Winding It Up

Liquidating the assets of the Christian Brothers of Ireland in Canada did more than just compensate the Mount Cashel orphanage victims. It created a caustic court battle in Vancouver, where the Brothers owned two high schools worth $30 million. It forever changed the law on seizing charitable trust assets. And it had a profound impact on the life and career of a lawyer at the centre of the liquidation. **By Richard Foot**

David R. Wingfield is tooling around the Toronto lakeshore in the leather-bound cockpit of his silver Porsche Carrera. It is a cool, spring afternoon in 2003, and Wingfield is a contented man — relaxed, satisfied and smiling — a far cry from the moment, two years ago, when he purchased the gleaming sports car. The Porsche had been a gift to himself on his 40th birthday. It had also been an indulgence designed to buoy his uncertain spirits in the midst of the most trying months of his professional career.

Two years ago, Wingfield was immersed in a long and bitter court battle, the winding-up of the Christian Brothers of Ireland in Canada (CBIC), following the infamous crimes of its members at the Mount Cashel orphanage in Newfoundland. Wingfield, a partner at Toronto's WeirFoulds LLP, was point man for Arthur Anderson Inc., which had been assigned to liquidate the Roman Catholic order in the face of claims by dozens of victims.

The winding-up, rather than proceeding smoothly, had turned into a vicious affair between the liquidator and the order's most valuable assets, two Catholic schools in Vancouver, which were resisting being turned into cash to compensate victims a continent away.

By the spring of 2000, the litigation had moved from Toronto to Vancouver, where Wingfield was working to convince the courts that the private schools should be sold to pay for the crimes at Mount Cashel. He was a pariah in British Columbia; the press was against him; the judiciary was skeptical of his case; and, says Wingfield, lawyers for the schools oozed hostility at every encounter.

By this time, legal fees had also emptied the Christian Brothers' estate of cash, and WeirFoulds was now working for free, subsidizing the high-risk case. Meanwhile, dozens of men abused as orphans blamed Wingfield for the long delay in their compensation. He was threatened with lawsuits from all sides. Even his girlfriend dumped him during his long stay in Vancouver.

"It was ugly," he remembers. "The consequences of failure on our part would have been nothing short of disastrous. Those many months of working in British Columbia wiped out my personal life. And the stress of the case, the responsibility — I felt the walls closing in." Ultimately, Wingfield prevailed enough in the courts to convince the schools to settle. By the fall of 2002, he had secured $15.5 million for 81 Mount Cashel survivors, pushing through the first liquidation of a charity under Canada's Winding-up and Restructuring Act.

One might imagine that he emerged from the battle as a minor hero to most victims, applauded for his relentless efforts to find them money in a legal system that had failed them for decades. In fact, Wingfield is a target of suspicion and scorn today, disliked by many victims and their Newfoundland lawyers for his handling of the case. Worse, the legal profession remains skeptical of the key decision in the case — the Ontario Court of Appeal's April, 10, 2000 judgment that charitable assets held in trust can be liquidated to pay tort claims: *Re Christian Brothers of Ireland in Canada* (2000), 184 D.L.R. (4th) 445. The ruling may jeopardize the financial security of hundreds of charities across the country.

However, the pressure has now lifted and Wingfield enjoys the satisfaction of having quarterbacked one of Canada's most highly charged and complex liquidations — a saga spanning three provinces, 10 judicial proceedings and three Supreme Court of Canada applications. He persuaded judges to make highly unpopular decisions, which in turn forced a Catholic organization to finally pay for its members' crimes after years of equivocation

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and avoidance. But mostly, Wingfield is happy because the whole episode is finally over.

"This was the most difficult, all-consuming case I have ever been involved in," he says laughing, still amazed at the enormity of it. "My whole life disappeared into this file for several years. We worked ourselves to the bone in a way that I've never seen before and I hope I never experience again."

