concept of charity, some aspects of the doctrine require modification in order to adapt it to non-charitable purpose trusts.

(b) Transposing cy-pres to the Non-Charitable Sphere

(i) No Equivalent to General Charitable Intent

General charitable intent is, of course, an irrelevant concept when the purpose chosen by the settlor is clearly non-charitable. To insist on a notion of "general dispositive intent" in order to permit variation of the objects of non-charitable purpose trusts would be to add an undue element of mysticism to the exercise. The mere fact that property has been dedicated to an impersonal purpose without any direction as to what should be done with the property if that purpose is not feasible, or ceases to be so, should be sufficient to allow the substitution of a new purpose by the court.

(ii) A More Relaxed Standard of Similarity

In many cases, substituting an analogous purpose for the one that has failed will be relatively uncomplicated.

Example No. 1

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[26] *See* Appendix B to the Report.

[27] Of course, the rule against perpetuities and the *Perpetuity Act* limit the settlor's freedom of action in this respect, but then that is true of most non-charitable dispositions of property.

A settlor establishes a trust to fund efforts to eliminate the killing of dolphins as a result of driftnet fishing. An international treaty later prohibits driftnetting. The treaty is aggressively enforced, so that dolphins are no longer endangered. Rather than allow the trust property to remain idle, the court varies the purpose of the trust to the support of efforts aimed at controlling commercial whaling.

Example No. 2

A trust is established for the protection of a particular animal species, which becomes extinct despite all efforts made to preserve it. The court approves a proposal to apply the trust property for the preservation of another endangered species.

In these two examples, the relationship between the original purpose and the one assigned by the court is immediately apparent.

The court's task is somewhat more difficult if the purpose is a narrow one, but even so, it will usually be possible to accommodate the settlor's original intention to some extent.

Example No. 3

The terms of a trust stipulate that the trustee shall erect, on a specific piece of land, billboards bearing the inscription "God Save the Queen." The terms of the trust make it clear that no other location may be used. The land in question is expropriated for other uses and zoning changes make it illegal to erect billboards anywhere near it.

In Example No. 3, the court would presumably try to find some purpose of a patriotic nature in keeping with the values of the settlor.

Cy-pres in its strict sense requires a great degree of similarity between the object that has failed and the one assigned by the court. Insofar as non-charitable purpose trusts are concerned, there are no broad categories of purposes like those in the *Pemsel* classification and no case law interpreting them to aid the court in characterizing the object chosen by the settlor. The court may be concerned that it is unconsciously applying its own values in selecting alternative objects, rather than merely doing what the settlor might have done if the original purpose had been impossible or impracticable when the trust was conceived. Some degree of similarity with the original object is obviously desirable, but the possibility that the court may have to find an analogue for a very narrow or unusual purpose suggests that the requirement of similarity need not be so strict as in the case of charitable trusts. The court should attempt initially to find a purpose that is as similar as is reasonably practicable to the original purpose of the trust.

(iii) What If There Is No Similar Purpose?

The object of a non-charitable purpose trust may be very narrow, or very eccentric. In such a case, the trust fund should be re-allocated for a purpose that, at the very least, does not tend to defeat the ends which the settlor wished to achieve. It should not be incompatible with the frame of mind leading to the creation of the trust, which may be described as the "spirit of the original settlement." This less onerous standard would provide the court with a considerable degree of latitude to re-deploy the trust property for some rational end, while giving assurance to settlors that their intentions will not be entirely ignored, even in the remote future.

The suggestion that the court should have the discretion to substitute a purpose not contrary to the spirit of the original settlement in a case where no purpose could be said to be reasonably similar to the original one was criticized in one of the responses to the Working Paper on the ground that it was far too wide. While it is indeed wide, so is the range of purposes from which a settlor may choose. The possibilities are in fact endless. It is to be hoped that the ability to create a non-charitable purpose trust would prove socially useful, but it can also be expected that some highly singular, and even whimsical, trusts will be created. Restricting the court to substitution of an object that is "reasonably similar" to the original one may place the court in a rather undignified position. To take an extreme example, a will may leave money to finance the construction of mountaintop shrines to Elvis Presley. If this proves to be impossible or impracticable (a not unlikely eventuality for a variety of reasons), what purpose can be said to be "reasonably similar?" The court should not be put in the position of having to hazard a guess. Allowing the court to substitute any useful purpose except one that is diametrically opposed to the spirit of the settlement (for example, desecration of the memory of Elvis Presley) would avoid an unseemly exercise in whimsy.

Given this very wide power to vary the trust purpose, it is hard to imagine a situation in which the court could not re-allocate the trust property to some other end. If such a case should arise, however, it would be fully consistent with the general law of trusts to direct the trustee to transfer the property back to the settlor or the settlor's estate. To provide for the remote possibility that a court would find itself unable to substitute a new purpose, the doctrine of resulting trust should remain applicable, deep in the background.

The Commission recommends that:

6. *In substituting a new purpose for a non-charitable purpose trust which has become impossible or impracticable, the court should be able to substitute a purpose which is as similar as is reasonably practicable to the original one specified by the settlor and, if no such purpose can be found, the court should be able to substitute a purpose that is not contrary to the spirit of the original settlement.*

7. *The court should continue to have the ability to return the trust property to the settlor or the settlor's estate if no alternative purpose meeting the requirements of Recommendation 6 can be found.*

F. Substitution of Objects On Grounds of Obsolescence or Expediency

1. General

The objects of a purpose trust may become obsolete with the passage of time in ways that fall short of impracticability in the *cy-pres* sense. For example, a trust to establish a prize to be awarded to anyone who developed a superior icebox would long ago have been superseded by the invention of the refrigerator. It would still be possible to carry out the terms of the trust, however. Someone might even develop an improved icebox and claim the prize. It is much more likely, nevertheless, that the trust fund would remain permanently idle. The settlor's intention may still be fulfilled, but that intention would have become irrelevant under present-day circumstances.

The *cy-pres* doctrine concerns only the feasibility of the settlor's purpose, not the question of whether or not that purpose is intrinsically useful or productive.[28] This may seem to flow from the principle that all charitable purposes are deemed to be of public benefit. Even so, some charitable purposes are more useful than others, and some that were originally useful may not remain so.

Example

> A will made before the turn of the century contains a gift in trust to a municipality to fund the vaccination of local children against smallpox. The gift follows a life interest in favour of a relative of the settlor. When the relative finally dies, smallpox has been brought under control throughout the world, and vaccination against it is considered to bring greater risks than the chance of contracting the disease itself. The municipality would like to use the gift to help it to meet present-day health concerns.

The distinction between impracticability and mere obsolescence may be a very fine one, but it would likely prevent the trust fund in the example from being applied for other medical needs. The narrowness of the concept of impracticability in the *cy-pres* sense has been recognized as a problem in other jurisdictions. In 1952 the Nathan Committee in England recommended that *cy-pres*

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[28] The point was expressed in this way by Kennedy, L.J. in *Re Weir Hospital*, [1910] 2 Ch. 124, 140-141 (C.A.):

> But neither the Court of Chancery, nor the Board of Charity Commissioners, which has been entrusted by statute, in regard to the application of charitable funds, with similar jurisdiction, is entitled to substitute a different scheme for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilections which inspired his liberality, and untrammelled by his directions, would have dictated a different use of his money.

