

A Proposal for Flexibility in Private and Public Express Trust Enforcement

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The Uniform Trustee Act provides for the enforcement of certain non-charitable purpose trusts. This paper draws on that concept but extends it by recommending an expansion of the range of potential enforcement methods for all types of express trusts whether they are for non-charitable purposes, charitable purposes or for persons. In particular, it recommends that, for all types of express trusts, settlors be allowed to indicate possible enforcers. It also recommends that courts be allowed, unless the settlor indicates otherwise, to grant standing to persons to enforce express trusts whether for persons, non-charitable purposes or charitable purposes. It further recommends allowing for Crown enforcement of all types of express trusts (not just charitable purpose trusts) in statutorily specified situations and it recommends extending the availability of cypres and administrative scheme orders to statutorily-identified non-charitable purpose trusts. The paper also argues that with Crown enforcement of all types of express trusts in statutorily specified situations, it is no longer necessary to retain several of the distinct features of charitable purpose trusts, such as exclusivity, public benefit and the invalidity of political purpose trusts.

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I. Introduction

Equity has long held, subject to limited exceptions, that non-charitable purpose trusts are not legally valid trusts. While a provision in Canadian wait-and-see perpetuities legislation¹ provides that trusts for specific non-charitable purposes are valid trusts, it provides for their enforcement only as a power (*i.e.* the trustee may carry out the terms of the non-charitable purpose trust but is not legally obliged to do so). The *Uniform Trustee Act (2012)*² (“*Uniform Trustee Act*”) proposed by the Uniform Law Conference of Canada in 2012 contains a provision

1. Wait-and-see perpetuity legislation modifies the common law rules against perpetuities. Many common law jurisdictions have enacted such legislation including the provinces of Alberta (*Perpetuities Act*, RSA 2000, c P-5 [*Alberta Perpetuities Act*]); British Columbia (*Perpetuity Act*, RSBC 1996, c 358 [*BC Perpetuity Act*]); Ontario (*Perpetuities Act*, RSO 1990, c P.9 [*Ontario Perpetuities Act*]); Yukon Territories (*Perpetuities Act*, RSY 2002, c 168 [*Yukon Perpetuities Act*]); Northwest Territories (*Perpetuities Act*, RSNWT 1988, c P-3 [*NWT Perpetuities Act*]); and Nunavut (*Perpetuities Act*, RSNWT 1988, c P-3 (as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28) as amended by the *Miscellaneous Statutes Amendment Act*, S Nu 2010, c 4, s 25 [*Nunavut Perpetuities Act*]). See *infra* notes 34-36 and the accompanying text.
2. *Uniform Trustee Act (2012)* adopted by the Uniform Law Conference of Canada, online: Uniform Law Conference of Canada <www.ulcc.ca> [*Uniform Trustee Act*].

for the enforcement of certain non-charitable purpose trusts as trusts (*i.e.* as legally enforceable obligations). This paper draws on this *Uniform Trustee Act* concept, but recommends expanding the range of potential enforcement for all types of express trusts whether they are for non-charitable purposes, charitable purposes or for persons. In particular, it recommends that, for all types of express trusts, settlors be allowed to indicate possible enforcers and courts be allowed to grant standing to persons to enforce, subject to the settlor indicating otherwise and subject to controls against vexatious actions or actions that would not be in the best interests of the trust.

Following a suggestion in the *Uniform Trustee Act* which allows for Crown enforcement of certain non-charitable purpose trusts, this paper recommends allowing for Crown enforcement of all types of express trusts (not just charitable purpose trusts) in statutorily specified situations. It is also argued that with Crown enforcement of all types of express trusts in statutorily specified situations, it is no longer necessary to retain several of the distinct features of charitable purpose trusts, such as exclusivity, public benefit and the invalidity of political purpose trusts. If the rule against perpetuities is abrogated, as it now has been in three provinces, there would also be no need for the perpetuity exception for charitable purpose trusts. If, however, the rule against perpetuities is retained, it is recommended that the perpetuity exception for charitable purpose trusts be extended to statutorily-identified non-charitable purpose trusts. In either case, the availability of *cy-près* orders should be extended to statutorily-identified non-charitable purpose trusts. In addition, it is suggested that the availability of court ordered administrative schemes be extended to statutorily-identified non-charitable purpose trusts.

In short, this paper recommends making quite drastic changes to trust law developments dating back hundreds of years. The path to the arguments for such significant changes begins, in Part II, with some background on the distinction between express trusts for persons, non-charitable purpose trusts and charitable purpose trusts. Part III indicates how express trusts for persons, sometimes referred to as “private trusts”, can provide benefits to a community broader than persons with a close connection to the settlor and may do so in a way that might be considered

socially beneficial or fall into traditional legal concepts of charitable purposes. It also indicates that non-charitable purpose trusts may have purposes that, while not fitting the legal definition of charitable purpose, may nonetheless provide societal benefits. Part IV focuses on enforcement issues, noting that problems of weak enforcement, while perhaps not as severe as for non-charitable purpose trusts, can nonetheless also occur in express trusts for persons and charitable purpose trusts. Part V notes the *Uniform Trustee Act* provision for enforcement of non-charitable purpose trusts and recommends extending the concept of settlor designated enforcers to express trusts for persons and charitable purpose trusts. Part VI recommends allowing the court to grant standing to persons to enforce all types of express trusts subject to the settlor indicating otherwise and subject to controls against vexatious actions or actions that would not be in the best interests of the trust. Part VII then suggests providing for Crown enforcement of all types of express trusts that have aspects that justify expenditure of public funds on enforcement determined according to statutorily provided circumstances for Crown enforcement. With the recommended common approach to the enforcement of express trusts, Part VIII goes on to suggest the elimination of other distinguishing features of charitable purpose trusts such as exclusivity, public benefit, the political purposes doctrine and perpetuities.

II. Relevant Trust Law Background

Some aspects of trust law that provide helpful background to the discussion that follows are briefly reviewed here. Subpart A, below, sets out a typology of trusts to highlight the focus of the paper on express trusts. It also identifies a common division of express trusts into trusts for persons and trusts for purposes and briefly notes the distinction between charitable and non-charitable purposes. Subpart B discusses the general invalidity of non-charitable purpose trusts with emphasis on the enforcement concern asserted to be the main reason for general invalidity. It then briefly notes judicial and statutory exceptions that have been made to general invalidity. Subpart C notes the validity of charitable purpose trusts and how the purpose trust enforcement concern is addressed for charitable purpose trusts. It also notes the requirement that charitable

purpose trusts be for exclusively charitable purposes and the enforcement concern that has been given as the reason for that requirement.

A. A Typology of Trusts: Express Trusts, Trusts by Operation of Law, and Statutory Trusts

A common typology of trusts distinguishes between express trusts and trusts by operation of law.³ Express trusts are trusts that a person (or persons) intends to create.⁴ The intention may have been clearly expressed in words the person used or, where the words are less clear, may be implied from words used, the conduct of the person or the particular circumstances in which the person used the words or engaged in the conduct.⁵ Trusts by operation of law include constructive trusts and, in

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3. See *e.g.* John Mowbray et al, *Lewin on Trusts*, 18d (London: Sweet & Maxwell, 2008) at 23; David Hayton & Paul Matthews, *Underhill and Hayton Law Relating to Trusts and Trustees*, 18d (London: LexisNexis, 2010) at 79-86; Geraint Thomas & Alastair Hudson, *The Law of Trusts*, 2d (Oxford: Oxford University Press, 2010) at 19-21; Jill E Martin & Harold G Hanbury, *Modern Equity*, 19d (London: Thomson, Sweet & Maxwell, 2012) at 71-74; John McGhee, ed, *Snell's Equity*, 32d (London: Thomson, 2010) at 630; Eileen E Gillese, *The Law of Trusts*, 3d (Toronto: Irwin Law, 2014) at 39, 105; and Albert H Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8d (Toronto: Carswell, 2014) at 24-28.
 4. See *e.g.* Mowbray, *supra* note 3 at 23; Hayton & Matthews, *supra* note 3 at 79-80; Thomas & Hudson, *supra* note 3 at 19; Martin & Hanbury, *supra* note 3 at 71; McGhee, *supra* note 3 at 630; Gillese, *supra* note 3 at 39; Oosterhoff, Chambers & McInnes, *supra* note 3 at 24; and Philip H Pettit, *Equity and the Law of Trusts*, 11d (Oxford: Oxford University Press, 2009) at 67.
 5. See *e.g.* Mowbray, *supra* note 3 at 23; Hayton & Matthews, *supra* note 3 at 80; Pettit, *supra* note 4 at 67; Thomas & Hudson, *supra* note 3 at 19-20; and McGhee, *supra* note 3 at 630.

the typology of some, may include resulting trusts.⁶ Statutes often create trusts that can have unique aspects deriving explicitly or implicitly from the particular statute.⁷ The focus in this paper is on express trusts.

Express trusts have been divided into trusts for persons and trusts for purposes. Trusts for persons provide benefits for persons who are called “beneficiaries”. For example, a parent with two minor children, Nancy and Dave, and not expecting to have any more children, might provide in a will that the residue of her or his estate be held in trust and invested, with the investment income to be used to provide for Nancy and Dave

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6. Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada*, 4d (Toronto: Carswell, 2012) notes that “[a]n express trust arises out of the intention of the settlor; a constructive trust comes into existence, regardless of any party’s intent, when the law imposes upon a party an obligation to specific property for the benefit of another” at 478. It also notes at 394, citing *Pecore v Pecore*, 2007 SCC 17, that “[b]roadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party’s name, but that party is under an obligation to return it to the original title owner, or to the person who paid the purchase money for it” at para 20. Oosterhoff, Chambers & McInnes, *supra* note 3, says that “[a] constructive trust ... defies simple description. Whereas an express trust is defined by its origins in the settlor’s intention and a resulting trust is defined by its operation in reversing a transfer, a constructive trust is simply a trust that equity has ‘constructed’ for some good reason” at 709. In Waters, Gillen & Smith at 394-97, 478 different uses of the term “implied trust,” “resulting trust” and “constructive trust” are discussed. While some treat the resulting trust as arising by operation of law, others treat it as an express trust arising out of implied intention (see *e.g.* Peter D Maddaugh & John McCamus, *The Law of Restitution* (Toronto: Canada Law Book, 2014) (loose-leaf 5:200), at 5-6, nn 22a, 23, and the accompanying text; and A J Oakley, *Constructive Trusts*, 2d (London: Sweet & Maxwell, 1987) at 14-18).
7. There are many statutory trusts. Examples include trusts of the property of bankrupts under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3; builders’ lien trusts such as under the *Builders Lien Act*, SBC 1997, c 45, s 10; or trusts for purposes such as habitat conservation an example of which is the Habitat Conservation Trust Fund under the *Wildlife Act*, RSBC 1996, c 488, as amended by SBC 2007, c 24, ss 51-52.

during their minority.⁸ Nancy and Dave would both be beneficiaries specifically named in the trust. A trust for persons can also describe a class of persons. A grandparent might, for example, during her or his life, transfer money to a person to hold in trust and invest the money, accumulating the income and making distributions to provide for the post-secondary education of her or his grandchildren. The described class of persons would be the “grandchildren” of the grandparent and could include as yet unborn grandchildren.⁹ The object of a trust for purposes differs in that it is not directed to specific persons or to a defined class of persons, but to the pursuit of one or more specific purposes. A person might, for example, provide in her or his will that some specified amount of money out of the person’s estate be set aside for the erection of a monument at the person’s grave site.

Trusts for purposes are typically divided into two types: charitable purpose trusts and non-charitable purpose trusts. A legally valid charitable purpose trust requires that the purpose(s) of the trust: (i) be charitable purposes; (ii) be exclusively charitable; and (iii) provide a “public benefit”.¹⁰ The meaning of “charitable purpose” is based on the

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8. The trust could go on to provide that when Nancy and Dave reach the age of majority any remaining funds be, among numerous other possibilities, distributed equally between Nancy and Dave, distributed to some named person other than Nancy or Dave or returned to the settlor. If nothing is said about the distribution of any remaining funds, they would go to the settlor (or the settlor’s estate) on a resulting trust.
 9. If the applicable jurisdiction of the trust continued to have the common law rule against perpetuities (or a modified version thereof), care would need to be taken to ensure that the potential gift to unborn grandchildren does not vest outside the perpetuity period. The description of a class of beneficiaries needs to meet the test of certainty of beneficiaries. In *McPhail v Doulton* (1970), [1971] AC 424 (HL), it was held that the test of certainty of beneficiaries for a discretionary trust is “that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class” at 16 [*McPhail*].
 10. The “charitable” requirement is discussed here in this Part II.A. The exclusivity requirement is discussed further in Part II.C.2 below and the public benefit requirement is discussed further in Part III.C below.

preamble to the *Statute of Charitable Uses of 1601*.¹¹ The preamble listed examples of charitable purposes to which funds had been provided at that time. In *Morice v The Bishop of Durham*¹² it was held that charitable purpose had a restricted meaning. For it to be a charitable purpose it had to be mentioned in the preamble to the *Statute of Charitable Uses* or

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11. 43 Eliz I, c 4. That was a statute that provided a mechanism for the enforcement of purpose trusts through publicly appointed “commissioners”. The preamble to the statute said:
 “WHEREAS Landes Tenements Rentes Annuities Profittes Hereditamentes, Goodes Chattels Money and Stockes of Money, have bene heretofore given limited appointed and assigned, as well by the Queenes moste excellent Majestie and her moste noble Progenitors, as by sondrie other well disposed persons, some for Reliefe of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highewaies, some for Educacion and prefermente of Orphans, some for or towards Reliefe Stocke or Maintenance for Howses for Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge Tradesmen, Handicraftesmen and persons decayed, and others for reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitants concerninge paymente of Fifteenes, settinge out of Souldiers and other Taxes, Whiche Landes Tenements Rents Annuities Profitts Hereditaments Goodes Chattells Money and Stockes of Money nevertheless have not byn employed accordinge to the charitable intente of the givers and founders thereof, by reason of Fraudes breaches of Truste and Negligence in those that shoulde pay delyver and imploy the same ... ”.
12. (1804), 32 ER 656 (Ch) [*Morice* Ch]; (1805), 32 ER 947 (Ch) [*Morice* Ch D].

be analogous to a purpose mentioned therein.¹³ In the 1891 House of Lords decision in *Commissioners for Special Purposes of the Income Tax v Pemsel*¹⁴ (“*Pemsel*”) Lord McNaughten said the charitable purposes in the preamble fell into four categories:¹⁵

- i. the relief of poverty;
- ii. the advancement of education;
- iii. the advancement of religion; and
- iv. other purposes beneficial to the community.

The categorization in *Pemsel* has been accepted by the Supreme Court of

13. In the words of Master of the Rolls Grant in *Morice Ch*, *supra* note 12 (what is a charitable purpose, “is derived chiefly from the Statute of Elizabeth (stat. 43 Eliz. c. 4). Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment” at 659). In upholding the decree of Grant MR, Lord Eldon in *Morice Ch D*, *supra* note 12 noted that the duty of trustees of a disposition to charity is “to apply the money to charity, in the sense, which the determinations have affixed to that word in this Court: viz. either such charitable purposes as are expressed in the Statute (stat. 43 Eliz. c. 4), or to purposes having analogy to those. I believe the expression ‘charitable purposes,’ as used in this Court, has been applied to many Acts described in that Statute and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the Statute given to all the purposes described” at 954.

14. [1891] AC 531 (HL) [*Pemsel*].

15. at 538. This categorization, or something close to it, appears to have been contemplated much earlier given the following comment by Mr. Romilly for the petitioners in *Morice Ch D*, *supra* note 12 (“There are four objects, within one of which all charity, to be administered in the Court, must fall: 1st, relief of the indigent; in various ways: money: provisions: education: medical assistance; &c.: 2dly, the advancement of learning: 3dly, the advancement of religion: 4thly, which is the most difficult, the advancement of objects of general public utility” at 951).

