Case Comment: *Re Levy Estate*[1]

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The dispute in this case arose from the disposition of the residue of Mr. Levy's estate which amounted to something in excess of $4,000,000. To the chagrin of Mr. Levy's next of kin, it was to be given to the State of Israel:

> ... for charitable purposes only, said charities to be decided on by my Trustees herein and to be in the form of a dedication honouring and recognizing the deceased herein.[2]

The next of kin challenged the validity of the bequest on two grounds, both of which will be explored below. Griffiths J., however, found the trust to be valid.

The case is significant because it required Griffiths J. to decide a question of charities law for which there was no Canadian precedent. It is also interesting because Griffiths J. breaks with English law on the point thereby charting a uniquely Canadian path. It is stimulating because of the questions it leaves unanswered. Thus, *Re Levy Estate* warrants our close attention.

In determining whether the trust was valid, Griffiths J. began by resolving one preliminary matter: whether the phrase "for charitable purposes only" created a trust that was wholly and exclusively charitable. That, of course, is a requirement for any valid charity. Griffiths J. followed English authority[3] in deciding that the words have a clear, technical and unambiguous meaning. In effect, they are equivalent to setting out in whole, Lord Macnaghten's definition of charity in *Income Tax Commissioners* v. *Pemsel:*

> Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[4]

Because the phrase "for charitable purposes only" imports the whole of Lord Macnaghten's definition, Mr. Levy's bequest could be used for any one or more of the four divisions of charity. It was the possibility that the trustees might select a charitable object falling within the fourth classification in *Pemsel*—"trusts for other purposes beneficial to the community"—that gave rise to the next of kin's first objection. They argued that because the trust was in favour of the State of Israel, the trustees could choose a purpose which was of benefit to the public of Israel but which did not benefit the public in Ontario and, indeed, might even be inimical to the latter's interest.

English law holds that trusts under the fourth head must benefit the community where the donor is domiciled and the trust created.[5] The rationale for such a limit is rooted in public policy, i.e., the English courts will not sanction the use of trust monies under the fourth head where the objects are of general public utility in foreign countries because such uses may not be beneficial to the public interest in the jurisdiction where the trust is to be administered. The examples that have been given are "setting out of soldiers" or the "repair of bridges or causeways" in a foreign country.[6]

Griffiths J. declined to follow the English law and in doing so held the trust to be valid. In short, he upheld the validity of a trust under which monies could be used exclusively for the benefit of another country. Three factors played a part in his ruling. First, he found that the English case on point, *Camille and Henry Dreyfus Foundation Inc.* v. *I.R. Commrs.*[7] was not persuasive because it was concerned with a taxing statute.

> It is perfectly understandable that where the trust sought exemption from tax under a United Kingdom statute, that the trust object should be of benefit to the tax-paying public of the United Kingdom.[8]

Second,

> Historically, the courts appeared to have placed a benign and liberal interpretation on charitable trusts tending to look favourably on trusts having objects of general benefit to the public even though for the benefit of a foreign public.[9]

Third, Griffiths J. found himself reluctant to invalidate the trust on the basis of mere speculation that the trustees *might* choose purposes to be carried out in Israel which *might* be invalid under Canadian law.

The decision has much to commend it. It makes the requirements concerning what public is to benefit uniform for all the categories of charity and, in my opinion, it accords with common sense, i.e., it seems reasonable that Griffiths J. would refuse to strike down a testamentary gift on the basis of mere speculation.

The decision goes on to pique our curiosity in a number of ways. First, Griffiths J. refers to the Australian test for the validity of such trusts:

> ... in Australia the test is whether the purpose is beneficial to the foreign community and not inimical to the general concept of legal charity as understood by the local law.[10]

However, while Griffiths J. states the Australian test, he does not tell us whether he adopts it. The result in the case accords with the Australian test, but there is no express approval of it. Are we then to assume that the Australian test, as set out above, is now law in Canada?

Second, Griffiths J. tells us he is "impressed" by a number of factual considerations. First, that the Public Trustee took the position that the trust and trustees were subject to the laws of Ontario and to the supervision of the Public Trustee. Second, that the State of Israel submitted to the Ontario jurisdiction. Third, that the tentative purposes which were presented to the court were unquestionably charitable within the meaning of the term. In making these observations, Griffiths J. included an admonition to the trustees to "only choose charitable purposes which are within the legal concept of charities defined by this court from time to time and supervised by the office of public trustee."[11]

These factual elements raise a serious question. Did Griffiths J. note them merely by way of observation or would the decision have gone the other way in the absence of one or more of them? In other words, are the items, singly or collectively, conditions to having such trusts validated by the court? The first two considerations, in particular, may amount to conditions and not mere observations. That is because it is crucial that charitable trusts be subject to the control of the court. By virtue of the undertakings by the Public Trustee and the State of Israel, if the trustees in this particular case fail in their duties, the Public Trustee could intervene and inform the court thereby ensuring court control. Nevertheless, several questions arise. Could the Public Trustee refuse to supervise a trust for the benefit of a foreign country? If so, when and on what grounds? Questions such as these will have to be resolved once we know what role the factual considerations in *Re Levy Estate* actually played in the judge's decision.

In conclusion, we should note briefly the second objection to the trust raised by the next of kin. This objection can be dealt with summarily. The argument revolved around the concluding words in the residuary clause that required the charities " . . . to be in the form of a dedication honouring and recognizing the deceased herein". It was maintained that such words showed that the testator's primary purpose was to perpetuate his memory and not to benefit the public. Griffiths J. acknowledged that if the trust required the trustees to choose objects of no general benefit to the public, the trust could not be charitable. However, he held that the testator had expressed a clear intention that the gifts be for charitable purposes. The words requiring the gifts to honour and recognize the donor were merely ancillary and thus did not defeat that main charitable intention.

FOOTNOTES

1. (1987), 62 O.R. (2nd) 212 (H.C.J.).
2. *Ibid.* at 214.
3. *Re Cox* [1955] A.C. 627.
4. [1891] A.C. 531 at 583.

5. See *Camille and Henry Dreyfus Foundation Inc.* v. *I.R. Commrs.* [1955] 3 All E.R. 97.
6. *Ibid.*
7. *Ibid.*
8. (1987), 62 O.R. (2d) 218.
9. *Ibid.*
10. *Ibid* at 219, citing 5 *Halsbury*, 4th ed., pp. 343-4.
11. *Ibid.*

John M. Hodgson Honoured by Law Society

On March 24, 1988 John M. Hodgson, co-founder, 16-year member of the Editorial Board, and present Chairman of the Management Committee of *The Philanthropist*, received the Medal of the Law Society of Upper Canada which is awarded to recognize outstanding service within the legal profession.

Mr. Hodgson was honoured for his outstanding work in the Wills and Trusts Section of the Bar, his major contribution to the education programs of the Canadian Bar Association, and his work for charitable organizations.

In addition to his voluntary service for *The Philanthropist*, Mr. Hodgson was Chairman on establishment of the National Committee on Charitable Organizations, Wills Section of the Canadian Bar Association from 1968 to 1980 and has been active in the organization and development of a number of charitable organizations including: Metropolitan Toronto Community Foundation; the Neathern Trust (trustee 1964-1984); Laidlaw Foundation (director 1967-1984); Agora Foundation (director since 1979); and Chairman of the Planning and Development Committee for The Canadian Centre for Philanthropy and President, from its founding in 1981 to 1986.