The Congregation of Christian Brothers, a worldwide teaching order based at the Vatican, first brought its services to Canada in 1876. By the mid-1960s, its members operated schools and orphanages across the country through the Christian Brothers of Ireland in Canada. The Mount Cashel orphanage in St. John's, Nfld. was the site of an appalling abuse scandal that in 1989 rocked the Catholic Church and the Newfoundland government, for their roles in covering up decades of cruelty towards the boys who lived there. By 1996, nine Brothers had been convicted of beating and raping the children in their care. Before the scandal erupted, various Brothers who worked at Mount Cashel, some of whom would be convicted of crimes there, were transferred away from Mount Cashel to the order's two private schools in British Columbia.

In the fall of 1996, facing victim civil claims totalling more than $36 million, CBIC asked that its affairs be wound up through the Ontario courts. Wingfield was hired by Arthur Anderson to handle any unforeseen litigation in what he and the accounting firm believed would be a quick and routine liquidation.

They would soon discover, as Toronto Superior Court Justice Robert A. Blair noted at a 1998 winding-up hearing, that "tragedy casts its shadows in long and unpredictable directions — in this case, reaching from the Atlantic coast of Canada to the Pacific, and into the mysterious eddies of the law relating to charitable institutions."

Two years into his partnership at the firm, Wingfield was an intense, supremely confident commercial litigator. He had earned a master's degree in political economy from the University of Toronto before completing his law degree at Queen's University. In truth, he was more of an urbane policy wonk than a courtroom scrapper, enamoured by the arcane intricacies of history, politics and legal theory.

His confidence, his tone of voice and his academic manner were sometimes misconstrued as arrogance. "I love history, and I love solving problems," he says. "The common law is about history, and the law is about solving problems. I love being able to use the two to articulate an elegant, rational solution to a problem in front of a neutral person. That's what a litigation lawyer does."

When CBIC asked to be liquidated, Barry Lynch, the order's senior Canadian official, voluntarily offered up $4.3 million worth of assets, the value of various homes and minor properties across eastern Canada. Lynch swore in an affidavit to the winding-up court that these would "provide the claimants with the maximum level of financial compensation possible out of the [CBIC's] assets."

But Wingfield also wanted the B.C. schools, together worth almost $40 million. Without them, the liquidation would yield little money for the creditors to the CBIC estate. These included 81 victims with individual claims, plus the Newfoundland government, which sought to recoup $11 million in compensation it had already paid out to various Mount Cashel victims.

Wingfield believed the schools legally belonged to the estate, and in the summer of 1997, he and Cam McCaw, the Arthur Anderson accountant overseeing the file, travelled to Vancouver to suggest that the schools pay millions of dollars into the estate to avoid being liquidated.

"We put forward where we saw the case going in a legal sense," says McCaw, "We were trying to encourage them that it was in their best interests to settle this sooner than later." McCaw and Wingfield had a good sense of the legal issues but a lousy appreciation of the political ones.

The Christian Brothers' B.C. schools were respected and prestigious institutions in Vancouver. St. Thomas More, in the suburb of Burnaby, filled an important niche in the Catholic education system, supervised by the Roman Catholic Archdiocese of Vancouver.

Vancouver College, in the heart of the city's well-heeled Shaughnessy district, was beloved by its alumni, which included an array of B.C. judges, business people, politicians and lawyers. Naive but hopeful, McCaw and Wingfield sat down in front of a large group of Christian Brothers, lawyers and church officials including Adam Exner, the Archbishop of Vancouver. Their settlement request was greeted with derision and anger.

"We were not warmly received," says Wingfield. "We were told that there's no way these schools would ever be made available to

the liquidation, and if we expected otherwise, we would have a real Irish fight on our hands."

Church officials ignored an interview request for this story. However, the schools' attitude was summed up by John Nixon, Vancouver College chairman, in a *National Post* interview three years ago: "This whole thing is an outrage, that we're in this at all," he said. "We are not liable for anything that happened in Newfoundland and we should not sacrifice our school on the basis of claims that have arisen there."

