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Crowdfunding and the Law of Trusts

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1. Introduction

Almost every week you will find a story in your newspaper about crowdfunding. This is a modern method of raising funds for all kinds of purposes that has caught the imagination of the public. But is it really modern? I shall demonstrate that it is not new, but that it is an age-old phenomenon. What is new is modern methods of communication that allow one to reach many people almost effortlessly and in a short period of time to fund one's favourite project.

And what does trust law have to do with crowdfunding? Potentially, quite a bit. As I shall demonstrate, it is likely that when you raise funds for an object,¹ particularly a non-commercial object, the moneys are subject to a trust that may be justiciable by the object, the donors or, in the case of a charitable trust, by a state official, such as the Public Guardian and Trustee.

Other organs of state may also have an interest in what you are doing, such as the tax authorities. And if some or all of the intended beneficiaries are minors, the Office of the Children's Lawyer may have to be kept informed too. I am not be able to cover all these matters in this paper, but raise them as points that should be considered.

This paper is about the intersection of crowdfunding and trust law, but its focus is restricted to charitable and philanthropic fundraising, otherwise known as donation-based fundraising.² In particular, I shall limit my remarks to situations in which the moneys that have been raised are insufficient, or are no longer necessary for the intended object, or when more moneys have been raised than necessary.

However, for a clearer understanding of the subject, I shall first provide a couple of definitions, a brief outline of the different types of crowdfunding, and a description of the means by which crowdfunding takes place.

¹ I am using the inclusive term, "object," rather than the restrictive term, "purpose." The latter typically refers to a beneficiary that is not a person, but a purpose, whether charitable or non-charitable. Since funds can be raised for a person as well as for a purpose, I use the inclusive term to encompass both.

² See §3, *infra*.

In the interest of full disclosure and *ex abundanti cautela*, I declare that I am not associated in any way with any of the organizations I mention in my paper. Nor do I necessarily endorse their sites or methods. They are mentioned simply for information purposes. Anyone wishing to make use of their facilities must make his own investigation of their utility and trustworthiness.

2. Definitions

Crowdsourcing is an umbrella term that embraces such concepts as crowdfunding and crowdtesting.³ Crowdsourcing enables the division of labour by outsourcing tasks to many others in order to make a project achievable within a reasonable period of time. The term derives from “outsourcing,” which involves contracting out specific aspects or tasks to specific subcontractors in order to complete a large job in an efficient and timely manner. Crowdsourcing implies that the outsourcing is no longer to specific persons, but rather to and among the crowd, that is, the unspecified public.

Wikipedia is a well-known example of crowdsourcing, since it relies on many people to contribute to that online information tool. Another famous example of crowdsourcing is the process initiated to establish the Oxford English Dictionary by its first editor, Dr. James Murray. He sought the help of a vast number of volunteer readers to supply the many illustrative quotations for words used in the dictionary.⁴

³ Crowdfunding is defined below. Crowdtesting employs crowdsourcing to test new software. The testers are volunteers and they may be paid a fee for each bug they discover.

⁴ A fascinating, though not well-known story about the compilation of the OED is the tale of Dr. William Chester Minor, an American army surgeon, who had been retired because of his developing insanity. Dr. Minor went to England and killed someone there. He was found not guilty by reason of insanity and was incarcerated in Broadmoor Criminal Lunatic Asylum at Crowthorne, Berkshire “until Her Majesty’s Pleasure be known.” He spent the next 30 years in Broadmoor and was permitted to amass and keep a substantial library. In due course, he became an enthusiastic and prolific contributor to the OED and he and Dr. Murray met in 1896 and formed a friendship based on their common intellectual pursuits. Dr. Minor’s contributions are acknowledged in the “Appendix to Preface” at p. xv of Vol. 1 of the OED, which was published in 1888. (Later printings omit the Appendix.) Dr. Minor was released into the custody of his brother in 1910 and returned to the US, where he spent most of his time in asylums. He died in 1920. See Simon Winchester, *The Surgeon of Crowthorne: A Tale of Murder, Madness and the Love of Words* (London: Viking, 1998), republished as *The Professor and the Madman: A Tale of Murder, Insanity, and the Making of the Oxford English Dictionary* (New York: HarperCollins Publishers, Inc., 1998).

Another type of crowdsourcing is vote swapping, which was used by some people in the 2015 UK election. In this type, A, a Labour supporter in riding X, agrees with B to vote Liberal-Democrat in riding X, because a Labour vote would be wasted in her riding; B, a Liberal-Democrat supporter in riding Y, agrees with A to vote Labour in riding Y, because the Liberal-Democrats are running a distant third in his riding.⁵

Crowdfunding is a means of funding a project, venture, or goal by raising money from many people unrelated to each other. The online Oxford English Dictionary does not yet contain a definition of the term, but its companion online Oxford Advanced Learner's Dictionary defines it as: "The practice of funding a project or venture by raising money from a large number of people who each contribute a relatively small amount, typically via the Internet."⁶

3. Types of Crowdfunding

There are various types of crowdfunding. It can be used for business purposes and for charitable and philanthropic purposes. The various models may be summarized as follows:⁷

Non-Equity Crowdfunding

(a) Donation-based

This is the domain of charities and other altruistic causes. Persons can give small or large amounts of money to a cause of their choice. Their reward is that they have donated to a worthwhile object. A relatively new form of fundraising that raises funds to support litigation also falls into this category.⁸ Other new forms allow people to express their positions on various

⁵ See www.swapmyvote.co.uk, accessed 22 April 2015; "Election 2015: Does 'vote swapping' work?" <http://www.bbc.com/news/magazine-32410531>, accessed 8 June 2015.

