Case Comment: *In Re The French Protestant Hospital:* The Interventionist Role of the Court

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Introduction

Three recent Ontario cases have addressed the question of the court's power to intervene in the activities of a charity. This article will analyze the law in England and the current state of the law in Ontario.

The Position in England

To understand the position in England, it is necessary to understand the framework within which the English cases have arisen.

The Attorney General of England exercises a supervisory role over charities; hybrid creatures, part trust and part corporation. If problems arise from the operations of a particular charity the Attorney General turns to the court of chancery, now the Chancery Division of the English High Court, which has jurisdiction over trusts. Chancery then fashions a remedy which covers both the corporate and trust aspects of the charity.

Cases essentially arise in one of two situations: the first is mismanagement or theft of trust property; the second occurs when the purpose for which the trust was created ends and a surplus has to be divided among existing or new beneficiaries not provided for in the originating document.

One of the first modern English cases was *In Re The French Protestant Hospital* [1951] 1 Ch. 567. In this case, the directors of an incorporated charity proposed to amend their by-laws to provide for their own remuneration should they provide professional services to the charity. Under the charity's articles the directors had the power and authority to amend the by-laws.

Dankwerts J. (who decided many charities cases) found that:

(a) the directors, though not technically trustees, were in the same fiduciary position as trustees in respect of the affairs of the corporation; and

(b) they were accordingly debarred by a rule of trust law from receiving payment for their services. It was improper for them on their own motion to introduce a by-law of the kind proposed.

At page 570–71, Dankwerts J., quoting old authorities, stated:

> It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's is not, unless otherwise expressly provided, entitled to make a profit: he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.

French Protestant Hospital became a new benchmark for the intervention of the courts in the affairs of charities[1] since the courts used their equitable jurisdiction and the "vehicle" of fiduciary duties to restrict the powers of the charity's trustees, notwithstanding the trustees' clear authority in the charity's by-laws.

Prior to the decision of Dankwerts J., in *French Protestant Hospital* the courts had followed the principle that they would restrict themselves to questions of interpretation, allowing testators considerable freedom to create the governing law or document. For example, in *Attorney General* v. *Governors of Christ's Hospital*, [1896] 1 Ch. 879, Chitty, J. stated at page 888:

> I hold that it is beyond the jurisdiction of the Court to sanction the Attorney General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter, and is established by Act of Parliament. To whatever lengths the Court may have gone, it has never assumed legislative authority; it has never by a stroke of a pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trust such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition... In a word, I cannot, under the guise of executing the trust *cy-près*, upset the constitution of the present governing body...

The proposal made by the Attorney General which was under consideration in the *Governors of Christ's Hospital* case would have redirected the funds of the trust. The directors were opposed to the Attorney General's scheme and hence applied to the court. They were successful in denying the Attorney General's right to change the trust.

The decision in *French Protestant Hospital*, running as it does against the previous non-interventionist cases, has not always been followed. Sub-

sequent English courts have attempted to restrict its scope. For example, in *Soldiers', Sailors' and Airmen's Families Association* v. *Attorney General,* [1968] 1 All E.R. 488, the trustees applied to the court for a determination as to whether, based on the construction of their charter, they had the power to invest funds in a certain manner. The Attorney General opposed their proposal. The court found that the charity's by-laws were akin to a trust deed. Comparing the situation to that of a testator and a will, the court stated that it would be reluctant to vary the terms of a trust deed when it provided for certain situations. The court was not prepared to follow *French Protestant Hospital* nor extend the provisions, or in any way to tamper with the corporate by-laws. The court did not use the "vehicle" of fiduciary duty to intervene, choosing instead to rely on the testator/will analogy.

In *Liverpool and District Hospital For Diseases of the Heart* v. *Attorney General,* [1981] 1 All E.R. 994, Slade J. had to deal directly with the court's jurisdiction. After reviewing the major cases, including *French Protestant Hospital*, he stated, at page 1009:

> In my judgement the so-called rule that the court's jurisdiction to intervene in the affairs of a charity depends on the existence of a trust, means this: the court has no jurisdiction to intervene unless there has been placed on the holder of the assets in question a legally binding restriction, arising either by way of trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes; for the jurisdiction of the court necessarily depends on the existence of a person or body who is subject to such obligation and against whom the court can act *in personam* so far as necessary for the purposes of enforcement. Nevertheless, it should be added for the sake of clarity, *even when these conditions are fulfilled,* the particular terms of the trust or constitution in question may operate substantially or partially to oust the jurisdiction of the court... (emphasis added)

The court cut through the various "vehicles" sometimes used to assert competence, going instead straight to the principles of jurisdiction.

