

Uberminae Fides

The duty of utmost good faith. Whatever it is, what does it have to do with operating a charity? Normally when there is a discussion about the law and charities in Canada, the questions posed centre on issues related to the *Income Tax Act*. While the federal government has an indirect responsibility for charities through its exercise of one aspect of the tax authority under the constitution, it is all too often forgotten that the primary, direct legislative responsibility for charity is with the provinces under their powers over property and civil rights.

And what would most make of the statement that the courts have an inherent jurisdiction to direct and control the administration of charities? (*Asian Outreach International Canada and Asian Outreach International v. Noel G. Hutchinson*, 1999). This common law authority — a third level of consideration in addition to the legislative roles of the federal and provincial governments — is the least acknowledged, the least used, and yet perhaps the most powerful means of overseeing charitable activity available in Canada today (There is an uncertain application of this jurisdiction in Quebec). The May 25, 2001 Ontario judgment of Mr. Justice Haley in *Public Guardian and Trustee v. The Aids Society for Children (Ontario) et al* amply demonstrates this potential.

The AIDS Society for Children was incorporated in Ontario and registered as a charity by Revenue Canada in 1994. Pamphlets indicated that the funds raised from public donations would be used to build a home for children living with HIV/AIDS. The Society signed fund-raising agreements with two professional fund-raisers. One contract provided, among other things, that the fund-raiser was to be paid a fee of 10% of the gross receipts of the fund-raising campaign payable on a weekly basis and that campaign expenses were not to exceed 65% of the gross dollars raised. The other contract provided that the other fund-raiser was entitled to a management fee of 50% of the donations plus payment for an extensive list of expenses.

On the basis of this, the Public Guardian and Trustee in Ontario (PGT) made an application under Ontario's *Charities Accounting Act*, for a court investigation to determine how the Society's money was handled. Before that application was heard, the court heard submissions from the PGT on six questions, two of which are particularly interesting in considering the scope and authority of the court's common law jurisdiction for charities.

The first question posed was whether the Society or its directors or both were responsible as fiduciaries to the public for all the funds collected from the public including the gross amount of funds received by the fund-raisers. The court said

yes; both the Society and its directors are fiduciaries who can be held to account by the court.

In reaching its conclusion, the court adopted the description of the fiduciary as an individual who stands in a position of trust to another individual. The court also accepted that the fiduciary concept has so dramatically expanded that it is now universally applicable: where one party has placed its “trust and confidence” in another and the latter has accepted (expressly or by operation of law) to act in a manner consistent with the reposing of that “trust and confidence,” a fiduciary relationship is established. These elements speak directly to the relationship between the Society and the public from which it sought and obtained funds.

The court also noted that there is an inherent jurisdiction in the court to direct and control the administration of charities. In other words, the court has the responsibility to ensure that the relationship – the fiduciary relationship – between donors and charities operates properly, with the fiduciary being made to uphold the duty of utmost good faith. This jurisdiction exists to the present day, handled in contemporary times by the superior courts of each common law jurisdiction as the successors to the old English Court of Chancery.

The exact nature of the inherent jurisdiction of the court in provinces other than Ontario, in most cases, remains to be determined. This is especially so in Alberta which has the *Charitable Fund-raising Act* on its books. What a court here would take to be its remaining inherent jurisdiction is an interesting question.

But the importance of this inherent jurisdiction on the question of remedy is seen in the response the court made in this case to the other question reviewed here. Is all or part of either of the funding raising agreements void or voidable as contrary to public policy or for some other reason? On this significant question the court answered yes, subject to the existence of proper grounds.

As to the basis on which the court might make that kind of order, the court in *The Aids Society for Children (Ontario)* noted that society in general has a fundamental interest in ensuring that monies raised from the general public, for which deductions create a loss in tax revenue, go to fulfill their intended purpose.

This is an extremely important case. It clearly reasserts and makes contemporary the role which courts have historically played in holding those in whom trust is placed to account and uphold their responsibilities. Whether those provinces without some statutory framework for the supervision of charities will see their courts as active as the Superior Court of Justice of Ontario in *The Aids Society for Children (Ontario)* case remains to be seen. But an inherent supervisory jurisdiction resides in the superior courts of each common law province with the power to direct and control the administration of charities and to intervene if charitable funds are misapplied. This case unequivocally says so.

Laird Hunter is a lawyer with the firm of Worton Hunter and Callaghan in Edmonton, Alberta.