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## UPDATE ON CHRISTIAN BROTHERS

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### A. INTRODUCTION

*Charity Law Bulletin No. 3*, posted at [www.charitylaw.ca](http://www.charitylaw.ca) in March of 2001, highlighted the potential impact of the decision of the Ontario Court of Appeal in the case of *Christian Brothers of Ireland in Canada (Re)* [2000] O.J. No. 117 (QL) and the subsequent refusal of the Supreme Court of Canada to grant leave to appeal from that decision. Specifically, *Charity Law Bulletin No. 3* focused on the impact of the Court of Appeal's decision not to recognize a special purpose charitable trust as a separate trust distinct from the general corporate assets of a charity for exigibility purposes, resulting in creditors of a charity being able to seize the assets of a special purpose charitable trust held by a charity, in addition to its general corporate assets.

Since the publication of *Charity Law Bulletin No. 3*, there have been two B.C. court decisions of importance involving the *Christian Brothers* saga. The purpose of this *Charity Law Bulletin* is to provide an update on the B.C. *Christian Brothers* decisions and to provide a brief commentary concerning the impact of the B.C. decisions, as well as some suggestions that might be taken in order to protect funds donated for restricted purposes.

### B. SUMMARY OF BACKGROUND AND CASE HISTORY

The somewhat convoluted background facts involving the *Christian Brothers* case in the Ontario and B.C. courts are summarized below:

- ◆ Christian Brothers is a worldwide Roman Catholic teaching order, which has had a presence in North America since 1876 when the Christian Brothers came to Newfoundland to teach Roman Catholic youth.
- ◆ In 1898, the Christian Brothers opened the Mount Cashel School, an orphanage for boys in St. John's, Newfoundland.
- ◆ In 1922, the Christian Brothers opened and operated Vancouver College in Vancouver, British Columbia.
- ◆ In 1960, the Christian Brothers agreed to establish and operate St. Thomas More Collegiate in Burnaby, B.C.
- ◆ In 1962, the Christian Brothers were incorporated by a Special Act of Parliament.
- ◆ In 1989, the Newfoundland Government appointed a Royal Commission to enquire into allegations made by boys who had been residents at Mount Cashel Orphanage that they had been sexually, physically and emotionally abused by members of the Christian Brothers. The findings of the Commission resulted in criminal charges and numerous civil actions for damages resulting from the alleged abuse.
- ◆ By July 1999, the aggregate amount claimed from the Christian Brothers was approximately \$67,000,000.
- ◆ By 1996, the Christian Brothers realized that the claims for damages far exceeded their general corporate assets, which amount to no more than \$4,000,000. They therefore made application to be wound up under the *Winding-Up and Restructuring Act* R.S.C. 1985, c. W-11. Christian Brothers was subsequently ordered to be wound up and a liquidator was appointed.
- ◆ In July 1997, the liquidator asked the winding-up court for advice and direction on legal questions relating to whether charities or their assets were immune from liability or whether their assets were exigible to satisfy tort claims. The winding-up court directed those questions to be argued fully before a judge of that court by all affected parties.
- ◆ In November 1997, Blair J. of the Ontario Court (General Division) ordered that the nature and scope of any trusts involving property located in British Columbia would be dealt with by the courts in British Columbia.
- ◆ The resulting B.C. decision of Levine J. in *Rowland v. Vancouver College Ltd.* [2000] B.C.J. No. 1666 (QL) held that the two schools located in British Columbia were held by the Christian Brothers as special purpose charitable trusts.
- ◆ In *Rowland v. Vancouver College Ltd.* [2001] B.C.J. No. 1901(QL), the B.C. Court of Appeal affirmed Levine J.'s decision.
- ◆ In relation to the issue of exigibility of special purpose charitable trusts, Blair J. in the Ontario Court (General Division) decision of *Christian Brothers of Ireland in Canada (Re)* [1998] O.J. No. 823 (QL) held that the general corporate property of a charity was not immune from exigibility by tort creditors; however, property held as a special purpose charitable trust by a charity would not be available to compensate tort creditors of the charity unless the claims arose from a wrong perpetrated within the framework of the particular special purpose charitable trust in question.

