Legal Developments

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This issue deals with two important recent decisions. In England, the Charity Commission has released its long-awaited decision on whether the Church of Scientology constitutes a religion. In Canada, the Ontario Court of Appeal has given its decision on whether assets of the Christian Brothers in Canada are available to satisfy judgments against the order for abuses committed over many years.

The *Christian Brothers* Case

In April the Ontario Court of Appeal released its decision on the appeal of the ruling by Blair J. that all assets of the Christian Brothers of Ireland in Canada (CBIC) were potentially available to satisfy tort claims based on the abuse by some members of the order of many young people over many years at the Mount Cashel Orphanage in Newfoundland.[1] Essentially the issue was whether two schools owned and operated by the CBIC in British Columbia could be attached to pay the claims. Blair J. had held that as a matter of general law CBIC assets other than their Newfoundland property were exigible to pay such claims but that any assets held on what he called "special purpose trusts" were not. That is, any property given to the CBIC with a particular charitable purpose attached was exempted from the property available to satisfy tort claims.

The Ontario Court of Appeal upheld the first part of Blair J.'s conclusion but not the second.[2] It agreed that there was no doctrine of immunity for charities generally and in addition held that all property was exigible, irrespective of whether it was arguably held for a particular purpose rather than the general purposes of the organization. On the issue of a general immunity doctrine the Court dealt exhaustively with charitable immunity, detailing its short-lived nineteenth-century English history, its rejection by the House of Lords in 1866, and its differential treatment in North America (adoption in the United States, rejection in Canada) (paras. 29–38). It also noted, at paras. 39–40, that the recent Supreme Court of Canada decisions on vicarious liability of employers for employee torts had unequivocally rejected any notion of immunity for charities.[3]

The Court then turned to the issue of property held on trusts for particular purposes. Blair J. had held that if the two British Columbia schools, although owned by the CBIC, were held in trust for the purpose of running such schools in that province, they were not available for satisfying general claims against the CBIC. While the property of a charitable corporation generally was simply the property of the corporation and not trust property, a corporation might hold

some property as trustee if the indicia of a trust (the certainties of intention, subject matter, and beneficiary or charitable purpose), were present. The Court of Appeal's response to this, to put it in the simplest terms, was that it introduced immunity by the back door just after the concept had been seen off at the front. That was because the immunity doctrine had been based on the idea that a charity's funds were held on trust only for the purpose, not for satisfying claims against it, which of necessity had to be claims against trustees or directors or employees. Thus the Court of Appeal began its analysis with this conclusion (para. 28):

> Once he [Blair J.] had determined that there is no doctrine of charitable immunity in Canada, it became redundant to then analyse whether the assets are held on trust in order to determine if they are exigible to pay the claims of tort victims.... Because a charity is not immune from liability..., the assets of a charity, be they beneficially owned or be they "trust" funds, are available to respond to these liabilities. It is neither necessary, nor logically probative, to examine each asset of the charity on an individual basis to determine its availability to be answerable for the debts of the charity..., based on whether that asset is held in trust for one or more charitable purposes. *To do so is to reintroduce into our law the rejected doctrine of charitable immunity by resurrecting the equally rejected trust fund theory.*

In the remainder of its judgment the Court elaborated this last point by noting, and refuting, three bases for what it called the "trust fund" theory: that the intention of the donor, who has given money for particular purposes, must be respected; that charities were originally only trusts and that in a trust the trustee does not own the property beneficially and it therefore cannot be made available to satisfy claims against the trustee; and that as trustees themselves cannot be reimbursed from trust property for their wrongs, neither can victims. The first was rejected, largely on policy grounds – the choice was between respecting donors' intentions and compensating victims, and the latter won. The second was relevant in the case of creditors of the trustee in a personal capacity but not when the trustee acted for the trust. The third had been effectively rejected by the Supreme Court in *Bazley*, "which defined the rule for determining when an employer, including a charity, will be held liable for the unauthorized, intentional wrongs perpetrated by an employee" (para. 57).

These two holdings – that there is no doctrine of charitable immunity and that the notion that particular funds are held on special trusts and immune from satisfying tort claims is also wrong as a "back door" type of charitable immunity – are the principal conclusions to draw from the judgment. The Court did go on to discuss other issues, some not very relevant once the general conclusions had been reached. It is nonetheless useful to note what it said about the status of "special purpose" funds, i.e., of funds given to a charity in which the donor expresses a clear intent that they be used for particular purposes.[4] The key point is that nothing said about using such assets to meet tort liabilities detracts from the fact that, while the charity is still in operation and not subject

to such liabilities, they remain impressed with the trust for a particular purpose. That is, ""[t]o the extent that charitable corporations do accept donations in trust for one of their charitable purposes, ... the trust obliges the charity to use the donation only for the specific objects of the trust while the charity is operating" (para. 92). The only exception to this is a case of impossibility or impracticability, in which case the charity would have to apply for a cy-près order. Thus the usual rules about purpose trusts apply, for both charitable trusts and nonprofit corporations pursuing charitable purposes, with the exception that purpose trust arguments cannot be made to shield property from liability claims.