Canada.¹⁶ The fourth category appears on its face to say that all one needs to show to establish a charitable purpose is that the purpose is beneficial to the community. This, however, is not the approach courts, including courts in Canada, have taken. The majority decision of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v MNR*¹⁷ noted that it is not enough to find that a purpose is beneficial to the community to make it charitable. The benefit must also be one that the law regards as charitable.¹⁸ The majority said the way to determine whether a purpose is charitable is to look to the preamble to the *Statute of Charitable Uses*, to analogies to the preamble and then to analogies upon analogies found in previous cases.¹⁹

B. Invalidity of Non-Charitable Purpose Trusts

Trusts for non-charitable purposes have traditionally been held not to be legally valid trusts.²⁰ The idea behind a legally valid trust, whether a trust for persons or a trust for purposes, is that the court will enforce the obligation undertaken by the trustee. The main reason given for the non-validity of non-charitable purpose trusts is that, without named beneficiaries or a defined class of beneficiaries, there is no one to enforce

16. See e.g. *AYSA Amateur Youth Soccer Assn v Canada (Revenue Agency)*, 2007 SCC 42 at 233 [*AYSA*]; *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10 at paras 40-41, 102-103 [*Vancouver Society*]; *Guaranty Trust Company of Canada v Minister of National Revenue*, [1967] SCR 133 at 141 [*Guaranty Trust*]; and *The King v Assessors of Sunny Brae (Town)*, [1952] 2 SCR 76.

17. See *Vancouver Society*, *supra* note 16.

18. See the majority decision in *Vancouver Society*, *supra* note 16 at paras 148, 176. The same point is made in the minority judgment at paras 43-49.

19. See the majority decision of *Vancouver Society*, *supra* note 16 at paras 148, 176-79, 200-203. The minority, after discussing several cases and the approach to the fourth head of charitable purposes, also concluded that (“courts should consider whether the purpose under consideration is analogous to one of the purposes enumerated in the preamble of the *Statute of Elizabeth*, or build analogy upon analogy” at 49-51). This approach to charitable purposes under the fourth head was confirmed more recently in *AYSA*, *supra* note 16 at paras 27-28, 31.

20. See the cases cited *infra* note 31.

the trust by seeking a court order to hold the trustee to obligations he or she has undertaken.²¹ The phrase often noted in the context of the reason for non-enforcement of purpose trusts is that of Master of the Rolls Grant who, in the 1804 decision of *Morice v The Bishop of Durham*,²² said that there needs to be someone “in whose favour the court can decree performance”.²³

Over the course of the 19th century some limited exceptions were made to the general rule of non-validity of non-charitable purpose trusts.²⁴ These were for:

- i. the maintenance of a gravesite;²⁵
- ii. the erection of a monument at a gravesite;²⁶ and
- iii. the provision of food and shelter for specified animals.²⁷

Another possible exception was where there was a gift over to some

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21. See *e.g.* James R Phillips, “Purpose Trusts” in Mark R Gillen & Faye Woodman, eds, *The Law of Trusts: A Contextual Approach* 3d (Toronto: Emond Montgomery, 2015) 165 at 166. See also Donovan WM Waters, “Non-Charitable Purpose Trusts in Common Law Canada” (2008) 28 *Estates Trusts & Pensions Journal* 16 at 18-19.
 22. *Morice* Ch, *supra* note 12 (The purported trust was for “such objects of benevolence and liberality as the trustee [the Bishop of Durham] in his own discretion shall most approve” at 656). Master of the Rolls Grant’s decree that the trust was invalid was upheld on appeal by Lord Eldon (see *Morice* Ch D, *supra* note 12).
 23. *Morice* Ch, *supra* note 12 at 658. Master of the Rolls Grant’s decision was upheld by Lord Eldon on appeal – see *Morice* Ch D, *supra* note 12.
 24. While these exceptions allow the trust to be valid so the funds directed to such purposes do not revert to the estate of the deceased, the trust is, practically speaking, only enforced as a power since the fundamental problem remains that there is no one to enforce the trust.
 25. See *Trimmer v Danby* (1856), 25 LJ Ch 424 (Eng); *Pirbright v Salwey*, [1896] WN 86 (Ch (Eng)); *Re Hooper*, [1932] 1 Ch 38 (Eng). This was accepted in Canada in *Crocker v Senior* (1971), 2 Nfld & PEIR 179 (SCTD).
 26. *Ibid.* A different position was, however, taken in the Canadian case of *Re Jefferson Estate*, [1929] 3 WWR 690 (Man KB).
 27. *Pettingall v Pettingall* (1842), 11 LJ Ch 176 (Eng); *Mitford v Reynolds* (1848), 60 ER 812 (Ch).

person after a period, complying with the rule against perpetuities, during which the trust for the purpose could operate.²⁸ The exceptions led to the argument in *Re Astor's Settlement Trusts*²⁹ that these exceptions meant there was no general rule against the non-validity of non-charitable purpose trusts.³⁰ It was, however, held that there was a general rule of non-validity and that the list of exceptions should be considered closed.³¹

The possible exception where there was a gift over to some person after a period for the operation of the trust provided a means of enforcement of the purpose trust. The person to whom there was a gift over at the end of the period would have an incentive to monitor the trustee and, if warranted, pursue a breach of trust action if the trustee expended the

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28. See *Re Thompson*, [1934] Ch 342 (Eng) [*Re Thompson*] commented on in *Re Astor's Settlement Trusts*, [1952] Ch 534 (Eng) [*Re Astor's*]. *Re Thompson* involved a trust for the purpose of furthering fox-hunting leaving the residue after a specified period to Trinity College of Cambridge University. The purpose trust was held to be valid since the purpose was found to be reasonably certain and since Trinity College of Cambridge University could enforce the trust if the funds were misapplied. Pettit, *supra* note 4 at 60-61, suggests that there may also be an exception for trusts for the saying of masses if they are not found to be for charitable purposes (saying of masses in public have been found to be for charitable purposes) and are restricted to the perpetuity period citing *Bourne v Keane*, [1919] AC 815 (HL).
29. *Re Astor's*, *ibid*.
30. See the arguments of Gray QC and Wilfred M Hunt in *Re Astor's*, *ibid* at 539 and Justice Roxburgh's summary of their argument at 541.
31. *Re Astor's*, *ibid* at 547; *Leahy v Attorney General of New South Wales*, [1959] 2 All ER 300 (PC (Austl)); and *Re Endacott*, [1960] Ch 232 (CA) (LJ Harmon at 250-51, and Lord Evershed, at 247) [*Re Endacott*]. In Canada see e.g. *Wood v R* (1977), 1 ETR 285 (Alta SC (TD)) at paras 18-19 [*Re Russell*]; *Rowland v Vancouver College Ltd*, (2000), 78 BCLR (3d) 87 (SC) at paras 68-73; (aff'd on appeal (2001), 94 BCLR (3d) 249 (CA) but the non-charitable purpose trust question was not discussed); *Dionisio v Mancinelli* (2004), 12 ETR (3d) 296 (Ont Sup Ct J); and *Keewatin Tribal Council Inc v City of Thompson* (1989), 61 Man R (2d) 241 (QB) at para 69 [*Keewatin*]. *Re Astor's*, *supra* note 28, and *Re Endacott* were considered in Canada in *Re Lerner and Society for Crippled Children & Adults of Manitoba*, [1979] 3 ACWS 442 (Man QB).

trust funds in a way that was not consistent with the purpose of the trust. This, it has been pointed out, provides only “negative enforcement” since the person to whom there was a gift over at the end of the period would not have an incentive to ensure the trustee actually used trust funds to pursue the intended purpose.³² Indeed, the person to whom there was a gift over at the end of the period would be better off if the trustee never expended any of the trust funds on the intended purpose. This would effectively make the trust operate as a power since it would be unlikely that any action would be taken against the trustee for not expending funds for the purpose, although the trustee could expend the funds for the purpose if the trustee so chose.³³

Wait-and-see perpetuities legislation often contains a provision for the validity of non-charitable purpose trusts along similar lines to the possible exception of a purpose trust for a period with a gift over at the end of the period.³⁴ The typical provision provides that where there is a trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person, the “trust” is valid but is to be construed as a power and can operate as such for a maximum period

32. See *e.g.* Oosterhoff, Chambers & McInnes, *supra* note 3 at 545.

33. On the effect of enforcing a purpose trust where there is a gift over of the residue as being similar to a power see *e.g.* James E Penner, *The Law of Trusts*, 7d (Oxford: Oxford University Press, 2010) at 248.

34. See *e.g.* *Alberta Perpetuities Act*, *supra* note 1, s 20; *BC Perpetuity Act*, *supra* note 1, s 24; *NWT Perpetuities Act*, *supra* note 1, s 17; *Nunavut Perpetuities Act*, *supra* note 1, s 25; *Ontario Perpetuities Act*, *supra* note 1, s 16; *Yukon Perpetuities Act*, *supra* note 1, s 20. See also American Law Institute, *Restatement of the Law of Trusts*, 3d (St. Paul: American Law Institute Publishers, 1992) at 47; and prior to that American Law Institute, *Restatement of the Law of Trusts*, 2d (Washington, DC: American Law Institute Publishers, 1957) at 124. See also the United States of America’s *Uniform Trust Code* § 409 (2010); and see *e.g.* *California Probate Code* § 15211.

of up to twenty-one years.³⁵ At the end of the period during which the purpose is to operate, subject to a maximum of twenty-one years, the capital and unexpended income is to go to the person who would have been entitled to the property at the end of twenty-one years.³⁶

The general rule of non-validity of non-charitable purpose trusts does not apply if the trust, although expressed as being for a purpose, can be construed as being a trust for persons, since there are then persons in whose favour the court can decree performance — *i.e.* persons who could enforce the trust. A common example is a trust “for the education of my children” that, while expressed to be for the purpose of educating

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35. See *e.g. Alberta Perpetuities Act, supra* note 1, s 20(1); *BC Perpetuity Act, supra* note 1, ss 24(1)-(3); *Ontario Perpetuities Act, supra* note 1, s 16(1). Two of the questions that arise in the interpretation of this legislation are: (i) when does the provision apply; and (ii) what is the meaning of the phrase “a specific non-charitable purpose trust”. As to the first question, one might argue that since this purpose trust provision appeared in legislation modifying the common law rule against perpetuities, it would only apply if the particular trust violated the common law rule (*i.e.* if the purpose trust was for a perpetual duration). In *Re Russell, supra* note 31, the court held a non-charitable purpose trust to be valid applying the provision in the Alberta wait-and-see perpetuities legislation (*The Perpetuities Act, SA 1972, c 121, s 20, now Perpetuities Act, RSA 2000, c P-5, s 20*) even though the purported trust did not violate the common law perpetuity rule. As to the second question, the court in *Re Russell, supra* note 31, applied the test in *McPhail, supra* note 9 at 28 (modifying it to purpose trusts so that there is “a specific non-charitable purpose” if one can say whether any given use of the trust funds would qualify as a proper use).
36. See *e.g. Alberta Perpetuities Act, supra* note 1, s 20(2); *BC Perpetuity Act, supra* note 1, s 24(4); *Ontario Perpetuities Act, supra* note 1, s 16(2). If, for example, there was a gift in a will to a person who was to use the property for a specific non-charitable purpose, that gift could take effect. It would not revert to the estate on the basis that the purported trust was an invalid non-charitable purpose trust.

the children, can be read as “to my children for their education”.³⁷ In this example, whichever of the two wordings are used, the beneficiaries are the children and the problem of there being no one “in whose favour the court can decree performance” does not arise.³⁸ *Re Denley’s Trusts*³⁹ (“*Re Denley’s*”) took this approach to finding a trust expressed ostensibly as for a purpose to be a valid trust. Land was given to trustees to create a recreational or sports ground for the benefit of the employees of a particular company.⁴⁰ While the trust was expressed as being for the purpose of creating a recreation or sports ground, it was clear that the beneficiaries were the employees. The court could decree performance in favour of the employees as beneficiaries — *i.e.* there were beneficiaries who could enforce the trust. Justice Goff held the trust to be a valid trust saying, “[w]here, then, the trust, though expressed as a purpose,

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37. See *e.g.* Phillips, *supra* note 21 at 171; and Gillese, *supra* note 3 at 59. A case involving a trust remarkably similar to this example is *Sacks v Gridiger* (1990), 22 NSWLR 502 (SC (Austl)) where the settlor created a trust “to pay the school tuition fees for the children of Dr Marcus L Sachs ... while both or either of them remain at school”.
38. If necessary, enforcement on behalf of the children can be through a Public Guardian and Trustee, Children’s Lawyer or similar official. See *e.g.* *The Public Trustee Act*, SA 2004, c P-44.1, s 5(c) [*Alberta Public Trustee Act*]; *The Public Guardian and Trustee Act*, RSBC 1996, c 383, s 7 [*BC Public Guardian and Trustee Act*]; *The Public Guardian and Trustee Act*, CCSM, c P205, s 5(2)(b) [*Manitoba Public Guardian and Trustee Act*]; *The Children’s Law Reform Act*, RSO 1990, c C 12, s 47; and *The Public Trustee Act*, RSNS 1989, c 379, s 4(2) [*Nova Scotia Public Trustee Act*].
39. [1968] 3 All ER 65 (Ch) [*Re Denley’s*].
40. *Ibid* at 67-69. The facts were a bit more complicated. The trustees wanted to sell part of the lands to raise funds to improve the recreational facility and asked the court to declare that they had a power to sell part of the land. The deed, however, said that if less than 75% of the employees were subscribing for the use of the facilities then the property was to go to the General Hospital Cheltenham. The General Hospital Cheltenham opposed the application since less than 75% of the employees were subscribing to use the facility and sought an order that the land be conveyed to it. The trustees responded by saying the trust was a purpose trust and was therefore not a valid trust so the land should be held by them on a resulting trust for the company.

is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle”.⁴¹

Re Denley's might be interpreted to simply mean that a trust expressed as being for a purpose is valid as long as it can be interpreted as really being a trust for persons. This is the interpretation it has been given in England and Australia.⁴² There is, however, Canadian authority relying on *Re Denley's* for the broader proposition that a purpose trust is valid as long as there is some person who can be given standing to enforce the trust. In 1989 in *Keewatin Tribal Council Inc v City of Thompson*,⁴³ Justice Jewers made reference to *Re Denley's* commenting, “[t]he real question is one of enforceability and nothing else ... there should be no problem with a non-charitable purpose trust where there are any number of persons with standing to enforce it”.⁴⁴

More recently in *Peace Hills Trust Co v Canada Deposit Insurance Corp*,⁴⁵ Justice Thomas said, “having particular regard to the approach taken in *Keewatin* ... a non-charitable purpose trust may be created in

41. *Ibid* at 69.

42. See e.g. in England *Re Grant's Will Trusts*, [1980] 1 WLR 360 (Ch) at 370-71; in Australia *Tidex v Trustees Executors and Agency Co Ltd*, [1971] 2 NSWLR 453 (WASC (Austl)) at 465-66; and *Strathalbyn Show Jumping Club Inc v Mayes* (2001), 79 SASR 54 (SASC (Austl)) at 64-66.

43. *Keewatin*, *supra* note 31.

44. *Ibid* at para 72. No one was actually granted standing to sue as a beneficiary in the case. The issue in the case was whether an exemption from municipal taxation could be claimed under the particular municipal taxing statute that provided an exemption for “lands held in trust for any tribe or body of Indians” at para 33. The applicant was Keewatin Tribal Council Inc which held title to the lands but purported to hold the lands in trust for a “tribe or body of Indians”. It was appealing from a decision by the “Board of Revision” which had upheld the imposition of the municipal tax on Keewatin Tribal Council Inc. The respondent, the City of Thompson, was the taxing municipality.

45. 2007 ABQB 364 [*Peace Hills*].