⁶ <http://www.oxforddictionaries.com/definition/learner/crowdfunding>, accessed on 8 June 2015.

⁷ This summary is based on papers by David Zitzerman, "Crowdfunding for Business Lawyers: An Introduction"; and Brian Koscak, "Reward, Donation, Equity, and Lending-Based Crowdfunding – What Are the Differences?" at Tabs 1 and 3, respectively, of The Law Society of Upper Canada, *Crowdfunding Primer for Business Lawyers*, 13 March 2015.

⁸ A recent example is litigation in which the constitutional validity of pardons regulations is being tested. See Sean Fine, "Taking on the law – via crowdfunding," *The Globe and Mail*, 19 May 2015. The article explains that The Law Society of Upper Canada has given its imprimatur to this kind of crowdfunding, provided that the lawyer initiating the litigation makes it clear to the donors that she is following the instructions of her client and not those of the donors. Presumably if the instructions of the donors were taken into account the old law of champerty and maintenance might be engaged.

socio-political issues about which the donors hold strong views, such as raising funds for businesses that refuse to serve gays for religious reasons, and raising funds to support police officers in the US who shot and killed black citizens.⁹ Indeed, it seems that whenever an event happens that pulls at the heartstrings of people, someone will begin a fundraiser to help those in need. A recent example is the vandalization of HitchBOT, the hitchhiking robot, in Philadelphia. Some Philadelphians started a campaign called “Philadelphia Rebuilds HitchBOT” to raise \$1,200 on the Kickstarter platform to repair the damaged robot. In very short order the goal had been exceeded and the fundraiser has now been closed.¹⁰ Another is the response by the toymaker, Ty Inc., to the killing of Cecil the lion in Zimbabwe by an American big-game hunter. The company is making a plush Cecil the Lion stuffed toy and intends to donate all profits from sales to the Oxford University Wildlife Conservation Research Unit that had been tracking Cecil. Although this is a crowdfunder *per se*, it effectively operates as one, since many people will undoubtedly want to buy the toy to support the cause.¹¹

(b) Reward-based

In this model, an entrepreneur seeks financial contributions to a project, such as the making of a movie or a product in return for a reward or perk provided by the entrepreneur.

⁹ See Omar El Akkad, “Crowdfunded ideology rising: Backers of controversial causes learn to get online community to put money where their beliefs are,” *Globe and Mail*, 18 May 2015, p. A3. The author refers to moneys raised to help pay fines imposed on a bakery in Oregon which refused to bake a wedding cake for a lesbian couple, and on a Washington State florist who refused to serve gays, in both cases because of religious convictions. He also mentions the anonymous campaign to raise funds for Darren Wilson, the white police officer in Ferguson MO, who shot and killed Michael Brown, an unarmed black teenager on 9 August 2014. The author mentions that some of the bigger crowdfunding platforms, such as Indiegogo and GoFundMe, have recently changed their terms and conditions to proscribe fundraising for certain types of causes and to enable them to shut down problematic fundraisers. El Akkad reported that the Wilson fundraiser has been shut down and that GoFundMe also shut down a fundraiser for Baltimore police officers who allegedly caused the death of Freddie Gray while he was in their custody in April 2015.

¹⁰ See <https://www.kickstarter.com/projects/1088059108/philadelphia-rebuilds-hitchbot> and http://www.nj.com/news/index.ssf/2015/08/hitchbot_returning_home_after_journey_ends_in_phil.html, both accessed 6 August 2015.

¹¹ <http://www.startribune.com/cecil-the-lion-plush-toy-being-sold-by-maker-of-beanie-babies/320612372/>, accessed 5 August 2015.

(c) Pre-purchase-based

In this model, people who contribute funds up-front will in return receive the product once it is complete.

Lending Crowdfunding

This type of crowdfunding involves persons who lend money by way of an unsecured loan to an enterprise on the understanding that their capital will be returned with interest. This is also known as the peer-to-peer lending model. It is facilitated by an online intermediary.

Equity Crowdfunding

In this type, persons invest money in an enterprise in return for an equity position in the business.