- ◆ The Ontario Court of Appeal reversed Blair J.'s decision in April 2000 in *Christian Brothers of Ireland in Canada (Re)* [2000] O.J. No. 1117 (QL), declaring that, if these properties were found to belong to the Christian Brothers, there was no difference in whether they were held beneficially or legally and they would therefore be available to the tort creditors of the Christian Brothers. In doing so Feldman J.A. agreed with Blair J. that there is no general doctrine of charitable immunity applicable in Canada; however, she held that once Blair J. had determined that there was no doctrine of charitable immunity in Canada, it then became redundant for the court to analyze whether special purpose charitable trusts of a charity were exigible to pay the claims of tort creditors. As a result, the Ontario Court of Appeal held that all assets of a charity, whether they are owned beneficially or they are held pursuant to a special purpose charitable trust, are available to satisfy claims by tort victims upon the winding-up of the charity.
- ◆ The British Columbia courts did not decide the issue of exigibility, which they held was not a question that was open to them to determine. However, in his dissenting opinion in the B.C. Court of Appeal recorded at *Rowland v. Vancouver College Ltd.* [2001] B.C.J. No. 1901 (QL), Braidwood J.A. took the position that this issue was open to the court to decide, essentially agreeing with Blair J. on this issue.
- ◆ In November 2000, the Supreme Court of Canada denied leave to appeal the Ontario Court of Appeal decision in *Christian Brothers of Ireland in Canada (Re)* [2000] S.C.C.A. No. 277 (QL).
- ◆ In May 2002 the Supreme Court of Canada denied leave to appeal the B.C. Court of Appeal decision in *Rowland v. Vancouver College Ltd.* [2001] S.C.C.A. No. 652 (QL)
- ◆ In applying the decision of the Ontario Court of Appeal, the assets of the two schools located in B.C. were made available to satisfy the claims of the creditors of the Christian Brothers' Mount Cashel orphanage.

### C. COMMENTARY ON B.C. DECISIONS

Levine J. of the British Columbia Supreme Court held in *Rowland v. Vancouver College Ltd.* [2000] B.C.J. No 1666 (QL) that two schools that had been started by the Christian Brothers in British Columbia were in fact held by the Christian Brothers as special purpose charitable trusts. Levine J.'s decision was particularly significant in that, after briefly reviewing the authorities on trusts and discussing the exemptions afforded to special purpose charitable trusts from the usual requirements for the existence of a trust, the decision affirmed that special purpose charitable trusts do exist in Canadian law.

In *Rowland v. Vancouver College Ltd.* [2001] B.C.J. No. 1901 (QL) the British Columbia Court of Appeal later affirmed Levine J.'s decision. However, a certain amount of ambiguity remains surrounding the issue of how to determine whether a particular trust is a special purpose charitable trust. While Blair J. sets forth a

formalistic approach, Levine J.'s decision seemed to advocate a more contextual and less rigid test for determining whether a special purpose charitable trust exists. The British Columbia Court of Appeal did not examine this issue in depth, but rather simply and briefly affirmed Levine J.'s analysis. Consequently, this matter will likely require further clarification from the courts. It is interesting to note, though, that the recent case of *Ukrainian Youth Assn. Of Canada v. Galandiuk* (2001), 43 E.T.R. (2d) 317 (Ont. Sup. Ct.) follows the approach of Levine J. in the B.C. Supreme Court decision of *Christian Brothers*. However, the decision simply adopts the approach with no discussion or explanation given and it is therefore not particularly helpful in providing insight with respect to the direction that other courts may take on this issue.