Canada and would be recognized by the courts of this country”.⁴⁶

C. Validity and Enforcement of Charitable Purpose Trusts

1. Crown Enforcement of Charitable Purpose Trusts

An exception to the invalidity of purpose trusts has long been made for charitable purpose trusts.⁴⁷ The Crown, as *parens patriae*, enforces charitable purpose trusts under its prerogative power. Responsibility for the enforcement of charitable purpose trusts in Canada is normally exercised by the relevant provincial Attorney General.⁴⁸ The Crown can take legal action in response to fraudulent or negligent acts of trustees of charitable purpose trusts or the Crown may be called upon in the context

46. *Ibid* at para 29. *Keewatin*, *supra* note 31, and *Peace Hills*, *ibid*, raise issues about when the wait-and-see perpetuities legislation provisions on purpose trusts apply. Do these provisions only now apply in Canada where *Keewatin* and *Peace Hills* have no application? Does that leave much room for the operation of the wait-and-see legislation provisions? See the discussion in *Waters*, *supra* note 21.

47. This goes back at least as far as *Morice Ch*, *supra* note 12. See per Grant MR in *Morice Ch*, *supra* note 12 at 658 and per Lord Eldon on appeal at *Morice Ch D*, *supra* note 12 at 954.

48. This role of the Attorney General or Public Trustee has been recognized and discussed in several Canadian cases. See *e.g.* *L'Évêque Catholique Roman de Bathurst v New Brunswick (Attorney General)* 2010 NBBR 372 (QB); *Pathak v Hindu Sabha* (2004), 8 ETR (3d) 151 (Ont Sup Ct J); *Re Baker* (1984), 47 OR (2d) 415 (H Ct J) at 420; *Re Stillman Estate* (2003), 5 ETR (3d) 260 (Ont Sup Ct J). See the discussion in *Waters*, Gillen & Smith, *supra* note 6 at 123-25. On the historical development of the *parens patriae* role of the Attorney General in England and Wales and in Canada see Kathryn Chan, “The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales” (2010) 89:2 Canadian Bar Review 373.

of litigation involving the trust.⁴⁹

Some supervision of charitable purpose trusts in Canada is done by the Charities Directorate of the Canada Revenue Agency (the “CRA”) in the context of the federal *Income Tax Act*⁵⁰ exemption of a “registered

49. See Waters, Gillen & Smith, *supra* note 6 at 835. The Crown might, for example, be called upon in the context of litigation by residuary legatees of the estate of a settlor arguing that the trust is not valid and that the funds allocated to the trust remain in, or result to, the estate of the settlor. The Crown might also be called upon in the context of an administrative scheme or *cy-près* application.

50. RSC 1985, c 1 (5th Supp) [*Income Tax Act*].

charity”⁵¹ from income tax⁵² and the tax credit for donations to registered

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51. *Income Tax Act*, *supra* note 50, a “registered charity” is defined in the Act to include a “charitable organization, private foundation or public foundation” with the terms “charitable organization”, “private foundation” and “public foundation” defined in ss 149.1(1) and 248(1). Section 149.1(1) defines a “private foundation” as a “charitable foundation that is not a public foundation” and defines a “public foundation” as a “charitable foundation” that meets certain conditions set out in the definition. A “charitable foundation” is defined in s 149.1(1) as “a corporation or trust that is constituted and operated exclusively for charitable purposes, . . . , and that is not a charitable organization”. A “charitable organization” is defined in s 149.1(1) as “an organization, whether or not incorporated, (a) all the resources of which are devoted to charitable activities carried on by the organization itself”. The *Income Tax Act* does not define the word “charitable” for the “charitable purposes” or “charitable activities” parts of the definitions of “charitable foundation” or “charitable organization”. In interpreting the meaning of “charitable” for these purposes courts have relied on the common law meaning given to “charitable purposes” in the context of trust law. See *Vancouver Society*, *supra* note 16 at para 143.
52. *Income Tax Act*, *supra* note 50, s 149(1)(f) which says that “no tax is payable under this Part on the taxable income of a person for a period when that person was . . . (f) a registered charity”. Trusts are not recognized as separate legal persons but the *Income Tax Act* treats them as taxpayers (see s 104(2)). As taxpayers, trusts are required to pay tax on income earned by the trust (*e.g.* rent on leasehold property, dividends on shares or interest on debentures). As with other taxpayers, the trust can, in calculating trust income, deduct expenses reasonably incurred in earning the income. A particular feature unique to trust taxation under the *Income Tax Act* is that the trust may deduct amounts that became payable to beneficiaries during the year (s 104(6)(b)) and amounts so deducted with respect to any given beneficiary are to be included in that beneficiary’s income for the year (s 104(13)). The trust, therefore, operates as a conduit through which income earned on trust investments can flow through to the beneficiaries to be taxed in the hands of the beneficiaries. The trust, therefore, is only taxed on the income that is retained (*i.e.* accumulated) in the trust). See *e.g.* Faye Woodman, “Introduction to the Taxation of Trusts and Beneficiaries” in Mark R Gillen & Faye Woodman, eds, *The Law of Trusts: A Contextual Approach*, 3d (Toronto: Emond Montgomery, 2015) at 25-28; and Peter W Hogg, Joanne E Magee & Jinyan Li, *Principles of Canadian Income Tax Law*, 8d (Toronto: Carswell, 2013) at 537.

charities.⁵³ Registration as a “registered charity” is required to take advantage of the exemption from income tax,⁵⁴ or to provide receipts required for the tax credit.⁵⁵ The Charities Directorate of the CRA assesses applications for registered charity status⁵⁶ and can remove that status where the registered charity is not devoting its funds to charitable purposes or engaging in charitable activities.⁵⁷ Registered charities must file reports to facilitate the assessment of whether they are complying with

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53. See *Income Tax Act*, *supra* note 50 (s 118.1(3) for the tax credit for donations by individuals that provides for a deduction from tax payable for “total gifts” for the year, and see s 118.1(1) for the definition of “total gifts” that refers to “total charitable gifts” which is also defined in s 118.1(1). The definition of “total charitable gifts” refers to gifts to a “qualified donee” which is defined in s 149.1(1) to include a “registered charity”. See *supra* note 51 for the definition of “registered charity”. See also *Income Tax Act*, *supra* note 50, s 110.1(1) for a deduction for charitable donations by corporations).
54. See *supra* note 52.
55. See *supra* note 53. See also *Income Tax Act*, *supra* note 50 that says “a gift shall not be included in the total charitable gifts ... of an individual unless the making of the gift is proven by filing with the Minister (a) a receipt for the gift that contains prescribed information” at s 118.1(2). The prescribed information is set out in *Income Tax Regulation*, CRC, c 945, s 3501(1) that refers to “every official receipt issued by a registered organization”, and s 3500 defines a “registered organization” to include “a registered charity”.
56. To obtain registered charity status as a charitable foundation under the *Income Tax Act*, *supra* note 50 the foundation must show it will be providing its funds to organizations operated for “charitable purposes”. See the definition of “registered charity” in *supra* note 51. To obtain registered charity status as a charitable organization under the *Income Tax Act*, the organization must show it will devote its resources exclusively to “charitable activities”. See the definition of “charitable organization” in *Income Tax Act*, *supra* note 50, s 149.1(1). The *Income Tax Act* does not define “charitable purposes” or “charitable activities”. In interpreting these terms courts have relied on the common law meaning of “charitable purpose” developed in the trust law context (see *Vancouver Society*, *supra* note 16).
57. See *Income Tax Act*, *supra* note 50, ss 149(2)-(4), 168(1).

the requirements for income tax exempt status.⁵⁸ The CRA, however, as discussed further below,⁵⁹ likely does not have the incentive or mandate to ensure charitable purpose trust funds are being used for the settlor's intended charitable purposes as long as charitable purpose trust funds are being used for charitable purposes. It also likely does not have the incentive or mandate to ensure the charitable purpose trust funds are being used efficiently for the settlor's intended charitable purposes.

Ontario is unique among the Canadian common law jurisdictions in having legislation relating to the enforcement of charitable purpose trusts.⁶⁰ In particular, the Ontario *Charities Accounting Act* requires a donee of property to be held for charitable purposes to give notice of the trust to the Public Guardian and Trustee.⁶¹ The Public Guardian and Trustee may request information of the trustee concerning the trust including the condition, disposition or other such particulars as requested of the property held in trust or as to any other matter relating to the administration or management of the trust.⁶² The Public Guardian and Trustee may also request of the trustee information concerning dealings with the property "to be passed and examined and audited by a judge of the Superior Court of Justice".⁶³ The Public Guardian and Trustee may apply to court for an order where, among other matters, the trustee is found to have misapplied or misappropriated trust property, made an improper or unauthorized investment or is not applying the trust property in the manner directed by the trust instrument.⁶⁴ The Act also allows any two or more persons who allege a breach of a charitable purpose trust or who seek the direction of the court for the administration

58. *Ibid*, s 149(14) together with Forms T3010, T1235, TF725 and publication T4033 "Completing the Registered Charity Information Return".

59. See Part IV.B, below.

60. *Charities Accounting Act*, RSO 1990, c C 10.

61. *Ibid*, s 1 which deals with an *inter vivos* instrument – presumably the Public Trustee and Guardian will have notice of a will that has received probate.

62. *Ibid*, s 2. This applies to both testamentary and *inter vivos* trusts.

63. *Ibid*, s 3.

64. *Ibid*, s 4.

of a charitable purpose trust to apply to court, with notice to the Public Guardian and Trustee, to hear the application and make such order as the court considers just for the carrying out of the trust.⁶⁵

In England and Wales there is a Charity Commission that performs its functions on behalf of the Crown.⁶⁶ Its functions include: (i) determining whether institutions are charities or not; (ii) identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in that connection;⁶⁷ (iii) giving such advice or guidance it considers appropriate with respect to the administration of charities;⁶⁸ and (iv) the maintenance of an accurate and up-to-date register of charities.⁶⁹ Subject to certain exemptions,⁷⁰ every charity is required to be registered with the registry, including the name of the charity and other information as the Charity Commission thinks fit.⁷¹ The Charity Commission has the power to make inquiries concerning a charity⁷² and has the discretion to publish the results of the

65. *Ibid*, s 10. Section 10 also allows the court to make an order directing the Public Guardian and Trustee to conduct an investigation of a charitable purpose trust and make a report to the Attorney General.

66. The Charity Commission is continued under the *Charities Act 2011* (UK), c 25, s 13. The Charity Commission had its origins in mid-19th century legislation (*Charitable Trusts Act, 1860* (UK), 23 & 24 Vict, c 136). The powers of the Charity Commission were increased in the *Charities Act 1960*, 8 & 9 Eliz II, c 58 (replaced by the *Charities Act 1993* (UK), c 10 then by the *Charities Act 2006* (UK), c 50 and subsequently by the *Charities Act 2011* (UK), c 25 [*Charities Act 2011*]). The Charity Commission is not subject to the direction or control of any Minister of the Crown or of another government department (see *Charities Act 2011*, s 13(4)) although it is subject to administrative controls by the Treasury over its expenditures (see *Charities Act 2011*, s 13(5)).

67. *Charities Act 2011*, *supra* note 66, s 15(1).

68. *Ibid*, s 15(2).

69. *Ibid*, s 15(4).

70. There is, for example, an exemption for charities with less £5,000 in gross income. See *ibid*, s 30(2)(d).

71. *Ibid*, ss 29(2), 30.

72. *Ibid*, s 46 (including broad powers in connection with inquiries – see also ss 47-53).

inquiry.⁷³ Proceedings concerning a charity can be brought by any of the trustees of the charity, “any person interested in the charity” or by any two or more inhabitants of the area of a charity where it is a local charity⁷⁴ and where the Charity Commission authorises such proceedings.⁷⁵

2. Exclusivity and the Enforcement of Charitable Purpose Trusts

A charitable purpose trust principle that is related to the question of enforcement of charitable purpose trusts is the requirement that such a trust be exclusively for charitable purposes.⁷⁶ A purported trust will not be a valid charitable purpose trust if it is partly for a charitable purpose and partly for some non-charitable purpose or partly for persons. The reason given for this principle is that if the trust had a charitable purpose combined with a non-charitable purpose or was, in part, for a defined class of persons, the trustee would have the discretion to use the funds for the charitable or non-charitable purposes or for persons. That would make it hard to enforce use of the trust property for the charitable purposes since the trustee might simply answer that it was within his discretion to use

73. s 50. Australia also has a statutory scheme for charities regulation and enforcement including charitable trusts. See *e.g.* the *Australian Charities and Not-for-profits Commission Act 2012* (Cth); and see “Australian Charities and Not-for-profits Commission Statement: Regulatory Approach”, online: Australian Charities and Not-for-profits Commission <www.acnc.gov.au>.

74. *Charities Act 2011*, *supra* note 66, s 115(1).

75. *Ibid*, s 115(2). Where the Charities Commission refuses to grant authority an application can be made to a judge of the High Court attached to the Chancery Division for leave to take proceedings.

76. On this exclusivity requirement see *e.g.* *Morice* Ch, *supra* note 12; *Vezey v Jamson* (1822), 57 ER 27 (Ch); *Hunter v Attorney-General*, [1899] AC 309 (HL) at 323-24; *Re MacDuff*, [1896] 2 Ch 451 (CA (Eng)) at 464-66 [*Re MacDuff*]; *Re Eades*, [1920] 2 Ch 353 (Eng); and *Chichester Diocesan Fund & Board of Finance Inc v Simpson*, [1944] 2 All ER 60 (HL). In Canada see *e.g.* *Brewer v McCauley*, [1954] SCR 645 [*Brewer*]; and *Jones v Executive Officers of the T Eaton Company Limited*, [1973] SCR 635 [*Eaton*].

the funds for the non-charitable purposes or for persons.⁷⁷

This exclusivity principle has the unfortunate capacity to invalidate many charitable purposes that have been inadvertently mixed with non-charitable purposes or with trusts for persons.⁷⁸ Courts have used several techniques to avoid such unfortunate outcomes.⁷⁹ Several common law

77. *Morice* Ch D, *supra* note 12. This reason was given by Lord Eldon where he says that “the true question is, whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend, that under any authority upon such words the Court could have charged him with mal-administration, if he had applied the whole to purposes, which according to the meaning of the testator are benevolent and liberal” at 955. Similarly, Grant MR’s earlier decision in *Morice* Ch, *supra* note 12 said, “[t]he question is, not, whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it?” at 659. This reasoning was accepted in *Re MacDuff*, *supra* note 76 at 465.

78. The settlor may, for instance, have directed funds to be used for “philanthropic” purposes (see *e.g. Brewer*, *supra* note 76), “benevolent” purposes (see *e.g. Lawrence v Lawrence* (1913), 42 NBR 260 (SC), “worthy” purposes (see *e.g. Planta v Greenshields*, [1931] 1 WWR 401 (BCCA)) or “public” purposes (see *e.g. Cox v Hogan* (1924), 35 BCR 286 (SC) although the majority held the gift to be charitable on the basis of added words that limited the public purposes to specified purposes that were charitable). However commendable such purposes may be, they do not fall within the legal meaning of “charitable purposes”.

