

## **ONTARIO COURT AFFIRMS THE FIDUCIARY OBLIGATIONS OWED BY DIRECTORS OF CHARITABLE ORGANIZATIONS**

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*By Terrance S. Carter\**

### **A. INTRODUCTION**

On April 13, 2010, Justice Brown of the Ontario Superior Court of Justice released the most recent decision in the ongoing litigation involving the Ontario Society for the Prevention of Cruelty to Animals (“OSPCA”) and the Toronto Humane Society (“THS”). This decision affirms that directors of charitable organizations have fiduciary duties toward the charity, and also emphasizes that with these enhanced duties comes an enhanced power of the courts to monitor and regulate charities.

In fact, the jurisdiction of the courts to oversee the management of charitable property extends so far as to provide them with the authority to order the destruction of charitable property, as the April 13, 2010 decision illustrates. This *Charity Law Bulletin* discusses the history of the dispute between OSPCA and THS, as related by the Court, and highlights Justice Brown’s observations about the fiduciary duties of directors of charities. The Bulletin concludes with a discussion of what lessons Justice Brown’s decision can teach the management of charities and their legal counsel.

### **B. HISTORY OF THE LITIGATION BETWEEN THE OSPCA AND THS**

The THS is a not-for-profit corporation incorporated in 1887 by way of a Declaration of Incorporation. It operates an animal shelter and veterinary hospital in Toronto, Ontario, and relies largely on charitable

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donations from the public to provide its services. The OSPCA was founded in 1873 and was incorporated by special act, now known as the *Ontario Society for the Prevention of Cruelty to Animals Act* (“*OSPCA Act*”).<sup>1</sup> The OSPCA has the ability to confer affiliate status on animal shelters in Ontario, and regularly conducts visits to its affiliates to provide guidance and assistance to them.<sup>2</sup> The OSPCA also has the ability to enforce standards of animal care throughout the province.<sup>3</sup> THS had affiliate status with the OSPCA until June 2009, when the OSPCA suspended THS’ affiliate status.

The current litigation arose as a result of an investigation by the OSPCA, which was conducted based on allegations in early 2009 against THS by current and former employees and volunteers. On June 2, 2009, the OSPCA conducted an investigation of THS’ facility, and issued two compliance orders under section 13(1) of the *OSPCA Act*. THS appealed the compliance orders to the Animal Care Review Board (“ACRB”), pursuant to section 17(1) of the *OSPCA Act*. After a further inspection of the facility, the OSPCA revoked the two compliance orders. However, THS maintained its appeal to the ACRB.

The ACRB decided that it had the jurisdiction to hear THS’ appeal notwithstanding the fact that the compliance orders had been revoked. The ACRB decided that it could consider, under section 17(6)(b) of the *OSPCA Act*, whether THS was entitled to reimbursement by the OSPCA of any costs it may have incurred in complying with the orders prior to their revocation. The ACRB ordered the OSPCA to pay THS \$231.70 to reimburse it for the amounts it paid to another animal hospital to comply with one of the compliance orders.<sup>4</sup>

After the ACRB hearing, the OSPCA continued to investigate THS. In November of 2009, the OSPCA executed a search warrant on THS. In support of the search warrant, numerous allegations were made about the condition of the animal cages, lack of food supply, inadequate care of animals in the care of THS staff, and insufficient levels of staffing to care for the number of animals in the care of THS. THS applied to the court to quash the search warrant, and requested an order that the OSPCA had no lawful authority to continue to occupy the premises pursuant to the search warrant.

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<sup>1</sup> R.S.O. 1990, c. O.36.

<sup>2</sup> *Ibid.*, s. 11.4.

<sup>3</sup> See Justice Brown’s description of THS and OSPCA in *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 608 at paras. 3-10.

<sup>4</sup> For a more detailed discussion of the ACRB decision, see *ibid.* at paras. 14-18.

The OSPCA launched a court application on December 22, 2009, seeking a wide range of relief under Ontario's *Charities Accounting Act*.<sup>5</sup> More particularly, the OSPCA sought the following in the court application:

- A declaration that the directors of THS are in breach of the corporation's charitable trust;
- An order directing Ontario's Public Guardian and Trustee ("PGT") to conduct an investigation of the breach and to report to the court and the Attorney General of Ontario;
- The appointment of a receiver and manager of THS until the PGT completes its investigation and report;
- An order permitting the OSPCA to remain in the THS premises until the completion of such investigation;
- An order granting leave to unseal an affidavit which refers to evidence obtained from the execution of the search warrant; and
- Orders under the *Corporations Act* calling for a special general meeting of THS, and related relief.<sup>6</sup>

On January 26, 2010, Justice Brown of the Ontario Superior Court of Justice granted the OSPCA's request for interim relief that permitted the OSPCA to remain in control of the animal care operations of THS facilities. Furthermore, Justice Brown appointed a monitor of the business and financial affairs of THS to provide the court with information about how THS is administering its charitable trust. Justice Brown also set out a schedule for the hearing of the main application on an expedited basis.<sup>7</sup>

Over the next two months, Justice Brown made several interim orders dealing with issues, such as the admissibility of seized materials as evidence. April 5, 2010 was set as the date on which the application would be heard.

