

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Jewish Foundation of Greater Toronto (Re), 2023 ONCA 268

Court of Appeal for Ontario, Lauwers, Paciocco and Thorburn JJ.A., 17 April 2023

An appeal from a decision declining bankruptcy of a Donor Advised Fund which refused to follow a donor's advice.

Key words: Charity, Canada, Ontario, Appeal, Bankruptcy, Donor Advised Fund, Costs

1. This was an appeal from [Bankruptcy of the Jewish Foundation of Greater Toronto](#), 2022 ONSC 2120.
2. The Joseph Lebovic Charitable Foundation (JLCF) is an Ontario non-share capital corporation designated by the Canada Revenue Agency (CRA) as a Private Foundation. The JLCF was controlled by its founder, Joseph Lebovic (Joseph), until his death on 1 May 2021. The JLCF is now controlled by Joseph's brother Wolf Lebovic (Wolf), who is the executor of Joseph's estate.
3. The Jewish Foundation of Greater Toronto (the Foundation) is a non-profit corporation located in Toronto and is designated by the CRA as a Public Foundation. The Foundation's focus is on creating long-term charitable resources for the Jewish community in Toronto and globally.
4. The JLCF donated over \$19 million to the Foundation between 2011 and 2016 through a Donor Advised Fund (DAF).
5. The donations became part of the assets of the Foundation, which were invested and distributed to charities with Joseph as an advisor. The Foundation could take Joseph's advice, but was not bound to do so, and could not bind itself regarding future use of the funds.
6. After Joseph's death, Wolf instructed the Foundation to distribute the remaining funds in the DAF (approximately \$16 million) to specific charitable organizations. When the Foundation did not do so, the JLCF commenced an action against the Foundation, seeking an order compelling the Foundation to make the distributions. Various interlocutory applications were made by both parties and were awaiting decisions.
7. JLCF then filed a bankruptcy application against the Foundation on the grounds that the Foundation had ceased to meet its liabilities generally as they came due, and that it had failed to meet its obligations to the JLCF in the six months preceding the filing of the application.
8. The Primary Court dismissed the application as raising no reasonable cause of action under the [Bankruptcy and Insolvency Act](#), R.S.C. 1985, c. B-3 (BIA), because there is no evidence of a debt, nor of any act of bankruptcy, nor special circumstances that would justify granting a single-creditor application.

9. The Primary Court found that the application was brought for a collateral purpose to put pressure on the Foundation to pay the amounts demanded by Wolf Lebovic to the charities he had named, even though such amounts were not debts and he had no actual authority to direct the distributions.
10. The Primary Court ordered that elevated costs on the basis that the application was an abuse of the court's process, and that the Foundation should not be left to defend this litigation and use the money to do so that would otherwise be earmarked for charitable purposes.
11. The Appeal Court agreed with the Primary Court that the claims had no merit and no errors of fact or law were made out.
12. As to costs, the Appeal Court would not interfere with the Primary Court's discretion where an abuse of process, particularly in regard to bankruptcy proceedings, was involved.

COMMENT



The gifting of funds through a Donor Advised Foundation does not usually give rise to any obligation to distribute the gifts at the behest of the donor. For the situation to be otherwise would be to call the tax concessions associated with the gift into question. Further, such a gift is not subject to revocation as this would also imperil the tax concessions of the donor.

The Appeal Court agreed with the Primary Court that the making of a bankruptcy application to pressure the Foundation when other more appropriate applications were before the Courts was unacceptable.

VIEW THE CASE



This case may be viewed at: <https://www.canlii.org/en/on/onca/doc/2023/2023onca268/2023onca268.html>

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