Legal Developments

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Cy-près

Cy-près applications would appear to represent the only charity law cases the provincial courts deal with these days, a product presumably of the fact that "definition" cases all revolve around Revenue Canada registration decisions and are thus dealt with by the Federal Court of Appeal. My discussions of *cy-près* cases in a number of previous issues of *The Philanthropist* [see, for example, "Legal Developments" (1996), 13 *Philanthrop.* No. 4, p. 64] have suggested that the courts do not have a good handle on the doctrine in this area, and that their problems could in part be solved by legislative abolition of the general charitable intent requirement. Two more recent *cy-près* cases, however, suggest that the law is not so inherently confusing that courts cannot reach decisions that are both sensible and doctrinally correct.

Royal Trust Corporation of Canada v. *Hospital for Sick Children*[1] involved a will which took effect in 1942 and which gave the residue of an estate, following the deaths of named income beneficiaries, to "the Crippled Children's Hospital in Toronto, Ontario and the Crippled Children's Hospital in Vancouver, B.C., in equal shares absolutely". There is not, and never has been, a "Crippled Children's Hospital" in Toronto (presumably there is in Vancouver since this part of the gift was not at issue). As this was a case of initial failure, before the gift took effect, *cy-près* could be granted only if the testator had shown a general charitable intention.

Boyd J. found such an intention. Although he did not say so, he was applying two principles enunciated in past *cy-près* cases. First, it is easier to find a general charitable intention when the named institution never existed, as opposed to when it once existed but then ceased to do so, because that suggests a general wish to benefit the purpose rather than a specific wish to advance the purpose through a particular institution.[2] Second, Boyd J. relied on the fact that in addition to the gifts of the residue, a series of immediate bequests had been made to a variety of charities when the will took effect. Although he did not use the term, this is an example of "charity by association". That is, one can find general charitable intention in the fact that a donor benefits a series of (preferably related) charitable purposes to the extent that most of the estate is so devoted.[3] In the event, the gift, rightly, did not fail, and was shared by four Toronto institutions that cared for disabled children.

The other recent case was very straightforward, at least as far as the *cy-près* issue was concerned. In *Boy Scouts of Canada, Provincial Council of Newfoundland* v. *Doyle*[4] a 30-acre site had been held in trust for the use of a particular scout troop since the early 1930s. That scout troop was disbanded in the early 1980s. Thereafter the trustees allowed a variety of groups to use the land, and more recently tried to find another body to take over the trusteeship. They did not want the provincial organization to have the land because of "long-standing differences" between the trustees and the provincial organization, but the provincial body claimed the land on behalf of the province's scouting movement.

The judgment of the Court of Appeal is a long one, mostly taken up with interpretation of the various title deeds, for the trial judge had found that these required the property to revert to the government if the particular scout troop ceased to exist. An exception to the use of *cy-près* for charitable trusts, of course, is that it is not applicable where the trust specifies some alternative disposition on failure of the charitable purpose. The majority of the Court of Appeal disagreed with the trial judge's interpretation,[5] and having done so were left with land dedicated to, and used for many years for, a charitable purpose which was now impossible to carry out. In such circumstances it was axiomatic that the property should go *cy-près*, and go to the provincial scouting movement. Marshall J.A. did spend some time on the issue of general charitable intent, which was not necessary because this was a case of subsequent failure, but otherwise the judgment is entirely sound.

Still on the subject of *cy-près*, *Re Buchanan,* a British Columbia case discussed last year in this journal was recently unsuccessfully appealed and has become the subject of a front-page *Globe and Mail* story.[6] The matter is now at the stage of designing a suitable *cy-près* scheme. Not surprisingly the newspaper story is not concerned with the law, but largely with the quite extraneous question of how the relatives who might otherwise have received the money applied *cy-près* feel about it. In one respect it is interesting, however, for one of the relatives' complaints is that money initially designated for the use of a Protestant association for helping indigent orphaned children could now go to Catholics, because the association in question has removed helping Protestants only from its objectives and is dedicated solely to assisting children in need.[7] This is an issue therefore about the precise nature and form of *cy-près* scheme-making. And while that process should seek to make a scheme as close as possible to the original charitable purpose, it is, in my view, inapplicable to insist on retention of this aspect of the original donor's choice. There are, to my knowledge, no cases which support this proposition, although the Leonard Foundation case may do so inferentially.[8] However, given that it is still perfectly legal to establish or benefit a religiously-based

charity, the argument could be made that the religious distinction should, or at least could, be retained at the *cy-près* stage. If the scheme for helping children in need in the *Buchanan* case is the subject of court action (probably unlikely given that the relatives have no chance of getting the money themselves) the courts will have an opportunity to say something on this question.