The Position in Ontario

Unlike England, Ontario has introduced legislation in this area of the law.[2] In Ontario, charities are governed by the *Corporations Act*, R.S.O. 1980, c. 95 with respect to their constitutions and the *Charities Accounting Act*, R.S.O. 1980 c. 65 with respect to their finances.

The *Charities Accounting Act* (the Act) first appeared in the late 1950s. It embodies the jurisdiction traditionally reserved to the Attorney General to supervise the operations of charities. In addition to the Act, charities

are subject to the equitable jurisdiction of chancery courts, now vested in the Supreme Court of Ontario, which means that the Supreme Court of Ontario, at the request of the Attorney General, has an inherent jurisdiction, as circumscribed by the Act, to investigate the operations of a charity.

If we assume the *Charities Accounting Act* is clear in itself, the jurisdiction of the Supreme Court has yet to be defined. Hence the common law remains important and it is important to analyze decisions like *French Protestant Hospital* and *Liverpool and District Hospital* to see the scope of the courts' authority, whether their principles are followed in Ontario, and whether the Act can account for any differences.

The question of jurisdiction was addressed in the decision of *Re Feldman (David) Charitable Foundation*, (1987), 58 O.R. (2d)626 (Surr. Ct.). On an application under the Act, the Surrogate Court had to decide whether a gift to an Olympic organization would be considered a charitable bequest. An appeal was taken to the Divisional Court on the question of the jurisdiction of the Surrogate Court in charitable matters. It was held that although a judge of the Surrogate Court had jurisdiction to examine the accounts of a charity under the *Charities Accounting Act*, it lacked any further jurisdiction and any questions beyond accounting were reserved to the Supreme Court.

The Surrogate Court in *Feldman* also had to decide whether the directors of the foundation were dealing at arm's length with respect to certain loan transactions. The court held that the directors were not at arm's length and ordered monies returned to the charity. The court chose to follow, and cited, the strict fiduciary test laid out in the *French Protestant Hospital* decision and this aspect of the decision was upheld by the Divisional Court.

The next decision dealing with jurisdiction is that of *Public Trustee* v. *The Toronto Humane Society* (1986), 60 O.R. (2d) 236, a Weekly Court decision of Anderson J. In this case, the Public Trustee[3] sought to have the Toronto Humane Society submit or pass audited accounts to the Surrogate Court. In addition to the passing of accounts, the Public Trustee sought to challenge certain corporate procedures and decisions of the Toronto Humane Society. The Public Trustee relied on the inherent jurisdiction of the Supreme Court of Ontario and on *French Protestant Hospital*. Anderson J. reviewed the trust character of a charity and the decisions from *French Protestant Hospital* down to *Liverpool District Hospital* were all put before His Lordship. Anderson J. chose to rely upon the *French Protestant Hospital* test and after quoting Dankwerts J. stated:

> I am in respectful agreement with that conclusion and deem it applicable to the remuneration of directors of the Society.

The trust character so permeated the charity that the standards of *French Protestant Hospital* could prevent what might, for other corporations, be ordinary acts of administration.[4]

Anderson J. did not find it necessary to make a final decision on the allegations of improper corporate procedures. Instead, he directed that the allegations, which included questions about the legitimacy of the election of the board of directors, be resolved by the membership at the next election, which was to be supervised by a person appointed by the court.

The effect of the court order was to intervene in the corporate activities of the Society and Anderson J. concluded that the court had the authority to intervene, not as a matter of corporate law, but because a charitable institution was answerable as though it were a trustee. He stated:

> 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. I do not think it is a sufficient answer to the criticism made concerning the conduct of the Society's affairs that there is no such irregularity as would ordinarily, as a matter of corporate law, call for the intervention of the court.

The full implications of Anderson J.'s statement remain to be seen. It would appear that he has provided dissident directors of charitable organizations with a right, not previously available by statute or at common law, to have a court review the activities of the board of directors. Further, it is clear that he has laid the foundation for an extensive supervisory jurisdiction over the activities of charitable organizations. Indeed, he went on to exercise this jurisdiction in addressing the Public Trustee's particular complaint that it was improper for a director to be paid for her services as an employee of the charitable organization. Anderson J. noted that the statute which governed the operation of the Society provided for the remuneration of directors but he went on to observe that as a matter of trust law a trustee must not be in a position where his or her duty conflicts with a personal interest. Anderson J. concluded that the corporate law safeguards were inadequate and that specific court approval was necessary before a director was entitled to receive a salary as an employee of a charitable corporation. His Lordship therefore directed the Society to discontinue paying remuneration to the director. The effect of this order was to require the executive director of

the Society to resign her position or resign as a member of the board of directors.