Equity crowdfunding is subject to securities laws and so, to a lesser extent, is lending crowdfunding.¹² Exemptions are possible under the accredited investors and offering memorandum exemptions. On 14 May 2015, securities regulators in British Columbia, Saskatchewan, Manitoba, Quebec, New Brunswick, and Nova Scotia announced that they have implemented or intend to implement registration and prospectus exemptions for start-ups and early-stage corporations to raise capital through crowd-funding, subject to certain conditions and limits on the amounts that can be raised. The Ontario regulator announced that it is in the process of developing a broader crowdfunding rule that will apply to start-ups and reporting issuers and will require crowdfunding websites to be registered as dealers with security regulators.¹³

¹² On 19 June 2015, the Ontario Securities Commission issued a notice to companies entering the peer-to-peer lending business to advise them that they may be subject to regulation and may be required to register as investment dealers. See Janet McFarland and Clare O’Hara, “Peer-to-peer lenders eyed for regulation,” *The Globe and Mail*, 20 June 2015, p. B5.

¹³ Janet McFarland, “Crowdfunding approved in six provinces,” *The Globe and Mail*, 15 May 2015, p. B1; and “Crowdfunding: ‘A modern, cost-effective way’ for companies to connect with investors,” *ibid*, p. B5. See also “Certain Canadian securities regulators to adopt start-up crowdfunding exemptions,” nfcacanada.org/crowdfunding, accessed 8 June 2015.

4. Crowdfunding Methods

It is possible for anyone who wants to raise funds through crowdfunding to do so on a website created for the purpose. That can certainly achieve excellent results if the website is well constructed, if it permits interaction with donors through social networks, and if the goal is attractive and something people want to support. Thus, for example, the President Obama election campaign of 2008 raised \$750 million in donations and more than half of the money came from donors who gave less than \$1,000 each.¹⁴

However, most people and organizations now use one of the many crowdfunding platforms that have sprung up to assist them in raising funds. Some permit fundraising for any type of crowdfunding, while others are restricted to specific types, such as charitable giving or philanthropic giving in general. There is also a Canadian industry-wide organization that assists and provides educational support to crowdfunding platforms: the National Crowdfunding Association of Canada.¹⁵ Canadians have also used US platforms, but Canadian platforms are likely to be more attractive because designed with Canadian laws and regulations in mind.

Crowdfunding typically involves three parties. In the case of donation-based funding they are: the platform provider, the promoter, and the donor. Each is subject to legal rules that regulate their positions. But what those rules are is still not entirely clear. It is probable that the relationship between the platform provider and the promoter is contractual. But is also possible that there is an agency relationship between them. There is no contract between the promoter and the donor because no consideration passes between them. However, it is certainly arguable that there is a trust relationship between them in the course of which issues about the proper application of the funds can be raised. There may also be a relationship between the platform provider and the donor, for example, if the former promises that it will obtain and deliver charitable donation receipts to the donors.

¹⁴ Travis Southin, “Harnessing the Fundraising Potential of Charitable Crowdfunding in Canada,” <http://ncfacanada.org/?s=southin>, accessed 29 May 2015.

¹⁵ <http://ncfacanada.org/>. The site maintains a directory of Canadian crowdfunding sites.

The following is a small sample of some Canadian donation-based platforms. CanadaHelps.org, itself a registered charity, is a Canadian platform for making donations to registered Canadian charitable organizations and for raising funds online. It charges a processing fee of 3.0% to 4.0%¹⁶ and provides tax receipts for charitable donations directly to the donors. Other platforms, such as RaiseHope.org have partnered with CanadaHelps, specifically to have the latter organization issue charitable donation receipts.¹⁷ This site also permits philanthropic fundraising and allows perks to be offered. GiveEffect is an organization that makes software for non-profits to manage their fundraising, volunteers, and donors. It also serves as a fundraising portal for registered charities.¹⁸

5. Caveat Emptor! Caveat Dator (or) Donator!

Buyer Beware! Do your due diligence. Make sure that you are getting what the seller is promising. You are all familiar with this admonition. It is, after all, expressed in the imperative mood. But do you know its companion, Donor Beware!?¹⁹ You should. There have been quite a number of fundraising scandals perpetrated by professional fundraisers for charities in the past.²⁰ Because of the anonymity that the web affords and because of the popularity that online giving

¹⁶ <https://www.canadahelps.org/en/why-canadahelps/our-fees/>. The fee varies depending upon whether the donation is in cash or securities and whether the charity uses the CanadaHelps online platform or alternative online fundraising tools. Accessed on 8 June 2015.

¹⁷ <http://raisehope.org/>, accessed 8 June 2015.

¹⁸ <https://www.giveeffect.com/>, accessed 8 June 2015.

¹⁹ The heading of this section indicates that there are two possible forms for the warning to donors in Latin. The first was not widely used except by Vergil and Plautus; the second was a later construction and became the more common one. The nouns *dator* and *donator* both mean giver, or donor. The English forms, *donor* and *donator*, both derive from the second Latin form. *Donor* is, of course, the form commonly used in English, although *donator* is, regrettably, because unnecessary, becoming more common, perhaps by transference from *donateur*, the common word in French for *giver*, whereas the French *donneur* appears to be restricted to the medical field.