With regard to the British Columbia schools, both the British Columbia courts held that, although the properties were special purpose charitable trusts, the question of whether these assets were exigible to the tort creditors of the Christian Brothers was not before them and that to that extent the decision of the Ontario courts would therefore apply. Accordingly, the decision of the Ontario Court of Appeal that all assets of the Christian Brothers, including special purpose charitable trusts are exigible, effectively disposed of the question and the decision that the schools were special purpose trust funds did not have any practical impact in this case. As a result of these decisions, the assets of Vancouver College and St. Thomas More Collegiate were made available to satisfy the claims of the creditors of the Christian Brothers' Mount Cashel orphanage.

The schools appealed the B.C. Court of Appeal decision to the Supreme Court of Canada, while at the same time asking the Court to reconsider its decision to deny leave in the Ontario case. The Supreme Court finally laid this case to rest through the dismissal of both the Ontario and British Columbia appeal applications in May 2002.

#### **D. DEVELOPING A STRATEGY IN RESPONSE**

Feldman J.A. was very careful in the Ontario Court of Appeal decision concerning exigibility of special purpose charitable trusts to note that the decision was limited to the specific facts of the *Christian Brothers* case. Nevertheless, the attempt to limit the decision is somewhat arbitrary and provides little comfort to charities and their legal counsel who may be concerned that the decision could become the "thin edge of the wedge" that could lead to future court decisions exposing special purpose trusts' property, such as

endowment funds, to claims by tort victims in a broader context instead of only in the limited fact situation involving the *Christian Brothers* case. Charities will need to now be aware of this risk and the possibility that the creditors may be successful in accessing restricted funds held by the charities that were previously thought to be immune from unrelated claims.

Charities, as well as donors, will need to address this uncertainty by finding means to ensure that restricted donations can be protected for the purposes for which they were intended. It is not clear whether existing donations can be adequately protected, but when considering future donations, charities will need to examine these issues closely with their donors and legal counsel. Some possible options that charities and donors might consider include the following:

- ◆ Creating a special purpose charitable trust by the donor giving the intended gift to an arm's-length parallel foundation established to advance only the purposes of the intended charity;
- ◆ Creating a special purpose charitable trust by the donor giving the intended gift to a community foundation or trust company to be held in trust for the benefit of a specific named charity; and/or
- ◆ Structuring a donation as a determinable gift to be determined upon the winding-up, dissolution or bankruptcy of the charity, accompanied by a "gift over" to another charity that had similar charitable purposes or, alternatively, providing that the gift revert to the donor.

All of these options and, in particular, the use of determinable gifts, would require addressing a number of important legal issues, including the income tax consequences to the donor making such a gift, that are beyond the scope of this *Charity Law Bulletin*.

## E. CONCLUSION

The British Columbia decisions in the *Christian Brothers* saga have clarified the fact that special purpose charitable trusts do exist in Canadian law. This should provide donors with some measure of comfort that charities receiving such donations have a legal, and not just moral, obligation to ensure that donated funds are used in accordance with the donor's intentions. However, as a result of the broader implications of these decisions and the refusal of the Supreme Court of Canada to consider the matter, special purpose charitable trust funds are now subject to seizure by creditors for claims that are unrelated to the purposes for which the funds were donated.

Concerns about the appropriateness of this decision are reflected in a report prepared by the British Columbia Law Institute Committee on the Modernization of the *Trustee Act* entitled “Creditor Access to the Assets of a Purpose Trust,” dated March 2003, which states as follows:

In Re: Christian Brothers of Ireland in Canada the Ontario Court of Appeal ruled that assets held as a special purpose trust by a charity were available to satisfy the claims of creditors even where those claims arose out of circumstances wholly unrelated to the special purpose trust.

In the Committee’s view, this decision constitutes a serious distortion of the law of trusts. Since the circumstances of the case are such that no further appeal is likely, the Committee is concerned that this holding may be more widely adopted unless steps are taken.

The committee went on to recommend that remedial legislation, in the form of a restatement of the law, be enacted.

Pending the enactment of such legislation, charities, donors, and the lawyers who advise them will need to continue to be proactive in reviewing ways of protecting restricted funds from possible creditors of the charities.