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# ONTARIO COURT FINDS THIRD PARTY CHARITABLE FUNDRAISING ARRANGEMENT UNCONSCIONABLE

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## A. INTRODUCTION

The Ontario Courts and the Public Guardian and Trustee of Ontario (the "PGT") are becoming increasingly proactive in relation to third party charitable fundraising arrangements. For background information on this issue see *"Charity Law Bulletin No. 9"*, dated September 28, 2001, and an article entitled *"Looking a Gift Horse in the Mouth: Avoiding Liability in Charitable Fundraising – revised October 5, 2001"*, both of which are available at www.charitylaw.ca. This more proactive approach has most recently been evidenced in the Ontario Superior Court of Justice decision of *Ontario Public Guardian and Trustee v. National Society for Abused Women and Children*, unreported, released January 31st, 2002, (Carswell: *Ontario Public Guardian and Trustee v. National Society for Abused Women and Children*, 2002 Carswell Ont 588) (Quicklaw: *Ontario Public Guardian and Trustee v. National Society for Abused Women and Children* [2002] O.J. No. 607).

The case involved three individuals who incorporated the National Society for Abused Women and Children (the "Society") in 1999, subsequently arranged for the Society to obtain charitable status, and then entered into fundraising contracts with businesses that the directors of the Society either owned or were employed by. The fundraising efforts for the Society raised close to $1,000,000.00, but only $1,365.00 made its way to

charitable work. The fundraising contracts provided for percentage commissions of between 75% to 80% of the gross funds raised, together with additional monthly administrative fees on one of the contracts of $1,500.00 per month.

The Court found that the fundraising contracts were void *ab initio,* as the amount of compensation paid to the fundraising companies under the contracts was found to be unconscionable. This resulted in the Court requiring the directors of the Society to pay all monies that they had received from the Society through the fundraising companies over to the PGT. Once the monies had been paid over to the PGT, then the directors could seek compensation, but only if such claims for compensation were properly documented and received, subject to approval by the Court.

Given the brevity of the decision, the intensity of the comments by the presiding Judge, and the serious consequences arising from the Court's decision for charities in Ontario, the decision is set out in its entirety below, followed by a commentary on some of the practical implications of the decision.

## B. TEXT OF THE DECISION

1. "IN THE MATTER OF NATIONAL SOCIETY FOR ABUSED WOMEN AND CHILDREN," *LOUKIDELIS, J.*

   a) A distinct odour emanates from the facts of this case.

   b) The ability and swiftness by which the main principals or indeed anyone acting within the system can extract from trusting citizens a large amount of money is rather stunning.

   c) Here the 3 main principals Perrin, Corriero and Dobbs without any background training or expertise in child or women abuse, but only a stated desire "to give something back", obtained a charter for a non-profit organization, the objects of which were to "promote awareness…and to assist abused women and children". The 3 named were the first directors. The corporation was given a high sounding name. The charter was issued March 2, 1999. Its objects were approved by the applicant and it was registered as a charitable organization. They were then ready to do business.

   d) Thereafter, they proceeded without advice to break statutory, common law and common sense rules, mixing their personal interest with those of the Society in a totally inappropriate manner.

   e) The laudable objectives were used as a cover to raise from unsuspecting donors close to 1 million dollars of which $1,365 actually found its way to a deserving charity.

   f) Thanks to the vigilance of the press the Society's fundraising methods and the conduct of its directors was brought to the applicant's attention resulting in this application.

g) The Society entered into 3 separate fund raising contracts between March 1999 and March 2000, all of which were shocking, paying to the collecting agency 75 to 80% of gross receipts.

h) The first was Community Fundraising Consultants, a now defunct company where Corriero and Dobbs at the time were both employed. This was an obvious conflict of interest that all 3 directors should have known.

i) There was no indication that the directors searched for other agencies with better rates. The suggestion that other new charities engaged this type of collector is not a valid answer.

j) The second contract was with a partnership known as Canadian Care Marketing Associates – the partners being Perrin and Corriero. While the commission was 75% rather than 80% of gross receipts there was an additional $1,500 monthly charge.

