

ONTARIO SUPERIOR COURT OF JUSTICE REAFFIRMS UNENFORCEABILITY OF PLEDGES

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A. INTRODUCTION

The Ontario Superior Court of Justice has reaffirmed that a pledge to donate funds to a charitable entity is not enforceable as a contractual agreement. The *Brantford General Hospital Foundation v. Marquis Estate*¹ decision does not establish new law, but rather reinforces the common law principle that a pledge is unenforceable for lack of consideration. Further, the doctrines of part performance and estoppel will only allow enforcement of a pledge in cases where there is a pre-existing legal or contractual relationship between the parties.

B. FACTS OF THE CASE

Both the late Dr. Jack and Mrs. Helmi Marquis were generous philanthropists, with the Brantford General Hospital being a significant beneficiary. Dr. Marquis' prior \$2.8-million bequest had been recognized by naming the hospital's coronary and cardiac diagnostic unit after him.

In response to the province's restructuring of the health care system in the late 1990s, the Brantford General Hospital Foundation launched a campaign to raise funds to expand the hospital. Mrs. Marquis was

¹ (2003), 67 O.R. (3d) 432 (Sup. C.J.) ("*Brantford General Hospital Foundation*").

approached by the hospital's Chief Executive Officer to become a potential lead donor for the campaign, the suggested amount being \$1-million. In September 1998, she was presented with a formal proposal that outlined the project and the hospital's interest in honouring her and the memory of Dr. Marquis by naming the new critical care unit after them. After seeking the advice of her accountant on at least three occasions, Mrs. Marquis signed the document, pledging to donate \$1-million over a five-year period to the Brantford General Hospital Foundation. She made the first instalment of \$200,000 on April 14, 2000 and died a month later. After Mrs. Marquis died, her estate refused to pay the balance of \$800,000 owing on the pledge.

In seeking to enforce the pledge against the estate, the hospital foundation raised two issues:

- a) Is a pledge document a contract enforceable in law or merely "a naked promise"?
- b) Are the defendants estopped from arguing that there was not a valid contract on the basis of the doctrine of part performance?

C. FINDINGS OF THE COURT

1. Pledge lacks consideration

In its decision, the court reaffirmed that Canadian courts follow English common law concerning pledges, namely that a promise to subscribe to a charity is not enforceable in the absence of consideration. It was the hospital foundation's submission that their commitment to name the entirety of the new unit in honour of Dr. and Mrs. Marquis constituted bona fide consideration. The court did not accept this position. While the court found clear evidence that Mrs. Marquis was adamant that Dr. Marquis' recognition in the coronary care portion of the unit be retained, including his name and picture, it did not find the larger naming opportunity to be of vital importance to Mrs. Marquis in her decision to pledge the funds as it was at the suggestion of the hospital. It was further found that as the decision to name the unit in honour of the Marquis's was still subject to board approval, it was difficult to say that this constituted bona fide consideration. In reaching this conclusion, the court distinguished the New York Court of Appeals' decision in *Allegheny College v. National Chautauqua County Bank of Jamestown*,² in which the court found a naming right attached to a pledge to be sufficient

² 246 N.Y. 369, 159 N.E. 173 (N.Y. C.A. 1927) ("*Allegheny College*").

consideration to create a bilateral agreement. However, the court distinguished this case as the donor clearly stipulated that the naming of the fund was a condition to making the subscription, which was not the situation in the case under consideration.

2. Outside evidence

The plaintiffs further submitted that the court consider the circumstances leading up to the signing of the pledge, including all of the meetings and formal proposal documents, to ascertain whether, in fact, appropriate consideration may be found. This would be in accordance with the Supreme Court of Canada's decision in *Dalhousie College v. Boutilier Estate*, where it was held that the court may consider "... circumstances proved by evidence, outside the subscription paper itself, from which such a reciprocal promise on the part of the promisee may well be implied."³ Although the court accepted this submission, it was unable to conclude on the evidence that Mrs. Marquis either expressly requested the foundation, as promisee, to undertake a specific project or personally participated in the proposed project in order to infer such a request. Absent an enforceable binding contract, the court was unable to enforce Mrs. Marquis' intentions.

3. Part performance and estoppel

Plaintiff's counsel made the alternative argument that the estate was estopped from denying the existence of a contract given the partial performance of the pledge as witnessed by the receipted payment of \$200,000 prior to Mrs. Marquis' death. In so doing, the court was asked to consider whether the doctrine of estoppel could be used as a sword rather than a shield. Based on the precedent set in *Reclamation Systems Inc. v. Rae*,⁴ the court stated that the testator's intentions aside, the doctrine of estoppel can only succeed if there is a pre-existing legal relationship between the parties. In this regard, the court reiterated that no such legal or contractual relationship existed between the hospital foundation and Mrs. Marquis. Further, it was the view of the court that the plaintiffs failed to establish that they acted to their detriment in reliance on the promise of Mrs. Marquis. While the hospital foundation clearly relied upon the pledge in calculating the funds raised to date for the purpose

³ [1934] S.C.R. 642 at 648, [1934] 3 D.L.R. 593.