Cf. Philpott v. *St. George's Hospital*, (1859) 27 Beav. 107, 54 E.R. 42; Waters, *Law of Trusts in Canada* (2nd ed., 1984) 622-623.

should be extended to allow variation of charitable objects before they become impracticable.[29] Some of that Committee's recommendations were enacted in the *Charities Act, 1960*,[30] which allows variation of the objects of charitable trusts when they have "ceased ... to provide a suitable and effective method of using the property..., regard being had to the spirit of the gift."[31]

New Zealand and Western Australia have also expanded the the *cy-pres* powers of the court. In addition to the traditional grounds on which *cy-pres* can be invoked, the court may also supply new objects for charitable trusts in those jurisdictions when the original ones are found to be "useless" or "inexpedient."[32]

Is it advisable to allow non-charitable purpose trusts to be varied for these reasons? No requirement of public benefit attaches to these trusts. Relaxing the limitations on the nature of the objects for which a trust may be created necessarily implies some tolerance of an individual settlor's views on what should be done with property. If settlements can be overturned merely because others do not have the same priorities as the settlor, the relaxation of those limitations would be meaningless.

On the other hand, if non-charitable purpose trusts are to be seen only as a means through which owners of property may indulge themselves in whimsical dispositions, there would be little reason to expand the opportunities now available for creating them. The chief value of the non-charitable purpose trust, in the view of the Commission, is to facilitate stable funding for lawful non-profit activities. Since we see the non-charitable purpose trust as serving a practical function, we conclude that it should be possible to approve a scheme substituting a new purpose for such a trust when the existing one is outworn or unproductive.

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[29] *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmnd 8710, 1952) 91. The Nathan Committee drew on earlier English, and especially Scottish, legislation expanding the court's power to vary the objects of certain educational charities. *Ibid*., at 76-79.

[30] 8 & 9 Eliz. 2, c. 58.

[31] *Ibid*., s. 13(1)(e)(iii). In *Re Lepton's Charity*, [1972] Ch. 276, 285-286, this provision was said to be "no more than a final writing out large" of s. 13(1)(a)(ii) of the Act. S. 13(1)(a)(ii) refers to situations in which the original purpose of the trust cannot be carried out in whole or in part, or cannot be carried out according to the directions given by the settlor or in keeping with the spirit of the gift. These appear to be situations of genuine impossibility or impracticability, not mere obsolescence. Given the genesis of s. 13(1)(e)(iii) in the Nathan Committee's report, supra, n. 29, and in earlier Scottish legislation expanding *cy-pres* jurisdiction in regard to educational charities, it is most unlikely that the scope of the provision was intended to be as limited as the dictum in *Lepton* would suggest.

[32] *Charitable Trusts Act, 1957*, Repr. Stats. N.Z., 441, s. 32(1); *Charitable Trusts Act, 1962*, Stats. W. Aus. 1962, No. 82, s. 7(1). In British Columbia, the *Vancouver Foundation Act*, S.B.C. 1950, c. 94, s. 8(2), the *Hospital Act*, R.S.B.C. 1979, c. 176, s. 29.92(2) and the *University Foundations Act*, S.B.C. 1987, c. 50, s. 10(2) confer broad powers to vary some charitable trusts. Similar provisions can be found in the *Mission Foundation Act*, S.B.C. 1987, c. 34, s. 15; *Chilliwack Foundation Act*, S.B.C. 1985, c. 62, s. 13; *Victoria Foundation Act*, S.B.C. 1987, c. 35, s. 10. S. 33 of the draft *Heritage Conservation Act* contained in the *White paper on Heritage Legislation* released by the Ministry of Municipal Affairs, Recreation and Culture on April 30, 1991 also provides for the variation of trust purposes.

Most persons who would entertain the idea of setting up a non-charitable purpose trust, would likely want the trust property to be used for a meaningful purpose. If the original object ceased to be of any practical significance, they would generally favour a variation of objects so that the trust property would continue to be used in an effective way.

2. Guidelines for the Court

Despite the benefit that may flow from expanding the court's *cy-pres* powers to take account of changing circumstances, settlors must have some assurance that they will not be second-guessed at every turn. If the original trust may be overturned at any time merely because the settlor's priorities are not shared by others, there would be little point in creating a trust at all. This means that the power to alter trust purposes when it is still technically possible to attain the original purpose of the trust should be exercised with restraint, due regard being had to the views of persons primarily affected.

(a) The Settlor's Wishes

(i) During the Settlor's Lifetime

Variation of trust purposes on the grounds of obsolescence or inexpediency would be a more subjective task than variation on the basis of impossibility or impracticability. It would depend to a greater degree on opinion and impressions rather than fact. The settlor's own view of the extent to which the original purpose has become obsolete or inexpedient is as valid as that of anyone else. If the settlor has indicated an attitude towards the question in the terms of the trust, or is still living and capable of making a view of the matter known to the court, that view should be considered.

The Working Paper proposed that the consent of a living settlor should be a prerequisite to a variation on these grounds. This may be too onerous a restriction on the ability to re-deploy the trust property, however. Consent may be withheld because the settlor is "out of touch" with conditions as they are, or out of sheer perversity. In addition, it is possible that insistence on the settlor's consent may have undesirable income tax effects.[33]

(ii) Non-Charitable Purpose Trusts Under a Will

Many non-charitable purpose trusts would be created by wills, and thus would come into being only upon the death of the settlor. In some cases, the settlor's views on the subject of obsolescence would be evident from the terms of the will setting up the trust. In some cases, they will not. The personal representative could be consulted, but, as noted in one response to the Working Paper, the

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[33] S. 75(2) of the *Income Tax Act*, R.S.B.C. 1971-72-73, c. 63, attributes income and capital gains and losses of a trust back to the settlor if the terms of the trust stipulate that the property shall not be disposed of except with the consent or at the direction of the settlor. Since the re-deployment of the trust property for another purpose may arguably be characterized as a re-settlement, and hence a "disposition" of property towards the new purpose, insisting on the consent of the settlor to a variation of purposes may cause the income and capital gains of the trust to be attributed to the settlor rather than to the trust itself.

views of personal representatives may not be entirely objective. For example, a personal representative may side with disgruntled relatives who see the trust as a whim of the settlor that deprived them of a larger inheritance. In addition, personal representatives are not always chosen because of their close relationship with the deceased. They are not necessarily better placed than others to give evidence that would shed light on the settlor's intentions.