79. Courts have, for instance, interpreted the intention apparently expressed as an intention to devote the trust property to both charitable and non-charitable purposes as really being an intention to have all the property devoted to charitable purposes (see *e.g. Eaton*, *supra* note 76). They have also read the non-charitable part as charitable based on who the donee is (see *e.g. Blais v Touchet*, [1963] SCR 358 where the donee was a bishop and the donor was a priest). Courts have also sometimes severed the non-charitable portion. See *e.g. Re Coxen*, [1948] 2 All ER 492 (Ch); *Re Porter*, [1925] Ch 746 (Eng); *Re Clarke*, [1923] 2 Ch 407 (Eng); and *Salisbury v Denton* (1857), 69 ER 1219 (Ch). They have also sometimes found the non-charitable purpose to be merely ancillary to the charitable purposes (*Guaranty Trust*, *supra* note 16).

jurisdictions have enacted a provision to address this concern,⁸⁰ although the provisions typically contain what might be said to be flaws limiting their application.⁸¹ The *Uniform Trustee Act* addresses this concern by providing, in section 75(1), that, “a trust is not void by reason only that the objects of the trust consist of a charitable purpose and a non-charitable purpose”. Section 75(3) gives the court powers to make orders addressing issues of combined valid charitable and non-charitable trusts, separating them where possible and otherwise dealing with situations

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80. Early examples include, for example, in Australia *Property Law Act 1958* (Vic), s 131; *Conveyancing Act 1919* (NSW), s 37D; *Trustees Act 1962* (WA), s 102; in New Zealand, *Charitable Trusts Act 1957* as amended by *An Act to Amend Charitable Trusts 1957* (NZ), 1957/18 s 4(1) adding s 61B to the *Charitable Trusts Act 1957*; in Ireland, *Charities Act, 1961*, Act No 17 of 1961, s 49; and in Northern Ireland, *Charities Act* (Northern Ireland), 1964, c 33, s 24. For British Columbia see the *Law and Equity Act*, RSBC 1996, c 253, s 47 [*Law and Equity Act*]. For Alberta see the *Wills Act*, RSA 2000, c W-12, s 32; for New Brunswick see *Wills Act*, RSNB 1973, c W-9, s 30; and for Manitoba see the *Trustee Act*, CCSM, c Tl60, s 91.
81. British Columbia *Law and Equity Act*, *ibid*, says, for example, that “[i]f 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 non-charitable purpose, and the gift, devise or bequest would be void for uncertainty or remoteness, the gift, devise or bequest is not invalid as a result but operates solely for the benefit of the charitable purpose” at s 47. One of the problems with this provision is that the charitable purpose must be linked “linked conjunctively or disjunctively ... a non-charitable purpose” and, therefore, does not deal with expressions such as “such benevolent purposes as my trustees choose”, “such worthy objects as my trustees shall select” or “the general benefit of children in the Sick Children’s Hospital”. Another problem is that the provision only applies if the “gift, devise or bequest would be void for uncertainty or remoteness”. If the gift, devise or bequest is not uncertain and not void for remoteness, the provision would not apply. It is not clear how the provision would fit with the wait-and-see perpetuity legislation provisions that treat a trust for a “specific non-charitable purpose that creates no enforceable equitable interest in a specific person” as a valid trust but to be construed “as a power to appoint the income or capital”.

where they are not separable.⁸²

3. Political Purposes and Charitable Purpose Trusts

It is also important to note for the discussion in Part VIII, below, that even if a trust is for an exclusively charitable purpose that provides a public benefit, it will not be a valid charitable purpose trust if it is for “political purposes”.⁸³ “Political purposes” include not just the promotion of a particular candidate in an election, a political party or political ideas, but also any attempt to influence the legislative or executive process, to influence domestic, or foreign, laws or government policy or to improve international relations.⁸⁴ The reason given for the rule is that the court has no means of judging whether a proposed change in the law will or

82. *Uniform Trustee Act*, *supra* note 2, s 75(3). Paragraphs (a), (b), (c) provide for the separation of mixed charitable and non-charitable purposes where it is “practicable” to separate them. Paragraph (d) through (g) provide for various situations where the court finds it is not practicable to separate mixed charitable and non-charitable purposes.

83. See *Bowman v Secular Society*, [1917] AC 406 (HL) [*Bowman*]. In Canada see *Re Loney Estate* (1953), 9 WWR (2d) 366 (Man QB); and *Ontario (Public Trustee) v Toronto Humane Society* (1987), 60 OR (2d) 236 (HCt J).

84. *McGovern v Attorney-General*, [1982] Ch 321 (Eng) at 340 followed in Canada in *Human Life International in Canada Inc v Minister of National Revenue*, [1998] 2 FC 202 (CA).

will not be for the public benefit.⁸⁵ Many have been critical of this rule.⁸⁶

III. The Potential Public-Private Trust Overlap

This part begins by noting the public-private distinction that has sometimes been used to distinguish charitable purpose trusts from express trusts for persons. Subpart B notes the public benefit requirement for the validity of charitable purpose trusts and discusses how courts have defined “public” in assessing that requirement. Subpart C argues that express trusts for persons and non-charitable purpose trusts can potentially have “public” qualities.

A. Public Trusts and Private Trusts

A public-private distinction is sometimes made between charitable purpose trusts and express trusts for persons. Charitable purpose trusts, are sometimes referred to as “public trusts”. Express trusts for persons and non-charitable purpose trusts are sometimes referred to as “private trusts”.⁸⁷ Charitable purpose trusts are, in part, “public” in the sense that the purposes are normally directed to a broader community and not just

85. See *Bowman*, *supra* note 83 at 417. In other words, in assessing public benefit the court would be put in the position of saying that there would be a public benefit to changing the law (*i.e.* implicitly saying the law was a bad law) when it might subsequently be bound to enforce that law.

86. See *e.g.* Paul Michell, “The Political Purposes Doctrine in Canadian Charities Law” (1995) 12:4 *The Philanthropist* 3 at 4-6; Henry G Intven, “Political Activity and Charitable Organisations” (1983) 3:3 *The Philanthropist* 35; LA Sheridan, “Charity Versus Politics” (1973) 2 *Anglo-American Law Review* 47; LA Sheridan, “The Charpol Family Quiz: A Game of Skill and Luck Played on the Boundaries of Charity and Politics” (1977) 2:1 *The Philanthropist* 14; and Abraham Drassinower, “The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis” in Jim Phillips, Bruce Chapman & David Stevens, eds, *Between State and Market: Essays on Canadian Charities Law and Policy* (Montreal: McGill-Queen’s University Press, 2001) 288.

87. Mowbray, *supra* note 3 at 22; Pettit, *supra* note 4 at 74; Thomas & Hudson, *supra* note 3 at 24; McGhee, *supra* note 3 at 683-84; Oosterhoff, Chambers & McInnes, *supra* note 3 at 24; Waters, Gillen & Smith, *supra* note 6 at 29.

the benefit of particular private interests.⁸⁸ Charitable purpose trusts are also “public” in the sense that the Crown (*i.e.* “the State”) is given standing to enforce such trusts. Enforcement by the Crown involves expenditure, although perhaps modest, of government funds provided at taxpayer expense. Charitable purpose trusts have another “public” quality in that they can benefit, as described above, from tax subsidies under the federal *Income Tax Act*.⁸⁹

B. The “Public” and “Private” Aspects of Charitable Purpose Trusts

It has been noted that a charitable purpose trust is a hybrid of private and public relationships.⁹⁰ This might be articulated in terms of a distinction between public law and private law that is said to have its roots in the jurisprudential model established by the Romans in which law is

88. See the reference to the public benefit requirement, *supra* note 10 and the accompanying text, and see *infra* Part III.C on the public aspects of charitable purpose trusts. Charitable purpose trusts are “normally,” not always, directed to a broader community since there are recognized exceptions to the public benefit requirement with respect to “poor relations” and “poor employees” (see Part III.C, below).

89. See *supra* notes 50-58 and the accompanying text.

90. See Mayo Moran, “Rethinking Public Benefit: The Definition of Charity in the Era of the Charter” in Jim Phillips, Bruce Chapman & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen’s University Press 2001) 251 “the charitable trust is neither a purely private nor a purely public institution; instead it is a hybrid of public and private relationships and must be assessed as such” at 257. On the public and private overlap of charitable purpose trusts see also *e.g.* Mark Freedland, “Charity Law and the Public/Private Distinction” in Charles Mitchell & Susan R Moody, eds, *Foundations of Charity* (Oxford: Hart Publishing, 2000); Adam Parachin, “Regulating Philanthropy: Is Charity Public or Private” (CBA National Charity Law Symposium, Toronto, 4 May 2012) 111; and Evelyn Brody & John Tyler, “Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?” (2010) 85 *Chicago-Kent Law Review* 571 which focuses largely on charities organized as not-for-profit corporations, but much of what it says about the public and private aspects of charities could be extended to charities organized as trusts (*i.e.* charitable purpose trusts).

conceived of as having relationships between person and person, person and thing and person and the state.⁹¹ Relationships between person and person gave rise to actions *in personam*.⁹² Relationships between person and thing gave rise to actions *in rem*.⁹³ Public law would involve relationships between persons and the state and would include actions by the state against persons.⁹⁴ It is also said to include laws of general application.⁹⁵ Charitable purpose trusts have a public law quality to them in the sense that they can be enforced by the Crown and therefore involve actions by the state against persons (the trustees).

There is also a private law quality to charitable purpose trusts in that charitable purpose trusts can be created by persons exercising rights with respect to property they own. Persons creating the trust can create their own scheme for the administration of the trust under which persons assenting to act as trustees will be under a legal obligation to carry out. It is, in effect, a legally enforceable promise to the person, or persons, creating the trust made by the persons assenting to be trustees to act for the benefit of others according to the terms of the trust instrument.⁹⁶

There is another “public” quality to charitable purpose trusts, although perhaps not “public law” in the sense described above. A

91. See Geoffrey Samuel, “Public and Private Law: A Private Lawyer’s Response” (1983) 46 *Modern Law Review* 558 at 558-59.

92. *Ibid* at 559.

93. *Ibid*.

94. See e.g. Herbert M Kritzer, *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (Santa Barbara: ABC-CLIO, 2002) vol III at 1339; and *Black’s Law Dictionary*, 10d, *sub verbo* “public law” [*Black’s Law Dictionary*].

95. Kritzer, *supra* note 94 at 1340; and *Black’s Law Dictionary*, *supra* note 94, *sub verbo* “public law”.

96. See John H Langbein, “The Contractarian Basis of the Law of Trusts” (1995) 105:3 *Yale Law Journal* 625 at 627. This connection between trust and contract was also suggested long ago by the well-known equity scholar Maitland. According to Maitland, “the use or trust was originally regarded as an obligation, in point of fact a contract though not usually so called”. See Frederic W Maitland, *Equity: A Course of Lectures*, in AH Chaytor and WJ Whittaker, eds, 1d (1909), John Brunyate, ed, rev’d 2d (1936) (Cambridge: Cambridge University Press, 1936; reprinted 1969) at 110.

charitable purpose trust is “public” in the sense of the definition of “public” as “members of the community in general or a particular section of this”.⁹⁷ This is reflected in the requirement that, for a trust to be valid as a charitable purpose trust, the trust must provide a “public benefit”.⁹⁸ The main, oft-referred to, case on what constitutes the “public” aspect of “public benefit” is the 1951 decision of the House of Lords in *Oppenheim v Tobacco Securities Trust Company*⁹⁹ (“*Oppenheim*”). The purported trust in issue provided for “the education of children of employees or former employees of British-American Tobacco Co Ltd ... or any of its subsidiary or allied companies”.¹⁰⁰ Since the trust was for education, it fit the charitable purpose of advancement of education. The question was whether there was a public benefit. Lord Simonds held that to constitute the “public” the beneficiaries must be a “section of the community”¹⁰¹ and he went on to say that:

these words ‘section of the community’ have no special sanctity, but they conveniently indicate, that the possible (I emphasize the word ‘possible’) beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from the community, so that they form by themselves a section of it, must be a quality which does not depend on their

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97. This wording is from *The Oxford Paperback Dictionary*, 4d, *sub verbo* “public”. The *Oxford English Dictionary*, 2d, *sub verbo* “public” has a similar definition that says “[a] particular section, group, or portion of a community or of mankind”. Brody & Tyler, *supra* note 90 argue against the notion that the state is justified in subjecting charities to broad-based government control over their governance, structures, missions, effectiveness, programs and other operations on the basis that property directed to charitable purposes is “public money” (in the sense that the purposes are public purposes) and on the basis that charities are enforced by the state.
98. See *supra* Part II.A.
99. [1951] AC 297 (HL) [*Oppenheim*]. The meaning of “public benefit” is canvassed in Gerald Henry Louis Fridman, “Charities and Public Benefit” (1953) 31 *Canadian Business Review* 537 which reviews the *Oppenheim* case and cases leading up to the *Oppenheim* case.
100. *Oppenheim*, *supra* note 99 at 298.
101. *Ibid* at 306.

relationship to a particular individual.¹⁰²

It was held that the purported trust did not satisfy the public benefit requirement and therefore did not qualify as a charitable purpose trust. There were over 110,000 employees of the various companies, but whether one was a beneficiary depended on whether one was a child of an employee of the companies and it, therefore, ultimately depended on the relationship to a particular person, namely, the British-American Tobacco Co Ltd as employer.¹⁰³

A justification for the first part of this public benefit or section of the community test (the “not numerically negligible” part) might be that there must be a sufficient benefit from the trust to warrant the potential expenditure of taxpayer funds to enforce it. The test seems to suggest that, even if the benefit is small on a per person basis, the total public benefit is more likely substantial if there are many persons who might benefit. The test, however, refers to the “number of *possible* beneficiaries” and it was specifically noted in the case that the number of persons actually benefiting can be quite small as long as the *possible* number of beneficiaries is high.¹⁰⁴

It is the second part of the test that attempts to distinguish between trusts created for a public purpose and those created for private reasons. This arguably makes sense in terms of the potential expenditure of taxpayer funds on enforcement. Taxpayer funds should presumably not be expended to enforce a trust created for purely private interests. This justification would, presumably, be much stronger for a charitable purpose trust that is exempt from income tax and for which a tax credit is given for donations to the trust.¹⁰⁵ If a person wants to create a trust that provides private benefits, the mechanism for enforcement should

102. *Ibid*, per Lord Simonds: “a group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes”.

103. *Ibid* at 299.

104. *Ibid* at 306.

105. On these *Income Tax Act* provisions see *supra* notes 50-58 and the accompanying text.

arguably be one that does not rely on a public enforcement mechanism or for which tax subsidies are provided.

While the second part of the test in *Oppenheim* attempts to make a distinction between trusts that provide “public” benefits and those that provide “private” benefits, there are, arguably, problems with how effectively it performs that function. In *Oppenheim* itself Lord MacDermott, dissenting, questioned whether a distinction should be drawn between “those who are employed in a particular industry before it is nationalized and those who are employed therein after that process has been completed and one employer has taken the place of many”.¹⁰⁶ Lord MacDermott was, in other words, noting that under the second part of the test a trust for the education of children in a coal industry with many employers would be valid, but after nationalization, with just one employer, the same trust would not be valid.

Another curious qualification on the public-private distinction in the context of charitable purpose trusts is that an exception has been made for charitable purpose trusts for the relief of poverty. Courts have accepted as valid, charitable purpose trusts that are for relief of poverty of “poor relations”¹⁰⁷ or “poor employees”.¹⁰⁸ While the House of Lords expressed reservations about such exceptions, these exceptions had been

106. *Oppenheim*, *supra* note 99.

107. See *e.g. Isaac v Defriez* (1754), 27 ER 387 (Ch); and *Re Scarisbrick*, [1951] Ch 622 (CA (Eng)) (a trust for “such relations” as “shall be in needy circumstances”). The exception did not apply on the facts of the *Oppenheim*, *supra* note 99, since there the purported trust was for the advancement of education not the relief of poverty. In *Re Cox* [1951] OR 205 at 224 (CA), *aff'd* [1953] 1 SCR 94, *aff'd* [1955] 2 All ER 550 (PC (Canada)) [*Re Cox*], Justice Roach of the Ontario Court of Appeal could see no reason for there being an exception for relief of poverty but not for advancement of education.

108. For England see *e.g. Dingle v Turner*, [1972] 1 All ER 878 (HL); and *Gibson v South American Store (Gath & Chaves) Ltd*, [1950] Ch 177 (CA (Eng)) at 191-97. For Canada see *Re Massey Estate*, [1959] OR 608 (HCt J); and *Eaton*, *supra* note 76.

long accepted in a series of first instance English decisions.¹⁰⁹

C. Potential “Public” Aspect for Trusts for Persons and Non-Charitable Purpose Trusts

While charitable purpose trusts have been referred to as “public trusts” and express trusts for persons referred to as “private trusts,” even private trusts can provide benefits to a community of persons and can, therefore, take on a “public” quality. Non-charitable purpose trusts that were not considered legally valid under the common law can also take on a “public” quality. The potential for each of these types of private trusts to take on a “public” quality is discussed below.