Wingfield saw it differently. "I thought the location of the schools was of singular unimportance legally," he says. "The liquidator's job is to turn assets into cash. The fact that assets are located in one part of Canada and claims are in another is of no legal significance. It's not something the liquidator can take into account."

So in the fall of 1997, the two sides went to court to settle the schools' fate, opening a bare-knuckle contest that would last five years. The schools went into the fight arguing the CBIC wasn't their owner, and even if it were, it was immune from liquidation because their shares were protected by a charitable trust.

They won the first two rounds before Blair in Ontario, who granted their request to let the B.C. courts determine the schools' ownership. Blair also ruled that while a charity's assets, even those held in trust, have no general immunity from tort claims, such claims can only be asserted against the specific assets under which the wrongdoing occurred: (1998) 37 O.R. (3d) 367.

Because the crimes took place at Mount Cashel, and not at the Vancouver schools, the schools could not be used to pay the victims, he said. Wingfield appealed this decision and in April 2000 won a unanimous judgment from the Ontario Court of Appeal. Justices Kathryn N. Feldman, David H. Doherty and Rosalie S. Abella overturned Blair's ruling, stating that all assets of a charity can be used to pay its debts, whether or not the assets are held in trust, or the debts are related to the assets in question.

The schools sought leave to appeal this decision at the Supreme Court, which refused their application on Nov. 16, 2000. This left the schools' fate in the hands of the B.C. courts. If the *CBIC* owned the schools, the properties could be liquidated.

If, as the schools argued, the properties were held in trust by *independent* parties, then Wingfield could lose his case. The hearing in B.C., through the winter and spring of 2000, became a long and arduous process, made worse for the schools by the release of the Ontario Court of Appeal's ruling in the midst of the Vancouver proceedings.

For Wingfield, and his Bay Street colleague Douglas G. Garbig (appointed by the winding-up court to represent the victims), working in Vancouver was like operating in enemy territory. Although assisted by lawyers from the Vancouver firm of Harper Grey Easton, Wingfield and Garbig say the atmosphere in court was poisonous and emotional, far beyond what they considered normal between professional combatants.

"It was a miserable experience," Wingfield says. "Many opposing counsel regarded us with hostility and disdain. There were *ad hominem* attacks. When the litigation started in B.C., one opposing counsel stood up in court and said if the liquidator had obtained an opinion about the competency of their counsel, 'We wouldn't be here right now.' A senior member of the B.C. bar said that about me in the courtroom."

"I regret that he viewed it that way," says William S. Berardino, a senior lawyer who practises with Vancouver's Berardino & Harris and who helped lead the case for the schools. "We just did the best we could to represent our clients. It was simply a hard-fought case. Everyone tried very hard."

The evidence presented by Garbig made the tension even worse. He offered the court a catalogue of human sorrow detailing the crimes and abuses at Mount Cashel, and the impact of the terror on the lives of the victims.

Such stories were not welcomed by supporters of Vancouver College, where the Christian Brothers were seen as a benevolent, powerful force in the history of the school, and where a few Brothers still taught in its classrooms. The evidence was ultimately rejected by then B.C. Supreme Court Justice Risa E. Levine (she was elevated to the Court of Appeal in the spring of 2001) as irrelevant to the issues before her.

Wingfield also put forward a startling allegation: that the CBIC had set out to mislead the winding-up court from the beginning. In court records filed both in B.C. and Ontario, he said, the Christian Brothers had deliberately used the process to "minimize the assets available to CBIC's creditors," rather than maximize them as sworn by Brother Lynch.

The "winding-up was structured to enable the [CBIC] to obtain a discharge of its [Mount Cashel] liabilities for approximately $4.3 million — the only amount the [CBIC] was willing voluntarily to relinquish — and to preserve for the Christian Brothers, or the Archbishop of Vancouver, the only assets of the [order] able to provide meaningful compensation to the tort creditors of CBIC."