The third case in the trilogy is *Canada Trust Company* v. *Ontario Human Rights Commission* (1988), 61 O.R. (2d) 75, dealing with the Reuben Wells Leonard Trust. The facts were that Colonel Leonard had set up a scholarship trust for the education of white Canadians. To qualify for a scholarship, a student had to be needy, white, of British nationality or parentage, and:

> ... owe no allegiance to any Foreign Government, Prince, Pope, or Potentate nor recognizing any such authority, temporal or spiritual; that is, Christian of the Protestant persuasion.

An application was made to the Supreme Court by the trustee for the advice, opinion and direction of the court upon questions arising out of the administration of the trust. The Ontario Human Rights Commission expressed concern over the conditions of eligibility for a scholarship and a formal complaint was filed before the Ontario Human Rights Commission. Based on the complaint, and general concerns, the trustees brought an application to the Supreme Court of Ontario. The Commission opposed the application, stating that the matter should properly be heard by it and not by the Court. In dealing with the question of its jurisdiction, the court found it could look into the questions as posed by the trustees. McKeown J. stated at page 86:

> It is an application to this court for a response to questions concerning a private trust, one which I find on close reading of the indenture to be a charitable trust as Colonel Leonard has wholly devoted the trust property to the furtherance of a charitable object. That being so, this court has inherent jurisdiction to answer the questions submitted to it and to vary the Leonard trust if necessary.

At this point I must comment on the powers of a board of inquiry appointed under the *Human Rights Code, 1981*,... if the board made a finding that the Leonard trust does, in fact, infringe a right in Part I of the Code... the board would then find itself unable to fashion a remedy. It could order the general committee members to cease the infringement which it had found. It could not go on to instruct the trustees on the proper steps to take. The legislature has not given the board the power in the *Human Rights Code, 1981* to assist trustees in refashioning a trust. The board is restricted either to finding no infringement, in which case the trustees and general committee continue as before, or to finding an

infringement and leaving it at that. The trustees would then be forced to return to this court for assistance.

Therefore, the trustee/applicant is entitled to answers to its questions from this court at this time.

The court by implication asserted that it had the powers that the board lacked.

The judgment also implies that the court only took jurisdiction when the trustees or governors applied to it for direction and then only because the governing statute was vague. The court acted as a solicitor, giving its opinion, advice, and direction. It was up to the directors to act upon that advice. The court did not assume a legislative authority nor did it ever assume the power to vary the trust or charity. That, it indicated, would be up to its directors.

Comment

Feldman and *Toronto Humane Society* relied on the *Charities Accounting Act* and *French Protestant Hospital*. It is submitted, however, that one cannot look at *French Protestant Hospital* alone as it has been superseded by other decisions. Indeed, Dankwerts J. himself, in the subsequent decision of *Abbey Malvern Wells, Ld.* v. *Ministry of Local Government Planning*, [1951] 1 Ch. 728, seems to moderate the position he propounded in *French Protestant Hospital*. As Hodgson and McNeely state in their article:

> In *Abbey*, the trust character of the corporate director was held to "rub off" on the character of the corporation itself. In *French Hospital*, the corporation's presumed... trustee status was regarded as stamping the corporate directors with trustee obligations. Interestingly, Dankwerts J. does not resort to some general rule about charitable corporations in his *Abbey* decision. He employs the more roundabout method of *de facto* control by trustee tests. This suggests that *French Hospital* cannot be taken as authority that all... charitable corporations are automatically to be considered trustees of their assets.[5]

In *Toronto Humane Society* the court ordered that an election of directors should be held to "clear the air" between the litigants. It appointed an overseer to ensure that the election was properly held. The overseer subsequently issued rules governing the conduct of the election meeting. The rules were challenged by the Society and upheld by Anderson J. who remained seized of the matter. Thus the court in effect extended its jurisdiction over the charity by its control of events occurring after trial.