1. Express Trusts for Persons

As noted above, an express trust for persons can describe a class of beneficiaries. The example of a class of beneficiaries given in Part II.A, above, was the “grandchildren” of a particular person. Even if the particular person has hundreds of grandchildren, most persons, it is submitted, would be likely to consider trusts with such a class of beneficiaries, or potential beneficiaries, to be “private” in nature. The class defined in an express trust for persons can, however, be much broader. In the 1971 House of Lords decision in *McPhail v Doulton*¹¹⁰ (“*McPhail*”), for example, Mr. Baden, by deed, purported to settle property on trust instructing the trustees to “apply the net income of the fund in making at their absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the company [Mathew Hall & Co Ltd] or to any relatives or dependents of any such persons in such amounts and on such conditions (if any) as they think fit”.¹¹¹ The purported trust was not expressed to be for the relief of poverty of these persons or to advance their education. It was, therefore, not a charitable

109. See *Oppenheim*, *supra* note 99 at 306-307. See also, the reservations of the Privy Council as to common employment trusts in *Re Cox*, *supra* note 107 at 552, affirming (1952), [1953] 1 SCR 94. For some of the first instance cases the House of Lords was referring to see *supra* notes 107-108.

110. *McPhail*, *supra* note 9.

111. *Ibid* at 437, 447.

purpose trust. The class of beneficiaries was potentially quite wide. One of the requirements for the establishment of a valid express trust for persons is that there must be certainty of beneficiaries. It was held that the requirement of certainty of beneficiaries is met if the class of beneficiaries is sufficiently clearly defined that “it can be said with certainty that any given individual is or is not a member of the class”.¹¹² When the matter returned to be reassessed by the High Court armed with this guidance from the House of Lords it was found that Mr. Baden’s purported trust met this test.¹¹³ This was affirmed by a unanimous Court of Appeal with the words “relatives” and “dependents” being held to meet the test set out by the House of Lords.¹¹⁴ The test for certainty of beneficiaries set out by the House of Lords in *McPhail* has been accepted in Canada¹¹⁵ and could, presumably, allow for a very large group of persons. One qualification suggested by Lord Wilberforce in the House of Lords was that the trust objects could not be so wide as to be “administratively unworkable”.¹¹⁶ They could not, he said, be so hopelessly wide as not to form “anything like a class”.¹¹⁷

The *McPhail* test for certainty of beneficiaries for a discretionary trust can allow for a very broad class of beneficiaries having potentially little direct connection with the settlor. The trust in *McPhail* had such a quality in that it provided that the trustees apply the net income of the fund “for the benefit of any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons in such amounts at such times and on such conditions ...

112. *Ibid* at 450.

113. *Re Baden’s Trust Deeds (No 2)*, [1971] 3 All ER 985 (Ch), *aff’d* on appeal, [1972] 2 All ER 1304 (CA).

114. *Ibid*.

115. See *e.g.* *Eaton*, *supra* note 76; *Dickson v Richardson* (1981), 32 OR (2d) 158 (CA); *Canada Trust Co v Ontario Human Rights Commission* (1990), 74 OR (2d) 481 (CA); and *Lewis v Union of BC Performers* (1996), 18 BCLR (3d) 382 (CA).

116. *McPhail*, *supra* note 9 at 441.

117. *Ibid*. Lord Wilberforce suggested that “[a]ll the residents of Greater London,” might be an example.

as they think fit”.¹¹⁸ The range of potential beneficiaries in such a trust could be quite broad. The nature of the “benefit” was apparently not constrained, and therefore was not “charitable” in the legal sense¹¹⁹ and might also have not been considered charitable in a popular sense, except, perhaps that it likely had a wealth redistribution quality since the settlor, Mr. Baden, was likely reasonably well off relative to the employees, their relatives and dependents.

*Eaton*¹²⁰ also provides an example of the potential for a discretionary express trust to have a public quality in providing for a potentially wide range of persons in a way that might be considered socially beneficial. In that case the testator provided a specified amount be paid to the executive officers of the Eaton Company to be used “for any needy or deserving Toronto members of the Eaton Quarter Century Club”. The club was not a charitable organization, but a social club, the members of which were persons who had been in the service of the Eaton Company for twenty-five years or more. By the time the litigation arose the club had 7,000 members who had worked, or were still working, for the Eaton Company, or who had retired. “Needy” was accepted as a charitable purpose relating to relief of poverty. The issue from the charitable trust perspective was whether “deserving” was for a charitable purpose. The trust was upheld as a charitable purpose trust interpreting “deserving” as what the testator presumably had in mind in the 1934 Great Depression context of the trust.¹²¹ The trust was also upheld as a trust for persons applying the *McPhail* test interpreting “Toronto members” to mean “those members who were employed by the company in Toronto at the time when they became members”.¹²² While the number of beneficiaries would have been less than all the 7,000 members of the club at the time of the litigation,

118. *Ibid* at 433.

119. It was not “charitable” in the legal sense since it was not limited to the traditional heads of charitable purposes and the funds could, therefore, have been used for non-charitable purposes. It would, therefore, not have been charitable under the exclusivity requirement for a valid charitable purpose trust (see Part II.C.2 above).

120. *Eaton*, *supra* note 76.

121. *Ibid* at 642-43.

122. *Ibid* at 651.

it would, given the number likely employed by the company in Toronto, presumably have included a fairly large number of persons. As *Eaton* demonstrates, an express trust for persons can have a large number of beneficiaries and can have a public quality with the beneficiaries having a very limited connection to the settlor of the trust and with the trust having a public purpose quality given that the funds were to be used for persons who were “needy or deserving”.

While the trust in *Oppenheim* was found, in 1951, not to meet the requirement of “public benefit” given the way “public benefit” was defined in that case, the funds were to be used for the education of the beneficiaries which was considered “charitable” under the traditional legal definition of “charitable purposes” and otherwise might be said to provide a benefit to a potentially large number of persons. If one were to argue the *Oppenheim* case today, one might well argue that it meets the 1972 *McPhail* test for certainty of beneficiaries.¹²³ The trust might, therefore, be valid as an express trust for persons with the potential number of beneficiaries being very large and with a purpose that might be considered to have a public quality.

Even broader examples of the potential use of an express trust for persons with public qualities could be provided. An express trust for persons might, for instance, be used to create a form of governance for a broad group of persons such as a particular Aboriginal group, assuming such persons could be sufficiently clearly defined to meet the *McPhail* test.¹²⁴ An express trust for persons might also be used to set

123. *Oppenheim*, *supra* note 99 was decided in 1951 long before *McPhail*, *supra* note 9, which was decided in 1972. The beneficiaries in *Oppenheim* were “children of employees or former employees of British-American Tobacco Co Ltd ... or any of its subsidiary or allied companies” at 298 (see *supra* note 100 and the accompanying text) and this description of a class of beneficiaries, it is submitted, would probably meet the test of certainty for a discretionary trust for persons under the *McPhail* test.

124. See *e.g.* Daryn R Leas & Victoria B Fred, “Yukon First Nation Trusts: Establishing a Legacy for Future Generations”, online: Council of Yukon First Nations <www.sgsyukon.ca> (on this use of trusts for First Nations).

up a community ecosystem trust¹²⁵ or for an environmental restoration trust.¹²⁶

2. Non-Charitable Purpose Trusts

A non-charitable purpose trust can have a public quality both in terms of the number of potential beneficiaries (who may well not be related to the settlor), and because the purpose may provide a public, or broad community, benefit. The facts in *Re Lipinski's Will Trusts*¹²⁷ provide an example of this. In that case the testator made a bequest to the Hull Judeans (Maccabi) Association “in memory of my late wife to be used solely in the work of constructing the new buildings for the Association and/or improvements to the said buildings”.¹²⁸ The Hull Judeans (Maccabi) Association was an unincorporated association that had been established to provide “social, cultural and sporting activities for Jewish youth in Hull, or for such Jewish youth in Hull as become members

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125. On community ecosystems trusts see Michael McGonigle, Brian Egan & Lisa Ambus, *The Community Ecosystem Trust: A New Model for Developing Sustainability* (Victoria: POLIS Project on Ecological Governance, University of Victoria, 2001), online: POLIS Project on Ecological Governance < www.polisproject.org >.
126. On the use of an express trust to set up an environmental restoration trust see Donovan WM Waters, “The Role of the Trust in Environmental Protection Law” in Donovan WM Waters, ed, *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993) 383 at 405-19.
127. [1976] Ch 235 (Eng) [*Re Lipinski's*]. The focus here is on borrowing the facts from *Re Lipinski's* case as an example of a non-charitable purpose trust that has a public benefit quality. The testator's gift was upheld in the case but while different possible bases for upholding the gift were discussed, it is not clear from the case on which basis it was upheld (or if it was upheld on each basis discussed). On the difficulty in pinning down on just what basis the trust was upheld see *e.g.* Nigel P Gravells, “Gifts to Unincorporated Associations: Where There's a Will There's a Way” (1977) 40:2 *Modern Law Review* 231 generally and especially where it is said that, “the reasoning in the judgment and the criteria adopted to avoid the conclusion of total invalidity of the gift may create yet more uncertainty for draftsmen in the future” at 236.
128. Gravells, *supra* note 127 at 237.

of the association”.¹²⁹ Such a trust might be valid as a trust for persons (consistent with *Re Denley’s*¹³⁰). If, however, it could not be found valid as a trust for persons and was held to be a non-charitable purpose trust,¹³¹ it would nonetheless potentially benefit a large number of persons (Jewish youth in Hull) who might be said to represent a section of the community. That section of the community may well have had a minimal connection to the settlor and the purpose of the intended trust, “social, cultural and sporting activities,” might have been considered one that provided a public benefit.

Many other non-charitable purpose trusts might have a public quality in the sense of benefiting a substantial community of persons and in a way that might be considered to be for the general benefit of society. Suppose, for example, funds were raised to be held on trust for the purpose of promoting the development of technologies that would reduce global warming. Such a trust would likely not be charitable in many common law jurisdictions but it could provide what, it is submitted, would be accepted by many persons as a public benefit and that benefit could be a benefit for virtually everyone in the world.

IV. Enforcement Problems Across All Three Types of Express Trusts

This part notes the potential for weak enforcement is not limited to non-charitable purpose trusts.¹³² Weak enforcement can also arise for charitable purpose trusts and even in express trusts for persons.

129. *Ibid* at 238.

130. See *Re Denley’s*, *supra* note 39.

131. Justice Oliver held in *Re Lipinski’s*, *supra* note 127 at 243, that the purposes of the unincorporated Hull Judeans (Maccabi) Association were not charitable purposes. To the extent, therefore, that the members of the association were to hold the funds on trust to build or improve buildings for the association, or otherwise for the purposes of the association, it would not be a trust for charitable purposes.

132. See *supra* notes 20-23 and the accompanying text on enforcement problems as a primary reason for the non-validity of non-charitable purpose trusts.

A. Addressing Enforcement Problems for Non-Charitable Purpose Trusts

The lack of a person in whose favour the court can decree performance has been given as the basis for the non-validity of non-charitable purpose trusts. There are no beneficiaries to enforce such trusts. Where the creator of the trust has retained the services of a knowledgeable trust draftsman, the trust draftsman, recognizing that the settlor's purpose is non-charitable or that there is significant doubt as to whether the purpose is charitable, has to find a way to either reconceive of the trust as a trust for persons, fit it into a recognized charitable purpose or abandon the trust form in favour of some other form such as a corporate form.¹³³ Such attempts to reconceive the trust are likely not to achieve what the settlor wants. They may, indeed, fall considerably short of what the settlor wants and may fall so far short that the settlor abandons the notion of devoting funds to his or her intended purpose. If the settlor's non-charitable purpose is reasonably certain and is not illegal or contrary to public policy, there seems no reason not to attempt to achieve the settlor's purpose by permitting the purpose to be enforced as a trustee obligation and not just as a trustee power as long as some means of enforcement can be provided.¹³⁴ Where the settlor's purpose happens to benefit a reasonably substantial section of the community there would seem to

133. A corporate form (likely a not-for-profit corporate form) would have members who could enforce the objects of the corporation. An unincorporated association might also be considered in which members would have a contractual basis for enforcing compliance with the objects of the unincorporated association.

134. Enforcement as a power is the approach taken by wait-and-see perpetuities legislation in Canada (see *supra* notes 34-36 and the accompanying text) and the approach effectively taken in *Re Thompson*, *supra* note 28 (see *supra* notes 32-33 and the accompanying text).

be all the more reason to facilitate its enforcement.¹³⁵ The grounds for facilitating enforcement of the settlor's purpose would, it is submitted, be that much stronger where the settlor has provided funds to be used for a non-charitable purpose to which taxpayer funds are currently directed.¹³⁶

While other forms, such as a not-for-profit corporation or an unincorporated association might achieve the same objective, the trust may provide the advantage of flexibility. There will also be situations in which persons without legal assistance, or sometimes even with legal assistance, purport to create trusts for non-charitable purposes instead of relying on alternate forms. It is arguably unfortunate that such trusts, particularly when they are for public purposes, are invalid and either operate not at all or only as powers.

B. Enforcement Problems for Charitable Purpose Trusts

Although the Crown can enforce charitable purpose trusts, it has been suggested that:

[i]t is probable that, without any previous complaint or critical information being brought to the Attorney General's attention, the prerogative to investigate charities, if it exists, would not be exercised. And, even when the Attorney General does receive such a complaint or information, it is entirely within the

135. In *Re Lipinski's*, *supra* note 127 discussed above, Part III.C.2, the gift in question was upheld but the basis for enforcement was not clear. James Phillips notes in Phillips, *supra* note 21 that "commentators have had difficulty knowing how to characterize *Lipinski*" at 180. It has been said that *Re Lipinski* "confirmed in this particular sphere a continuing determination on the part of the judiciary not to allow the clear intentions of testators to be defeated" see Gravells, *supra* note 127 at 231.

136. A trust that, for example, provided for assisting immigrants in finding jobs and integrating into the society of the country they had migrated to might reduce tax dollars spent on supporting such persons and might lead to more tax revenues from immigrant employment income. A trust to provide for recreational facilities might reduce the expenditure of local taxpayer dollars on recreational facilities.

attorney's discretion whether the office should take any legal or other action.¹³⁷

Indeed, Canadian cases dealing with charitable purpose trusts rarely, if ever, arise in the context of a breach of trust action pursued by the Crown.¹³⁸ While the CRA may also have a role with respect to the enforcement of charitable purpose trusts, its focus may not be entirely consistent with the interests of the persons who might benefit from pursuit of the purposes of a charitable purpose trust. If, for instance, charitable purpose trust funds are being used for charitable purposes but not for the particular charitable purposes the settlor clearly intended, the CRA, given that the funds are at least being used for some public benefit falling within the legal definition of charitable purpose, may not be particularly concerned, from the income tax perspective, that the funds are not being directed to the purpose the settlor intended. The CRA is unlikely to have the resources, and perhaps, from an income tax administration perspective, the incentive, to monitor charitable purpose trusts to assess whether they are devoting trust funds to their intended

137. Waters, Gillen & Smith, *supra* note 6 at 835. See also the discussion of the lack of Crown enforcement of charitable purpose trusts in Chan, *supra* note 48 at 389-93. It is perhaps because, practically speaking, the enforcement of charitable purpose trusts is relatively weak that charities in Canada are typically organized as corporations. With a charity organized as a not-for-profit corporation the prospect of the corporation's members enforcing the corporation's charitable objects is likely greater than the prospect of Crown enforcement of charitable purposes of a charity organized as a trust.

