

Case Comment: *Christian Brothers Decision* Exposes Charitable Trust Assets to Tort Creditors

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Introduction

The recent Ontario Court of Appeal decisions in *Christian Brothers of Ireland in Canada (Re)* released on April 10, [2000] O.J. No. 1117, Number. C. 29290 (also available on the Internet at www.ontariocourts.on.ca/decisions/2000/april/christian.htm), is likely to create serious problems for charities across Canada concerning the protection of their charitable trust property from tort creditors. This decision may also have a serious impact upon the ability of charities to raise monies from donors, particularly monies for endowment funds in situations where donors expect that their gifts will be protected from creditors of the charity. Leave to appeal from the decision to the Supreme Court of Canada is currently being sought and is being supported by a number of concerned charities. [Editor's Note: On November 16, 2000 the Supreme Court of Canada (the Chief Justice, Iacobucci and Major J.J.) dismissed the application for leave to appeal.]

Case Summary

The Ontario Court of Appeal decision arose out of an appeal from a lower court judgment (see *Christian Brothers of Ireland in Canada (Re)* (1998), 37 O.R. (3^d) 367), concerning the exigibility of charitable property. The lower court decision involved an application to determine whether property held in trust by the Christian Brothers of Ireland in Canada (CBIC) was available to compensate tort creditors of CBIC, which was being wound-up under the *Winding-Up and Restructuring Act* (R.S.C. 1985 c. W. 11). The matter had arisen because the CBIC had general corporate assets totaling \$4,000,000 but judgments against it by tort victims from the Mount Cashel Orphanage in Newfoundland totaling in excess of \$36,000,000. A primary issue dealt with by the lower court was whether two schools located in British Columbia that the CBIC purportedly owned in trust were exigible to satisfy claims by the tort victims.

The lower court was only required to deal with the general legal principles involving the exigibility of charitable property. The specific issue of whether the two schools in British Columbia were owned in trust by CBIC had been referred to the jurisdiction of the B.C. courts. In dealing with the issue of exigibility of charitable property, the lower court made a distinction between

general corporate property of the CBIC and property that was held pursuant to a special purpose charitable trust where it was clear that a trust had been established. The lower court held that the general corporate property of a charity is not immune from exigibility by tort creditors, however property held as a special purpose charitable trust by a charity would not be available to compensate tort creditors unless the claims arose from a wrong perpetrated within the framework of the particular special purpose charitable trust in question.

In the Ontario Court of Appeal decision, Feldman J. agreed with the lower court that there was no general doctrine of charitable immunity applicable in Canada. However, she stated that once the lower court judge had determined that there was no doctrine of charitable immunity in Canada, it then became redundant for the judge to analyze whether special purpose charitable trusts of a charity were exigible to pay the claims of tort creditors. As a result, the Court held that all assets of a charity, whether they be beneficially owned or held pursuant to special purpose charitable trusts, are available to satisfy claims by tort victims upon a winding-up of a charity.

Notwithstanding the decision by the Court of Appeal that special purpose charitable trusts were not a factor in determining the question of exigibility, Feldman J. went to considerable lengths to confirm that charities can still hold specific property pursuant to a special purpose charitable trust and that a charity and its directors must hold and deal with such assets as charitable trust property, including the obligation to seek judicial variation of a special purpose trust through a *cy-prés* order where the applicable charitable purposes become impossible or impracticable. In this regard, the Court stated at paragraph 76:

The Authors of *Tudor on Charities* 8th ed. (1995), pg. 159, have extrapolated from this law the proposition that a charitable company may hold particular property in trust for specific charitable purposes, distinct from its other property, and that “clearly to misapply such property would be a breach of trust”. I agree with the authors of *Tudor on Charities* as to the obligations of the charity when it accepts such gifts, with the following qualifications: (a) as long as the charity is in operation, and (b) subject to any *cy-prés* order of the court, the charity will be obliged to the use of funds for the purposes stipulated by the trust.

If Feldman J. was prepared to recognize the legal enforceability of a special purpose charitable trust on a charity with all the fiduciary obligations associated with property being held in trust, then it follows that the other general attributes of a trust, i.e., that trust property is not subject to claims by creditors of the trustee, should also apply. If Feldman J.’s decision were to be applied to other trusts, then any property held by a trustee would arguably become susceptible to claims by creditors of the trustee. However, since such a result does not reflect general trust law in Canada, for Feldman J. to suggest that the basic elements of a trust should be applied differently for special purpose charitable trusts than for other trusts, creates an inconsistency which may have

been driven more by policy considerations in support of tort victims of sexual abuse than a traditional application of trust law.

