THE LAWYERS WEEKLY

Vol. 23, No. 39 | *SERVING CANADA'S LEGAL COMMUNITY SINCE 1983* | February 20, 2004

Liquidator's counsel David Wingfield and Kim Mullin

Court accepts proposals for distribution to victims of Christian Brothers assets

By John Jaffey
Toronto

An Ontario Superior Court judge hopes his order winding up the Christian Brothers of Ireland in Canada will "provide a concluding chapter" to the quarter-century of abuse associated with the name Mount Cashel Orphanage, and to a cover-up by police and the government of Newfoundland and Labrador.

Justice Robert Blair, recently appointed to the Court of Appeal, concluded his 87-page reasons with empathy for the victims of "unspeakable acts of physical, sexual and emotional abuse" in these words:

"No amount of compensation can ever adequately make up for the terror, the trauma, and the torment that the Abuse Victims have experienced. ... Although it may not be possible in all cases, I hope … the resolution of these matters will enable as many of the Claimants as possible to put an end to this heartrending story in their lives — and that of a certain part of Canadian society — and move on."

The corporation owned by the Christian Brothers became insolvent because of numerous abuse claims by boys who had been under their protection and care at Mount Cashel and other institutions in Newfoundland and, in the case of three claimants, in British Columbia.

In 1996, the religious order applied to be wound up under the federal *Winding-up and Restructuring Act*.

The liquidated assets produced $15.5 million for distribution to 83 qualified claimants. Liquidator Deloitte & Touche's final report, dated April 10, 2003, recommended a method of distributing these funds and acceptance of an agreement with the Newfoundland government.

see BROTHERS p.19

SCC finds judges can lower criminal-level interest rates

By Cristin Schmitz
Ottawa

A split Supreme Court of Canada has ruled that courts can partially enforce a commercial contract that exceeds the maximum 60 per cent criminal interest rate by "reading down" the contract to make it comply with the *Criminal Code*.

The top court's groundbreaking 4-3 decision Feb. 12 recognizes the availability of a new discretionary remedy of "notional severance" in cases where contracts violate s. 347 of the Code. The majority gave courts additional flexibility beyond their traditional powers to declare the entire agreement unenforceable, or to "blue pencil" the contract by severing and striking out the illegal contractual provisions.

"Given the desirability of remedial flexibility in cases of statutory illegality arising in connection with s. 347 of the Code, the evolving nature of the law regarding statutory illegality generally and the sound policy basis in which the concept is rooted, I find that notional severance is available as a matter of law in cases arising under s. 347," Justice Louise Arbour wrote, with Justices Frank Iacobucci, Jack Major and Louis LeBel concurring.

In his first judgment since his appointment, Justice Morris Fish dissented, with Justice Marie Deschamps concurring.

While he did not affirm or deny the availability of notional severance in s. 347 cases, Justice Fish argued its use on the facts of this case inappropriately stretched the principles of equity while sending "the wrong message" to those who criminally overcharge borrowers who can not otherwise obtain a loan.

"They should not be encouraged to believe that if their illegal arrangement is subjected to judicial scrutiny, they will nonetheless recover the highest rate they could have legally charged — and thus suffer no pecuniary disadvantage for having violated s. 347 of the *Criminal Code*," he wrote.

see INTEREST p.16

Law society may hold referendum on mandatory CBA fees in B.C.

By Michael Wilhelmson
Vancouver

In a move aimed at avoiding contention and reducing the amount of time and resources expended on the issue, the Law Society of B.C. (LSBC) is considering putting the question of the annual practice fee, including the Canadian Bar Association (CBA) fee component, on a referendum ballot.

The mandatory payment of CBA fees in B.C. has been the subject of heated debate, including litigation and motions and counter motions at recent LSBC annual general meetings. In the past 20 years, there have been five lawsuits against the LSBC by lawyers objecting to the mandatory payment of fees.

The most recent lawsuit, brought by former LSBC president Richard Gibbs (*Gibbs v. Law Society of British Columbia*, [2003] B.C.J. 2912), was dismissed in December and is now under appeal.

At their February meeting, LSBC benchers approved in principle submitting both the annual practice fee for 2005 and the payment of an amount equivalent to the CBA fee to a referendum.

"While the invariable practice of the Benchers for many years has been to ask the members to set the annual practice fee at the Annual General Meeting, the statute [the *Legal Profession Act*] allows an alternative means — by referendum ballot of all the members," wrote LSBC staffer Jeffrey Hoskins in a report to the benchers.

The benchers have been divided on the issue. In July 2003, they voted 10-8 in favour of a voluntary CBA fee, but the proposal was rejected at the 2003 general meeting.

"In summary," wrote Hoskins, "an issue, which does not concern the Law Society's primary mandate of upholding and protecting the public interest in the administration of justice, has occupied a disproportionate amount of the Society's attention over an extended period of time."