One means of protecting the wishes of the settlor, as well as the interest of society in seeing that wealth is used productively, might be to require a certain period of time to go by after the settlor's death before a non-charitable purpose trust created by a will could be varied due to obsolescence. The Nathan Committee recommended a minimum period of 35 years before any variation of the objects of a charitable trust was permitted on this ground without the consent of the settlor and the trustees.[34] No minimum period for the survival of the original trust was incorporated into the *Charities Act 1960*[35], but one did find its way into the *Charities Act 1985*[36], which concerns local charities in England for the relief of poverty. The 1985 Act allows the trustees of a local charity to substitute new objects for the charity if it has existed for at least 50 years.[37]

Given the rate of change in present-day society, periods of 35 or 50 years seem far too long for the original objects to persist without any possibility of variation. In the Working Paper, we noted that if we were to propose a minimum duration for the original objects, it would be considerably shorter. Comment was specifically invited on this point. None of the responses suggested any minimum period of time which should elapse before variation of the objects was permitted, or suggested that the consent of the trustees or the settlor's personal representative be a prerequisite. Consequently, in the Commission's view, there is no need for a minimum duration for the original objects.

(b) The Views of the Trustees

It is not the usual role of trustees to alter the nature of the trust, and for this reason the Commission does not favour making the trustees' consent a prerequisite to a variation.[38] The views

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34 *Supra*, n. 29 at 80-81.

35 *Supra*, n. 30.

36 1985, c. 20, s. 2.

37 *Ibid*.

38 Substitution of new objects would probably amount to a change in the nature of the trustee's duties which would justify a dissenting trustee to petition the court for discharge: *Gardiner* v. *Downes*, (1856) 22 Beav. 395, 397, 52 E.R. 1160, 1161. The Nathan Committee recommended that the consent of trustees (as well as that of the settlor, if living) should be required for a variation of a charitable trust under the expanded *cy-pres* powers of the court, (including the power to substitute a new purpose on the grounds of obsolescence): *supra*, n. 29 at 81. The *Charities Act 1960, supra*, n. 30, did not fully adopt this recommendation, and requires the trustees' consent only if the new scheme is imposed by the Charity Commissioners rather than the court: s. 18(4). S. 2 of the *Charities Act 1985*, c. 20, allows the trustees of a local charity for the relief of poverty to pass a resolution altering the objects on a number of grounds, including obsolescence. The resolution is subject to confirmation by the Charity

of the trustees regarding the usefulness of continuing to administer the trust according to its original terms are bound to be of interest to the court, however.

(c) The Substituted Purpose

Varying non-charitable purpose trusts on grounds of obsolescence or irrelevance is not *cy-pres* variation. It would be unproductive to search for similar purposes if there are more pressing concerns than those served by the original terms of the trust, especially when this is the very reason why the variation is sought.

A policy that allows the substitution of new objects should not erode or destroy confidence in the purpose trust as a way of influencing the future use of property, however. Confidence in the purpose trust would be undermined if the court were to permit the settlor's original intention to be entirely defeated. The power to substitute new purposes for a non-charitable purpose trust on the grounds of obsolescence or irrelevance should be limited in the same way as the power to vary such a trust on the grounds of impossibility and impracticability. No scheme should be approved if it would be contrary to the spirit of the settlement.

The Commission recommends that:

8. The court should have the power to approve a scheme substituting a new purpose for a non-charitable purpose trust if, due to a change in circumstances since its creation

(a) the trust is obsolete, or has ceased to represent a useful or expedient means of employing the trust property,

(b) the new purpose proposed in the scheme is not contrary to the spirit of the original settlement.

9. In exercising its power to approve a scheme substituting a new purpose for a non-charitable purpose trust on the grounds set out in Recommendation 8, the court should have regard to the views of the settlor and the trustees concerning the continued usefulness or relevance of the trust and the variation proposed.

G. Variation of Administrative Powers

Trust instruments usually confer detailed powers on trustees in relation to the management of

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Commissioners, who are directed by s. 2(8)(a) to accept the trustees' opinion regarding the obsolescence of the original objects as *prima facie* well-founded in the absence of "contrary considerations." The power to alter the objects of a trust is an unusual power for a trustee to have, but its statutory conferment by the *Charities Act 1985* may be reasonable in the context of the administrative problems generated by the vast number of small local charitable trusts in England.

the trust property to enable them to fulfil the trust. These are known as administrative powers. They may relate, for example, to investment of trust funds, sale or leasing of specific assets, repair and improvement of land and buildings, and obtaining insurance on the trust property. The settlor cannot foresee every situation that may arise when deciding upon the powers which the trustees should have, and it is sometimes necessary or desirable to expand the trustees' administrative powers in order to enable them to carry out the trust effectively.

Trustees' powers under private trusts may be added to or otherwise varied with the approval of the court under the *Trust and Settlement Variation Act*.[39] The court also has a narrow jurisdiction to vary them, apart from the Act.[40]

Administrative powers under charitable trusts may be varied by virtue of the court's ability to approve a scheme to allow the settlor's objects to be achieved more effectively.[41]

Since the *Trust and Settlement Variation Act* does not extend to purpose trusts, and there is no historical jurisdiction with respect to non-charitable purpose trusts, there probably is no means by which the administrative provisions of a non-charitable purpose trust may be varied at the present time. This should be corrected by legislation, so that non-charitable purpose trusts can be administered effectively as circumstances change.

The Commission recommends that:

10. The court should have power to vary and add to the administrative powers of trustees under non-charitable purpose trusts.

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39 R.S.B.C. 1979, c. 413, s.1. The Act empowers the court to give effect to an "arrangement" for the variation of the original terms of the trust. The arrangement may be proposed by "any person:" s. 1.

40 Insofar as administrative powers are concerned, the court may authorize particular actions on the part of trustees when these are necessary to to save the trust property. This is sometimes referred to as the "emergency jurisdiction." The court may also allow trustees to pay amounts out of accumulated income as maintenance to beneficiaries whose interests have not yet fallen into possession. The jurisdiction will only be exercised on grounds of necessity, not of expediency alone. *See Re Lotzkar*, (1984) 57 B.C.L.R. 365 (S.C.); Waters, *supra*, n. 28, 1060-1063; *Report on the Land (Settled Estate) Act* (LRC 99, 1988) 9-10. The court's freedom of action under the *Trust and Settlement Variation Act, supra*, n. 39, is considerably wider, but it only applies where the court is asked to consent to a proposed variation on behalf of beneficiaries who are unable to consent because they are minors, mentally incompetent, unborn or unascertained. Unlike some other provinces, British Columbia did not enact a general provision modelled on s. 57 of the English *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19, which allows the court to confer, on grounds of expediency, administrative powers on trustees that are not contained in the trust instrument. *See* Waters, *supra*, 1065.

41 *Re Royal Society's Charitable Trusts*, [1956] Ch. 87; *Re Royal Naval and Royal Marine Children's Homes*, [1959] 2 All E.R. 716n (Ch. D.). According to the case law, this aspect of the jurisdiction over charities should only be used "sparingly." It may be limited to cases in which the Attorney General, acting on behalf of the Crown as protector of charities, consents to the variation: *Re Royal Society's Charitable Trusts, supra*, at 92; *Re Baker*, (1984) 11 D.L.R. (4th) 430, 440-441 (Ont. H.C.).