On April 1, 2010, the parties appeared before Justice Brown asking for a settlement agreement to be approved by the Court.<sup>8</sup> The first part of the settlement agreement addressed corporate governance issues,

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<sup>5</sup> R.S.O. 1990, s. C.10.

<sup>6</sup> *Supra* note 3 at para. 24.

<sup>7</sup> *Ibid.* at paras. 1-2.

<sup>8</sup> *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 1953.

requiring that a special general meeting of THS members be held for the purposes of electing a new board of directors under the supervision of an independent Election Supervisor. The remainder of the settlement agreement addresses the allegations made by the OSPCA regarding the performance of THS's charitable objects. Paragraph 12 required THS to report to the PGT, as requested, on any financial matter which might arise prior to the May 30<sup>th</sup> special meeting. Paragraph 13 provides that as of April 12, 2010, THS will close to the public. By April 12, 2010, THS is to have divested itself of all of its animals, and if there are any remaining animals on April 11, 2010, they must be surrendered to the OSPCA.<sup>9</sup>

The settlement agreement also provided for a transition period from April 12<sup>th</sup> to May 30<sup>th</sup>, during which THS would revise and implement policies and protocols regarding various issues, including euthanasia and animal care procedures. As well, during this time THS is to undertake a deep cleaning of the facility, implement a retraining program for its staff, and improve operations through the use of software and other assets.<sup>10</sup> Justice Brown approved the settlement, but reminded THS that it “owes fiduciary duties to the public who support it, and it must operate within a defined regulatory regime. Meeting those obligations must always remain the focus of the decision-makers at the THS.”<sup>11</sup>

However, on April 13, 2010, the THS moved before Justice Brown to vary the settlement order so that “Bandit” the pit bull could remain in its possession.<sup>12</sup> Bandit, a dog with a history of aggression and violence, was originally ordered to be destroyed in 2004. THS then appealed the destruction order, and obtained a stay of the destruction order pending the appeal, but the appeal was never heard.

Justice Brown vehemently dismissed the motion to vary the settlement order to permit THS to keep Bandit, noting that “an appellant has an obligation to pursue an appeal with reasonable diligence” and that “[e]vidently, the THS can move an appeal along quickly when it suits its own purposes.”<sup>13</sup> The Court heard evidence that, contrary to the terms of the destruction order, THS did not keep Bandit under leash and muzzle control when outside its cage, and that Bandit had bitten three people since admission to THS.

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<sup>9</sup> *Ibid.*, Sched. A.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, at para. 18.

<sup>12</sup> *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 2182.

<sup>13</sup> *Ibid.*, at para. 12.

Of importance in this decision is the manner in which the Court addresses the fiduciary obligations of the directors of charitable organizations:

For a charitable organization, such as the THS, to appeal a court destruction order, sit on its hands for years after obtaining a stay, continue to harbor an animal which then proceeds to bite three more people and, to top it off, fails to control the dog on THS premises in the manner mandated by a court order, is nothing less than scandalous.<sup>14</sup>

Justice Brown affirms that “[t]he Board of Directors of the THS is responsible for the direction and control of the affairs of that charitable organization”, but that the board has failed to comply with the court-approved settlement agreement.<sup>15</sup> Furthermore, Justice Brown indicated that the board of directors has “dropped the ball big-time on the issue of what to do with Bandit...signal[ing] to me that the Board perhaps has not yet recognized its obligations to the public and under the defined animal care regulatory regime, and that I was premature in giving the Board credit for having done so in paragraph 19 of my April 1 reasons.”<sup>16</sup>

Justice Brown concluded his firm stance against THS by commenting that, “If the board of the THS truly intends to turn over a new leaf, then do so. Stop playing games.” The Court ordered that either THS itself must destroy Bandit, or that THS must file a notice of abandonment of its appeal and turn Bandit over to the OSPCA to destroy the dog. Justice Brown gave the THS one day to decide what course of action to take, noting that if Bandit remained in the possession of THS after the deadline, he would reconvene a further hearing on his own motion “pursuant to the court’s broad jurisdiction to supervise charities.”<sup>17</sup> Bandit was euthanized shortly thereafter by THS.