138. While the author has not made a proper attempt to verify this empirically, a search through numerous (not all) Canadian cases involving an allegation of breach of trust did not yield a single case in which the Crown in right of a province (either through the Attorney General or nominee such as a Public Trustee or Public Trustee and Guardian) appeared as a party in the case name. The author also does not recall a single Canadian breach of trust case in which the Crown in right of a province pursued a breach of trust claim in respect of a charitable purpose trust. The assertion that Canadian cases dealing with charitable purpose trusts rarely, if ever, arise in the context of a breach of trust action pursued by the Crown appears to the author to be a reasonable one. See also the discussion in Chan, *supra* note 48 at 389-93.

charitable purposes in an efficient manner. It is also doubtful whether the CRA has the statutory mandate to prevent a trustee from deviating from specific intended charitable purposes as long as the trustee is spending the funds for charitable purposes (or activities) or to deal with a trustee's failure to expend the trust funds in an efficient manner.¹³⁹

Charitable purpose trusts may, therefore, also operate with very limited enforcement. A trust draftsman aware of this might consider advising the settlor of this problem and suggest as an alternative that the trust be reconceived as a trust for persons. This would at least provide beneficiaries who could enforce the trust instead of leaving enforcement to the Crown. If, however, the class of beneficiaries was quite large and if the trustee was given discretion over to whom distributions of income and capital were to go, it is likely none of the beneficiaries would have much of an incentive to enforce the trust and one might be no further ahead in terms of increasing the likelihood that the trust would be enforced.

C. Potential Enforcement Problems in Express Trusts for Persons

Weak enforcement may also arise with an express trust for persons. While the beneficiaries of express trusts are often individuals with a close relationship to the settlor, an express trust can, as noted in Part III.C.1 above, be a discretionary express trust with a broadly-defined, but conceptually certain, class of beneficiaries. The probability of the trustees exercising their discretion in favour of any particular persons within the class of beneficiaries may be low enough that none of the beneficiaries has

139. The *Income Tax Act*, *supra* note 50, allows for a tax credit for donations to registered charities. A "registered charity" is a "charitable organization" that devotes its resources exclusively to charitable activities or a "charitable foundation" that distributes its funds to charitable organizations. See *supra* note 51. The Canada Revenue Agency could refuse registration or remove registration if these requirements were not met. While trustees of a charitable organization must devote the trust funds to charitable activities, the *Income Tax Act* does not specifically provide for action to be taken against trustees who fail to use trust funds for the specific purposes intended by the settlor or who fail to exercise a fiduciary duty of care in their use of trust funds for charitable purposes.

much of an incentive to enforce the trust. Expressing it in the way it was expressed in *Morice v The Bishop of Durham*, there would be “[persons] in whose favour the court [could] decree performance”¹⁴⁰ and, assuming requirements for a valid express trust were met (in addition to certainty of beneficiaries), the trust would be a valid trust, but the probability of enforcement would, nonetheless, be low. With no one likely to ever enforce the obligations the trustee has assented to, the court enforcement feature that arguably gives a trust its “legal” quality is, practically speaking, absent.

V. Expanding the Range of Persons Who Can Enforce Express Trusts

A. Proposed Enforcement of Certain Non-Charitable Purpose Trusts under Section 74 of the *Uniform Trustee Act*

The *Uniform Trustee Act* was the result of a project initiated by the Civil Section of the Uniform Law Conference of Canada in 2008.¹⁴¹ It is intended to be suitable for enactment across the country.¹⁴² Section 74 of the *Uniform Trustee Act* would allow some non-charitable purpose trusts to operate as valid trusts and, unlike the non-charitable purpose trust provisions in perpetuities acts,¹⁴³ would allow for the enforcement of trust duties instead of simply having the trust operate as a power.¹⁴⁴ Like the perpetuity act provisions, the trust would have to be one that “does not create an equitable interest in any person”¹⁴⁵ and that is

140. *Supra* note 12 at 658.

141. See Uniform Law Conference of Canada, Civil Section, *Uniform Trustee Act: Final Report to the Working Group*, (Whitehorse: 2012) at para 1.

142. *Ibid.*

143. The wait-and-see perpetuities legislation provisions are discussed in *supra* notes 34-36 and the accompanying text.

144. *Uniform Trustee Act, supra* note 2, s 74(10) allows a court to make an order it considers appropriate to enforce a non-charitable purpose trust. The comment on s 74 says that, “this section validates the creation of trusts for certain non-charitable public purposes”.

145. *Uniform Trustee Act, supra* note 2, s 74(2)(a).

“sufficiently certain to allow the trust to be carried out”.¹⁴⁶ The types of non-charitable purpose trusts that are made valid by section 74(3) are those that are “recognized by law as capable of being a valid object of a trust”,¹⁴⁷ those with “purposes for which a society may be incorporated

146. *Ibid*, s 74(3)(a). This appears to capture the essence of the “specific non-charitable purpose trust” language in the wait-and-see perpetuity legislation as it was interpreted in *Re Russell*, *supra* note 31. *Uniform Trustee Act*, *supra* note 2, s 74(3)(c) adds that the non-charitable purpose not be contrary to public policy.

147. These would presumably include the recognized exceptions of: (i) the erection of a monument at a gravesite; (ii) the maintenance of a gravesite; and (iii) the provision of food and shelter for specified animals. See the discussion *supra* notes 24-31 and the accompanying text. This is, indeed, what the commentary to *Uniform Trustee Act*, *supra* note 2, s 74 says. Would it, however, include non-charitable purpose trusts recognized on the basis suggested in *Keewatin*, *supra* note 31, that there are persons to whom the court could give standing to enforce the trust?

under the jurisdiction's legislation respecting societies",¹⁴⁸ those for the performance of a function of government in Canada or those provided

148. *Uniform Trustee Act*, *supra* note 2, s 74(3) is in italics and set out in square-brackets presumably as a suggested way to identify the "public purposes" the section is intended to validate (see the commentary to s 74). For provinces or territories with Acts styled "Societies Act" or "Society Act" see *e.g.* the Nova Scotia *Societies Act*, RSNS 1989, c 435; the British Columbia *Society Act*, RSBC 1996, c 433 soon to be replaced by the *Societies Act* SBC 2015, c 18; the Alberta *Societies Act*, RSA 2000, c S-14; the Yukon *Societies Act*, RSY 2002, c 206; and the Northwest Territories *Societies Act*, RSNWT 1988, c S-11. Not all provinces or territories have Acts styled "Societies Act" or "Society Act" but have instead Acts for "not-for-profit" or "non-profit" corporations – see *e.g.* the Ontario *Not-for-Profit Corporations Act*, SO 2010, c 15; and in Saskatchewan *The Non-profit Corporations Act, 1995*, SS 1995, c N-4.2. Some provinces provide for non-profit corporations in a statute that covers both for-profit and non-profit corporations – see *e.g.* for Manitoba *The Corporations Act*, CCSM c C225 [*Manitoba Corporation Act*]; and the Newfoundland *Corporations Act*, RSNL 1990, c C-36. British Columbia *Societies Act*, provides that: "a society may be formed under this Act for one or more purposes, including, without limitation, agricultural, artistic, benevolent, charitable, educational, environmental, patriotic, philanthropic, political, professional, recreational, religious, scientific or sporting purposes" at s 2(1). The Nova Scotia *Societies Act* provides that "[a] society may be incorporated under this Act to promote any benevolent, philanthropic, patriotic, religious, charitable, artistic, literary, educational, social, professional, recreational or sporting or any other useful object, but not for the purpose of carrying on any trade, industry or business" at s 3(1). In Prince Edward Island Part II of the *Companies Act*, c C-14 allows for the incorporation by letters patent of a body corporate "without share capital, for the purpose of carrying on in Prince Edward Island, without pecuniary gain to its members, objects of a patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like" at s 89. Similarly, the *Manitoba Corporation Act* provides that a corporation without share capital must "restrict its undertaking to one that is only of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, literary, historical, artistic, social, professional, fraternal, sporting or athletic nature or the like" at s 267(1).

for by regulation.¹⁴⁹

Section 74(10) would allow a court to make an order it considers appropriate to enforce a non-charitable purpose trust or to enlarge, or otherwise vary, the powers of the trustee of a non-charitable purpose trust.¹⁵⁰ Section 74(11) provides that:

[a]n application for an order under this section may be made by any of the following:

- (a) the Attorney General;
- (b) a person appointed specifically by the settlor in the trust instrument to enforce the trust;
- (c) the settlor;
- (d) the personal representative of the settlor;
- (e) the trustee; or
- (f) a person appearing to the court to have a sufficient interest in the matter.

This list of persons who can seek a court order to enforce the non-charitable purpose trusts made valid by section 74 addresses the main long-standing reason for the non-validity of non-charitable purpose trusts, namely, the lack of a beneficiary to enforce such trusts.

The provision in section 74(3)(c)(i) providing for the validity of a non-charitable purpose trust with a purpose for which a society may be incorporated is set out in italics and with square brackets perhaps because it is just a suggestion. It is a very broad suggestion that, given the breadth of societies legislation purpose provisions,¹⁵¹ might well include trusts

149. *Uniform Trustee Act*, *supra* note 2, ss 74(3)(c)(iii) and (12). Each jurisdiction would provide its own regulations and could add to the list of purposes of non-charitable purpose trusts to which s 74 would apply. Section 74 would also apply to non-charitable purpose trusts created by a court making an order under s 75(3)(b), (d) or (f) which gives the court certain powers to deal with mixed charitable and non-charitable purpose trusts.

150. *Uniform Trustee Act*, *supra* note 2, ss 74(5)-(10) set out court powers to make orders. Subsections 74(5)-(9) set out a somewhat modified version of court *cy-près* powers with respect to charitable purpose trusts. These *cy-près* powers are necessary because s 74(4) allows for the limited types of non-charitable purpose trusts made valid by s 74 to exist indefinitely.

151. See *supra* note 148 on the scope of societies' legislation provisions on possible society purposes.

that have little or no public quality. In that respect it may be too broad to the extent it might allow for enforcement of effectively private trusts by the Attorney General which would arguably not be a proper expenditure of taxpayer funds.

The *Uniform Trustee Act* effectively creates a fourth type of express trust since it provides in section 74 for the enforcement of trust duties for only certain types of non-charitable purpose trusts as described in section 74(3), leaving the remaining non-charitable purpose trusts to be dealt with under section 76 in a manner similar to the non-charitable trust provision in wait-and-see perpetuities legislation. Section 76(2) provides that,

If the terms of a disposition of property purport to create a trust that

- (a) does not create an equitable interest in any person, and
- (b) is for a specific non-charitable purpose, other than a non-charitable purpose described under s. 74(3),

the terms of the disposition must be construed, subject to this section, as constituting a power to appoint the income or the capital, as the case may be, for a period not exceeding 21 years.

Under the *Uniform Trustee Act* there would, therefore, be express trusts for persons, express trusts for non-charitable purposes that can be enforced under section 74, express trusts for specific non-charitable purposes that would, under section 76, operate as powers to appoint income or capital for the specific non-charitable purposes¹⁵² and express trusts for charitable purposes.

B. Allowing the Settlor to Add Trust Enforcers

The persons who can apply for a court order in the list in section 74 that are of particular interest are: the settlor, the personal representative of the settlor or a person appointed specifically by the settlor. None of

152. If the suggestion in *Uniform Trustee Act*, *supra* note 2, s 74(3)(c)(i) of allowing for purposes for which a society might be incorporated were followed there would seem to be relatively little room left for non-charitable purpose trusts under s 76 given the scope of purposes for which a society may be incorporated. On the scope of purposes for which a society may be incorporated see *supra* note 148.

the persons in this list can apply to court to enforce an express trust for persons or a charitable purpose trust. It seems a curious result that the set of non-charitable purpose trusts made valid by section 74 would have access to a greater range of enforcement mechanisms than express trusts for persons or charitable purpose trusts. It might be said that the reason for the difference is that express trusts for persons and charitable purpose trusts have their own enforcement mechanisms — the beneficiaries for express trusts for persons and the Crown for charitable purpose trusts. Perhaps, however, it would make sense to expand the scope of enforcement mechanisms for express trusts for persons and for charitable purpose trusts, that could give the trusts draftsman greater scope for creating an enforcement mechanism for the trust. Perhaps also a greater scope of enforcement mechanisms could be extended to non-charitable purpose trusts more generally and not just to those that are made valid by section 74.

The expanded scope of enforcement mechanisms for express trusts for persons and non-charitable purpose trusts not made valid by section 74 should not include enforcement by the Attorney General for all such trusts since many such trusts are likely to have private objects.¹⁵³ It arguably does not make sense to have the Attorney General, at taxpayer expense, enforce trusts created for the pursuit of private objects. Crown enforcement should, however, as discussed in Part VII below, extend not to just charitable purpose trusts but to non-charitable purpose trusts and express trusts for persons that provide sufficient public benefits to justify expenditure of taxpayer funds on enforcement.

1. Express Trusts for Persons

While the rights of beneficiaries to enforce express trusts for persons should remain, legislation might allow the settlor to indicate in the trust instrument that any one or more of the persons in (b) through (d)

153. Also, as noted in notes 149-50 above and the accompanying text, a scope of non-charitable purpose trusts made valid by the *Uniform Trustee Act*, *supra* note 2, s 74 that includes any purpose for which a society may be incorporated is likely to be too broad since it may well include trusts that have little or no public benefit.

of section 74(11) be given standing to enforce the trust (*i.e.* a person appointed specifically by the settlor in the trust instrument to enforce the trust, the settlor or the personal representative of the settlor). In the context of a discretionary express trust for persons with a broadly defined class of beneficiaries who might have little incentive to enforce the trust, legislative support for such a broader range of persons able to enforce the trust would allow the trust draftsman (in consultation with the settlor) to consider and, if thought appropriate, allow for these additional means of enforcement. It might also be helpful to allow the trust draftsman (in consultation with the settlor) to indicate in the trust instrument that any one or more of such persons be given standing to enforce the trust where it has unborn, minor or other incapacitated beneficiaries to better ensure enforcement on behalf of such beneficiaries.¹⁵⁴

One problem with naming persons to enforce a trust is that they may have no more incentive to enforce the trust than the trustee has to carry out its terms. One might, therefore, ask: who monitors the enforcer? This may also be true of the personal representative of the settlor. Perhaps even the settlor will have little incentive to enforce once she or he has disposed of her or his interest in the trust property to the trustee. Why would the settlor not simply start by naming as trustee a person whom the settlor genuinely trusts to carry out the obligation regardless of whether there will ever be, for practical reasons, any enforcement of the legal obligation? There may, however, be situations where the person chosen as trustee has particular skills that will be beneficial in managing the trust. For instance, the trustee may have particular skills in investing trust funds and skills with respect to managing other trust assets or in the distribution of trust funds. The settlor may feel more comfortable with other persons seeing

154. The person chosen by the settlor to enforce the trust might have a greater incentive to monitor the day-to-day operation of the trust than a public official who might be subject to many demands on limited resources. Even if the settlor appointed someone as enforcer, it might, nonetheless, be prudent, in the interests of protecting the minor, unborn or incapacitated beneficiary, to retain enforcement powers of a public official, such as a Public Trustee and Guardian, even where the settlor had appointed an enforcer (and even where the appointed enforcer refused to enforce the trust).

to it that the chosen trustee, through the threat of enforcement, has an incentive carry out the trust obligations and do so in good faith and with care.

2. Charitable Purpose Trusts

Consideration should also be given to allowing settlors to name enforcers for the enforcement of charitable purpose trusts. This would allow them to provide for ongoing monitoring and enforcement of a charitable purpose trust that likely would be more effective than enforcement by the Crown. It would also allow for enforcement without expenditure of taxpayer funds.