H. Who Should be Able to Apply for Variation of a Non-Charitable Purpose Trust?

It would be reasonable to think that most applications to the court to vary a purpose trust would be made by the trustees. They would generally be in the best position to know when the original objects are no longer feasible or relevant, or if additional administrative powers are needed. There seems to be little reason, however, to distinguish between the persons who can apply for a variation and those who are entitled to apply to enforce the trust. Unless a wide variety of persons are able to submit schemes to the court, the broad powers of variation may not be as effective in preserving the utility of non-charitable purpose trusts as they are designed to be. Accordingly, it should be open to the trustees, the Attorney General, the settlor, the settlor's appointee, the settlor's personal representative, or any other person sufficiently interested in the eyes of the court, to apply for a variation of a non-charitable purpose trust.

The Commission recommends that:

11. The persons who may apply to the court for an order varying a non-charitable purpose trust should be the same as those who may apply for an order to enforce the trust.

I. Trusts With Mixed Charitable and Non-Charitable Objects

1. Is there Still a Need for a Provision like Section 44 of the *Law and Equity Act*?

Once it has been accepted that a non-charitable purpose can be the object of a valid trust, the question arises whether any special treatment of trusts having both charitable and non-charitable objects continues to be justified. If the objects would be individually valid, why should they not be so when they appear together in the same settlement? Section 44 of the *Law and Equity Act*,[42] which gives precedence to charitable objects to the complete exclusion of the non-charitable ones, seems at first glance to be inconsistent with the full recognition of non-charitable purpose trusts.

Certainly, the policy underlying section 44 should not extend to all mixed purpose trusts. To require non-charitable objects to be ignored whenever they appear in association with charitable ones would deprive the non-charitable purpose trust of much of the flexibility we think should be available to settlors.

There is little to be gained from upholding both elements of the gift in the case of a settlement linking a reference to charity with uncertain terms like "benevolent" or "worthy," however. A settlor making this kind of disposition is probably motivated by a vague idea of making "a gift to charity," but is likely unaware of the legal pitfalls involved. In all likelihood, the settlor's intentions are predominantly charitable. For this type of settlement, it may be quite acceptable to let the charitable element of the gift supersede anything else which may have been unintentionally included due to the settlor's use of inexact language. We think it is appropriate to confine the policy of the

42 R.S.B.C. 1979, c. 224.

present section 44 in this manner.

2. Mixed Purpose Trusts with Specific Non-Charitable Objects

Trusts having specific objects, some of which are charitable and some not, should now be allowed to stand in their entirety. It may nevertheless be desirable, in order to preserve the advantages enjoyed by exclusively charitable trusts, to treat the charitable and non-charitable elements as distinct trusts if this can be done without making the settlement ineffective as a means of achieving the settlor's overriding goal.

Deeming the charitable purposes to be the objects of a distinct trust would require the trust capital to be divided between the two categories of objects. Any directions given by the settlor regarding apportionment of the trust property among the various objects should be respected. A power to apportion the capital would have to be read into the instrument, however, if it did not contain an express provision of that kind.

Normally the court would assume an equal division among the objects if a basis for apportionment existed in the instrument and the property was not divided in any specific manner. This rule may not always result in the most efficient division of the trust property. Where the settlor has not indicated a preference as to how the property should be apportioned among the various objects, it may be better to leave the apportionment that is required by the deemed separation of the trusts to the trustee's discretion. The trustee is closer to the day to day administration of the trust, and so is in a better position to apportion the trust property in an effective way.

One of the responses to the Working Paper raised the question whether apportionment at the trustees' discretion might result in unwarranted challenges to the decision by organizations and groups whose causes would stand to benefit if the discretion were exercised differently, and suggested that the court's approval for the apportionment should be sought. While attacks on the exercise of the discretion to apportion are a possibility, the courts' attitude toward such attacks would not likely differ from that in other cases in which an application is made to overturn an exercise of discretion by trustees. The court will seldom interfere with the exercise of a discretion as long as the trustee has acted reasonably and in good faith.[43] It is open to the trustees to seek the court's opinion on the propriety of a decision if they wish, though the court will not exercise the discretion for them.[44] For these reasons, the Commission does not see the court's approval of all apportionments as a necessity.

Sometimes the charitable and non-charitable purposes will be so intertwined that division into two separate trusts would be impractical. For example, a trust fund for the support of an industrial

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[43] Normally the courts will interfere with the trustees' discretion only if the decision is so unreasonable that no honest trustee could have reached it, when irrelevant considerations have been taken into account, or if the trustees have failed to consider whether or not a power should be exercised: Waters, *supra*, n. 28 at 761-762.

[44] *Trustee Act*, R.S.B.C. 414, s. 88.

research organization would serve partly charitable (scientific) and partly non-charitable (commercial) ends simultaneously. The inefficiency that would result from an attempt to split the endowment into non-charitable and charitable elements would probably outweigh the benefits it might bring.

When the two categories of purposes are too closely integrated to allow them to be disengaged, the settlement should simply be treated as a non-charitable purpose trust.

The Commission recommends that:

12. *Section 44 of the Law and Equity Act should be repealed. In its place there should be a provision validating trusts in which a charitable purpose is linked conjunctively or disjunctively with a non-charitable purpose that is not described specifically, but is referred to only by an indefinite qualifying term such as "benevolent," "worthy," or "philanthropic." The new provision should state that such a trust operates solely for the benefit of the charitable purpose, to the exclusion of the indefinite non-charitable purpose.*

13. *If the objects of a trust consist of both specific charitable and specific non-charitable purposes and it is practicable to separate the charitable from the non-charitable purposes*

    (a) *the specific charitable purposes should be deemed to constitute a separate charitable trust,*

    (b) *the specific non-charitable purposes should be deemed to constitute a separate non-charitable purpose trust, and*

    (c) *subject to any directions in the instrument concerning apportionment, the trustee should be required to divide the trust property between the charitable and non-charitable purposes.*

14. *If the objects of a trust consist of both specific charitable and specific non-charitable purposes and it is not practicable to separate the charitable from the non-charitable purposes, the trust should take effect and be treated in its entirety as a non-charitable purpose trust.*

J. Summary

The concept of a valid non-charitable purpose trust is a salutary one, but legislative changes are required to address problems which still persist in relation to the validity and enforceability of these trusts. Section 21 of the *Perpetuity Act* and section 44 of the *Law and Equity Act* were at best partial solutions.

Our conclusion is that both sections should be repealed and replaced by legislation validating non-charitable trusts as fully enforceable trusts rather than as powers. The legislation should also address a number of consequential issues. These include:

(a) the requirements for a valid trust of this kind;

(b) variation of the objects of non-charitable purpose trusts that have become impossible or impracticable to carry out, or that are simply obsolete;

(c) enforcement of non-charitable purpose trusts; and

(d) validation of trusts that are partly charitable and partly non-charitable.

Our view as to the duration of non-charitable purpose trusts is that no upper limit should be placed on the length of time they can persist other than one that is imposed by the settlor when the trust is created.

We also hold the view that the doctrine of *cy-pres*, in modified form, should be extended to the non-charitable purpose trust. Where there are no general fields like the categories of charity stated in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [45] within which the court can re-direct the use of the trust property, however, the court's task in selecting alternative objects for a non-charitable purpose trust is made more difficult. Some leeway would have to be given to the court in cases where there is no purpose similar enough to the original one as to satisfy the stringent test of similarity under traditional *cy-pres*.

