Case Comment:
In the Matter of The Toronto Humane Society Re David Feldman Charitable Foundation

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The degree of judicial and administrative supervision that can or should be exercised over charities in Ontario has been a recurring theme in this journal.[1] For the most part, the discussion has focused on the scope and inadequacies of the *Charities Accounting Act*[2] and the role of the Public Trustee. Some of the thorniest questions concern the status of charitable corporations and their directors and the extent to which they are subject to the law governing charitable trusts and trustees.

Ten years ago in a case comment in *The Philanthropist,*[3] attention was drawn to the criticism levelled by His Honour Judge Cornish of the limited extent of the jurisdiction of surrogate courts under the *Charities Accounting Act.* It was suggested that some of the deficiencies of the statute could be bypassed by recourse to the general supervisory jurisdiction of the Supreme Court in matters of charity and the law recognizing the special role of the Attorney General in that connection.

More recent developments have broadened the powers of the courts and of the Public Trustee under the *Charities Accounting Act,*[4] recognized (*semble*) that the general authority of the Attorney General with respect to charities can be exercised by the Public Trustee[5] and confirmed the existence of the inherent jurisdiction of the Supreme Court over charitable corporations and their directors.[6]

It is on the last of those points that the decision of Anderson, J. in *The Toronto Humane Society* case is most interesting. The Court was concerned with what were, in effect, applications by the Public Trustee and by a director of the Society. These apparently arose out of a change in the composition of the board of directors of the Society, a reduction in the number of its members and the support given by the Society to an enterprise known as the Coalition Against Pound Seizure (CAPS), which has objects that the court characterized as political in nature. In addition, the Public Trustee questioned the right of the Society to pay salaries to its directors.

Anderson, J. held that the Society was "amenable to the ancient supervisory equitable jurisdiction of the court", that the degree to which the Society was involved with, and was supporting, CAPS did not require the intervention of the court although "danger signals are showing", that the Society "shall not pay to any director any remuneration whatsoever" and that the court could,

and would, regulate the conduct of the next annual meeting of the members of the Society.

Inherent in each of the issues before the court was the general question of the status of the Society as a charitable corporation. The Public Trustee argued that the Society and its directors were trustees and accountable as such. The Society took the position that its directors were not trustees, that donations and bequests to the Society were simply gifts to the corporate body and that the expenditures made by the Society were not open to criticism as long as they were within the expressed objects of the corporation.

Although obtaining assistance from the provisions of subsection 1(2) of the *Charities Accounting Act,* Anderson, J. appears to have been of the view that even under the general law the corporation and its directors were subject to some of the laws and restrictions applicable to trustees:

> Without going the length of holding that the Society is in all respects and for all purposes a trustee, I have concluded that it is answerable in certain respects for its activities and the disposition of its property as though it were a trustee; specifically I am satisfied that it is amenable to the ancient supervisory equitable jurisdiction of the court.

Anderson, J. indicated that, in addition to the inherent equitable jurisdiction of the court in matters of charity, he would also have been prepared to intervene on the basis of the jurisdiction of the court under the *Trustee Act*[7] or under section 6d(1) of the *Charities Accounting Act.* The reference to the *Trustee Act* appears to have been a reference to an application for advice and directions under section 60 of that statute and it raises the question whether other provisions of the *Act* are now to be regarded as applicable to directors of charitable corporations. It appears, indeed, that the court was asked to appoint a trustee to take over the affairs of the Society but declined to do so. The nature of the arguments addressed to the court on this point does not appear clearly from the reasons for judgment. If, however, one argument was that the Society was sufficiently a trustee to make it subject to the court's inherent and statutory jurisdiction to remove and replace trustees, this would appear to require an extention of the court's supervisory jurisdiction over charitable corporations beyond the limits reached by previous authority.

The reported decisions in England and in Canada and elsewhere do not assert that charitable corporations are trustees in the fullest sense of that term. Rather, although recognizing that much of the law governing the responsibilities of trustees is applicable to such corporations and their directors, courts have also affirmed the distinction between corporate ownership by charitable corporations and ownership as a trustee.[8] Moreover, the power of a court to divest a charitable corporation of its assets has been denied:

> Corporations constituted Trustees, have indeed sometimes been by decrees of the Court divested of their Trust for an abuse of it; as any other trustees would have been ... but that is very different from divesting a person of his corporate character and capacity.[9]
>
> To whatever lengths the court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament.[10]

It is submitted that it would be a mistake to regard the decision in *The Toronto Humane Society* case as authority for a general proposition that charitable corporations are trustees for all purposes. The court appears to have deliberately refrained from taking that position and, although the decision is important for its recognition of the general supervisory jurisdiction over incorporated charities, the decision and the reasons of Anderson, J. appear to be perfectly consistent with the following statement of Professor Scott in *Scott on Trusts:*

> The truth is that it cannot be stated dogmatically either that a charitable corporation is or that it is not a trustee. The question is in each case whether a rule which is applicable to trustees is applicable to charitable corporations, with respect to unrestricted or restricted property. Ordinarily, the rules which are applicable to charitable trusts are applicable to charitable corporations, ... although some are not. It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications.[11]

The guarded comments of Anderson, J. with respect to the status of the Society may be contrasted with dicta of a Surrogate Court in *Re David Feldman Charitable Foundation*[12] where it was held that directors of a corporation had acted improperly in making a loan at a commercial rate of interest to a corporation controlled by one of the directors. The court stated:

> It is clear from a reading of the Letters Patent creating the foundation, that a charitable trust was created by Mr. Feldman for the purpose of maintaining a fund, and applying from time to time all or part thereof and all or part of the income derived therefrom as donations to recognized Canadian charities. A charitable trust was created. By virtue of s.1(2) of the *Charities Accounting Act* the corporation itself is deemed to be a trustee within the meaning of the statute. But it is my view that the directors are also trustees of the foundation.[13]

It is suggested, with respect, that the cautious approach of the court in *The Toronto Humane Society* case is more consistent with the authorities as a whole.