3. Non-Charitable Purpose Trusts

As noted above, section 74 of the *Uniform Trustee Act* only provided for the enforcement of trust duties for certain types of non-charitable purpose trusts, leaving other types of non-charitable purpose trusts to operate as powers pursuant to section 76. Legislative support might also be provided to allow these other non-charitable purpose trusts to be enforced not just as powers, but as trust duties by giving standing to enforce to persons the settlor appoints in the trust instrument to enforce the trust. This is an approach that was suggested by the Manitoba Law

Reform Commission in 1992.¹⁵⁵ The persons entitled to enforce non-charitable purpose trusts might also be extended to the settlor or the settlor's personal representative. The trustee of a non-charitable purpose should also be given standing to apply to court to vary a non-charitable

155. Manitoba Law Reform Commission, *Report on Non-Charitable Purpose Trusts*, no 77 (1992). This Manitoba Law Reform Commission report also recommended that the enforcer be someone other than the trustee and that the enforcer be subject to the supervision of the court. Further, if no enforcer had been appointed, the trustee would have a duty to appoint one. It is interesting to compare the notion in *Uniform Trustee Act*, *supra* note 2, s 74(11)(b) of giving standing to a person appointed specifically by the settlor in the trust instrument to enforce the trust to opting instead to make a gift to a non-profit corporation (or society) with purposes set out in its constitution and a board of directors appointed by members of the corporation. The purposes might well be purposes similar to those in a non-charitable purpose trust (although they would have to fit the permitted purposes for a non-profit corporation). The board of directors might be seen as functionally equivalent to trustees of a purpose trust and the members who elect, or remove, members of the board of directors might be seen as an enforcement mechanism for seeing to it that the directors carry out the purposes of the corporation and do so efficaciously. With this comparison in mind, the linking of the limited set of non-charitable purpose trusts made valid by s 74(3)(c)(i) of the *Uniform Trustee Act*, *supra* note 2, to the range of purposes set out in societies acts or their equivalents makes sense. Section 74 could, in this light, be seen as facilitating the use of an alternative organizational form, a trust, for the pursuit such purposes.

purpose trust.¹⁵⁶

Allowing non-charitable purpose trusts to be enforced as trust duties, and not just as powers, gives greater scope to carrying out the intent of the settlor. It seems reasonable to carry out a settlor's purpose trust intent if the trust intent is sufficiently clear to permit enforcement of the trust and the purpose is not illegal or contrary to public policy. The interest in carrying out the settlor's intent would arguably be strengthened where the non-charitable purpose happens to be one that provides a benefit to a reasonably broad section of the community.

VI. Allowing Courts to Grant Standing to Persons to Enforce Express Trusts of Any Type

As noted in Part IV, enforcement can be weak for charitable purpose trusts and for discretionary express trusts for persons with large numbers of beneficiaries. Empowering the court to grant standing to persons to enforce not only non-charitable purpose trusts, but also charitable purpose trusts and express trusts for persons could facilitate the enforcement of

156. In 1991 the British Columbia Law Reform Commission suggested in British Columbia Law Reform Commission, *Working Paper on Non-Charitable Purpose Trusts*, no 128 (1991) that standing to enforce non-charitable purpose trusts be extended to a trustee [*BC Working Paper*]. *Uniform Trustee Act* s 74(11)(e) would also allow the trustee to enforce a non-charitable purpose trust. This would allow the trustee to apply pursuant to subsections 74(5)-(10) of the *Uniform Trustee Act*, *supra* note 2, to vary a non-charitable purpose trust where it is of a type made valid by s 74. A provision for the variation of a non-charitable purpose trust is necessary because a non-charitable purpose trust would not have identifiable beneficiaries and therefore could not be varied by invoking *Saunders v Vautier* (1841), 49 ER 282 (Ch) or under variations of trusts legislation. It would be particularly important to allow for the variation of non-charitable purpose trusts if the rule against perpetuities is abrogated as is proposed under s 88 of the *Uniform Trustee Act*, *supra* note 2, and as has occurred in in three provinces (for Manitoba see the *Perpetuities and Accumulations Act*, CCSM, c P33, ss 2-3 [*Manitoba Perpetuities and Accumulations Act*]; for Saskatchewan see *The Trustee Act*, 2009, SS 2009, c T-23.01, s 58 [*Saskatchewan Trustee Act*]; and for Nova Scotia see the *Perpetuities Act*, SNS 2011, c 42, ss 2-3 [*Nova Scotia Perpetuities Act*]).

such trusts when other means of enforcement are weak.

Section 74(11) of the *Uniform Trustee Act* takes a similar approach by providing, in section 74(11)(f), that an application may be brought by “a person appearing to the court to have a sufficient interest in the matter”.¹⁵⁷ A similar provision could be enacted for express trusts for persons or charitable purposes allowing a person appearing to the court to have a sufficient interest in the matter to make such an application.

Opening the scope for applications by anyone appearing to the court to have a sufficient interest in the matter might raise a concern for vexatious actions or actions not in the interests of the trust.¹⁵⁸ This might be addressed by constraints similar to those used in corporate statutory derivative action provisions. For instance, one might require that the trustees be notified prior to the application to court for standing so the trustees have an opportunity to respond to alleged breaches and avoid potentially expensive litigation.¹⁵⁹ One might also require that the applicant be acting in good faith and that the action appear to be in the best interests of the trust (*i.e.* in the interests of accomplishing the intent of the trust and in a cost-justified manner).¹⁶⁰ Other features of the corporate statutory derivative action might also be borrowed. For instance, requiring court approval of settlements might discourage attempts by the applicant to pressure trustees into giving the applicant favourable treatment and for court orders giving directions with respect to the conduct of an action.¹⁶¹ Provisions relating to interim costs and

157. The British Columbia Law Reform Commission in *BC Working Paper*, *supra* note 156, would also have allowed the court to grant standing to enforce a non-charitable purpose trust to “any person appearing to the Court to have a sufficient interest in the enforcement of the trust” at 33.

158. For instance, actions that could significantly drain trust assets with little to be gained for the beneficiaries or purposes of the trust.

159. For a roughly corresponding corporate derivative action provision see *Canada Business Corporations Act*, RSC 1985, c C-44, s 239(2)(a) [CBCA].

160. For roughly corresponding corporate derivative action requirements see CBCA, *supra* note 159, ss 239(2)(b), (c).

161. For related corporate derivative action provisions see CBCA, *supra* note 159, ss 240(b) and 242(2).

final cost awards might also be considered.¹⁶²

In keeping with the approach in Part V.B, above, of allowing settlors to add to the list of persons who can enforce a trust, one might allow settlors to decide whether the court should have a power to grant standing to persons to enforce the trust. This could be an opt-in approach where the statutory provision granting the court such a power would only operate if the settlor so indicated. It might instead be designed as an opt-out approach in which the settlor could indicate that the statutory provision granting the court a power to grant standing to persons (other than beneficiaries) was not to operate.

VII. Crown Enforcement of Specified Express Trusts

The Crown, as noted in Part II.C.1 above, has a prerogative power to enforce charitable purpose trusts. Trusts other than charitable purpose trusts, including both non-charitable purpose trusts and express trusts for persons, may, as noted in Part III.C above, have a public quality in some circumstances. That public quality may justify expenditure of Crown funds in the enforcement of such trusts. The *Uniform Trustee Act* appears to recognize this in the context of non-charitable purpose trusts since it proposes providing for potential Crown enforcement of certain specified non-charitable purpose trusts. Since it is possible for express trusts for persons to have a public quality, it arguably makes sense to extend Crown enforcement to express trusts for persons where they have a similarly sufficient public quality to justify the expenditure of public funds in enforcing such trusts.

If the *Uniform Trustee Act* proposal for potential Crown enforcement of certain types of non-charitable purpose trusts is followed, there would be two bases for potential Crown enforcement of trusts. One would be the traditional enforcement of charitable purpose trusts said to be

162. For corporate derivative action provisions see *CBCA*, *supra* note 159, ss 240(d), 242(3), 242(4). Section 240(d) allows the court to order the corporation to pay reasonable legal fees incurred by the complainant (and here corporation might be replaced with payments out of trust funds). Section 242(3) concerns security for costs, and s 242(4) concerns interim costs.

based on a Crown prerogative. The other would be potential Crown enforcement of non-charitable purpose trusts under a statutory authority. The justification for both forms of Crown enforcement is presumably the same — the presence of sufficient public interest in enforcement to make the potential expenditure of Crown funds on enforcement worthwhile. If the justification for the potential for Crown enforcement is the same for both charitable and non-charitable purpose trusts, then why should the basis of Crown enforcement be different? Grounding Crown enforcement on a statutory power makes Crown enforcement more directly part of the political process since elected representatives would have to turn their minds to appropriate circumstances for Crown enforcement and be responsible to the electorate for their decisions in that regard. It is, therefore, also recommended that the Crown prerogative to enforce charitable purpose trusts be replaced with a statutory authority. The statute would set out the types of trusts for which Crown enforcement would be available. The potential for Crown enforcement would then be based on a modern statute rather than the preamble to an English statute from over 400 years ago.¹⁶³ In other words, the statutorily identified types of trusts for which there would be potential Crown enforcement would replace the current common law on what constitutes a charitable purpose. Potential for Crown enforcement would extend to all express trusts that were identified as having the requisite public quality to justify

163. This approach is similar to the approach in the English *Charities Act 2011*, *supra* note 66. This act lists charitable purposes in ss 3(1)(a) to (l) that capture the main elements of the charitable purpose categories in *Pemsel*, *supra* note 14 and accompanying text, while adding several new charitable purposes. It therefore effectively adds to the list of the types of trusts that can be subject to Crown enforcement (although through the various mechanisms provided for in the Act). The English *Charities Act 2011* differs, however, from what is proposed here in that it would allow the Charity Commission or a court to add to the list of charitable purposes by including under “any other purpose ... (ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) ... or (iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognized, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this subparagraph” s 3(1)(m).

Crown enforcement whether they were traditional charitable purpose trusts, non-charitable purpose trusts or express trusts for persons.

One danger in trying to set out in statutory form all the types of trusts for which Crown enforcement is possible is that it might, perhaps through inadvertence, leave out many trusts that, as currently legally recognized charitable purpose trusts, have potential Crown enforcement. That problem might be addressed by grand-parenting in existing charitable purposes, but without a court power to add to these by reference to the preamble to the 1601 *Statute of Charitable Uses* or analogies thereto.¹⁶⁴ Instead the court would be assessing whether the Crown could enforce a particular express trust and would do so through interpretation of a statute identifying the types of express trusts that could be enforced by the Crown.

A possible advantage to the existing common law approach to charitable purpose trusts is that it allows the law to move forward by gradually adding to valid charitable purposes by way of analogy and analogy upon analogy. A statutory approach might be too slow to respond to current societal needs. The statutory approach to Crown enforcement suggested above could, however, include additions to potential Crown enforcement by regulation allowing for a relatively quick response to societal need without having to get the question on the legislative agenda. The additions would then be part of a political process and would not be subject to constraints of a common law approach wedded to the preamble of a 400 year old statute. While the statute might list various purposes that would typically tend to have a public quality justifying Crown enforcement, it would likely also have to have a more general category that would be subject to incremental modifications through

164. See e.g. English *Charities Act 2011*, *supra* note 66 which lists charitable purposes in s 3(1)(a) to (l) that, while capturing the main elements of the charitable purpose categories in *Pemsel*, *supra* note 14 and accompanying text, and while expanding on the scope of charitable purposes by adding several items, goes on to add, in s 3(1)(m), “any other purposes – (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes ... under the old law”.

court statutory interpretation.¹⁶⁵

The statutory provisions identifying express trusts that could be enforced by the Crown would presumably have to address the question of public benefit since that is arguably the key to justifying Crown enforcement. While, for instance, a trust for the purpose of education normally would be inclined to have a public quality to it, it would presumably not be considered to have the requisite public quality for Crown enforcement if it was for exclusively for the education of the settlor's children. Consideration should, however, be given to providing some statutory guidance on the meaning of public benefit.

In providing statutory authority for Crown enforcement of specified purpose trusts one might also revisit the question of how to make Crown enforcement more effective. In doing so one might consider various models currently used for the enforcement of charitable purpose trusts such as the Ontario *Charities Accounting Act* or the English *Charities Act 2011*, discussed in Part II.C.1 above.¹⁶⁶

VIII. Dispensing With the Distinctions Between Non-Charitable Purpose and Charitable Purpose Trusts (or Between Private Purpose Trusts and Statutorily Identified Public Purpose Trusts)

Once charitable and non-charitable purpose trusts are treated on the same basis with respect to Crown enforcement in the way described above, one might consider whether the distinction between these types of purpose trusts needs to be maintained. In addition to the issue of enforcement addressed by a Crown prerogative to enforce, charitable purpose trusts have a number of other distinct features such as the public benefit requirement, an exception with respect to the application of the rule against perpetuities, the exclusivity requirement, the political purposes doctrine and a qualification of the requirement of certainty of

165. The listed purposes would also be subject to statutory interpretation, therefore, leaving some room for court modification over time.

166. See notes 60-75 and the accompanying text.

objects. This part addresses these distinct features of charitable purpose trusts arguing that once a common approach to enforcement of express trusts is provided for and if the historical concept of charitable purpose trusts is replaced with statutorily identified public benefit express trusts that can be enforced by the Crown, several distinct features of current charitable purpose trusts with respect to exclusivity, public benefit, the invalidity of political purpose trusts and possibly also perpetuity, need no longer be maintained. This part also notes implications for the *Income Tax Act* approach to registered charities if the traditional approach to charitable purpose trusts is replaced in the way recommended herein.

A. Exclusivity

The exclusivity requirement for charitable purpose trusts should be dispensed with even if the current approach to charitable versus non-charitable purpose trusts remains. For similar reasons, the exclusivity requirement should be dispensed with if non-charitable purpose trusts are treated as valid trusts that impose trust obligations (not mere powers) on trustees. Also for similar reasons, the requirement should be dispensed with if the concept of charitable purpose trusts is replaced with broader statutorily identified public purpose trusts.

1. Dispensing with the Exclusivity Requirement

One might approach the exclusivity requirement for charitable purpose trusts from the standpoint of encouraging the creation of charitable purpose trusts on the assumption that it is desirable to encourage the creation of such trusts. In other words, one might ask what the effect would be on the creation of charitable purpose trusts if a settlor was allowed to mix charitable and non-charitable purposes and give the trustee an unfettered discretion to choose the extent of dispositions for either type of purpose. This is an empirical question that would be difficult to assess. However, there would be three possible outcomes. Dispensing with the exclusivity requirement could reduce the creation of charitable trusts, it could increase them or it could have no significant effect.

i. Reduction Unlikely

Is dispensing with the exclusivity requirement likely to reduce the creation of charitable purpose trusts? The only basis for such a reduction, it is submitted, is that if removal of the exclusivity requirement made enforcement of charitable purpose trusts by the Crown less effective, then settlors, knowing the prospect of enforcement is reduced, might be less inclined to create charitable purpose trusts. Crown enforcement of charitable purpose trusts in Canada appears, however, to be virtually non-existent, so removal of an exclusivity requirement is likely to have little or no effect on the prospect of enforcement. It is unlikely that settlors, even if they knew about how charitable purpose trusts are enforced, would become less inclined to create charitable purpose trusts.

Perhaps more robust Crown enforcement, together with an exclusivity requirement, would encourage greater allocations of property to charitable purpose trusts. The settlor, however, can achieve the effect of an exclusivity requirement simply by settling funds in trust on exclusively charitable purposes. The exclusivity requirement may, however, frustrate settlor intentions. Consider, for instance, the effect of the exclusivity rule under the current law with the distinction between charitable and non-charitable trusts and with an exclusivity requirement for charitable purpose trusts. A trust draftsman might inform the settlor that a trust of mixed charitable and non-charitable purposes runs the risk that it will either be devoted exclusively to charitable purposes or held void with a resulting trust to the settlor (or her or his estate). The trust draftsman might suggest creating two separate trusts, one for the charitable purposes and one for the non-charitable purposes. This, however, might not be entirely satisfactory for a settlor who wants to give the trustee the discretion to allocate funds between the settlor's intended non-charitable and charitable purposes. The settlor might instead indicate that the funds should be directed exclusively to the non-charitable purposes. The trust draftsman should then advise the settlor that such a trust would be invalid, or, in the Canadian wait-and-see perpetuity legislation jurisdictions, that while such a gift would be valid, it would operate only as a power and only for a maximum of twenty-one years. The settlor might respond by directing all the funds to the charitable purposes even

though that is not quite what the settlor wants and in this way perhaps the exclusivity requirement could lead to more funds being directed to charitable purpose trusts. The settlor may, however, conclude that the simplest thing to do is to just give everything to her or his children or other persons or not give at all. Either way it frustrates the settlor's intention and it is hard to imagine that frustrating settlor intentions encourages more settling of property on charitable purpose trusts.

ii. Increase or No Significant Effect

If dispensing with the exclusivity requirement would not reduce the creation of charitable purpose trusts, it leaves only the other two outcomes. Either dispensing with the exclusivity requirement increases the creation of charitable purpose trusts, which many would likely consider desirable, or it would have no significant effect in which case it would make sense to dispense with the exclusivity requirement and avoid the problems it can create.¹⁶⁷ In the end, it is submitted, all an exclusivity requirement seems likely to do is frustrate settlors who would like to give trustees discretion to allocate funds between charitable and non-charitable purposes. Such frustration may cause some settlors to abandon some or all of their intended charitable and non-charitable purposes. Settlors who are unaware, or are not advised of, the pitfalls of mixed charitable and non-charitable purposes are likely to have their intentions defeated.