²⁰ For a discussion of previous scams, see Albert H. Oosterhoff, "Charitable Fundraising: Research Paper," 15 April 2004, prepared on behalf of a national working group on charitable fundraising for the Uniform Law Conference of Canada, Civil Law Section, at http://www.ulcc.ca/images/stories/2004_English.pdf/2004ulcc0028_Charitable_Fundraising_Paper_En.pdf. Part of the problem is that most provinces do not regulate charitable fundraising well or at all. The Uniform Law Conference of Canada adopted the draft Act recommended by the Working Group in its 2005 Report: http://www.ulcc.ca/images/stories/2005_English_pdf/2005-Charitable-Fundraising_E.pdf. The Act is entitled *Uniform Charitable Fundraising Act (2005)*, <http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/664-charitable-fundraising/1433-charitable-fundraising-act>. No province has yet enacted it.

enjoys, it stands to reason that fraudsters will try to use this vehicle to fleece the unsuspecting and the gullible of their money.²¹ Sadly, the provinces do not exercise adequate oversight over charitable giving and fundraising²² and although the Canada Revenue Agency does impose a number of reporting requirements on charities, these do not necessarily catch the fraudsters.²³

It has been suggested that the CRA should expand its Informant Leads program. It is currently a call-in and online program that encourages citizens to report people they suspect of tax evasion.²⁴ But the suggestion is that it be expanded into an online, crowdsourced platform that can be used by citizens to report charities, fundraising businesses, and individuals whom they suspect of collecting funds fraudulently by means of crowdfunding. The program would thus become a kind of “crowd-sourced policing” program.²⁵

There are other problems with crowdfunding as well. The donation-based crowdfunding process excites the emotions of individuals and, for good or ill, is designed to evoke empathy. This is not wrong, but in the internet context it often leads to herding or lemming-like behaviour on the part of donors when they park their rational selves at the door and abandon sober second thought.

Another problem is that promoters are not always honest and forthright in making their pitch. This is not necessarily because of evil intent: often they have simply not thought the whole project through and have not made provision for all eventualities.

²¹ See also Neil Gross, “Crowdfunding has a place, but it’s a crazy place to invest,” *The Globe and Mail*, 1 June 2015, p. B4, in which the author explores the risks and pitfalls of online equity crowdfunding.

²² See footnote 20, *supra*.

²³ The CRA maintains a “Charities Listing” page at <http://www.cra-arc.gc.ca/chrts-gvng/lstngs/menu-eng.html>, as well as an “Other qualified donees listings” page at <http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/qd-lstngs/menu-eng.html>. Another helpful page, developed by Imagine Canada in partnership with the CRA is “Charity Focus,” at <http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/qd-lstngs/menu-eng.html>. The CRA also maintains online public information about charities. See <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cntct/nfrmtn-eng.html>.

²⁴ <http://www.cra-arc.gc.ca/gncy/nvstgtns/lds/menu-eng.html>.

²⁵ See Southin, footnote 14, *supra*, at pp. 14-15. The author relates the successful use of “crowd-sourced policing” when police invited the public to post their photos of the Vancouver post-hockey loss riot in 2011 on its Facebook page. The response from the community enabled the police to identify many of the rioters.

Some information provided may be misleading, or even wrong. While many people frequently make use of Wikipedia, it is a peer-monitored form of crowdsourcing and the monitoring often does not exist or is cursory at best. So also with crowdfunding, one cannot always rely on the promoter's hype.

One of the big concerns with crowdfunding is whether all, or at least most of the money will in fact be applied to the proposed project. Clearly it will not be if the promoter is a fraudster. The concern is lessened if the promoter uses a reputable platform and the moneys are directed to reputable charities. If the moneys are raised for non-charitable objects, donors need to be more careful. Such moneys are not paid to charities, but to the promoter and it is the promoter who must apply them for the object she defined in her online appeal. Can the donor trust the promoter to do the right thing? Aye, there's the rub! Not that all promoters are dishonest, but in the anonymous world of the internet, it is almost impossible to test the promoter's probity.

And then there is the question of surplus funds. What if more funds are donated than needed. What's to be done with the surplus? Can the promoter keep them? Give them to another charity or some philanthropic or public purpose?²⁶ I shall discuss this in more detail below when I examine the applicability of trust principles to crowdfunding.

6. Modern Phenomena, or Same Old, Same Old?

I already adverted to the question whether crowdfunding and crowdsourcing are modern phenomena. Many people seem to think that these devices are modern inventions. In fact, they are age-old. The only thing that is modern about them is the methods used to outsource labour or raise funds.

²⁶ Jordan Diacur mentions the infamous "Crackstarter" campaign as an example of a case of surplus funds in his paper, "Crowdfunded Donations for the Family of the Deceased," presented at the 13th Annual Estates and Trusts Seminar of The Hamilton Law Association, 12 February 2015, at p. 5. John Cook, the editor of the gossip blog, Gawker, raised funds online to purchase a video that purported to show Rob Ford, then Mayor of Toronto, smoking a crack pipe. However, the person who offered the video for sale could not be found once the campaign was fully funded. Thus Cook voluntarily refunded the donors. The author makes the wry comment: "One can imagine the outcry..." if he had not done so. See further <https://www.indiegogo.com/projects/rob-ford-crackstarter#/story>, accessed 10 June 2015.