The elimination of lingering uncertainties in the law through the repeal and replacement by more comprehensive provisions of section 21 of the *Perpetuity Act* and section 44 of the *Law and Equity Act* would enable a settlor to take advantage of the full potential of the non-charitable purpose trust as a device for stable, long-term funding.

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[45] [1891] A.C. 531, 583.

CHAPTER V **CONCLUSION**

A. General

The trust is most familiar as a means of controlling the way in which private property is used to fulfil private needs. Usually, the beneficiary of a trust is a human being. The charitable variant of the trust nevertheless emerged at a fairly early stage in the development of our legal system in order to allow private resources to be dedicated to public purposes by those who wished their assets to be used in that manner.

As society evolved, the concept of charity did not change at the same pace. The result is that the range of purposes for which charitable trusts can be created is limited.

Today there is a pressing need to find alternative sources of funding for many worthwhile activities which fit into the traditional categories of charitable purposes uneasily or not at all. Non-charitable purpose trusts can provide sustainable funding that is not as susceptible to economic cycles as funding from public sources.

The concept of a valid non-charitable purpose trust seems to have been initially introduced with hesitation. We conclude that the restraints on its potential usefulness should now be removed.

B. List of Recommendations

The following is a restatement of the recommendations made in this Report:

1. *It should be possible to create a valid and enforceable trust for a non-charitable purpose.* **[page 41]**

2. *There should be no restrictions on the range of purposes for which a non-charitable purpose trust can be created except that the purpose must be*

   (a) certain,

   (b) lawful, and

   (c) not contrary to public policy. **[page 41]**

3. *Non-charitable purpose trusts should not be subject to a maximum duration, other than a maximum duration specified in the instrument or declaration creating the trust.* **[page 43]**

4. *The Supreme Court should be empowered to make an order that it considers just for the*

proper enforcement of a non-charitable purpose trust on the application of:

(a) the settlor,

(b) a person appointed specifically by the settlor to enforce the trust,

(c) the personal representative of the settlor,

(d) a trustee,

(e) the Attorney General, or

(f) any person appearing to the Court to have a sufficient interest in the enforcement of the trust. **[pages 45-46]**

5. *Where the object of a non-charitable purpose trust is or becomes impossible or impracticable and the settlor's intention as to the ultimate disposition of the trust property cannot be inferred from the trust instrument, the court should have jurisdiction to substitute a new purpose for a non-charitable purpose trust.* **[page 50]**

6. *In substituting a new purpose for a non-charitable purpose trust which has become impossible or impracticable, the court should be able to substitute a purpose which is as similar as is reasonably practicable to the original one specified by the settlor and, if no such purpose can be found, the court should be able to substitute a purpose that is not contrary to the spirit of the original settlement.* **[page 54]**

7. *The court should continue to have the ability to return the trust property to the settlor or the settlor's estate if no alternative purpose meeting the requirements of Recommendation 6 can be found.* **[page 54]**

8. *The court should have the power to approve a scheme substituting a new purpose for a non-charitable purpose trust if, due to a change in circumstances since its creation*

   (a) the trust is obsolete, or has ceased to represent a useful or expedient means of employing the trust property,

   (b) the new purpose proposed in the scheme is not contrary to the spirit of the original settlement. **[page 60]**

9. *In exercising its power to approve a scheme substituting a new purpose for a non-charitable purpose trust on the grounds set out in Recommendation 8, the court should have regard to the views of the settlor and the trustees concerning the continued usefulness or relevance of the trust and the variation proposed.* **[page 60]**

10. *The court should have power to vary and add to the administrative powers of trustees under non-charitable purpose trusts.* **[page 61]**

11. *The persons who may apply to the court for an order varying a non-charitable purpose trust should be the same as those who may apply for an order to enforce the trust.* **[page 62]**

12. *Section 44 of the Law and Equity Act should be repealed. In its place there should be a provision validating trusts in which a charitable purpose is linked conjunctively or disjunctively with a non-charitable purpose that is not described specifically, but is referred to only by an indefinite qualifying term such as "benevolent," "worthy," or "philanthropic." The new provision should state that such a trust operates solely for the benefit of the charitable purpose, to the exclusion of the indefinite non-charitable purpose.* **[page 65]**

13. *If the objects of a trust consist of both specific charitable and specific non-charitable purposes and it is practicable to separate the charitable from the non-charitable purposes*

    (a) *the specific charitable purposes should be deemed to constitute a separate charitable trust,*

    (b) *the specific non-charitable purposes should be deemed to constitute a separate non-charitable purpose trust, and*

    (c) *subject to any directions in the instrument concerning apportionment, the trustee should be required to divide the trust property between the charitable and non-charitable purposes.* **[page 65]**

14. *If the objects of a trust consist of both specific charitable and specific non-charitable purposes and it is not practicable to separate the charitable from the non-charitable purposes, the trust should take effect and be treated in its entirety as a non-charitable purpose trust.* **[page 65]**

C. Draft Legislation

The Appendix to this Report contains draft legislation intended to illustrate how the reforms recommended in this Report could be enacted into law. The draft legislation does not form part of the formal recommendations themselves.

D. Acknowledgments

We wish to acknowledge our gratitude to all those who commented on the *Working Paper on Non-Charitable Purpose Trusts*. We have benefited greatly from the insights they provided.

We also acknowledge the contribution of Gregory G. Blue, a member of the Commission's

legal research staff, who undertook research and, subject to the direction of the Commission, prepared the Working Paper and this Report.

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APPENDIX A

DRAFT NON-CHARITABLE PURPOSE TRUST LEGISLATION

Her Majesty, by and with the advice and consent of the Legislative Assembly of British Columbia, enacts as follows:

Non-Charitable Purpose Trusts

1. Section 44 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224, is repealed and the following is substituted:

44. (1) In this section,

"trust document or declaration" includes a will or codicil and an oral or written declaration of trust;	A trust can be created by an oral or written declaration by a settlor that he or she holds property on trust, by a written document (often called an "instrument") transferring property to a trustee, or by a will or codicil (amendment to a will).
"non-charitable purpose trust" means a trust for a non-charitable purpose that does not create an equitable interest in a particular person;	The definition of "non-charitable purpose trust" refers to trusts that do not have a person as a beneficiary and are created for a purpose that is not legally charitable.
"rule against perpetuities" means the rule against remoteness of vesting commonly known as the modern rule against perpetuities, as modified by the *Perpetuity Act*, R.S.B.C. 1979, c. 321;	The rule against perpetuities is explained in Appendix B to the Report.
"settlor" includes a testator.	The definition of "settlor" is extended to cover a testator, i.e. one who makes a will.
(2) Subject to this section, a person may create a non-charitable purpose trust if the purpose is	This subsection validates trusts for non-charitable purposes.
(a) sufficiently certain to allow the trust to be carried out,	In order for the trust to be enforceable, the purpose that is the object of the trust must be stated in terms certain enough for the trustees and the court to know what is the settlor's intention.

