
COURT PROVIDES COMMENTS TO TRUSTEES PURSUING LITIGATION

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

A. INTRODUCTION

On May 7, 2012, the Ontario Superior Court of Justice issued an unreported decision concerning costs in the matter of *Highfield v. Murray* (the “Costs Decision”).¹ The Costs Decision followed an earlier unreported decision of the Ontario Superior Court of Justice on November 25, 2011 in the same matter (the “Trial Decision”).² The decisions involved a dispute concerning the trustees of an unincorporated rural church known as Crossroads Christian Fellowship (“Crossroads”). Since the dispute involved an unincorporated church, the individuals involved in the dispute were trustees in accordance with the *Religious Organizations Land Act*, R.S.O. 1990, c. R.23 (“ROLA”), which permits unincorporated religious organizations to hold land for purposes enumerated in the act. The decisions provide guidance concerning behaviour that would constitute a breach of trust, together with guidance for trustees involved in litigation which would apply equally to directors of incorporated charities. This *Charity Law Bulletin* summarizes the decisions and provides comments on what trustees or directors need to know as a result of these unreported cases.

B. BACKGROUND FACTS AND THE PARTIES

Crossroads was established in Sombra Township in the County of Lambton, where Crossroads purchased property on October 30, 1995. Crossroads is a registered charity.

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¹ 2012 ONSC 2524. [Costs Decision]

² 2011 ONSC 6518. [Trial Decision]

One of the applicants in the case, Russell Murray, was the pastor of Crossroads from inception (the “Pastor”), in addition to being a trustee under ROLA. The other applicant was a fellow trustee at Crossroads whom the Pastor had appointed, but the court later determined that this appointment was not done in accordance with ROLA (collectively, the “Applicants”). The respondents included attendees of the Church, as well as one of the trustees of the Church under ROLA (collectively, the “Respondents”).

By 2006, attendance at Crossroads had declined to the point where a decision was made to sell the church property. The dispute arose over how the proceeds of that sale were to be used. An application was issued in December 2006 and a cross-application was issued in February 2007. The proceeds of the sale of the Crossroads property were ordered to be paid into the court in 2007 and 4 years later the trial occurred after both applications were combined.

The Applicants, who included the Pastor, alleged that Crossroads had merely changed its name and moved to Sarnia, where the funds were to be used for the Pastor’s new church. The Respondents, which included one of the original trustees of Crossroads, argued that when the church lands were sold and the church closed, a decision was made to distribute the proceeds amongst other registered charities. Both parties also sought orders under section 10 of the *Charities Accounting Act* concerning breach of trust and requiring the Public Guardian and Trustee (“PGT”) to investigate and report to the court.

C. ISSUES

The issues to be decided in the Trial Decision involved what should happen to the money being held in court from the sale of the land owned by Crossroads, as well as whether or not the allegations of breach of trust raised by both parties had occurred and if so, what should be the appropriate remedy.

The issue to be decided at the Costs Decision was how the proceeds of the sale of the church were to be used to indemnify the costs of both the Respondents and Applicants in the decision.

D. SUMMARY OF DECISION

1. Trial Decision

a) Breaches of Trust and Appropriate Remedy

The Respondents alleged several instances of breach of trust concerning the conduct of the Pastor at Crossroads, including that he bought and sold a motor home on behalf of Crossroads, that he attended mission trips outside the country when he had no authority to do so, that he breached an order of the court in 2007 in the manner in which a portable owned by Crossroads was sold, improper increases to his housing allowance, that he permitted items owned by Crossroads to be taken to Sarnia and that he wrongfully kept some of these items in his home.

The court found that the Pastor's conduct in the purchase and sale of the motor home, and in increasing his housing allowance were inconsistent with the obligations of a trustee or fiduciary.³ Specifically, the court found that he failed to both disclose and document the transaction related to the motor home and profited financially by keeping the proceeds of the sale. He also directed that his housing allowance be increased without obtaining approval from the other trustees of Crossroads. Lastly, the court also found that in keeping personal property belonging to Crossroads for the use of his new church in Sarnia and for his home office, he was also in breach of trust.

In addition, the court also specifically applied the decision of *Public Trustee v. Toronto Humane Society*⁴ noting that the Pastor, aside from his position as trustee, was also the "Pastor/President" and "residing chairman" and therefore "was clearly in a fiduciary position in terms of governance similar to a director of an incorporated charity and could not put himself in a financial conflict of interest against the interest of the charity".⁵ Furthermore, the court found that the Pastor had breached his obligations as both a trustee and fiduciary in promoting the church in Sarnia by using the Crossroads charitable registration number.

While section 35 of the *Trustee Act* (Ontario) permits the court to excuse a fiduciary where a breach of trust has occurred and the trustee "acted honestly and reasonable, and ought to fairly be excused for the breach of trust", the court found that the present circumstances did not permit the Pastor to be excused.

³ Trial Decision, at 202.

⁴ [1987] O.J. No. 534.

⁵ Trial Decision, at 208.