Impact of the Decision

Feldman J., in an attempt to limit the impact of the decision, was careful to note that the decision was limited to a very specific situation, i.e., only where:

- there are claims by tort victims against a charity;
- the general assets of the charity are insufficient to satisfy the resulting judgments;
- the charity is no longer operating; and
- the charity is being wound up pursuant to a winding-up order under the *Winding-up and Restructuring Act*.

These limitations, though, are generally arbitrary and provide little comfort to charities and their legal counsel who may be concerned that the decision could become the “thin edge of the wedge” that may lead to future court decisions exposing special purpose trust property, such as endowment funds, to claims by tort victims in a broader context instead of only in the limited fact situation of the CBIC decision.

In addition, the Court of Appeal decision may have a negative impact on the operations of charities across Canada in at least four crucial areas:

- First, tort victims will now be encouraged to pursue claims against charities, particularly larger charities, knowing that there may be “deep pockets” that had been previously untouchable but can now be readily accessed.
- Second, property and/or funds held as special purpose charitable trusts, particularly endowment funds, that many charities depend upon for their continued existence, will now be susceptible to claims by tort victims. This in turn may prejudice the ability of some charities to continue operating and could result in either the bankruptcy or dissolution of some charities that are particularly vulnerable, such as religious denominations, local churches and educational institutions.
- Third, the ability of donors to create enforceable special purpose trusts will be thwarted where claims by tort creditors cause those special purpose charitable trusts to be applied in ways totally different from what was originally contemplated by the donors. Such a result ignores the overriding jurisdiction and mandate of the court to apply special purpose charitable trusts *cy-près* where the original charitable purpose has become either impossible or impracticable.

- Fourth, donors will be reluctant to give large gifts directly to charities, such as endowment funds that otherwise had been thought to be protected as special purpose charitable trusts when no assurance can be given to donors that such special purpose charitable trusts will be immune from present or future creditors of the charity.

The combined overall “chill effect” that will likely result from the negative impact of the Court of Appeal decision may very well prejudice the financial stability of a large segment of the charitable sector in Canada and could even affect its long-term viability. This in turn may require that various levels of government fill the void that may result from the loss of social services currently being provided by charities affected by the decision.

Developing a Strategy in Response

Since it is uncertain whether anything can be done to “credit-proof” existing special purpose trust funds, the task for lawyers in advising charities and donors will be how to structure future special purpose charitable gifts so that they will not become exigible by tort creditors of the charity. Some strategies that legal counsel may want to consider in advising charities and donors on this issue include the following:

- creating a special purpose charitable trust by having the donor give the intended gift to a community foundation or a trust company to be held in trust for the benefit of a specific named charity;
- creating a special purpose charitable trust by having the donor give the intended gift to an arm’s-length parallel foundation established solely to advance the purposes of the intended charity; or
- structuring a donation as a conditional gift with a condition subsequent that would become operational upon the winding-up, dissolution or bankruptcy of the charity accompanied with a “gift over” to another charity that had similar charitable purposes, or alternatively, providing that the gift revert to the donor.

All of these options, and in particular the utilization of conditional gifts, would require addressing a number of important legal issues, including determining the income tax consequences to the donor. For a more thorough discussion concerning structuring restricted gifts and conditional gifts, reference can be made to two articles by the author entitled “Donor Restricted Charitable Gifts: A Practical Overview” and “Looking a Gift Horse in the Mouth: Legal Liability in Fundraising” both of which are available at www.charity-law.com.

Conclusion

Pending a successful appeal to the Supreme Court of Canada, the Ontario Court of Appeal decision in the CBIC case will likely have a devastating impact upon the future ability of charities to raise monies through special purpose charitable

trusts and may expose existing charitable trust property to claims of tort victims, in particular tort victims with claims arising from sexual abuse. It is hoped that leave to appeal to the Supreme Court of Canada will be granted and that the Supreme Court will have an opportunity to reverse the decision and reaffirm the more reasonable approach taken by the lower court. However, given the current tendency of the Supreme Court of Canada to extend vicarious liability to charities arising from claims by victims of sexual abuse, it is not at all certain whether the Supreme Court will reverse the decision. This would be an unfortunate result for the future of charities in Canada.