(b) lawful, and
(c) not contrary to public policy.

The requirement that the objects of a non-charitable purpose trust not be unlawful or contrary to public policy is merely an extension of the general principle that dispositions of property which contravene laws or are contrary to public policy are unenforceable.

(3) The rule against perpetuities, as modified by the *Perpetuity Act*, R.S.B.C. 1979, c. 321, applies to a non-charitable purpose trust.

The modern rule against perpetuities restricts the length of time during which interests in property can exist as contingent interests. It applies to interests under a trust, although it is relaxed in relation to charitable trusts in certain situations. The rule has been substantially modified by the *Perpetuity Act*, R.S.B.C. 1979, c. 321. Appendix B contains an explanation of the rule against perpetuities, and its application to purpose trusts.

Subsection (3) affirms that the rule against perpetuities, as modified, applies to non-charitable purpose trusts.

(4) A non-charitable purpose trust may exist indefinitely unless the trust document or declaration that creates it specifies a maximum duration or provides otherwise for its termination.

Subs. (4) allows a non-charitable purpose trust to last indefinitely, like a charitable trust. It remains open to the settlor to specify a maximum duration for the trust, or to specify the conditions or events that shall cause it to terminate.

(5) Subject to subsection (9), if, in the opinion of the court, a non-charitable purpose trust is or has become impossible to perform or incapable of effectively fulfilling the purpose intended by the settlor, the court may at any time

Subs. (5) extends the jurisdiction to vary the objects of a purpose trust under the doctrine of *cy-pres* to non-charitable purpose trusts. Under *cy-pres*, the court can substitute new purposes for a charitable trust when the original ones are impossible or impracticable (in the sense that even though it is technically possible to carry out the trust, doing so will not effectively accomplish what the settlor intended.) The new purposes substituted by the court must be as similar as possible to the ones specified by the settlor. In this way, charitable trusts are preserved whenever possible.

(a) approve a scheme substituting a purpose for the non-charitable purpose trust that is as similar to the original purpose as is reasonably practicable, or

(b) if the court is unable to find a purpose that is reasonably similar to the original purpose of the trust, approve a scheme substituting a purpose that is not contrary to the spirit of the original settlement.

Subs. (5) modifies the doctrine of *cy-pres* insofar as non-charitable purpose trusts are concerned. There is no requirement of general charitable intent, and the substituted purpose only has to be as similar to the original one as is reasonably practicable. The standard of similarity is relaxed because of the wide scope a settlor has to create a non-charitable purpose trust under subs. (2). When even this relaxed standard cannot be met, subs. (5)(b) still allows the court to supply a new purpose, rather than let the trust fail. The new purpose must not defeat the settlor' s original intention, however, or else no one would set up a non-charitable purpose trust. For this reason, subs. 5(b) sets out a fundamental requirement that the substituted purpose must not be contrary to the spirit of the original terms of the settlement.

The court's *cy-pres* power cannot be invoked if the settlor intended a specific alternative disposition for the trust property. For this reason, subs. (9) prevails over subs. (5).

An application to vary the purposes of a non-charitable purpose trust would be made under subs. (10)(h).

(6) Subject to subsection (9), the court may vary a non-charitable purpose trust by approval of a scheme substituting a new purpose for the trust that is not contrary to the spirit of the original settlement if the court is of the opinion that the purpose of the trust is obsolete, or no longer useful or expedient, due to a change in circumstances since the creation of the trust.

Cy-pres is only concerned with impossible or impracticable purposes. It does not take account of purpose trusts that simply become irrelevant or obsolescent due to changes in circumstances. Subs. (6) allows the court to substitute a new purpose for a non-charitable purpose trust when the original purpose becomes obsolete or useless in light of changed conditions.

The court has no power to substitute a new purpose if the settlor's intention regarding alternative purposes can be discerned. For this reason, subs. (9) prevails over subs. (6).

An application to approve a scheme under subs. (6) would also be made under subs. (10)(h).

(7) In exercising the power to vary a non-charitable purpose trust under subsection (6), the court must consider the views, if any, of the settlor and the trustees concerning the continued usefulness or relevance of the trust and the proposed variation.

Settlors must be assured that their intentions will continue to have influence over the way in which trust property is used. Subs. (6) allows the court to substitute a new purpose even when the original one can still be fulfilled. For this reason, subs. (7) directs the court to consider the views of the settlor and the trustees.

(8) If the court finds it is unable to approve a scheme to substitute a purpose for a non-charitable purpose trust under subsections (5) and (6), it may order that the trust property be returned to the settlor or to the settlor's personal representative.

In the event that it proves impossible to find a suitable alternate purpose for a non-charitable purpose trust, subs. (8) empowers the court to order the return of the trust property to the settlor. This would seldom be necessary, given the broad range of purposes that can be substituted for the original one under subsections (5) and (6).

(9) Subsections (5) and (6) do not apply if

(a) the trust document or declaration contains a legally valid direction concerning the ultimate disposition of the trust property, or

(b) the intention of the settlor concerning the ultimate disposition of the trust property can be inferred from the trust document or declaration and is legally valid.

Variation of trust purposes by the court is unnecessary if it is possible to discern the settlor's intention regarding what should happen to the trust property in the event that the original purpose of the trust is unattainable or obsolete. Subsection (9) indicates that the court's power to supply new purposes would not apply in that case.

(10) On an application by

(a) the Attorney General,

(b) a person appointed specifically by the settlor in the trust document or declaration to enforce the trust,

(c) the settlor,

(d) the personal representative of the settlor,

(e) the trustee, or

(f) any person appearing to have a sufficient interest in the matter,

the court may make an order that it considers just in the circumstances

(g) for the enforcement of a non-charitable purpose trust,

Since non-charitable purpose trusts do not have beneficiaries who can sue a trustee in order to enforce the trust, others must be able to do so. Subsection (10) allows anyone who can show a sufficient interest in the enforcement of the trust to apply to the court for an order against the trustee. The settlor or an appointee (or the settlor's personal representative, if the settlor is deceased), and the Attorney General may do so as well. The trustee may also apply for an enforcement order, since it may occasionally be necessary for the trustee to seek the court's assistance against a co-trustee, or to protect the trust property.

The same persons may also apply under this subsection for a variation of a non-charitable purpose trust under subsections (5) and (6), or for a variation of the powers of the trustees, in order to enable them to carry out the trust more effectively.

(h) varying a non-charitable purpose trust under subsections (5) or (6), or

(i) enlarging or otherwise varying the powers of the trustees of a non-charitable purpose trust.

Trusts having both charitable and non-charitable purposes

2. Section 44.1 is added to the *Law and Equity Act*:

44.1 (1) Subject to subsection (2), if the objects of a trust consist of a charitable purpose linked conjunctively or disjunctively with a non-charitable purpose that is not described specifically, but is referred to only by an indefinite qualifying term, such as "benevolent," "worthy," or "philanthropic," the trust is not void for that reason alone.