During a visit to the CBIC's Toronto offices in 1999, Wingfield had noticed a row of filing cabinets in a back room and asked what was in them. "Nothing much," the office manager replied. "I said, 'Let's open them up.' And there was a lot there," he recalls. "I just found a treasure trove of stuff, which painted a very different picture than what had been disclosed before. It gave a very different flavour to how the liquidation had been planned."

Among the documents was correspondence detailing plans by Catholic officials to rid the CBIC of its liabilities while at the same time protect the Vancouver schools at all costs. In 1996, two months before the liquidation began, Brother Lynch had written to his superiors in Rome, questioning the moral conduct of the order and the sincerity of a liquidation effort "in which the survivors may not be fairly and equitably compensated," he said. "For example," Lynch added, "our decision to keep Vancouver College out of the compensation picture needs to be reviewed."

Says Wingfield: "Normally when you liquidate a corporation the directors work with the liquidator to maximize the value that can be used to pay the claims of creditors. We had an organization that was working against the liquidator, to minimize the value. It was disturbing."

On top of all this, Wingfield felt the schools and the Christian Brothers had tried to undermine him in 1999, when representatives of the school travelled to Newfoundland and offered approximately $10 million to settle the case, not to the liquidator — which represented *all* claimants to the estate, including the Newfoundland government — but to the victims' lawyers.

Berardino won't discuss the 1999 episode today. But Wingfield calls it an underhanded move. For one thing, he says, no such offer was ever made to the liquidator. For another, how could the schools quietly lay $10 million before the victims, while at the same time argue in court that the school assets should not be used to finance any abuse liabilities?

On Aug. 11, 2000, Levine issued her decision: the schools were owned under charitable trusts, yet the trustee in each case was the CBIC. Because the Ontario Court of Appeal had said such trusts conferred no immunity, she said, the properties were subject to the liquidator's claims: *Rowland v. Vancouver College Ltd.* (2000), 78 B.C.L.R. (3d) 87.

It was a narrow but crucial ruling for the liquidator. And while Wingfield credits Garbig and their Harper Grey Easton Vancouver colleagues, Bryan G. Baynham and John P. Sullivan, for their success, Baynham says Wingfield revealed his ability during the hearing before Levine: "He spoke for an entire day in court," says Baynham, "citing one complex trust case after another without ever looking at a note. It was a *tour de*

force." Adds Cam McCaw: "The guy knew his stuff. David's ability in court — he has an idea and he uses very few notes to take him there — it's a total command of his topic."

Levine's decision was appealed. More lengthy hearings ensued, and in September, 2001, the B.C. Court of Appeal delivered a 2-1 judgment upholding Levine's ruling: (2001), 205 D.L.R. (4th) 193. Once again, the schools sought leave to appeal the decision at the Supreme Court of Canada. They also took the rare step of asking the Supremes to reconsider their earlier refusal to examine the Ontario Court of Appeal decision. The Supreme Court rejected both requests in May 2002.

Emboldened by these decisions, the liquidator asserted control over the schools and last summer Wingfield walked into the schools with a police escort, armed with a $30-million offer from a private developer to buy the properties.

Then, in a last-ditch effort to save the schools, the B.C. government petitioned the B.C. Supreme Court for an order forbidding any transfer of the schools to an owner who refused to operate them as Catholic religious schools, and to declare that they should not be "brought to an end by the insolvency or winding-up of the Christian Brothers."

The court opted to refer the question to the winding-up court in Ontario. Everyone trooped back to Toronto to debate the petition before Ontario Superior Court Justice Ian V. B. Nordheimer. By this time all sides were growing weary of the battle. The schools and the church had opened settlement negotiations with Wingfield. The summer was clicking by, and they were keen to resolve the schools' future before a new term started in September. For his part, Wingfield sensed that the hearing before Nordheimer wasn't going well; for the first time since his appearance at the Ontario Court of Appeal, he seemed unable to convince a judge of his arguments.