k) Contrary to Perrin's evidence I am satisfied that at the time that contract was signed, Perrin and Corriero were still directors of the Society; a clear conflict of interest and breach of their fiduciary duty as directors of a charitable organization. I note also that this contract was for 3 years which places in considerable doubt their now stated position that the contract was a temporary measure until a data base of contributors had been established.

l) The third contract was with OFC Charity Call Centre.

m) The whole operation was a scheme whereby charity was used as a cover to raise money for the benefit of the collection agency.

n) While the principals did collect some clothes and toys and distributed same, these items were donated to them at no cost. They were careful also to collect some thank you letters.

o) Mr. Andreou raised a spirited argument on behalf of the respondents. I cannot accept that the principals were naïve or that this is the accepted and appropriate manner of doing things for new charities.

p) Corriero and Perrin profited in numerous ways because of their conflicts and by breaching their fiduciary duties as directors. They had no right while directors, or after, to charge food and car expenses to the Society. Perrin's claim for reimbursement of a loan is undocumented.

q) They also charged partnership expenses to the Society when they carried on their business from the same location as the charity.

r) The inappropriateness of their conduct is more particularly set out in the detailed letter of administrative fairness from Revenue Canada dated September 29, 2000.

s) Ms. Dobbs also received a personal benefit by way of expenses which was improper.

t) These 3 principals particularly Corriero and Perrin, treated the Society as a personal fiefdom with a nice treasury for their own purposes.

u) I am not prepared, therefore, to approve the Society's accounts as stated.

v) Each of the 3 principals should repay all monies received from the Society if demanded by the applicant. Upon submitting proper documentation in support to their claims, approval by the Court may be granted after which they will be paid by the applicant from funds ordered to be returned.

w) If there is a dispute as to the amount owing by each, the applicant may arrange to reattend before me to determine the amount from the material already filed.

x) The contract between Canadian Care Marketing Associates (CCMA) and the Society was obviously improper at the time and was, I find, void ab initio. The profit shown by CCMA on its filed statement of some $28,000 should also be paid to the applicant by Corriero and Perrin.

y) Turning now to the issue of the collection agencies. Their share of 75 - 80% of gross receipts if known, is bound to shock the conscience of any citizen. If any prospective donor knew the true facts, I doubt that a penny would have be given. They claim to speak for a charity, but are careful not to reveal what the charity will receive. The main beneficiary is the collection agency. If not an outright fraud, it is clearly wrong.

z) Every charitable donor expects a charity to have some administrative costs. But in circumstances like this where the actual amount used for charitable purposes was a fraction of 1%, it is clearly unconscionable.

aa) Some mechanism should require canvassers for such collection agencies to be forthright in divulging collection and administration costs.

bb) If any funds are collected as a result of my order, the applicant hopefully might distribute same to authorized shelters in the areas where these funds were collected.

cc) The Society as well as the respondents or their agents are prohibited from seeking further donations from the public on behalf of the Society.

dd) Also the respondents Corriero, Perrin and Dobbs are prohibited from acting as directors of any other charitable organization until the accounts of the Society have been approved."

## C. COMMENTARY

The practical consequences of the National Society for Abused Women and Children decision are summarized below as follows:

1. The intensity of the comments by the Court reflect the offensive nature of the facts involved in the case. The Court found that the whole *modus operandi* was "*a scheme whereby the charity was used as a cover to raise monies for the benefit of the collection agency*". However, the decision is not limited to the specific fact situation involving this particular charity but has application to any charity that fundraises by utilizing third party fundraising companies.

2. The Court found that the compensation to third party fundraisers of 75% to 80% of the gross receipts for the donations was unconscionable and would "*be bound to shock the conscience of any citizen*". These comments were made notwithstanding that legal counsel for the three directors of the Society argued that the fundraising practices for the Society were similar to those carried out by other new charities and were done for purposes of establishing a database for future contributions.

This would suggest that the Court will compare fundraising expenses to the gross amount of donations received in the same year, instead of amortizing those expenses over a number of years to reflect the long term benefit of the fundraising database that was being established.