This subsection validates certain trusts that are partly charitable, but are also capable of extending to non-charitable purposes. Earlier law held such trusts void for uncertainty. Subs. (1) is similar to the present s. 44 of the *Law and Equity Act*, but is more specific in describing the kind of trust to which it applies. Compendious terms extending to other than charitable purposes are sometimes used without full recognition of their effect. Subs. (1) saves charitable trusts that are flawed in this manner.

(2) A trust described in subsection (1) operates solely for the benefit of the charitable purpose to the exclusion of the non-charitable purpose, and the trustee shall apply all of the property of the trust as if no non-charitable purpose had been set out in the trust document or declaration creating the trust.

A trust that is saved by subs. (1) is likely intended to be exclusively charitable, but is created in ignorance of the implications of the language used to express it. The draft legislation preserves the charitable character of the trust by providing in subs. (2) that the trustee is to proceed as if the trust document or declaration only referred to charitable purposes. Subs. (2) carries forward the policy of the present s. 44 of the *Law and Equity Act* in relation to the trusts described in subs. (1).

(3) If the objects of a trust consist of both specific charitable and specific non-charitable purposes, the trust is not void for that reason alone, but if it is practicable to separate the charitable from the non-charitable purposes,

Subs. (3) validates purpose trusts with specific charitable and non-charitable objects. Both categories of objects take effect, but the subsection deems one trust to exist for the benefit of the charitable purposes and another for the non-charitable purposes. The legislation requires the trust property to be divided between the two trusts and gives the trustee the power to do this. Any terms in the trust document or declaration expressing the settlor's intention regarding the apportionment of the property among the various objects, or the way in which a power of apportionment should be exercised, would take precedence.

(a) the specific charitable purposes constitute the objects of a separate charitable trust,

(b) the specific non-charitable purposes constitute the objects of a separate non-charitable purpose trust, and

(c) subject to any terms in the trust document or declaration regarding apportionment of the trust property or the manner in which a power of apportionment may be exercised, the property of the trust shall be divided in the trustee's discretion between the charitable trust and the non-charitable purpose trust mentioned in paragraphs (a) and (b), respectively.

(4) If the objects of a trust consist of both specific charitable and specific non-charitable purposes and it is not practicable to separate the charitable from the non-charitable purposes, the trust is not void for that reason alone, but shall take effect and be treated as a non-charitable purpose trust.

Often it will be impracticable to separate the charitable and non-charitable purposes of a mixed purpose trust. Where this is the case, subs. (4) would allow the trust to stand in its entirety as a non-charitable purpose trust.

Repeal

3. Section 21 of the Perpetuity Act, R.S.B.C. 1979, c. 321, is repealed.

Self-explanatory.

APPENDIX B

THE RULES AGAINST PERPETUITIES, INALIENABILITY, AND ACCUMULATIONS AS THEY RELATE TO PURPOSE TRUSTS

A. The Rule Against Perpetuities

1. The Basic Rule

This rule concerns the time at which interests in property must become vested interests. When there are no events that can prevent a person who is to take an interest in property from acquiring that interest, it is said to be a *vested* interest. If the acquisition of the interest remains subject to events which may or may not occur, it is only a contingent interest. The effect of the unmodified rule[1] is to render contingent interests in property void if there is a possibility that they may become vested outside a specified period following the disposition of property which creates them. For that reason it would be more correct to refer to it as a rule against remoteness of vesting.[2]

An interest in property is said to vest for the purpose of the rule when three conditions occur:

1. The persons who are to take the interest are living and identifiable;

2. The extent of each taker's interest is known;

3. All preconditions to the taking of the interest are satisfied, except the natural termination of a prior interest.

Thus, if a will contains the following gift:

> To A for life, then to A's children alive at his death in equal shares absolutely,

the property would vest in the children of A only when A died, because it would not be known until then whether any of the children would survive A. Before then, A's children would have only an interest contingent on their surviving A, and the extent of each interest could vary depending on how many of the children were alive at the end of A's life.

Vesting does not require that the taker have possession of the property as long as the three criteria are met. Thus if the will reads:

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[1] The effect of the common law rule has been modified substantially by the *Perpetuity Act*, R.S.B.C. 1979, c. 321.

[2] *Cf.* Morris and Leach, *The Rule Against Perpetuities* (1962) 326.

To A for life, then to B absolutely

and both A and B are alive, B has a vested interest even though B cannot have possession until the end of A's life interest.

Since the law was concerned that property should not be rendered inalienable because of rights that might come into existence only at a distant future time, the so-called "modern rule against perpetuities" was developed: contingent interests would be invalid if there was a possibility that they could vest outside a period that was longer than the lifetime of a person who was alive at the time the contingent interest was created, plus 21 years.[3]

Thus, a gift on these terms:

To A for life, then to the first child of A to reach the age of 21

would be valid if A was alive at the time of the gift, because none of A's children could reach the specified age more than 21 years after the death of A. On the other hand, if the terms of the gift were:

To A for life, then to the first child of A to graduate from university

the gift would be void, because it is possible that the first child of A to graduate from university might do so after the expiration of 21 years from A's death.

The period of a life plus 21 years was called the "perpetuity period." If there were no lives which could be identified by reference to the document which created the interest, such as a will, trust deed, or contract, the perpetuity period (prior to the enactment of the *Perpetuity Act*[4]) was 21 years.

2. Application of the Rule Against Perpetuities to Charitable Trusts

The rule against remoteness of vesting applies to trusts, as it does to other transfers of property. There is an added complication flowing from the nature of the trust as a separation of legal and beneficial ownership, however. Vesting in trustees alone is insufficient to stay within the rule. If there are successive beneficial interests under a trust for persons, these must also vest within the perpetuity period.

Charitable trusts are purpose trusts. It is obvious that property cannot "vest" in a purpose, and the logical solution might have been to exempt them from the rule.

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[3] *Duke of Norfolk's Case*, (1683) 3 Ch. Ca. 1, 23 E.R. 388.

[4] *Supra*, n. 1.

There was no general exemption for charitable trusts, however. Instead, the rule was merely applied in a different fashion. The ability to carry out the purpose of the trust had to arise within the perpetuity period. If the trustee's duty to apply the trust property for the settlor's purpose did not arise until a condition was fulfilled, and the fulfilment of the condition might not occur until after the perpetuity period, the trust was invalid.[5]

In one type of situation, charitable trusts were exempt from the rule against perpetuities. If a settlor specified that a gift for a charitable purpose should end on the occurrence of a particular event, and the trust property should then be applied to another charitable purpose, the gift for the second charitable purpose was valid even if the event occurred outside the perpetuity period.[6] The exemption did not apply if the prior interest which came to an end was non-charitable.[7]

3. The *Perpetuity Act*

Significant changes to the application of the rule against perpetuities were introduced by the *Perpetuity Act*. While the rule still remains in effect, contingent interests which it would render invalid may be saved under the Act. Thus, if an interest would be valid under the unreformed rule, there is no need to resort to the Act.[8]

When an interest runs afoul of the common law rule by reason of a possibility of vesting outside the perpetuity period, the Act provides that it will not be void unless it does not actually vest within that time.[9] This is referred to as the "wait and see" rule. A settlor may specify a period of up to 80 years within which an interest may vest without violating the remoteness rule.[10] If the perpetuity period is to be assessed without reference to lives, as might often be the case with a

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5 *Re Wightwick's Will Trusts*, [1950] Ch. 260. If the precondition attached only to the method of application rather than to the charitable gift itself, the rule was not violated: *Jewish Home for the Aged* v. *Toronto General Trusts Corporation*, [1963] S.C.R. 465; *Re Pearse*, [1955] 1 D.L.R. 801 (B.C.S.C.).