The Charity Commissioners and the Church of Scientology

Late last year the English Charity Commissioners handed down their decision on the application of the Church of Scientology for registration as a charity. It is sure to be scrutinised carefully by the Charities Division of the Canada Customs and Revenue Agency (CCRA), which is still considering Scientology's application for registration in Canada. The Commissioners rejected the application, holding that Scientology was not a religion according to the English law of religious charity, that it was not charitable as "promoting the moral or spiritual welfare of the community" (one of the subcategories under the "fourth head" of charity), and that, in any event, it did not provide sufficient public benefit to qualify under either head.

The decision is long and detailed, too much so for this brief report to do it full justice but it is worth discussing the principal conclusions in more depth. While the result is perhaps not surprising, aspects of what the Commissioners said on the way to reaching it are of considerable interest to Canadians, especially as regards three issues: the meaning of religion in the law of charity, the meaning of "public benefit" for religious charities, and the application of a "fundamental rights" document to the common law meaning of charity. I will comment in more detail on each of these issues and, very briefly, on the alternative fourth head claim to charitability.

i) *The Meaning of Religion in the Law of Charity*

The Commissioners' decision contains a lengthy analysis of the meaning of religion in charity law. A series of cases has long been taken to stand for the dual propositions that there must be faith in a god and worship of that god,[5] and the Commissioners dealt with these two elements separately. On the need for theism, they seem to have travelled a long way to get back, more or less, to the place they started. First, they reviewed prior cases and concluded that "the English legal authorities are neither clear nor unambiguous as to the definition of religion in English charity law" (p. 19). To reach this conclusion the Commissioners distinguished the prior cases in various ways – some were said not to be about charity law, others to be about what advances religion as opposed to what religion is. As for *Re South Place Ethical Society*[6] which

contains the most explicit statement of the need for a god and worship of that god, the Commissioners said that this part of the judgment "may not have been necessary to the decision of the case" (p. 17). In the result, they concluded that the cases were of no more than "persuasive value" (p. 19).

However, having reached this conclusion for not very convincing reasons and having, as a result, held that they were now able to take a "positive and constructive approach" to a definition, the Commissioners effectively reasserted the need for a deity of some kind. They briefly reviewed cases from other jurisdictions (Australia, India and the United States), the expert opinions of religious scholars, and dictionary definitions. Yet despite the fact that some of these sources argued for a broader definition of religion, the Commissioners came up with only a very slight modification, if any, of what has until now been taken to be the law. "Belief in a supreme being", they concluded, was "a necessary characteristic of religion for the purposes of English charity law" (p. 21). Exactly what is meant by "supreme being" was deliberately left unclear. It did not need to be "analogous to the deity or supreme being of a particular religion" but, on the other hand and more importantly, the Commissioners rejected the idea of doing away with a supreme being and substituting belief in a "supernatural principle" (p. 21).

Thus at the end of the day the decision does not change charity law's definition of religion from what people have long assumed it to be. Belief in a "supreme being" is not much different, if any different, from "belief in a god", and it has long been the case that the "god" need not be any particular god. Moreover, the decision contains no reasons why belief in a supreme being is required, beyond fidelity to the apparently nonbinding prior authorities. The Commissioners' short one-paragraph summary of "expert opinion", for example (p. 20), deals only with the opinions of experts on the question of whether Scientology entailed belief in a supreme being, and not at all with whether, and why, "religion" generally required there to be such belief.