I also mentioned the use of “crowdsourcing” in the creation of the Oxford English Dictionary. A much earlier example is the building of the Tower of Babel, although of course that ended rather badly.²⁷ An early example of crowdfunding is the collection held by the young Christian churches in Achaia and Macedonia for the benefit of the poor in the church at Jerusalem.²⁸ And we shall see further examples when we discuss cases involving fundraising of insufficient funds and of an overabundance of funds.

And so crowdfunding is not something new, but is age-old. This should not surprise. *Plus ça change, plus c'est la même chose*. Already some 2,900 years ago, Qoheleth informed us that “there is nothing new under the sun.”²⁹

7. The Intersection of Crowdfunding and the Law of Trusts

7.1 Is There a Trust?

That brings me to a consideration of the question how the law of trusts impacts crowdfunding.

It may well be that platforms providers for and especially promoters of other forms of crowdfunding have trust-like and fiduciary obligations toward donors. They may also have contractual and agency obligations toward them and potentially be liable to them in tort for misrepresentation. However, to keep this paper manageable, I shall restrict my discussion to donation-based crowdfunding, that is, crowdfunding in which the donors receive no reward other than the knowledge that they have given money to a worthwhile cause.

The first question then is whether a trust is created when donors pay money for a particular cause to a platform provider at the instigation of a promoter. We cannot answer this question with an unequivocal yes. It depends in first instance on what the intentions of the donors were. Did they intend to create a trust, or was their relationship to the other party determined by some other

²⁷ See Gen. 11:1-9

²⁸ See Rom. 15:26; 2 Cor. 8 and 9.

²⁹ Ecc. 1:9.

legal concept, such as contract or agency? The law has generally taken the view that when moneys are raised for a specified object, the resulting relationship is one of trust. It makes the promoter, or the person who receives the funds, the trustee,³⁰ with fiduciary obligations toward the donor. But those obligations may vary from one case to the next.

Let us consider the relationship to the platform provider first. It would seem likely that this relationship is governed by the terms specified by the provider. The provider typically stipulates that the moneys collected will, after deduction of the processing fees, be paid either to the charitable purpose specified by the promoter, or to the promoter in the case of an object that is not charitable. In the case of a gift for a charitable purpose the provider also typically promises to collect and distribute charitable donation receipts to the donors. Although these obligations appear to be strictly contractual, they can also have a fiduciary flavour. The money is paid to the provider in first instance and is to be disbursed by it for a specific purpose. We would normally call such a relationship a trust and if that is what it is, it will entitle the donor to call the provider to account if it fails to disburse the funds correctly. However, the promoter will probably have attempted to preclude the inference of a trust by suitable language on its website.

Alternatively, the platform provider may be regarded as the agent of the donor, the promoter, or both. However, it would then be a fiduciary and must act honestly and in good faith. It must also use its powers properly and only for the purposes for which they were given.³¹

The relationship between the donor and the promoter can also be regulated by contract, trust, or agency and render the promoter liable to the donor for failure to apply the funds given for the intended purpose. A trust is the most likely vehicle if the moneys are ultimately paid (typically by the platform provider) to the promoter. If the moneys are never paid to the promoter, the latter cannot be a trustee: there is no trust if no property has been transferred to the intended trustee.³²

³⁰ If the relationship is a commercial one, the court will not so readily infer a trust. See *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. by A.H. Oosterhoff, Robert Chambers, and Mitchell McInnes (Toronto: Thomson Reuters/Carswell, 2014), §4.3.1, pp. 197-98.

³¹ *Ibid.*, §2.2, p. 76.

³² *Re Beardmore Trusts*, [1952] O.W.N. 728, [1952] 1 D.L.R. 41 (H.C.).

For the purposes of this paper, I shall assume that a trust was intended and was created. I shall then focus on what happens when the funds that have been raised cannot be applied for the intended objects in whole or in part. This may be because too much money was raised, not enough was raised, or there is simply no need for the moneys. Unless the terms on which the moneys were raised provide for substitute objects, the law's response to such situations is that the moneys must be returned to those who gave it. And the vehicle used to that end is the resulting trust.

In addition, we must distinguish between two kinds of objects for which moneys may be raised in donation-based crowdfunding. First, registered charities; second, any other kind of object. While some of the legal principles are the same for both types, there are also differences. Thus, I shall consider them separately.

7.2 Moneys Raised for a Charitable Purpose

A charitable purpose must, by definition, fall into one or more of four categories: relief of poverty, advancement of religion, advancement of education, and other purposes beneficial to the community that the law regards as charitable. Persons do not benefit from charitable gifts, at least not directly. Rather, it is the purpose itself that benefits.

