

SUPREME COURT'S REFUSAL TO GRANT LEAVE TO APPEAL IN CHRISTIAN BROTHER CASE PREJUDICES CHARITIES

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A. INTRODUCTION

The recent decision by the Supreme Court of Canada ("S.C.C") on November 16, 2000 denying leave to appeal from the Ontario Court of Appeal decision in *Christian Brothers of Ireland in Canada (Re)* 2000, 47 O.R. (3d) 674 (Ont. C.A.), ("Ont. C.A. Decision") has caused confusion for charities and will prejudice the financial viability of the charitable sector in Canada. In permitting tort creditors to seize special purpose charitable trusts of a charity, the Ont. C.A. Decision will likely become one of the most important decisions affecting charities in Canada in recent memory, primarily due to the negative impact it will have upon major donations to charities.

By exposing special purpose charitable trusts to claims of creditors, the Ont. C.A. has undermined one of the primary means by which charities raise monies from donors. Special purpose charitable trusts used by charities include endowment funds, scholarship funds, building funds, 10- year gifts under the *Income Tax Act*, donor advised funds placed with community foundations, and testamentary gifts where the testator imposes restrictions on the use of funds. As donors become more sophisticated with their giving and demand more accountability from charities, the use of special purpose charitable trusts is becoming more and more a major fundraising vehicle, particularly for donors making large gifts to charities. However, as a result of the

Ont. C.A. Decision, charities will now be unable to assure donors that special purpose charitable trusts will be protected and accordingly, this important means of fundraising will likely be curtailed in the future.

An earlier commentary on the impact of the Ont. C.A. Decision and possible strategies that may be developed in response to the decision are contained in an article by the author included in the June 30, 2000 issue of *Charity & the Law Update* available at www.charitylaw.ca, as well as in a longer article by the author entitled “*Donor Restricted Charitable Gifts: A Practical Overview Revisited*” dated November 22, 2000, also available at www.charitylaw.ca

Some additional comments concerning the rationale of the Ont. C.A. Decision and its long- term impact upon charities are set out below as follows:

- ◆ Although not specifically stated in the Ont. C.A. Decision, the rationale by which the Court has been able to conclude that special purpose charitable trusts are eligible, without at the same time blatantly contradicting established principles of trust law in relation to the protection of trust property, is to make a distinction between private trusts and charitable trusts. There appears to be an underlying assumption by the Ont.C.A. that a special purpose charitable trust held by a charity as trustee is tantamount to a trustee holding property in trust for itself, thereby precluding a trust in the first place. This line of reasoning comes from a misconception that special purpose charitable trusts do not have identifiable beneficiaries to enforce a charitable purpose trust. Therefore, it is as if the charity is holding the charitable property in question for itself, subject only to a trustee-like fiduciary obligation to comply with the requirements of the donor.
- ◆ While the Ont. C.A., and counsel who advocated the position before the Court, failed to recognize is that a basic attribute of a charitable purpose trust is that it is a unique trust that is exempt from the requirement that there be identifiable beneficiaries. The reason why special status is given at law to a charitable purpose trust is that the public-at-large receives the benefit of a charitable purpose and as such are collectively considered to constitute the beneficiaries of the trust. Since it would be impossible for all members of the public to enforce the trust, it falls upon the Attorney General on behalf of the Crown to enforce the terms of the charitable purpose in accordance with its *parens patriae* role in overseeing charitable property. Given that a charitable purpose trust is recognized at law to be as much a valid trust as a private trust, it follows that the decision by the Ont. C.A. in allowing tort creditors to seize property held by a charity in a special purpose charitable trust could arguably mean that any trust property held by a trustee, including trust property held pursuant to a private trust, might be subject to claims against the trustee personally.

Since such a result would be inconceivable as contradicting established principles of private trust law, the same should be true in relation to charitable purpose trusts.

- ♦ The Ont. C.A. Decision may result in discriminatory treatment between otherwise identical special purpose charitable trusts. Some special purpose charitable trust documents include wording that permit the trust to be amended in order to ensure that the trust property can continue to be used for the intended charitable purpose, similar to what a court can do pursuant to its inherent *cy-prés* scheme making power. An example would be the inclusion of a clause in a charitable trust document stating that if the special purpose charitable trust in question becomes impossible or impracticable to carry out, the trustee may apply the fund to another similar charitable purpose without the necessity of obtaining a court order. Practically, this would mean that a charity facing insolvency, a winding up order, or bankruptcy, that was holding a special purpose charitable trust may be able to transfer the fund to another charity and thereby protect that fund. However, the majority of special purpose charitable trusts, particularly testamentary trusts drafted before the mid nineteen-nineties, would not likely have included adequate *cy-pres* clauses and therefore will now be susceptible to claims by tort creditors.
- ♦ Discriminatory results may also occur between perpetual endowment funds given to incorporated entities and those given to incorporated charities. The Ont. C.A. Decision has raised the question whether charitable purpose trusts require identifiable beneficiaries who are distinct from the charity as trustee. If so, the decision leaves in question whether charitable purpose trusts are in fact real trusts at all as opposed to constituting a trustee-like fiduciary obligation only. This in turn adversely affects the validity of perpetual endowment funds given to charities that are unincorporated associations. A gift of an endowment fund to an incorporated charity is not dependant upon the gift being a special purpose charitable purpose trust, since a charitable corporation can hold property in accordance with its corporate objects whether or not there is a charitable purpose trust. However, unincorporated charities do not have the legal capacity to receive gifts absolutely, as they are not legal entities at law. In order to overcome the rule against perpetual ownership of trust property, gifts of perpetual endowment funds to unincorporated charities can only be valid if the gift constitutes a charitable purpose trust. Since the Ont. C.A. Decision has called into question whether charitable purpose trusts exist at law, the validity of perpetual endowment funds to unincorporated charities may now be left in doubt. This may lead to increased estate litigation involving gifts of endowment funds to unincorporated charities, such as testamentary endowment funds to local churches and other small charities.
- ♦ Many lawyers who have advised charities and/or donors that special purpose charitable trusts are exempt from claims against a charity will now have to explain why gifts that had previously been given by donors, and were presumed to be protected from claims as trust property, are now not protected. In the future, lawyers may be found liable if they fail to advise clients, both charities and/or donors, that special purpose charitable trusts are no longer protected from the claims of tort

creditors and that alternatives should be canvassed in an attempt to “credit-proof” special purpose charitable trusts where possible.

Given the serious impact that the Ont. C.A. Decision has had upon charities, it is regrettable that leave to appeal to the S.C.C. was not granted. The only practical alternative is to seek legislative protection for special purpose charitable trusts through remedial legislation at the provincial level. Given the serious impact that the Ont. C.A. Decision will have upon charities, it is hoped that provincial governments will be receptive to legislative initiatives in this regard in order to ensure the long-term financial stability of the charitable sector in Canada.