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Article 11

Canada Trust v. Labadie

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CANADA TRUST V. LABADIE—GIFTS—DONATIO MORTIS CAUSA—STATE OF MIND OF DONER—Upon first reading, *Canada Trust Co. v. Labadie*,[1] a recent decision of the Ontario Court of Appeal, seems to depart from the general principles of the law of valid *donatio mortis causa* as laid down in their classic form in *Cain v. Moon*.[2] Specifically, this impression is created by Mr. Justice Roach's statement that:

> It is impossible on the evidence to hold that at the various times when he delivered possession to the respondent he was by reason of his then physical condition, and the surrounding circumstances, *in extremis*. Such a condition is an essential to a valid *donatio mortis causa* . . . [3]

The classic statement of Lord Russell in *Cain v. Moon* is as follows:

> It is further conceded that for an effectual *donatio mortis causa* three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as show that the thing is to revert to the donor in case he should recover.[4]

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[24] One additional problem that arises out of the *Vantel* decision, is that once assuming the jurisdictional procedure problem, by what means is the court to determine whether or not the Board has acted fairly? In other words, since the provincial court has assumed jurisdiction, does it follow that it can then proceed to apply its own substantive rule of natural justice? It may be that with the enactment of the federal Bill of Rights, the provincial court should apply it to the question of whether the court has acted fairly, which of course is the essential nature of prerogative remedies. On the other hand, there may not be any practical difference at all as to which rule the court applies.

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1 [1962] O.R. 151; 31 D.L.R. (2d) 252.

2 [1896] 2 Q.B. 283.

3 *Supra*, footnote (1) at 152; 253.

4 *Supra*, footnote (2) at 286.

Before searching for an authority to support Mr. Justice Roach's statement, none being cited in the judgment, the facts in *Canada Trust Co. v. Labadie* should be summarily stated. Here the donor made three promissory notes of which he was the payee, payable to the donee by the endorsement "if anything happens causing my death this note is to be paid to [the donee]". Although possession of those notes was given to the donee, the donor continued to receive the payments and interest on the notes until his death, about seven months after endorsing the last note. It was established that the donor had a chronic heart ailment which caused him some "apprehension" but he tended his business up to his death in his normal fashion. Mr. Justice Roach held this to be nothing but a vain attempt to make a testamentary gift and an invalid *donatio mortis causa* for the reason stated above.

Where did the requirement of *"in extremis"* come from? In an earlier *donatio* case, *Thomas v. Mechan*,[5] Roach, J.A., approved and applied *Cain v. Moon*[6] but he made this statement as well:

> In English Law, a *donatio mortis causa* is only valid when made in contemplation of death from a cause that is proximate, either an existing or immediately impending peril, placing the donor *in extremis*.[7]

There is yet another step to be taken. In aid of the *"in extremis"* requirement, Roach, J.A. appears to have relied upon *Hedges v. Hedges*[8] decided in 1708, where Cowper, C., in listing the requirements of a valid *donatio* stated:

> . . . where a man lies in extremity or being surprised with sickness and not having an opportunity to make a will . . .[9]

Perhaps this case, cited in *Thomas v. Mechan*[10] is the basis of the decision in *Canada Trust Co. v. Labadie.*

One must agree with Mr. Justice Roach in *Thomas v. Mechan*[11] where he states that the necessary contemplation "will not be satisfied by a vague and general impression that death may occur from one of the ordinary risks that attend human affairs". Certainly, it could equally be stated that attending to one's business in a normal manner, albeit with a chronic heart ailment, would seldom have the necessary "contemplative" state of mind required for a valid *donatio mortis causa.* That the donor be *in extremis* to effect a valid *donatio* would seem to be a strict requirement indeed, and, it is submitted, unnecessary for the decision. Perhaps the *in extremis* basis will be disregarded in future, as there was an alternate basis for the decision, namely, that the donor reserved substantial control of the notes.

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5 [1958] O.R. 357.
6 *Supra,* footnote (2).
7 *Supra,* footnote (5) at 364.
8 (1708) Pr. CL. 269.
9 *Ibid.*
10 *Supra,* footnote (5).
11 *Ibid.*

Nevertheless, it would now appear that a judge on the High Court has three guides or choices when next confronted with a *donatio mortis causa* situation. He can follow *Cain v. Moon*[12] expressly adopted in *Eppen v. Szczepkowski*[13] by Mr. Justice Roach; or he can follow the hybrid requirement found in *Thomas v. Mechan*;[14] or, if desired, he can require the donor to be *in extremis* relying upon Mr. Justice Roach's latest decision, *Canada Trust Co. v. Labadie*.[15]

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