In *Kitchener-Waterloo and North Waterloo Humane Society* v. *Zimmer, et al.* an unreported Weekly Court decision of Rosenberg J., May 24, 1985, the

court, as part of its decision, and as part of the relief sought by the applicants, ordered a similar election and set out rules for the election in the body of the decision, after argument. Thus, in this case also, the court in a sense intervened in events occurring after argument and judgment.

It is submitted that the authority of *French Protestant Hospital* should not be taken as definitive in Ontario, given the provisions of the *Charities Accounting Act*. The Supreme Court in the *Leonard Trust* case acknowledged an inherent jurisdiction, but circumscribed its exercise of that jurisdiction in light of the powers of the charity's directors as set out in the governing deed. It is not disputed that there is an inherent power in the Attorney General and delegated in part to the Public Trustee to review the expenditures of a charity; however, the courts should be circumspect in their activist and interventionist role. As Chitty J. stated in *Christ's Hospital*, the court has not as yet assumed the role of the legislator.

When supervising charities, the office of the Public Trustee has relied heavily on a restrictive interpretation of *French Protestant Hospital*; however, this interpretation does not accord with the English position as set out in *Abbey Malvern Wells*. Indeed it does not accord with provisions embodied in the *Corporations Act*.

The position in Ontario as interpreted by the Public Trustee, until it is finally resolved by the Court of Appeal, is a definite burden on charities. Fending off a court challenge, let alone having to pass accounts in the Surrogate Court, is a drain on the resources of a charity. Restricting a charity's ability to pay a director will further restrict its activities in an already tight recruiting market.

In light of the above decisions, when advising charities, solicitors should consider, among other things, the following questions:

1. What is the governing jurisdiction of the charity? If other than Ontario it may be argued that the office of the Public Trustee does not have jurisdiction (though read the Act carefully in this regard).
2. Do the governing articles vest in the board of directors powers akin to those contained in the *Corporations Act*? If so, it may be argued that the donor vested powers in the directors and a court should not lightly tamper with those powers.
3. Is a salary provided to one or more directors? The new standard appears to prohibit such a payment, even though provided for in the *Corporations Act*.
4. Are the charity's books audited regularly? This may reduce the cost of passing accounts before the Surrogate Court.

From the point of view of policy alone, the office of the Public Trustee is exercising jurisdiction not previously exercised by that office. Is this the proper role for that office? Traditionally the office in Ontario did not play such an active part in seeking out charities for intervention. In England its counterpart acts as a consultant and third party intervenor. From a tactical point of view, until its jurisdiction is clarified, litigation can only be avoided by full disclosure and cooperation with the Public Trustee.

From the judicial point of view we have seen various approaches and the employment of several vehicles. Although the courts have not been reluctant to assume jurisdiction, there is still the possibility of restricting their role. The jurisdictional issue can be summarized as follows:

1. Any jurisdiction beyond questions of accounting does not vest with the Surrogate Court. (*Feldman*)
2. The jurisdiction of the Supreme Court is based on the ancient supervisory equitable role exercised in England (*Toronto Humane Society*), hence the cases restricting *French Protestant Hospital* become germane.
3. Where possible the charity should resolve any issues internally and come to the court for advice and direction only. (*Leonard*)

From the above review it appears that without further clarification a charity will never know whether or when it has transgressed the internal guidelines of the Office of the Public Trustee or whether the previous law on charities will be followed in any future case. This unsatisfactory state can only be resolved by either legislation or a clear pronouncement from the courts.

FOOTNOTES

1. For a detailed analysis of the conflict in cases see J.M. Hodgson, Q.C. and A.C. McNeely, "Directors and Trustees, The Charitable Corporation and Trusteeship", *Continuing Legal Education*, Canadian Bar Association, December 7, 1983 and "Trustees and the Charitable Corporation", (1984), 4 *Philanthrop.* No. 2, p. 26. See also *Corporations Act* R.S.O. 1980 c. 95 s. 126(2) re power to remunerate directors.
2. See Donovan Waters, *Law of Trusts in Canada*, 1984, pp. 632-642 in which Professor Waters discusses the history and interplay between the *Charities Accounting Act* and the power vested in the Supreme Court of Ontario. See also *Re Laidlaw Foundation* (1984), 48 O.R. (2d) 549.
3. The office of the Public Trustee acts on behalf of the Attorney General in supervising charities in Ontario.
4. See, for example, s. 126(2) of the *Corporations Act*, *supra*, footnote 1.
5. *Supra*, footnote 1, "Directors and Trustees, The Charitable Corporation and Trusteeship".