These circumstances cemented a deal before Nordheimer could issue a ruling. On July 25, 2002, the liquidator dropped its claims against the schools in return for $19 million from the schools themselves and the Archdiocese of Vancouver. After legal and accounting fees were paid, there was $15.5 million for the estate's creditors. Newfoundland dropped its $11-million claim to the estate, and in May 2003, the money began to be distributed to 81 Mount Cashel victims, each receiving an average payment of $250,000. In Vancouver, the schools and the church began the task of raising money to recoup the $19 million they sent to the liquidator. Both welcomed the end of litigation.

"I don't think there were any losers or winners here," says Berardino. "The end result is the claimants will receive compensation, and the schools have been saved. Those schools have a vital role in the community, and the claimants have obviously suffered terribly and deserve compensation."

For many claimants and their personal lawyers, the compensation came far too late. Despite the fact that enough money was found to fairly satisfy most claims, there is deep anger towards Wingfield. St. John's, Nfld. lawyer Robert W. Buckingham, who represents dozens of the Mount Cashel victims, says Wingfield could have resolved the matter for a similar sum of money in 1999 if he had allowed the schools to proceed with settlement discussions in Newfoundland.

"In 1999, we had the Vancouver schools in my office ready to negotiate. They offered to settle the whole thing. We told them what the dollar figure was — $15 million to $16 million. We eventually got that much money, but under the liquidator it took two more years of expensive litigation.

"On balance, I think this whole process was very destructive to the victims. It took too long, and was unnecessarily confrontational. It's beyond me how the end justified the means here."

There have been suggestions out of Newfoundland that Wingfield became obsessed with the case, enamoured of its high-profile and its long-term potential economic benefit for his firm. Wingfield dismisses these suggestions as ludicrous. Once the litigation had emptied the estate of money in 2000, WeirFoulds agreed he should continue his work without payment.

The firm's fees were eventually paid, but only after years of subsidizing the litigation. "The idea that I've been out for personal gain or glory is manifestly false," Wingfield says. "The reality is that through our efforts we've taken an estate that was worth $4 million at the outset, and turned it into an estate that generated about $24 million in assets. To do so we had to win litigation that was regarded as being almost impossible to win. This was an undertaking that was the litigation equivalent of climbing Mt. Everest."

The most controversial result of the litigation was the Ontario Court of Appeal's ruling — and the Supreme Court's subsequent refusal to hear an appeal of it — that *all* charitable trust assets can be used to pay tort claims facing the charity. For Wingfield the issue is simple: unlike private trusts, which can only be used to pay the debts of a private beneficiary (and not those of a trustee), charitable trusts have no beneficiary other than the public at large. "Should the public at large be able to preserve a charity's assets for its benefit at the expense of the private creditors of the trustee?" asks Wingfield. "The answer, I believe, is no — and that's what the courts have held. The difficulty is getting judges and lawyers to understand that."

The legal profession has been in a minor uproar over the issue ever since. Both the judgment and Wingfield have been attacked in the academic and legal press. For example, David Stevens, an estate planner at Toronto's Goodman and Carr LLP, wrote the decision was "bizarre" and a "miscarriage of justice" in June 2001.

Other lawyers fret that the ruling has cast a pall over the gift-giving that sustains charities across the country. Wingfield says there is deep skepticism about the results of his work among both lawyers and judges in Canada. Yet in the midst of all the hand-wringing, and in the face of scorn from victims' lawyers in Newfoundland, he remains gratified by the outcome of the liquidation, and certain that his perseverance against difficult odds ultimately paid off.

"Had we failed, you would not have been able to liquidate a large or socially important charity in Canada," Wingfield says. "At the end of the day, we would not have been able to obtain the assets necessary to pay the charity's debts. And the only reason would have been because of the social importance of the organization. The law doesn't provide for that. We demonstrated that the law works, no matter how socially desirable a charity's activities are." CL

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