In terms of the proper remedy in relation to the above breaches of trust, the court first removed the Pastor as a trustee under ROLA for Crossroads. As well, the court also ordered the Pastor to pay \$2,000 to Crossroads representing the value of property the Pastor had taken from Crossroads for use in his new church in Sarnia, \$100 for property he had kept for his home office, and \$2,000 for the motor home. Although the court found that the Pastor had committed a breach of trust in using the Crossroads charitable registration number for the church in Sarnia, the court left it with the Minister of National Revenue to determine how the *Income Tax Act* (Canada) should be applied to the Sarnia church's use of the Crossroad registration number.

Although the Applicants had also raised allegations of breach of trust against the Respondents, the court stated that the allegations were not pleaded, and that even if they were, the respondent trustee would have been excused under section 35 of the *Trustee Act* (Ontario).

b) Distribution from proceeds of sale

The court was not persuaded by the argument from the Applicants (which included the Pastor) that Crossroads had elected to move to Sarnia and continue under a different name. The court concluded based on the evidence that the membership of Crossroads had voted to sell or donate any inventory still held by Crossroads and to distribute the proceeds of the sale to other registered charities.

In this regard, the court agreed that the sale proceeds should go to other registered charities. In terms of the procedure to be used for selecting these other charities, the court declined to order a membership meeting of Crossroads to let the members decide, because the constitution used by Crossroads did not adequately address the issue of membership and because it was likely that the hostility amongst the members could result in further conflict if a meeting was ordered. As such, the court exercised its inherent jurisdiction in determining the process to be used, subject to the PGT being given an opportunity to make submissions regarding the charities before final approval.

2. Costs Decision

The process for the selection of charities was followed. As such, the court determined that there was \$83,686.41 available for distribution after determining the issue of costs from the Trial Decision.

The Applicants were entirely unsuccessful in the Trial Decision. The Respondents sought their costs on a substantial indemnity basis (i.e., higher costs of a punitive nature), and the PGT agreed that costs on a

substantial indemnity basis was consistent with the fact that the Applicants were the losing party. The Applicants also claimed costs to be paid out of the funds held in court.

While the court agreed that the Respondents were entitled to costs on a substantial indemnity basis, the court then struggled with the issue of what is the proper amount for costs. In this regard, the court made the following comments concerning the conduct of both parties:

This court case simply spun out of control. Parties were investing time, effort and resources well beyond what this case was worth. The combined substantial indemnity costs claimed by both parties exceeded \$190,000 representing approximately 275% of the value of the net proceeds from the sale of the church.⁶

After reviewing the applicable case law, the court determined that the amount of costs that could be paid out of the funds held by the court needs to be reasonable, and concluded that it would be unreasonable to expect the entire substantial indemnity costs to be paid out of the funds held in court. In addition, the court noted that this was particularly so in light of the fact that the beneficiaries of the funds held in the court are other charities.

As such, the court concluded that the Applicants would not be entitled to any reimbursement of their costs from the money held in the court. The court fixed the costs of the Respondents on a substantial indemnity basis at \$60,000, from which approximately \$15,900 was to be paid out of the money held in court. It is important to note that the Respondents had sought \$106,224 in costs on a substantial indemnity basis. The \$40,000 balance after the \$15,900 was paid out of the court, together with the costs ordered against the Pastor for his breaches of trust, was then split between the Applicant, in that the Pastor was ordered to pay \$20,000 to the Respondents, and the Pastor and the other applicant Jason Vermeulen, whom the court characterized as merely following the Pastor, were required to pay the remaining \$20,000 on a joint and several basis. The balance of the funds was then accorded to the selected charities accordingly.

The fact that the court permitted some of the costs of the Respondents to be paid out of the funds held by the court meant that the amount the Applicants had to pay was reduced. However, the court refrained from having the Applicants repay the funds because the organizing documents of Crossroads were not satisfactory. The court noted that Crossroads lacked any kind of trust document concerning how the proceeds of the sale

⁶ Costs Decision, at 32.

of the church were to be distributed, and that there were no clear rules concerning trustees or membership criteria in Crossroads, which resulted in increasing the length of time required at trial in order to fully canvass those issues.

E. CASE COMMENTS AND CONCLUSION

The Costs Decision highlights that although trustees and directors of charities in Ontario can often be “right” in pursuing litigation on behalf of their charity, they can also be “wrong” if they allow the costs spent on litigation to go beyond the value of the charitable property in question. As such, directors and trustees of charities in Ontario need to take a prudent approach before deciding whether or not it would be in the best interest of the charity to seek a remedy from the courts.

The Applicants and Respondents both sought payment of their costs out of the funds held in court, i.e., the remaining charitable property of the charity to which they acted as trustees. In this regard, in dealing with an unincorporated church, and to some extent, an incorporated charity, a trustee or a director can be indemnified for acts properly undertaken in the administration of the charity or even undertaken in breach of trust but under an honest and reasonable mistake. In this case, however, given the Pastor’s various breaches of trust and misconduct, and given the fact that the Respondents spent legal costs well above the value of the charitable property in dispute, neither party was entitled to full indemnity from the funds held in court.

In addition, the various breaches of trust found by the court against the pastor of Crossroads highlights the fiduciary nature of the relationship of a director, trustee, or like official of the charity. In particular, the breach of trust concerning the charitable registration number of Crossroads implies that a charity’s registration number is in fact charitable property of the charity, and that directors must ensure that the charitable registration number is used appropriately.