2. Dispensing With an Exclusivity Requirement in a Regime of Private vs. Statutorily Identified Public Purpose Trusts

If the charitable versus non-charitable purpose trust distinction was replaced by a distinction between statutorily identified public purpose trusts, as well as express trusts for persons, that could be enforced by the Crown and those that could not, the reason for an exclusivity rule would remain. In other words, the Crown arguably could not enforce public purpose trusts effectively if they were mixed with private purpose

167. On the problems the exclusivity requirement can create see Part II.C.2 above, notes 78-81 and the accompanying text.

trusts and the trustee had the discretion to allocate trust funds among the various purposes. The trustee might simply point to his discretion to justify the expenditure of trust funds on private purposes to the exclusion of public purposes. If the settlor articulated purposes that were at least in part public purposes, then arguably there is a public interest in enforcement and the trustee should not be able to so easily avoid the expenditure of trust funds on public purposes by arguing that he has discretion to allocate funds between either the public or private purposes.

The same arguments that apply to dispensing with the exclusivity requirement in the context of current charitable and non-charitable purpose trusts would, however, apply in the context of a regime that had enforceable private trusts for persons or purposes together with statutorily identified express trusts (whether for persons or purposes) enforceable by the Crown. Assuming it is considered desirable to encourage donations of funds on trusts that provide public benefits, what would be the effect of an exclusivity requirement on the creation of such trusts? It seems unlikely, for the reasons noted above with respect to charitable purpose trusts, that it would encourage the creation of such trusts. If it would discourage them, then presumably it makes sense not to have an exclusivity requirement. If the effect of an exclusivity requirement would be insignificant, then it would seem to make sense not to have such a requirement since it would invite the same difficulties currently created by the exclusivity requirement for charitable purpose trusts.

B. Public Benefit

While a court determination of public benefit, as discussed in Part VII above, would inevitably remain, it would be a public benefit assessment in the context of determining whether a particular express trust could be enforced by the Crown and this assessment would be the same whether the express trust was for persons or purposes. Whether the purpose was charitable or not would not be relevant in the context of interpreting the statute that identified trusts for which Crown enforcement was available.

C. Political Purposes

The question of whether a trust for political purposes should be subject

to potential enforcement by the Crown should, it is submitted, be a question taken up in the legislative and political process of deciding whether the Crown should be given a statutory power to enforce such trusts. The question of whether “political purpose” trusts should be valid or not could then be subject to public debate. There arguably are public benefits to trusts for political purposes in a democratic society. This question should be confronted in the drafting of a statute that identifies the types of trusts for which Crown enforcement is available.¹⁶⁸ Either the statute should permit Crown enforcement of such trusts or it should not. If the statute permitted Crown enforcement of political purpose trusts, the public benefit question that courts will inevitably have to assess should be addressed in the statute in a way that avoids having the court decide whether there is a benefit to advocating a change in the law. The statute might, for instance, deem there to be a benefit to political purpose trusts. The question for the court might then be limited to the question of whether there was a sufficient public quality to the trust in terms of the potential number of persons who might benefit.¹⁶⁹ The question being addressed by the statute and by a court interpreting the statute would not be whether the trust is valid or not but whether the trust could be enforced by the Crown.¹⁷⁰

If it was decided through the political process, that political purpose trusts were to, by statutory enactment, be treated as valid trusts, it

168. In other words, the current approach with respect to charitable purpose trusts mixes two questions together – one being the availability of Crown enforcement (currently tied up in the question of whether the purpose is charitable and provides a public benefit) and the question of whether trusts for political purposes should be allowed (that has become linked to the public benefit question).

169. A political purpose trust that advocated for a change to a law that, for example, benefited only the settlor or the settlor’s close relatives would arguably not have the requisite public quality to justify Crown enforcement.

170. The validity of the trust would be a separate question focusing on, for instance, the capacity of the settlor to create the trust, the three certainties, the constitution of the trust, its compliance with any necessary formalities such as under wills legislation or statute of frauds legislation, and whether the purported trust was illegal or contrary to public policy.

would be important to address the mechanism for Crown enforcement. Enforcement through an Attorney General who is a member of cabinet would arguably be less than ideal since the Attorney General may be reluctant to enforce political purpose trusts that were against the interests of the government. It may, therefore, be important to create a Crown enforcement body that operates reasonably independently from government.

D. Perpetuity Exception

1. Abrogation of the Rule Against Perpetuities

Another distinction between charitable purpose trusts and non-charitable purpose trusts is that charitable purpose trusts, subject to limited exceptions, can be of perpetual duration. Obsolete uses of trust property can be dealt with through court *cy-près* orders. There is a move to abrogation of rules against perpetuities with Manitoba, Saskatchewan and Nova Scotia having all abrogated them in recent years.¹⁷¹ The Uniform Law Conference of Canada has recommended similar abrogation in other Canadian common law jurisdictions.¹⁷² If rules against perpetuities are abrogated, it would remove the perpetuity distinction between non-charitable purpose trusts and charitable purpose trusts. If non-charitable purpose trusts were treated as valid trusts and the rule against perpetuities were abrogated it would leave the potential for obsolete non-charitable purpose trusts and some means to vary such trusts would be needed. *Cy-près* might be extended to non-charitable purpose trusts, but it might be better to reassess the variation of express trusts more generally addressing not only the question of varying non-charitable purpose trusts, but also addressing issues in varying charitable purpose trusts and express trusts

171. For Manitoba see the *Manitoba Perpetuities and Accumulations Act*, *supra* note 156, ss 2-3; for Saskatchewan see the *Saskatchewan Trustee Act*, *supra* note 156, s 58; and for Nova Scotia see the *Nova Scotia Perpetuities Act*, *supra* note 156, ss 2-3.

172. Currently expressed in *Uniform Trustee Act*, *supra* note 2, s 88.

for persons.¹⁷³

The same considerations would apply if the charitable versus non-charitable purpose trust distinction was replaced with a distinction between private purpose trusts and statutorily identified public purpose trusts and purpose trusts were generally made enforceable. Removal of the rule against perpetuities would make distinguishing between such public and private purpose trusts on the basis of a rule against perpetuities no longer necessary. There would, however, be a need for a means to vary such trusts if, over time, it became impossible or impracticable to execute them.

2. Retention of the Rule Against Perpetuities

If the rule against perpetuities or some alternative rule of similar purpose was to be retained, one would need to consider whether a distinction should be made in the application of the rule to valid private purpose trusts and statutorily identified public purpose trusts. If private purpose trusts were treated as valid trusts or were even just enforced as powers, concerns about dead hand control of funds through private purpose trusts (or powers) might remain and some means of bringing an end to such trusts (or powers) might be considered necessary.

E. Certainty of Objects for Charitable Purpose Trusts

Certainty of objects is one of the three certainties required for the creation of an express trust. For an express trust for persons the objects are the persons who are to be the beneficiaries of the trust and the certainty required is certainty of beneficiaries. For a purpose trust the objects are the purposes of the trust and the certainty required is certainty of purposes. A qualification with respect to certainty of purposes is made for charitable purpose trusts. The certainty need only be that the settlor intended the trust property to be held for charitable purposes. If, however, the particular charitable purposes are not clearly expressed, the

173. Nova Scotia has taken a different approach to variation of trusts than other jurisdictions. See the Nova Scotia *Variation of Trusts Act*, RSNS 1989, c 486, as amended by SNS 2011, c 42, s 6.

court can provide a scheme giving the trustee some clarity as to how the trust should be administered. In a testamentary trust, subject to concerns for dependent relief, it arguably makes sense to treat a clearly expressed charitable intent, even though the charitable purposes themselves are vague, as a valid charitable purpose trust to avoid the return of the trust property to the estate and, therefore, to residuary legatees or intestate heirs (giving them a windfall gain) contrary to the clearly expressed charitable intent of the testator and taking into account the public benefit quality of charitable purposes.

It seems desirable to retain this particular aspect of the exceptional treatment of charitable purpose trusts. One might, however, ask whether this same treatment should be extended to other purpose trusts. If, for instance, a testator put aside property to be held on trust for “benevolent or philanthropic purposes” without further elaboration, would it not also be reasonable to allow the trust to take effect with the court setting out a scheme for the “benevolent or philanthropic” purposes rather than having the property revert to the estate to be distributed to the residuary legatees or intestate heirs (subject, perhaps, to concerns for the needs of dependents). Returning the property to the estate to be distributed to residuary legatees or intestate heirs would be contrary to the clearly expressed benevolent or philanthropic intentions of the testator and the property intended by the settlor to be used for “benevolent or philanthropic” purposes could, in accordance with those words, be directed to purposes that could provide a public benefit (unless some other language in the will constrained the scope of persons whom the testator intended to benefit). Such an approach, in addition to providing a public benefit, would arguably be more consistent with the settlor’s intent.

If property is settled on trust for vaguely expressed private purposes, the question would be more difficult. One would be faced with the issue of either finding the trust invalid and having the property revert to the estate, and therefore to persons the settlor apparently did not intend the property to go to, or trying to provide the trustee with some direction as to the purposes to which the property should be directed knowing that whatever purpose the property was directed to, given the settlor’s vague

expression of purposes, probably also did not fit the intent of the settlor. There would likely be some purpose trusts that would be close to the line in terms of falling within the statutorily identified public purposes and for these a possible resolution might be to conclude they do fall within the statutorily identified public purposes and therefore apply the approach suggested above and provide a public purpose scheme for the use of the property. Where the property is clearly directed to purposes outside the statutorily identified public purposes, it would appear to leave a choice between two outcomes neither of which satisfies the intent of the settlor (whatever that might have been). A rule that returns the property to the settlor might give the settlor, hopefully assisted by a knowledgeable draftsman, an incentive to spell out the purposes in sufficient detail, such that the trustee, and a court, has a clear enough indication of the settlor's intent. Perhaps an alternative would be to give the intended trustee a power to use or appoint the property for purposes or persons (other than the trustee) for a statutorily set period of time.

F. Effect on the *Income Tax Act* Approach to Registered Charities

If Canadian provincial legislative provisions were to do away with the distinction between charitable and non-charitable purpose trusts, how would it affect the tax subsidy provisions under the *Income Tax Act*? In interpreting the meaning of "charitable purposes" and "charitable activities" courts in Canada have made reference to the meaning of "charitable purposes" in the common law of trusts. Courts interpreting those *Income Tax Act* provisions could continue to do so even though the continued development of that expression would no longer be developed by Canadian common law in the context of trust law. The development of the meaning of that expression has, for some years now, largely been done by courts interpreting provisions in the *Income Tax Act*. Perhaps Parliament might then be inclined to give a renewed focus to identifying the types of purposes and activities for which donation tax credits should be provided. One might lament the absence of the contribution trust law court decisions might make to the meaning of charitable purposes under the *Income Tax Act* if the traditional approach to charitable purpose trusts

was no longer retained. The loss of such contributions might not, however, be that significant given the relative paucity of such cases. Further, one might question the benefit to be obtained from trust law decisions on the meaning of charitable purposes where the policy considerations are quite different from those at play in the context of providing an income tax credit that can lead to a potentially significant reduction in government tax revenues.

IX. Conclusion

Trust enforcement problems are not limited to problems arising from the absence of named beneficiaries, or a clearly described class of beneficiaries, in non-charitable purpose trusts. Enforcement of trusts will rarely, if ever, be perfect and the effectiveness of enforcement for any given trust will always be question of degree. While charitable purpose trusts are valid in spite of the absence of named beneficiaries or a clearly described class of beneficiaries on the basis of enforcement by the Crown as *parens patriae*, there will be gaps in enforcement, particularly in Canada where, with some qualification in the province of Ontario, there is no scheme for enforcement such as the English Charity Commission. Enforcement of express trusts for persons can also be weak, particularly in the context of discretionary trusts with a large number of beneficiaries.

While charitable purpose trusts are sometimes described as “public trusts,” express trusts for persons and non-charitable purpose trusts can provide benefits for a broad community extending well beyond the settlor’s family and personal friends. Express trusts for persons and non-charitable purpose trusts may well, in fact, provide benefits to a much broader range of persons than many charitable purpose trusts. Facilitating enforcement of all types of express trusts would, therefore, likely be conducive to encouraging philanthropy and ensuring the philanthropic use of funds directed to philanthropic purposes.

With provinces perhaps poised to enact the *Uniform Trustee Act* proposed by the Uniform Law Conference of Canada Law, it seems an appropriate time to consider extending aspects of enforcement for non-charitable purpose trusts, charitable purpose trusts and express trusts for persons. Enforcement could be facilitated by providing for the

enforcement of non-charitable purpose trusts by appointed enforcers that might include the settlor or the settlor's personal representatives. That same approach to enforcement could also allow for stronger enforcement of express trusts for persons, particularly where those express trusts for persons are discretionary trusts with a broad range of beneficiaries. Enforcement of all types of express trusts might also be expanded by allowing the court to grant standing to persons (other than named beneficiaries or the Crown) to enforce express trusts, perhaps with the settlor being allowed to opt in or out of granting the court such a power.

With a workable means of enforcement, non-charitable purpose trusts could be treated as legally valid so that the trust purposes become trustee duties and not just powers in the manner provided for in wait-and-see perpetuity legislation. Once non-charitable purpose trusts are treated as legally valid trusts there would arguably be no further need, at least from the standpoint of legal validity, to distinguish between charitable and non-charitable purpose trusts. While the distinction might be retained with respect to the question of whether the Crown (through the Attorney General or other nominee such as a Public Trustee) has standing to enforce the trust, this might be treated as a separate question with legislation describing the types of purpose trusts with respect to which the Crown would be given standing to enforce thereby making the question of Crown enforcement more directly a part of the political process.

If a statutory approach to Crown enforcement is taken, the question of public benefit can become part of the political process with the public benefit then presumed if the particular purpose falls within the statutorily identified purposes for which Crown enforcement is permitted. If public benefit was presumed for the statutory identified trusts for which Crown enforcement is permitted, the alleged problem that led to the invalidity of political purpose trusts is arguably no longer present. The validity of political purpose trusts might then be addressed as a question for the legislature and therefore more directly a part of the political process. If, as a result of such a political process, it is decided that political purpose trusts are to be treated as valid trusts, legislation might address as a separate question whether such trusts should be enforceable by the Crown. *Cy-*

près, or some modified version of it, could be extended to non-charitable purpose trusts made valid by providing for their enforcement as trusts. One might also extend the provision of administrative schemes for uncertain purposes beyond charitable purposes to the purposes statutorily deemed to be public purposes.

The exclusivity requirement should be dispensed with regardless of whether any other changes are made concerning the validity of non-charitable purpose trusts or expanding the range of means of enforcement for express trusts generally. The exclusivity requirement is not likely to have the effect of increasing the creation of charitable (or statutorily identified public) purpose trusts. It either discourages the creation of such trusts which would favour dispensing with it or it has no significant effect on the creation of such trusts in which case dispensing with it would avoid problems associated with it.