There are also other criteria that must be satisfied to ensure that the gift is charitable: it must be of public benefit, its main purpose may not be political, and it must be exclusively charitable. The public benefit criterion means that the trust must not be for the benefit of private individuals.³³ The distinctions have become rather recondite, not to say anfractuous. But for our purpose we need not delve into them deeply. A description of them can be found elsewhere.³⁴

If moneys have been given for charitable purposes and they can be applied for those purposes, clearly there are no problems. Difficulties are apt to arise if the moneys cannot be applied to the

³³ *Re Compton, Power v. Compton*, [1945] Ch. 123, [1945] 1 All E.R. 198 (C.A.).

³⁴ See *Waters' Law of Trusts in Canada*, 4th ed. by Donovan W.M. Waters, Mark Gillen, and Lionel Smith (Toronto: Thomson Reuters/Carswell, 2012, pp. 721ff; *Oosterhoff*, footnote 30, *supra*, §§7.3.3, 7.4.

stated purposes. What should the law do with the moneys in these circumstances? To answer that question we need to draw a distinction between: (a) initial impossibility or impracticability, and (b) supervening impossibility or impracticability.

Impossibility means that the trust cannot be carried out at all because the named institution has never existed or has ceased to exist, or because there is no longer a need for the purpose for which the moneys were collected.³⁵ Impracticability means that there is no practical benefit to the purpose.

If the purpose is impossible or impracticable at the time the trust is created (*i.e.*, there is an initial impossibility or impracticability), there are three possibilities: (a) the terms upon which the funds were raised specify what is to happen to the moneys; (b) the moneys can be applied to similar purposes under a *cy-près* scheme; or (c) the moneys must be returned to the donors by way of a resulting trust. Clearly, possibility (a) is the most attractive and one that legal advisers should always raise with promoters. If option (a) is inapplicable, option (b) may be possible. However, it can be used only if the donors had a general charitable intention. Often their intention was specific: to give money only for the specific purpose defined by the promoter. If their intention was specific, possibility (c) is the only response. However, it is not an attractive option because it requires the trustee to ascertain the names and addresses of the donors in order to return their donations to them. This often proves to be impossible because the donations were made anonymously. Consequently, the moneys are then paid into court where they may languish for many years.³⁶ I shall address the problems about returning funds to donors in the next section

The result is different if there is a supervening impossibility or impracticability and the moneys are devoted exclusively to charity and are vested in the charity. This situation arises when moneys have vested in and applied to a charitable purpose and it is then determined that they can no longer be applied to that purpose. In this situation, the moneys cannot be returned to the donors, because they are vested absolutely in charity. However, they then can be applied *cy-près*

³⁵ See, *e.g.*, *Re Y.W.C.A. Extension Campaign Fund*, [1934] 3 W.W.R. 49 (Sask. Q.B.).

³⁶ See generally *Oosterhoff*, footnote 30, *supra*, §7.7.2.

to similar charitable purposes and the law does not require a general charitable intention because the property is already vested in charity.³⁷

7.3 Moneys Raised for Other than Charitable Objects

Many appeals seek to raise funds for objects that are not charitable. The object may be a purpose, *i.e.*, a non-charitable purpose,³⁸ or it may be to assist or provide relief for a specific person or persons. The latter adventitious kind of assistance or relief is the more common situation. A typical example is the case of a family that has fallen on hard times, perhaps because fire has destroyed their home, one of the parents has suffered a debilitating accident, or a child has been diagnosed with a virulent cancer and needs treatment that is unavailable in Canada and for which the family lacks the resources. None of these situations fall under the charitable rubric, because the moneys are raised for private individuals and not for the public at large or at least a sizable and unrelated segment of the public. Friends of the family may then start a fundraiser to help the family financially.

The motivation is admirable. But what happens when more moneys are raised than needed. Perhaps the child dies before or during the treatment. The moneys are used to defray all expenses up to this point, but there is a substantial surplus. In other circumstance perhaps insufficient moneys are raised. What should the trustee do with these moneys. As we saw in the previous section, the default response then is to return the moneys to the donors via a resulting trust. That can be avoided if the promoter was sufficiently prescient to provide for substitute purposes. But usually that does not happen. A brief review of cases will illustrate these problems.

*Re Trusts of the Abbott Fund*³⁹ confirms that normally the moneys are returned to the donors. Mr. Abbott had made adequate provision for his two deaf-mute daughters in his will, but the trust fund was lost through the defalcations of the trustee. Friends of the family then issued a circular by which they solicited donations from friends and neighbours. They raised a lot of money and the two women were supported from the fund for life. When they died, a surplus remained. The

³⁷ See *ibid.*, §7.7.3.

³⁸ See *ibid.*, ch. 8.

³⁹ [1900] 2 Ch. 326.

question was whether the surplus should be paid to the estates of the two women, or whether it should be returned to the donors. The court held that it could not have been the intention of the donors to create estates for the two women, so the moneys had to be returned to the donors under a resulting trust. That presented no difficulty, since all the donors were known.