### C. IMPACT OF JUSTICE BROWN’S DECISION

Justice Brown’s decision regarding the destruction of the pitbull Bandit should be juxtaposed to the inherent jurisdiction of the courts to supervise the activities of charities. Directors of charities have significant fiduciary duties to which they must adhere, and along with these enhanced fiduciary duties comes the increased common law *parens patriae* powers of the courts to supervise the carrying out of the organization’s charitable objects and to monitor the use of the organization’s charitable property. As Justice Brown noted in his January 22, 2010 decision, the court has a “broad, historic jurisdiction to supervise the

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<sup>14</sup> *Ibid.*, at para. 14.

<sup>15</sup> *Ibid.*, at para. 20.

<sup>16</sup> *Ibid.*, at para. 23.

<sup>17</sup> *Ibid.*, at paras. 24-25.

activities of a charitable corporation to ensure that they accord with its charitable purpose and to intervene if the charity is not administered in accordance with its purpose or if charitable funds are misapplied.”<sup>18</sup>

While the recent decisions of Justice Brown do not include any ground-breaking pronouncements regarding fiduciary duties, they serve to reaffirm previous case law which addressed the role of the courts with regards to charities:

It is in this sense that the court in its inherent jurisdiction and within the framework of the *Charities Accounting Act* has required a charitable corporation to act in accordance with its charitable purposes and to intervene if charitable funds are misapplied... There is an implicit acknowledgement that the fiduciary owes a duty to the public in general which supports the privileges extended to charitable corporations and to the public in particular which turns over its money to the charitable corporation for the charitable purposes it wishes to support.<sup>19</sup>

In fact, Justice Brown references the earlier decision of *Ontario (Public Trustee) v. Toronto Humane Society*,<sup>20</sup> which also involved the THS. Justice Brown quotes this 1987 decision to support the principle that directors are impressed with fiduciary obligations to carry out the trust created for a charitable purpose:

Without going the length of holding that the Society is in all respects and for all purposes a trustee, I have concluded that it is answerable in certain respects for its activities and the disposition of its property as though it were a trustee; specifically I am satisfied that it is amenable to the ancient supervisory equitable jurisdiction of the court ... Whether one calls them trustees in the pure sense (and it would be a blessing if for a moment one could get away from the problems of terminology), the directors are undoubtedly under a fiduciary obligation to the Society and the Society is dealing with funds solicited or otherwise obtained from the public for charitable purposes.<sup>21</sup>

The fiduciary duties imposed on directors and officers of charities involve the requirement that they act with a reasonable degree of prudence, are diligent, act in good faith and with honesty and loyalty, and avoid conflicts of interest.

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<sup>18</sup> *Supra* note 3 at para. 39.

<sup>19</sup> *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)*, [2001] O.J. No. 2170 (S.C.J.), at para. 26. For a discussion of the *AIDS Society for Children* case, see Terrance S. Carter and Jacqueline M. Connor, “Fiduciary Relationships in Fundraising: The Impact of the *AIDS Society for Children* Decision” in *Charity Law Bulletin* No. 9 (September 29, 2001), online: <http://www.carters.ca/pub/bulletin/charity/2001/chylb09.htm>.

<sup>20</sup> (1987), 60 O.R. (2d) 236 (H.C.J.).

<sup>21</sup> *Ibid.*

What is interesting about Justice Brown's decision is that it emphasizes the immense power of the courts to ensure charitable purposes are being carried out by the organization. In fact, courts have the power to direct the management and control of charitable property, as they must ensure that charitable property is being dealt with properly. For example, Justice Brown warned THS that if Bandit remained in THS's possession after the deadline, he reserved the right to call the parties back to court to deal with the issue, based on the court's inherent jurisdiction to supervise charities. As this decision demonstrates, the power of the court to ensure charitable objects are being met can go so far as giving courts the authority to order the destruction of charitable property (i.e. Bandit) and to bring the matter back before the Court on the judge's own initiative if the order is not followed. While this is not a new power, the decision should serve to remind boards of directors of charities of the high fiduciary obligations placed upon them.

#### D. CONCLUSION

The OSPCA and THS litigation emphasizes that fiduciary obligations continue to be a very relevant and important consideration when addressing governance and management issues for charities. Directors have a continuing obligation to apply charitable property to the charitable objects, with the distinct possibility of court interference if they do not do so. This decision is an example of the court exercising its supervisory role in relation to the proper management of charitable property.

This litigation should also remind directors and officers of charities that where mismanagement of charitable property occurs, directors and officers can be held personally liable for breach of trust. It is therefore essential that charities, their boards of directors, and their legal counsel be fully aware of the extent of the fiduciary obligations placed upon the management of charities, and also of the negative consequences that could ensue from a breach of those fiduciary duties.