⁴ (1996), 27 O.R. (3d) 419, [1996] O.J. No. 133 (Gen. Div.).

of the campaign kick-off and in its representations to the provincial government in their quest to achieve further approvals, this phase of the project had not yet commenced, and they were unable to prove that they relied to their detriment on this incomplete pledge. Further, the court heard the foundation would proceed with the project regardless; the hospital would merely need to raise additional funds over and above that which had previously been anticipated.

D. IMPLICATIONS OF THIS CASE

Two implications can be drawn from the decision of the court in the *Brantford General Hospital Foundation* case. First, there should be a correlation between testamentary and *inter vivos* gifts. In drafting a will, it is important that counsel ensure the testamentary gift will continue to honour the *inter vivos* gift and allow for the testator's wishes to be fulfilled. In the *Brantford General Hospital Foundation* case, the court acknowledged that Mrs. Marquis clearly intended to provide the hospital foundation with the \$1-million gift at the time of the pledge, in addition to her substantial bequest amounting to \$800,000, but the court was unable to enforce her intentions in the absence of an enforceable binding contract.

Secondly, with regards to an enforceable contract, can there be consideration and still be a gift? The case reinforces that a pledge is not a binding contract. Query whether a charity, desiring to enforce a pledge, would be able to structure the pledge as a contract, with the charity giving nominal consideration to the donor, and calling the pledge document a "pledge contract."

The giving of nominal consideration would in turn necessitate reference to the proposed new definition of a gift under the *Income Tax Act* (the "Act"), announced December 20, 2002, and the corresponding proposed rules regarding split-receipting, announced December 24, 2002.⁵ Whereas a gift at common law is defined as a voluntary transfer of property for which the donor receives nothing of value in return for having made the gift, the proposed amendments will create a new concept of "gift" for tax purposes which will permit a donor

⁵ Canada Revenue Agency, *Registered Charities Newsletter*, No. 17 (1 January 2004). See *Charity Law Bulletin*, No. 23 (31 July 2003), "New CCRA Guidelines on Split-Receipting" for an explanation of *Income Tax Technical News*, No. 26 (24 December 2002), available at <http://www.charitylaw.ca>, which contains the proposed new guidelines on split-receipting to explain CRA's new administrative policy in relation to determining whether there is a gift in situations other than where there is an outright transfer of property for no consideration. See also Terrance S. Carter and Theresa L.M. Man, "Recent Changes to the *Income Tax Act* and Policies Relating to Charities and Charitable Gifts" (4 March 2004), a paper presented to the Society of Trust and Estate Practitioners, available at <http://www.charitylaw.ca>.

to have a tax benefit under the Act even though the donor (or a person not dealing at arm's length with the donor) received a benefit, provided that the value of the property exceeds the benefit received by the donor.

Under the proposed split-receipting rules, for a donation to be considered a gift, the following four key elements must be satisfied:

- a) First, there must be a voluntary transfer of property with a clearly ascertainable value;
- b) Second, any advantage received or obtained by the donor must be clearly identified and its value ascertainable;
- c) Third, there must be a clear donative intent by the donor to give property to the donee;
- d) Fourth, the eligible amount of the gift, calculated at FMV, must exceed the amount of the advantage provided to the donor.

Presumably, entering into a pledge contract involving nominal consideration of \$2 should not defeat the first requirement that there be a voluntary transfer of property, given the voluntary intent involved in signing the pledge. Reference should also be made to Canada Revenue Agency's ("CRA") *de minimis* threshold which provides that the amount of the advantage received by the donor that does not exceed the lesser of 10% of the value of the property transferred to the charity and \$75 will not be regarded as an advantage for purposes of determining the eligible amount of the donation. This, however, does not apply to cash or near cash advantages (e.g., this may include redeemable gift certificates, vouchers, coupons). The nominal consideration of \$2 should also not defeat the third requirement for split-receipting that there be a clear donative intent by the donor to give property to the donee. However, these issues have not yet been specifically addressed by CRA, and until they are, the option of using an enforceable pledge contract remains uncertain.

E. CONCLUSION

The *Brantford General Hospital Foundation* case reiterates the common law principles concerning the enforceability of pledges: a promise to subscribe to a charity is not enforceable in the absence of a bargain. As well, the doctrines of part performance and estoppel will not operate absent a pre-existing legal relationship between the parties. Although this case does not establish new law, it raises serious questions for charitable

organizations, donors and their legal counsel acting to ensure enforcement of a pledge, issues that will need to be addressed by CRA in future policy pronouncements.