That was not the case in *Bowman v. Official Solicitor*.⁴⁰ A number of marine cadets were killed and others were injured when a bus drove into their marching column. The mayors of three towns made a public appeal for funds to be used to defray funeral and medical expenses. The trust was not charitable. There was a surplus, because the expenses were largely covered by the bus company's insurer. An application was brought to determine what should be done with the surplus. The Crown claimed it as *bona vacantia*. Harman J. held that the moneys should be returned to the donors under a resulting trust. It belonged to them, even though they probably never expected to have the moneys returned to them. Thus, he ordered the surplus to be paid into court and an inquiry conducted to ascertain the donors. The moneys languished in court for 35 years. At that point some of the survivors initiated an inquiry into the fund and asked the Treasury Solicitor what happened to it. On the application of the Treasury Solicitor, the court made an order declaring the funds *bona vacantia*. The Treasury Solicitor was then able to distribute the funds *ex gratia* among the 17 survivors, each of whom received slightly more than £400.⁴¹

*VanDenBussche v. VanDenBussche*⁴² is a different kind of case. Craig VanDenBussche (the applicant) was married to Jeannine and they had one child when he was diagnosed with leukemia. The VanDenBussches lived in rural Manitoba, but moved to Winnipeg for the duration of his cancer treatments. The respondents, members of the VanDenBussches' rural community, raised moneys from the community to meet the family's expenses. The promotional material

⁴⁰ [1958] Ch. 300, [1958] 1 All E.R. 37, affirmed [1959] Ch. 62, [1958] 2 All E.R. 749 (C.A.). The case is usually referred to as *Re Gillingham Bus Disaster Fund*.

⁴¹ See Treasury Solicitor, Press Release, 1 September 1993; *The Guardian*, 4 December, 1993. Cf. s. 1 of the *Escheats Act*, R.S.O. 1990, c. E.20, which empowers the Public Guardian and Trustee to take control of unclaimed property and, if the owners cannot be found, to transfer it to the consolidated or general revenue fund. Section 3 empowers the Lieutenant Governor in Council, by *ex gratia* grant, to return the property to a person who has a legal or moral claim to it. See also *Re British Columbia Charitable Gaming Funding Society* (1998), 57 B.C.L.R. (3d) 1 (B.C.S.C.).

⁴² 2009 MBQB 308.

spoke of a trust fund for Craig and the family and stated that a trust account had been opened for the fund. The moneys were deposited to an account in the local credit union and the respondents had signing authority. Part of the moneys were used to pay for the family's expenses. The spouses then separated. After Craig returned home, the respondents informed the applicant that the fund was no longer needed and that they intended to divide it between him and his wife. The respondents made a deposit to his account and he asked them for an accounting. They refused, so he brought this application.

The court held that the respondents were trustees. The donors understood from the promotional material that a trust fund had been created and that the moneys collected for it would be used for the VanDenBussches. Thus the respondents had a legal obligation to deal with the account for the benefit of the family. Further, the three certainties were satisfied. Accordingly, the court declared that the respondents were trustees and ordered an accounting.

These cases teach us several things. First, the default response of a resulting trust causes more problems than it solves in many cases. It can certainly be used if all or some of the donors give their money by name, but it does not work for those who give anonymously. Why should their gifts languish in court and be appropriated by the government? Legislation would solve the problem.

7.4 Legislative Responses to the Problem

In Canada there have been one legislative response and two proposed legislative responses to the problems that arise when moneys raised for charitable or non-charitable objects cannot be used for the specified objects.

The first response is s. 52 of the Nova Scotia *Trustee Act*.⁴³ It seems to have been enacted in response to and to cure the problem of *Bowman v. Official Solicitor*.⁴⁴ It authorizes a trustee to apply to the court for the approval of a scheme for the distribution of moneys raised by public

⁴³ R.S.N.S. 1989, c. 479. The section was first enacted by S.N.S. 1968, c. 61, s. 1.

⁴⁴ Footnote 40, *supra*.

appeal. The scheme must benefit persons in respect of whom the appeal was held. It is significant, however, that the section applies promiscuously to charitable and non-charitable objects. The section thus valorizes the probable intention of the donors.

The second response is contained in a report of the Uniform Law Conference of Canada, which adopted the *Uniform Informal Public Appeals Act* in 2011.⁴⁵ This Act addresses only the question of what to do with surplus funds that have been raised by an informal public appeal for a purpose other than a charitable purpose. It confers power on the court to direct the making of a scheme to distribute surplus funds raised for objects that are not charitable. The Act provides a mechanism for the disposition of such surpluses, including their return to identifiable donors. Finally, a Schedule to the Act includes a model trust document that can serve as a default governance structure for the trust created by the appeal. The purpose of the model trust is to enable persons with no legal training to declare the trust and ensure that issues, such as a possible surplus, are addressed. It also ensures that potential donors are informed of the terms of the appeal and of the trust. The Schedule contains clear instructions on how to complete the trust and is designed to be user friendly.