On the question of the salaries paid to directors of the Society, Anderson, J. held that the fiduciary obligation of the directors to the Society and the fact that the society received funds from the public for charitable purposes required

that the directors should be able to obtain remuneration only according to the same principles that apply to trustees. He recognized that remuneration could be authorized in the constating documents of the corporation or by an order of the court. On this aspect of the case, he followed *In re The French Protestant Hospital*[14] in which it was held that directors could not authorize payment to those of their number who rendered professional services to the charity. As Letters Patent incorporating charitable corporations under the *Corporations Act*[15] in Ontario stipulate that a director cannot profit from his position as such, the issue before the court in *The Toronto Humane Society* case will presumably arise only with corporations incorporated otherwise than under that statute. However, there would appear to be nothing in the law of charity to prevent the Letters Patent of a charitable corporation expressly authorizing directors to charge for any professional services they render to the corporation. If Letters Patent in such terms will not be granted, the alternative of an application to court to authorize such remuneration is probably required and the reasoning of Anderson, J. would appear to be sufficient authority to support the proposition that the court has jurisdiction to permit remuneration in such cases. The analogy between trustees and charitable corporations is probably sufficiently close to disentitle directors to remuneration for their professional services on the basis of a by-law sanctioned by a resolution of the members of the corporation.

The other interesting aspect of the reasons for judgment in *The Toronto Humane Society* is the discussion of the propriety of the Society's involvement with, and support of, CAPS. The Court accepted that it was established that political activity per se is not charitable in the legal sense. At the same time, it accepted the proposition that political activity may be legitimately employed for the purpose of achieving charitable ends while recognizing the difficulty in distinguishing between means and ends for this purpose. It appears to be implicit in the reasons that political activities will become objectionable if they involve a significant part of a charity's activities or resources. The implication would appear to be that political activities must be incidental to the achievement of charitable ends, not only in the sense that they must constitute a means of achieving those ends but also in the sense that they must be comparatively minor in their extent. The rationale may be that, when political activities form a major part of the body's work, it can be assumed that those activities are themselves ends rather than means. Although the distinction between objects and incidental activities is now firmly established in the law of charity[16] it can be, as Anderson, J. recognized, a very difficult distinction to apply and certain aspects of its application in the cases are not easy to justify.[17]

In its affirmation of the general equitable supervisory jurisdiction of the court in matters of charity, *The Toronto Humane Society* case is an important decision and will undoubtedly strengthen the hand of the Public Trustee in dealing with charities in Ontario. It remains to be seen whether, having taken one

more step in the direction of treating charitable corporations as trustees, the courts will continue the process on such matters as investment powers, accumulations and other matters.

FOOTNOTES

1. See, for example, Levis, "The Protection of Charities in Ontario", *The Philanthropist* (1972), Volume 1, No.1, p. 115; Cullity, "Statutory Machinery for Supervising Charities", *The Philanthropist,* (1972); Volume I, No. 1, p. 22; Levis, "Some Implications of Charitable Trusts and Charitable Corporations", *The Philanthropist* (1978) Volume 3, No. 3, p. 12; Cullity, "Case Comment: The Canadian Foundation For Youth Action", *The Philanthropist* (1978), Volume 2, No. 1, p. 41.
2. R.S.O. 1980, c.63.
3. "Case Comment: The Canadian Foundation for Youth Action", *supra,* footnote 1.
4. Section 6d, enacted by S.O. 1982, c.11 permits applications to the Supreme Court with respect to an alleged breach of a charitable trust or for directions in the administration of a charity. The application can be brought by any two or more persons on notice to the Public Trustee.
5. *Re Baker* (1984), 17 E.T.R. 168 (Ont. H.C.).
6. *In the Matter of The Toronto Humane Society,* Ont. H.C., (Anderson, J.), Reasons for Judgment, June 5, 1987.
7. R.S.O. 1980, c.512.
8. See "Case Comment: *The Canadian Foundation for Youth Action", supra,* footnote 1, pp. 46–47 and *Liverpool and District Hospital For Diseases of the Heart* v. *Attorney General,* (1981) Ch. 193 (Ch. D.), pp. 209–211.
9. *Attorney-General* v. *Earl of Clarendon* (1811), 17 Ves. 491 (M.R.).
10. *Attorney-General* v. *Governors of Christ's Hospital,* (1896) 1 Ch. 879 (Ch. D.); see, also, *In re Whitworth Art Gallery Trusts,* (1958) Ch. 461 (Ch. D.).
11. *Scott on Trusts* (3rd ed., 1967) at page 2778.
12. (1987), 58 O.R. 626 (Surr. Ct.).
13. *Ibid,* p. 631.
14. (1951) Ch. 567 (Ch. D.).
15. R.S.O. 1980, c.95.
16. Picarda, *The Law and Practice Relating to Charities,* pp. 152–157.
17. See Cullity, *Charities—The Incidental Question* (1967), 6 Melb. Univ. Law Review 35; *Alberta Institute on Mental Retardation* v. *The Queen* 87 DTC 5306 (F.C.A.).