He said the proposal "is to take the contentious issue of the CBA fee, or equivalent, away from the Annual General Meeting and resolve it in the broader forum of a referendum ballot of all the members."

The proposal is for a binding determination rather than a poll, the results of which would be re-debated later by the benchers. "To accomplish that, the referendum will have to ask the members to actually set the annual practice fee for 2005 in a way that is binding and enforceable."

see REFERENDUM p.3

PUBLICATIONS MAIL AGREEMENT NO. 40065517

26 claimants filed objections to liquidator's proposed distribution

BROTHERS

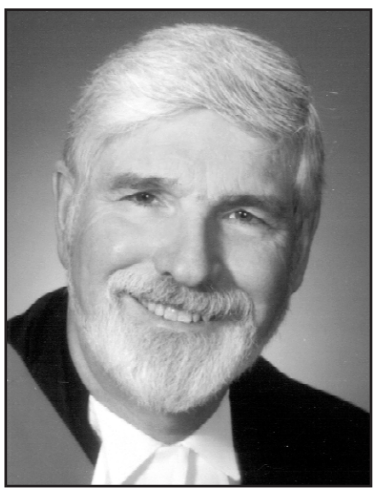
–continued from front page–

However, 26 claimants filed notices of objection, leaving the court to face two issues: whether to accept the liquidator's recommendations for distribution of funds, and how to deal with the agreement, under which claimants were required to release the government from claims of breach of fiduciary duty, breach of duty of care and vicarious liability.

Distribution of funds

The liquidator, with the help of Dr. David Wolfe, a clinical psychologist who wrote the textbook on the causes of childhood disorders and their outcomes in adulthood, recommended the following methodology for distributing funds:

- that all 83 of the 111 claimants whose statutory declarations satisfactorily proved abuse at the hands of the Christian Brothers should receive $20,000 as a recognition that they had been abused and that the Christian Brothers were liable to them; plus,
- based on Dr. Wolfe's objective assessment of the comparative severity of abuse, the victims were placed in one of three categories denoting extreme abuse, median abuse and less extreme abuse. General damages for pain and suffering for each of the three categories were $100,000, $50,000 and $25,000; plus,
- based on psychological tests, which determined the lasting effect of the abuse on a victim's ability to work and function in society, a sliding-scale formula was devised to pay specific damages for impaired functioning, notwithstanding the abuse.



Justice Robert Blair

Victims who were able to overcome their childhood demons and cope normally as adults received nothing, while others who were totally unable to maintain relationships and/or meaningful employment received upwards of $300,000.

Several victims objected to the methodology because they felt their abuse was as severe as the worst; others felt their coping skills as adults should not detract from the size of their awards.

However, Justice Blair held that Dr. Wolfe's methodology for determining compensation, as adopted by the liquidator in his report, was "substantially in accord with" the causation principles in *Athey v. Leonati,* [1996] 3 S.C.R. 458, which he summed up in this way: "A defendant is liable for any injuries caused or contributed to by his or her negligence. As long as the defendant's conduct is found to be a cause of the injury, it is irrelevant that there may also have been other non-tortious contributing causes. A contributing causal factor is material if it is outside the *de minimis* range, *i.e.* it is not insignificant or trivial."

He found institutional abuse a relatively new category of tort claim that was difficult to prove and for which damages are uncertain.

"Given the complexities of this winding-up, the nature of the claims being asserted, the need for a fair overall process that would treat all Claimants with similar claims reasonably and equally, and the limited resources available for the resolution of individual claims disputes — it made sense to direct and authorize the Liquidator … to develop the methodology utilized and to make recommendations accordingly."

Government agreement

Twenty-eight of the claimants sued the government in the Supreme Court of Newfoundland and Labrador and settled their claims in 1996 by signing a release and assigning their claims against the Christian Brothers to the government. The government filed a proof of claim in the winding-up for $6.9 million regarding these assigned claims as well as a claim for contribution and indemnity from the Christian Brothers.

In addition, 38 claimants had ongoing actions brought after 1996 against the government, and the government has taken third-party proceedings against the Christian Brothers in these actions.

In total, the government's claim against the estate of the Christian Brothers exceeded the amount available for distribution. Justice Blair called it "the sword of Damocles hanging over the Liquidator's ability to distribute the assets." He pointed out that the government's claim must be resolved before the estate can be liquidated.

To deal with the government's claim, the liquidator negotiated a settlement under which the government would subordinate its contribution claim to the individual claimants and agreed not to pursue its assigned claims and to dismiss its third-party claims. The *quid pro quo* was a release by each claimant and a discontinuance of existing actions.

