
CASE COMMENT: LONDON HUMANE SOCIETY CASE AFFIRMS DIRECTORS OF CHARITIES MUST ACT IN GOOD FAITH

*By Terrance S. Carter and Ryan M. Prendergast**

A. INTRODUCTION

On November 12, 2010, the Ontario Superior Court of Justice released its decision in *London Humane Society (Re)* (“the Decision”), which discusses fiduciary duties of directors of charitable corporations and their relationship with corporate members.¹ The Decision relates to an application for direction from the court by the directors of the London Humane Society, (“LHS”) regarding who should constitute the membership of the charity for the purposes of a special meeting of members. LHS intended to significantly alter the voting privileges of its members pending the outcome a special meeting of members for the purpose of approving a new by-law. This *Charity Law Bulletin* provides an overview of the Decision, as well as a commentary concerning the outcome of the Decision.

B. THE DECISION

The following provides an outline of the background facts in the Decision, as well as the issues and conclusion of the court.

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¹ London Human Society (Re), 2010 ONSC 5775. The full decision is available through the Canadian Legal Information Institute online at: <http://www.canlii.org/en/on/onsc/doc/2010/2010onsc5775/2010onsc5775.html>.

1. Background Facts

LHS is a registered charity organized for the purposes of animal welfare. The dispute in the case arose concerning the constitution of the membership under the LHS by-law. In 2003, the LHS directors passed a resolution granting automatic membership to anyone who donated \$30 or more, as well as granting an automatic renewal to any member who made a donation in the following year of \$30. However, the procedure for the admittance of members into LHS had changed throughout its history, as initially, there was no automatic membership, nor was there any automatic right to renewal. Starting in the late 90's, prospective members were required to fill out an application form. In 2007, the by-law of LHS was amended to grant discretion to the directors concerning the approval of new members. On November 27, 2008, the resolution of the LHS board of directors granting automatic membership for donations of \$30 or more was revoked. In September of 2009, the LHS Membership Committee recommended to the board that any member, whether new or renewing, should be required to fill out a membership application, which recommendation the board adopted at their October 1, 2009 meeting.

The court found that because the LHS by-law gave the board the discretion to approve members, an approval process was implied, and therefore an application form was warranted despite their being no requirement for one in the by-law. Since the requirement that new and renewing members in 2010 complete an application form was not a change to the by-law per se, but rather a change of policy, the court found that no notice of that change to LHS members was warranted. Despite finding that no notice was required, the court went on to evaluate the notice LHS provided to its members. The first notice of the application form requirement was contained in the Fall 2009 newsletter for LHS, which was distributed to the LHS membership. The second notice was distributed in early 2010 when LHS sent out their 2009 tax receipts to 800 monthly donors. The court noted that these 800 donors, “constituted less than half the total membership of LHS.”

The court noted that by the time the second notice was sent out, all LHS memberships had expired, as membership in LHS automatically expires on December 31 of each year in accordance with the LHS by-law. However, the membership application form was not available until January 14, 2010 at 5:11p.m. Consequently, in 2009 no one had the ability to renew or apply as a member, since the form was not available until mid-January 2010.

Eventually, 117 applications were received. Of these 117 applications, 109 were approved and 8 were rejected. No reasons were given for the rejection, other than that the rejected applications may have been ideologically opposed to the LHS board of directors

2. Issues and Decision of the Court

The court determined that the issues in the case at bar were as follows:

- a) Was there sufficient notice of the new application form requirement to the members of the LHS?
and
- b) Was the Board of Directors' decision to reject eight applications for membership valid?

In determining the sufficiency of the notice of the new application form to the LHS members, the court distinguished the case at bar from a case involving the Toronto Humane Society (“THS”). In the *Trow* decision², the directors sent notice of a by-law change to members of THS but did not mention that the membership of THS was changing so that most members would no longer have a vote. The *Trow* decision was distinguished, however, since the “membership policy change by the LHS Board of Directors was not a bylaw change and there were no statutory notification or confirmation requirements for such policy decisions.”

The court then went on to recognize the contractual nature of the relationship between members of charitable corporations and their directors, which is, “governed by statute, the creational documents of the corporation, its by-laws and fiduciary obligations and duties of good faith.” The court affirmed that directors of corporations, both for-profit and non-profit, are in a fiduciary relationship to the corporation, and not its shareholders or members. Therefore, the court found that the notices sent to LHS members were sufficient to fulfil the interests of the corporation, despite the court recognizing that both notices were deficient in some regards.

The respondents, who acted on behalf of persons who had applied for membership in LHS and were rejected, argued that the court should exercise its inherent jurisdiction to direct and control the administration of charities, asserting that the insufficient notices constituted a breach of the director's

² *Trow v. Toronto Humane Society* (2001), 16 B.L.R. (3d) 298 (ON S.C.J.)

fiduciary duties. However, the court found that there was “no plausible ground for declaring the notice insufficient and providing memberships to those donors who have not applied for membership.”

The court also went on to state that since the directors of LHS owe a fiduciary duty to the corporation, they are required to act in good faith. The court followed the decision in *Chu v. The Scarborough Hospital Corporation*³, which had stated that the court will intervene in decisions made by non-share capital corporations in accordance with their by-laws where the corporation has acted in bad faith or contrary to principles of natural justice. In this regard, the court found that the eight applicants for membership who had their membership applications rejected by the board had been refused based on ideological differences with the board of directors. The court, therefore, found that the applicants had their applications denied for improper purposes and should therefore be deemed as members.

In responding to the request for directions from the court, the court concluded that the membership of LHS, for the purposes of voting at the special meeting of members and all other purposes, were those who the directors approved as part of the new application process requiring a membership application form from new and renewing members.

C. COMMENTARY

The Decision affirms that directors of charitable and not-for-profit corporations are fiduciaries to the corporation, and must act in good faith in accordance with their by-law. The Decision also provides protection to directors who adjust the process for membership approval or renewal, without necessarily making an amendment to the corporation’s general operating by-law. It is important to note from the Decision, however, that when members take a different philosophical approach to that of the board, particularly with organizations which have varying ideologies, as in animal welfare organizations, the board cannot act arbitrarily with respect to approval of membership.

The outcome of this decision means that more than 800 former members of LHS will not be permitted to vote on proposed by-law changes, which will significantly change the voting privileges for members in LHS. It is interesting that the court took the “cost effectiveness” of the notices into account when determining that the LHS board had not breached its fiduciary duties or acted contrary to natural justice. It is also interesting

³ *Chu v. The Scarborough Hospital Corporation* (2007), 35 B.L.R. (4th) 254 (Ont. Div.Ct.)

to note that the court found that the failure of the board to give notice to all members of LHS about the change in the application form process did not affect the validity of the membership application process.

While the court found in the case at bar that the applicant directors had complied with their statutory and common law duties to the corporation to the detriment of the respondent members, directors of charitable and not-for-profit organizations with large memberships, such as LHS, will need to be aware that the new Canada *Not-for-profit Corporations Act*, as well as the Ontario *Not-for-profit Corporations Act*, will provide new remedies to their members, such as the oppression remedy, which could lead to a different result.



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