3. The Court found that the three directors of the Society were in a clear conflict of interest when they arranged for the Society to enter into contracts with fundraising companies that were either owned by them or employed by them. The Court held that by entering into these contracts, the directors breached their fiduciary duty as directors of the Society. For background information concerning the common law rule prohibiting remuneration of directors of charities, as well as a discussion of the decision by the PGT not to introduce regulations to permit remuneration of directors, see *Charity Law Bulletin No. 2* dated March 20, 2001, and an article entitled "*Remuneration of Directors in Ontario and Update of Remuneration of Directors in Ontario*", available at www.charitylaw.ca. The practical difficulty that can arise from conflicts of interest where directors receive, either directly or indirectly, remuneration from a charity is made all the more problematic in extreme fact situations such as the one in this case.

4. Once the Court identified that the directors of the Society were in conflict of interest by directing the Society to enter into the fundraising contracts, the Court went on to require that the directors account for all monies that they had received from the fundraising companies that they either owned or were employed by. This aspect of the decision underscores that where directors of a charity are found to be in breach of their fiduciary duties, the directors will personally be liable to repay the monies that they have received back to the charity, whether such monies have been received directly or indirectly, including monies received through fundraising contracts.

5. The Court also confirmed the fiduciary duty that directors in Ontario have to disclose unreasonable fundraising costs to donors. This decision of the Court is similar to the position taken by the Court in the recent Ontario case of *Aids Society for Children (Ontario)*, 105 A.C.W.S. (3rd) 1044 reviewed in "*Charity Law Bulletin No. 9,*" dated September 28, 2001, available at www.charitylaw.ca, in which the Court held that directors of a charity have a fiduciary obligation to disclose fundraising costs to donors where such costs exceed 70% of the gross receipts. In *National Society for Abused Women and Children* decision, the Court was particularly critical of the fundraising arrangement that allowed a fundraising company to "*speak for the charity*" and receive 75% to 80% of the gross receipts, but failed to disclose what those costs were and what the charity was actually receiving. This aspect of the decision emphasizes that directors of a charity have a fiduciary obligation to ensure that fundraising expenses are kept within the reasonable expectations of donors. What the reasonable expectations on fundraising expenses are was not identified by the Court, nor was there any reference to the 80/20 disbursement quota rule required for registered charities under the *Income Tax Act*. However, what is clear from the decision is that fundraising administrative costs of 75% to 80% of gross receipts is much higher than what the Court was prepared to consider as reasonable in the circumstances.

6. The common law fiduciary obligation placed upon directors of a charity would appear to be in addition to the increasing legal obligations imposed upon directors by statute concerning fundraising, such as the requirements under the federal *Competitions Act*, the federal *Personal*

*Information Protection and Electronic Documents Act*, and the proposed Ontario *Privacy of Personal Information Act*. For more information on liability exposure involving statutory compliance with fundraising legislation, reference should be made to the article, "*Looking a Gift Horse in the Mouth: Avoiding Liability in Charitable Fundraising*", available at www.charitylaw.ca.

7. It is possible that the decision of the Court in the *National Society for Abused Women and Children* case, as well as the earlier decision in the *Aids Society for Children (Ontario)* case, may become the impetus for fundraising legislation in Ontario similar to what has been put in place in other provinces, such as Alberta. Whether the provincial Government, the charitable sector, or the third party fundraising community will take the initiative in this regard remains to be seen.

## D. CONCLUSION

*The National Society for Abused Women and Children* decision is important for the numerous observations, findings and conclusions of the Court concerning the inappropriateness of fundraising activities carried out by the Society, as well as the recognition that the PGT will not hesitate to seek an order for a judicial passing of accounts under the *Charities Accounting Act* (Ontario) where fundraising arrangements are considered to be patently unreasonable. It will now be more important than ever for charities that are fundraising in Ontario to be diligent in ensuring that they not only comply with statutory requirements involving fundraising, but also comply with common law fiduciary duties imposed upon directors of charitable corporations in relation to the expectations of donors concerning reasonable administrative expenses involved in fundraising. It is clearly a new day in Ontario, and possibly across Canada, for charitable fundraising that will need to be closely monitored by charities, their directors, legal counsel who advise them, professional fundraisers, as well as the third party fundraising community.

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