The assertion that the Commissioners have not altered the definition of religion is bolstered by the fact that they have also maintained the requirement that religion requires worship of that supreme being. I say this with some hesitation, for the decision assumes the need for worship rather than discussing it and simply gets on with defining "worship". "The identifying feature of worship in English charity law", it says, is "reverence for or veneration of a supreme being" (p. 24). This conclusion is drawn from a survey of the prior cases which therefore, again, seem to carry more weight than the initial exercise of distinguishing them would suggest. Perhaps not surprisingly, on the substantive issue before them, the Commissioners concluded that Scientology did not meet the test they had devised. They were prepared to accept that it did believe in a supreme being but it failed because no worship was carried out. The Scientology practices of "auditing" and "training" were respectively held to be "akin to counselling" and "like an educational activity" (p. 25), and thus not worship.[7]

The English decision on Scientology will doubtless be highly influential with the CCRA's Charities Division in its consideration of Scientology's application for charitable registration in this country. The Division follows English law in many respects and its current definition of religion includes the need for a god and worship of that god, as well as incorporating the English test for public benefit (discussed in the next section).[8] It seems likely that the Division will come to the same conclusion as the Charity Commissioners on this one.

ii) *Public Benefit*

It is well-known that, in Anglo-Canadian law, for a purpose to be charitable it must fall within one of the four categories of charitable purposes *and* provide a benefit to the public. Although the conclusion that Scientology was not a religion for the purposes of the law of charity made it unnecessary to consider public benefit, the Commissioners did so in any event. Under the religion category, they asserted, public benefit was generally presumed; here they relied on the oft-quoted dictum that "it is good for man to have and to practice a religion". However, they also cited the well-known, and somewhat notorious, case of *Gilmour* v. *Coats*[9] for two propositions: "that benefit to the public must actually be present as a matter of fact" and that "the presumption [in favour of public benefit in religious charities] may be rebutted in individual cases" (p. 40).

The Commissioners then divided their analysis into two – whether this was a case where the presumption of public benefit was rebutted and, if it was, whether the facts allowed Scientology to show that it did indeed confer a benefit to the public? On the first issue they listed a nonexhaustive set of factors that could lead to the presumption being rebutted: "whether there was evidence that the organization's purposes were adverse to religion, were subversive of morality, failed to confer recognisable charitable benefits, focused too narrowly upon its adherents or extended to too limited a beneficial class" (p. 40). In the case of Scientology a number of facts were used to conclude that the presumption was rebutted: it was a new religion that had previously called itself the science of mental health and then a philosophy; it was different in form to other religions, especially in its "auditing" and "training" practices; it normally required specific prepayment for engaging in these; many people had written to the Commission expressing concern about Scientology; and there had been much adverse judicial comment, in the UK and abroad, on Scientology. Collectively, these facts led to the conclusion that Scientology would have to show that it conferred a benefit.

In the Commissioners' view it was not able to do so. The "essential distinguishing feature" that enabled a religion to provide a benefit to the public was "whether or not the practice of the religion is essentially public". That is, "where the practice of the religion is essentially private or is limited to a private class of individuals not extending to the public generally, the element of public benefit will not be established" (p. 44). Scientology was essentially private. Auditing and training were carried on in private and, while people could sign

up for them, members of the public could not attend the sessions. Moreover, they were activities that were in their nature private, i.e., even if members of the public could attend sessions, they would be attending something aimed at the individuals being audited or trained. The Commissioners' view of this as essentially private was bolstered by the fact that people paid for the sessions and by the fact that adherents consistently described the benefits they received from them in private, individual, rather that in public, societal, terms. Scientology thus failed on the same basis as the Carmelite Priory at issue in *Gilmour* v. *Coats* – religious "observances" carried out in private for the benefit of those attending do not provide sufficient public benefit.

iii) *The European Convention of Human Rights*

Although it appears to have made no concrete contribution to the decision, as a preliminary to the decision the Commissioners held that it would take into account the relevant articles of the European Convention on Human Rights. They stated that, although the Convention was not part of English law, it would almost certainly become so by October 2000, and if an appeal were to be launched against their decision that appeal would be heard after the Convention came into force. The Commissioners noted that once the Convention was in force they could not act "in a way incompatible with ... [Convention] rights". In short, as a public body, they were bound by the Convention, just as the CCRA is bound by our own *Charter of Rights*.

The Scientology decision recognized two articles of the Convention as potentially applicable – the "right to freedom of thought, conscience and religion", including the right to "manifest religion or belief, in worship, teaching, practice and observance" (Article 9), and the right not to be discriminated against on the grounds of, *inter alia*, religion (Article 14). The Commissioners thought that Article 9 would probably not be engaged by charitable registration decisions, for the conferring of state privileges on one religion does not prevent others from believing or manifesting their beliefs. This seems right in the context of the Convention; indeed, if it is not, then the establishment of churches in the United Kingdom will contravene the Convention! However, the Commissioners also thought it possible that courts would hold that the "fiscal benefits which flow from charity registration" would be "relevant to an organization's ability to teach and pass on its beliefs" (p. 10). In addition, they saw the possibility that Article 14 would be engaged by the conferring of registration and its attendant benefits on one religion but not another. Given the possibility of either, or both, articles being relevant, the Commissioners concluded that "the relevant English case law concerning charitable status should, where ambiguous, ... be interpreted in a way compatible with" the Convention.