The liquidator felt the agreement would permit the estate to be wound up in a fair and timely fashion. Furthermore, the 1996 claimants would recover at least an additional $20,000 from the estate even though they had already settled with the government. So too, the post-1996 claimants had the option of recovering compensation immediately from the estate or of continuing their pursuit of "full compensation" from the government.

However, opponents of the agreement strongly believed it would be unfair to let the government escape its civil obligations by, in effect, forcing the claimants to accept less that full compensation from the estate. Barry Stagg, counsel for claimant # 46 — the judgment referred to all but one claimant by number — spoke of "the Government's goal of thrifty litigation immunization."

Justice Blair refused to get drawn into ruling on arguments about Crown priority and equitable subordination, instead focusing his concern on how the estate's assets should be distributed. He said the liquidator was correct in accepting the government's claims as valid in the liquidation. He held that since the size of the claims would consume the entire estate, it was not unreasonable for the liquidator to make a deal with the government. It was also to be expected the government would demand something in return, namely releases and discontinuances.

Noting that the agreement "interferes to some extent with the post-1996 litigants' autonomy to proceed against the government and that it is an anathema to them for understandable emotional reasons," he ultimately approved the agreement as "a fair and reasonable way for the Liquidator to accomplish what needs to be accomplished, while balancing the interests of the various competing Claimants in the Estate and avoiding the risks, costs, and delays that may result from any future litigation respecting the above matters."

WeirFolds LLP lawyers David Wingfield and Kim Mullin acted for the Provisional Liquidator.

Douglas Garbig of Toronto's Roebuck, Garbig was representative counsel appointed by the court to assist claimants.

Claimants' counsel were Clifton Prophet and Patrick Eichenberg of Gowling Lafleur Henderson LLP in Toronto, Geoffrey Budden of Mount Pearl, NL, Robert Buckingham and David Day of St. John's, David Bright of Boyne Clarke in Dartmouth, N.S., Nicola Savin and Craig Colrain of Toronto's Birenbaum, Steinberg, Ian Stauffer of Ottawa's Ierney Stauffer and Kevin Kemp of Toronto.

Reasons in *Re Christian Brothers of Ireland,* [2004] O.J. No. 359, are available from FULL TEXT: **2339-021**, 87 pp.

Winning lawyer retained in 1996

By John Jaffey
Toronto

David Wingfield, lead counsel for Deloitte & Touche, the provisional liquidator of Christian Brothers of Ireland in Canada, says the case produced firsts, both in his career and in Canadian insolvency law.

The WeirFoulds lawyer told *The Lawyers Weekly* the case was by far his biggest since being called to the bar in 1988. His retainer began in 1996, and at times he worked harder than he thought he could.

For example, while preparing for and fighting a three-month trial in the B.C. Supreme Court, to bring Vancouver College and St. Thomas More Collegiate into the estate, he lived in a hotel for five months and worked from 4 a.m. to 7 p.m. seven days a week at the law firm of Harper Gray Easton.

Wingfield shares credit for his success at the Supreme Court and the B.C. Court of Appeal with Vancouver lawyers Bryan Baynham and John Sullivan, who he says worked equally long hours.

In terms of fees, WeirFoulds earned more than $4 million over the course of the winding up. Last fall, Wingfield won an Ontario Court of Appeal ruling granting the firm a premium — not only for the complexity and difficulty of the litigation but, since the estate was insolvent by February 2001, because there was no assurance of payment. If Wingfield had not taken on the B.C. litigation on spec, and won, there would have been *no* fees.

But in a judgment last November written by Justice John Laskin, the appeal court overturned a ruling by Superior Court Justice Robert Blair and raised Wingfield's $400 hourly rate to $675.

"The litigation was regarded as hopeless by most observers," said Wingfield.

"Everyone thought using the sparse funds in the estate to fund this litigation would be a waste of what little money was available for the victims. But right from the beginning, I felt the law was on our side."

As for the impact of the case on insolvency law, Wingfield said the winding-up application produced a number of firsts in Canada:

- It was the first time a religious organization was ever wound up for any purpose and the first time a charity was wound up to pay tort liabilities;
- It was the first time an insolvency court has been asked to consider how to divide up a large amount of money into appropriate tort damages for each of many victims;
- It is the leading case — possibly the only one — now on what assets of a charity are available to pay its liabilities under federal insolvency law: all of them;
- It is the leading case on the legal status of an incorporated religious organization;
- It affirms the primacy of federal insolvency law over provincial trust law;
- It settles the law in Canada on the doctrines of charitable liability and charitable immunity: charitable trusts are not immune from execution by the creditors of the charitable trustee.

In addition, he said, the case has social importance. The payment to the Canadian abuse victims was the first time the Christian Brothers of Ireland ever had to account for wrongdoing.

And, of course, the case brings to an end decades of suffering and uncertainty for 83 men.