6 *Royal College of Surgeons of England* v. *National Provincial Bank*, [1952] A.C. 531 (H.L.). The gift over would apparently be valid whether the prior charitable interest terminated automatically (a determinable interest) or was subject to a condition subsequent (an event which allowed the donor the option of terminating it): *see Re Mountain*, (1912) 26 O.L.R. 26 (C.A.); *Re Tyler*, [1891] 3 Ch. 252. Before s. 20(1) of the *Perpetuity Act* made possibilities of reverter following the cessation of determinable interests subject to the rule against perpetuities, the general rule concerning non-charitable interests was that conditions subsequent which could defeat a prior interest were subject to the rule against perpetuities, while events allowing a determinable interest to come to an end were not: *Re Tilbury West Public School Board* v. *Hastie*, [1966] O.R. 20, 55 D.L.R. (2d).

7 *Re Davies*, [1915] 1 Ch. 543.

8 Maclean, "The British Columbia Perpetuities Act - A Primer," (1979) 13 U.B.C. L. Rev. 240, 242. S. 2(1) of the Act preserves the common law rule.

9 R.S.B.C. 1979, c. 321, ss. 4, 5.

10 *Ibid*., s. 3.

purpose trust, the perpetuity period is now 80 years.[11]

Possibly the most radical reform introduced by the Act is to allow the court to vary the disposition, if it would be void solely on the ground that it infringed the rule against perpetuities, so as to give effect to the general intention behind the disposition within the rule, as far as possible.[12]

The Act expressly preserves the exception from the perpetuities rule for gifts over from one charity to another.[13]

As a result of the modifications of the rule against perpetuities introduced by the *Perpetuity Act*, the likelihood of any interest being defeated by the rule is greatly reduced.

B. The Rule Against Inalienability

This is an obscure rule, often stated in terms of its effect: a trust is invalid if its capital cannot be alienated for a length of time greater than the perpetuity period, unless the trust is charitable.[14] It is a rule aimed specifically at indefinite duration, and for this reason it is sometimes said to be a branch of the rule against perpetuities. It is unquestionably distinct from the rule against remoteness of vesting, however. It has not been modified by statute, apart from the fact that section 21 of the *Perpetuity Act* allows perpetual non-charitable purpose trusts to exist for 21 years unless the court invalidates them.

The rule does not prevent trusts from lasting indefinitely, provided that they can come to an end through the trust property being used up. Instead, it prevents the possibility of non-charitable trusts which *must* last forever.

It is the fact that charitable trusts are not subject to the rule against inalienability that allows them to be designed to last perpetually. The justification for the exemption is that the public benefit they supposedly bring is considered to outweigh concerns about the immobilization of the property.

While some writers link the origins of the rule to a more general principle of property law that prohibits restraints on alienation of absolute rights of property,[15] it remains a distinct rule that is

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11 *Ibid*., s. 6(1)(b). S. 6(2) specifies the lives in being which are to be used for the calculation.

12 *Ibid*., s. 9.

13 *Ibid*., s. 20(3).

14 *Re Wightwick's Will Trust*, [1950] 1 Ch. 260, 265; *Carne* v. *Long*, (1860) 2 De G.F. & J. 75, 45 E.R. 550.

15 Waters, *Law of Trusts in Canada* (2nd ed., 1984) 518; Megarry and Wade, *The Law of Real Property*, (4th ed., 1973) 267. Morris and Leach, on the other hand, take exception to describing the rule as one against inalienability, because of the confusion with the general principle that absolute rights of property cannot be made subject to a restraint on alienation. They prefer to describe it as a second rule against perpetuities: Morris and

consistently invoked only in relation to non-charitable purpose trusts. A private trust under which the trustees must hold the capital for the benefit of successive income beneficiaries longer than 21 years from the end of lives in being at the effective date of the gift is valid as long as the income interests vest within the perpetuity period. A purpose, however, can go on forever. Finding the constraints on the marketability of property that purpose trusts would impose unpalatable, courts have given the fact that these trusts "tend toward a perpetuity" as a further reason for striking them down.[16]

C. The Rule against Accumulations

Prior to 1979, charitable trusts in British Columbia were subject to statutory limits on the length of time during which income from the trust capital could be accumulated under a trust without being paid out or otherwise applied to the trust objects.[17] Section 24(1) of the *Perpetuity Act* now states that a power or direction under a trust to accumulate income is valid if the disposition of the income is valid, but not otherwise. Thus, if the right to receive income arises within the perpetuity period as modified by the Act, any accumulations of income until that point will be unobjectionable.

Income that is improperly accumulated under a charitable trust can be dealt with by a court under the *cy-pres* doctrine.

As a result of section 24(1) of the *Perpetuity Act* and of the fact that registered charities may not accumulate except with the permission of Revenue Canada, the rule against accumulations is likely of declining importance insofar as charitable trusts are concerned.[18]

D. Pension Plans, RRSPs and Other Exempt Trusts

Certain types of trusts are exempted entirely from the rules against perpetuities and accumulations, and the statutory provisions relating to them. Not all of these would be entirely charitable, but some, like those relating to hospital and university funds, may well be. An exempt category is created by section 22 of the *Perpetuity Act*, consisting of trusts associated with:

1. A plan, trust or fund established for providing pensions, retirement allowances, annuities or sickness, death or other benefits to persons or their surviving

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Leach, *The Rule Against Perpetuities* (1962) 326.

16 *Carne* v. *Long, supra*, n. 14.

17 *Accumulations Act, 1967*, S.B.C. 1967, c. 2.

18 *Income Tax Act*, R.S.C. 1970-71-72, c. 63, s. 149.1(8). Registered charities must also meet minimum disbursement quotas in each year, or risk deregistration: *ibid*., ss. 149.1(1)(e), 149.1(2), 149.1(3).

spouses, dependants or other beneficiaries;

2. An RRSP or RHOSP;

3. Property donated to the First Peoples' Heritage, Language and Culture Council;

4. Any property donated to a university or to a foundation established by a university, the *University Foundations Act*[19] or the *Trinity Western University Foundation Act*;[20]

5. Any property donated to the Hospitals Foundation of British Columbia;

6. Any property donated to the British Columbia Health Research Corporation.

Further exemptions from the rules against perpetuities and accumulations can be found in statutes establishing various foundations.[21]

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19 S.B.C. 1987, c. 50.

20 S.B.C. 1989, c. 82.

21 *E.g., Chilliwack Foundation Act*, S.B.C. 1985, c. 62, s. 47 (rule against perpetuities only mentioned); *Mission Foundation Act*, S.B.C. 1987, c. 35, s. 22; *Victoria Foundation Act*, S.B.C. 1987, c. 35, s. 22.