The fact that a supra-national fundamental rights document might affect the meaning of charity in the United Kingdom in the future is interesting, and can only add to arguments already being advanced in this country that the pre-

viously private law of charities should take account of public law values as expressed in the *Charter of Rights*.[10] But as far as English law is concerned, the Convention in this case made no apparent difference. Having established its possible relevance, the Commissioners made no further substantial analysis of the Convention and it played no obvious role in the conclusion, laid out above, that religion in the law of charity required belief in a supreme being. This is rather odd, especially given the Commissioners' view that the Convention would be taken into account if the case law was ambiguous and their conclusion that it was indeed ambiguous. Yet, as noted above, the Commissioners then reaffirmed the need for a supreme being. In doing so, they twice stated merely that they were interpreting the cases consistently with Convention principles but never said what that meant or how, if at all, those principles informed the definition of religion.

iv) *The Fourth Head of Charity*

Scientology's alternative claim for charitable status was that it is an organization established for promoting the moral and spiritual welfare of the community – a "fourth head" purpose. The case law establishing this category is scanty and the Commissioners reviewed all of it, concluding that there were significant differences between the prior cases and Scientology. Some of those cases dealt with temperance organizations and the Commissioners found it easy to conclude that discouraging particular behaviour was different from inculcating belief in Scientology. Other cases concerned ways of thinking but were also different. *Re Price*,[11] for example, concerned the work of one Rudolf Steiner on a theory of knowledge and "a method of mental and moral discipline". Conversely, Scientology had a formal and fixed system of beliefs and practices – a system of thought, not a way of thinking. Similarly, *Re South Place Ethical Society*,[12] was about encouraging rational thought, not a particular belief system. In short, Scientology was hoist by its own petard; once it had argued that it was a particular religion, and having shown doctrines and observances relative to that, it could not effectively persuade the Commissioners that it was an organization established to promote a general way of thinking.

FOOTNOTES

1. *Re Christian Brothers of Ireland in Canada*, [2000] O.J. No. 1117 (C.A.). The trial decision of Blair J. is *Re Christian Brothers of Ireland in Canada* (1998), 21 E.T.R. (2d) 93 (Ont. G.D.).
2. The principal judgment of the Court was written by Feldman J.A., Abella J.A. concurring. Doherty J.A. wrote a short concurring judgment, concurring in the result but leaving open the question of whether or not all of a charity's assets would be exigible other than in the context of a winding up of the charity.
3. *Bazley* v. *Curry*, [1999] 2 S.C.R. 534. This and a similar case are discussed in "Legal Developments" (2000), 15 *Philanthrop.* No. 2, pp. 33–38.
4. For an excellent general review of the law here see T. Carter, "Donor Restricted Charitable Gifts: A Practical Overview" (1999), 18 *Estates, Trusts and Pensions Journal* 139.

5. For reviews of the meaning of religion in charity law see Ontario Law Reform Commission, *Report on the Law of Charities* (2 vols., Toronto, 1996), vol 1, pp. 191–202, and J. Phillips, "Religion, Charity and the Charter of Rights", in J. Phillips, B. Chapman, and D. Stevens, eds., *Between State and Market: Essays on Charities law and Policy in Canada* # (McGill-Queens University Press, forthcoming, 2000).
6. [1980] 1 W.L.R. 1565 (Ch.D.).
7. I cannot discuss Scientology beliefs and practices in any detail here. Suffice it to say that Scientology is built around the idea that a person's existence can be divided into eight "dynamics", with each dynamic representing an area where a person has an urge to survive. The dynamics are ordered progressively, from the first – the urge to survive as an individual – to the eighth – the urge to exist as infinity. "Auditing", conducted by an "auditor" in individual meetings, is the process by which a person increases awareness and capability and moves through the dynamics. "Training" is general instruction in Scientology beliefs and necessary for a person to become an "auditor".
8. See principally the CCRA's definition of religion in the publication which accompanies Form T2050, *Application for Income Tax Registration for...Canadian Charities*.
9. [1949] A.C. 426 (H.L.).
10. See Phillips, "Religion", and M. Moran, "Rethinking Public Benefit: The Definition of Charity in the Era of the Charter", both in *Between State and Market*, *supra*, footnote 5.
11. [1943] Ch. 422.
12. *Supra*, footnote 6.