The third response is also by the Uniform Law Conference of Canada and is contained in its report on the *Uniform Trustee Act*. The ULCC promulgated this Act⁴⁶ at its 2012 meeting, when it adopted the Final Report of the Working Group on the Act.⁴⁷ Section 70 of the Act varies the court's *cy-près* power and gives the court broad power to vary charitable gifts and trusts if the court is of opinion that: (a) impracticability, impossibility, or other difficulty hinders or prevents giving effect to the terms of the gift or trust; or (b) if a variation of the trust or gift would facilitate the carrying out of the donor's intention. Subsection (4) provides that the court may exercise its power whether the donor's intention was general or specific, unless the gift provides expressly for a gift over or a reversion in the event of a lapse or other failure of a charitable purpose. Such a gift over or reversion is allowed to take effect if otherwise valid. The effect of s.

⁴⁵ See http://www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0011.pdf. For the civil law version, see http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0016.pdf.

⁴⁶ See http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf.

⁴⁷ See http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0028.pdf. For a discussion of the Act see Albert H. Oosterhoff, "Trust Law Reform: The Uniform Trustee Act" (2014), 34 E.T.P.J. 329.

70 and, particularly of subs. (4) is that the court can vary a charitable gift or trust by applying the subject matter of the gift *cy-près* in all cases.

Section 71 of the *Uniform Trustee Act* confers power on the court to dispose of surplus funds raised for a non-charitable object by an informal public appeal when the appeal does not make express provision for the disposition of the surplus and the funds cannot be returned to the donors because they cannot be identified. Section 71 is unnecessary in jurisdictions that have enacted the *Uniform Public Appeals Act*.⁴⁸

The problem was also addressed in England in the *Charities Act 2011*.⁴⁹ Section 62 confers broad powers on the court to order a scheme to apply property devoted to a charitable purpose *cy-près*. Section 63 permits the disposition of property given for specific charitable purposes as if given for charitable purposes generally if the donor cannot be identified or found. In addition, s. 64 states that, for the purpose of s. 63, property is conclusively presumed to belong to donors who cannot be identified if it derives from cash collections or the proceeds of a lottery or other money-raising activity.⁵⁰

8. Some Suggestions for Advising Potential Crowdfunders.

It will be clear from the foregoing that significant legal issues arise from crowdfunding. Many of them can be avoided if crowdfunders seek legal advice before taking action. In most situations that doesn't happen and you will then be asked to pick up the pieces. But if you are approached by a client before the damage is done, the following are some of the questions you should ask of and the advice you should give to the client. This list is by no means intended to be complete, but is intended to provide a starting point. It also addresses the issues that arose in the cases discussed above.⁵¹

⁴⁸ Footnote 45, *supra*.

⁴⁹ 2011, c. 25 (U.K.).

⁵⁰ Additional supplementary provisions are contained in ss. 65ff.

⁵¹ In §7.3, *supra*.

1. Do your due diligence. Investigate the platform provider to ensure that it is reputable and has a history of ethical dealings with the public.
2. What is the object of the proposed fundraiser? Is it charitable, is the object a non-charitable purpose, or is it to benefit a specific person or persons?
3. If the object is charitable, is it a registered Canadian charity? Does the charity appear to be legitimate?
4. If the object is charitable, will the platform provider collect the money, pay the net amount after fees to the charity, and collect and distribute charitable donation receipts to the donors?
5. If the object is not charitable, is it a legitimate object? Will the platform provider collect all funds and pay the net amount after fees to you? If not to you, how will the moneys be disbursed? If the moneys are paid to you, have you thought through the implications of receiving the moneys and disbursing them? Are you aware of your obligations in that case?
6. Make full disclosure on the platform provider's website of your plans. This should include statements that:
 - (a) The client will hold funds paid to her in trust, or alternatively, if the object is a charity, that the funds will be paid by the service provider to the charity and that it will collect and distribute the charitable donation receipts to the donors.
 - (b) The client has opened a trust account for this purpose, if that is the case.
 - (c) If the funds collected are insufficient or are no longer needed for the purpose, they will be paid to: [insert name of charity or other object], unless a donor has declared in writing that he wants to have his donation returned to him.
 - (d) If more funds are collected than needed, the surplus will be paid to: [insert name of charity or other object], unless a donor has declared in writing that she wants to have her donation returned to her.
7. Make a declaration of trust. For this purpose the model trust that is contained in the Schedule to the *Uniform Public Appeals Act*, referred to above,⁵² can serve as a useful template.

⁵² See text at footnote 45, *supra*.

9. Conclusion

It is clear that donation-based fundraising raises many practical issues and legal questions. Among other things, it gives opportunities to fraudsters to rob the public. But it also offers great opportunities for raising moneys for worthwhile objects, opportunities that were not available before crowdfunding in its modern guise became possible. The legal questions will be resolved over time as cases reach the courts and the practical issues will be determined as the industry develops best practices. One hopes that those best practices will also attempt to weed out fraudsters.