Enforcing Pledges

Turning to other matters, the ARNOVA (American Non-Profit and Voluntary Action) internet discussion group recently had an item of interest to fundraisers. Earlier this year the Museum of Contemporary Art in Chicago announced that it was suing its former board chair for refusing to make good on a pledge of several million dollars. This is possible under American laws; indeed such promises are "almost universally enforced".[9] Generally this is done on the grounds that consideration for the promise is to be found in detrimental reliance (typically the charity expends money in the expectation of receiving the gift). This reliance has been held sufficient to make the promise enforceable even if the charity has merely carried out its general undertakings, not embarked on some specific new project. American courts have also found that something like naming a building after the donor is a form of consideration, for it provides a benefit to the donor.[10]

While there are some early Canadian cases which followed these American principles,[11] the leading case on this issue in Canada rejected the idea. In *Dalhousie College* v. *Boutilier*[12] the Supreme Court of Canada held that a promise to give to charity was not enforceable in the absence of some form of consideration. That is, the issue was to be governed by the ordinary rules of contract and there was no consideration in mutual promises or reliance. Of course, if one were able to argue in a particular case that some benefit did indeed accrue to the donor such that there was consideration for the promise, there would be significant tax consequences for that donor.

The Canadian position is probably preferable, for at least three reasons beyond the doctrinal. First, some people would likely be discouraged from making pledges if they thought that a lawsuit would follow some complete or partial failure to make good. Second, if the failure was due, not to a simple change of mind, but to some financial reversal (as occurred in the *Dalhousie College* case) or insolvency it would pit the charity, as a creditor, against arguably more deserving claimants, the promisor's family.[13] Third, in such a circumstance the publicity would surely do the charity a good deal of harm. Note that while in two provinces, Nova Scotia and Prince Edward Island, written subscriptions to "undertakings of public utility" (be they of money or contributions in kind) are enforceable by virtue of statutory provisions, they are not generally enforceable against estates.[14]

FOOTNOTES

1. (1997), 17 E.T.R. (2d) 57 (B.C.S.C.).
2. See the discussion in the leading English case of *Re Spence*, [1979] Ch. 483.
3. See *In Re Satterthwaite's Will Trusts*, [1966] 1 W.L.R. 277 (Ch.), and *In Re Knox*, [1937] Ch. 109.
4. (140) D.L.R. (4^{th}) 22 (Nfld. C.A.).
5. I make no comment on this aspect of the judgment. Cameron J.A. dissented on one aspect of the interpretation of the various deeds.
6. Issue of 31 December 31, 1997. My previous comment on the case is at (1996), 13 *Philanthrop.* No. 4, pp. 65–66. For the appeal see *McMinn* v. *Watson*, unreported, 29 December 1997, [1997] B.C.J. No. 2867.
7. This summary passes over some of the complexity of the case. As discussed in the previous issue of *The Philanthropist*, the bequest in question was one to "The Loyal Protestant Home for Children" in New Westminster. No such institution ever existed, and the trial judge decided that the gift should be construed as one for the purposes of the Loyal Protestant Association, which did run a home for indigent orphaned children in New Westminster. However, the home was closed in 1983 and the Association devoted its resources instead to broader charitable purposes, without distinction as to the religion of the children or others that it assisted.
8. *Re Canada Trust Company and Ontario Human Rights Commission* (1990), 69 D.L.R. (4^{th}) 321 (Ont. C.A.), discussed in J. Phillips, "Anti-discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts" (1990), 9 *Philanthrop.* No. 3, pp. 3–42.
9. *Corbin on Contracts* (St. Paul: 1950), p. 643.
10. *Ibid.*, pp. 643-645. For other theories underlying enforceability see pp. 646–651.
11. S.M. Waddams, *The Law of Contracts* (Toronto: 1977), p. 81.
12. [1934] S.C.R. 642.
13. See for this point Waddams, footnote 11 *supra.*, pp. 81-82. Further, other competing creditors may have furnished real value to the promisor.
14. *Public Subscriptions Act,* R.S.N.S. 1989, C. 378; *Statute of Frauds,* R.S.P.E.I. 1974, c. S-6, s. 4. The provisions are identical.