

PETER C.P. THOMPSON, Q.C.  
T 613.787.3528  
pthompson@blg.com

Borden Ladner Gervais LLP  
World Exchange Plaza  
100 Queen St, Suite 1100  
Ottawa, ON, Canada K1P 1J9  
T 613.237.5160  
F 613.230.8842  
blg.com



By electronic filing

September 17, 2012

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
27<sup>th</sup> floor  
Toronto, ON M4P 1E4

Dear Ms Walli,

|  |                      |
|--|----------------------|
| <b>Union Gas Limited (“Union”)</b>   |                      |
| <b>2011 Earnings Sharing and Disposition of Deferral Accounts and Other Balances</b> |                      |
| <b>Board File No.:</b>   | <b>EB-2012-0087</b>  |
| <b>Our File No.:</b>   | <b>339583-000137</b> |

We are attaching the case of *Victoria Order of Nurses for Canada and Victorian Order of Nurses for Canada – Ontario Branch v. Greater Hamilton Wellness Foundation*, (2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246 (the “*VON*” case). We request that this case be added as Tab 10 to the Brief of Authorities we circulated electronically on Friday, September 14, 2012.

We rely on this case as additional support for paragraphs 18 and 19 of the Written Argument we circulated on Friday, September 14, 2012. The case is germane to the Board’s consideration of whether the relationship between Union and its ratepayers with respect to particular items of pass-through expense, such as Upstream Transportation costs, is a trustee/beneficiary relationship, or, at the very least, a fiduciary/beneficiary relationship.

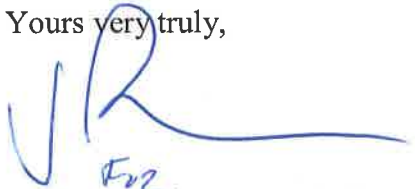
While the *VON* case is one that arises in a charitable organization’s context, rather than in a regulated utility context, where the regulatory regime calls for and the regulated utility has expressly agreed to treat Upstream Transportation costs as a pass-through item of expense, the same principle applies when determining the nature of the relationship that exists between someone who provides and someone who receives monies provided for a specific purpose.

That principle is that when one party provides and another receives money, which is expressly designated and agreed to be used for a particular purpose, then the party receiving the funds has a fiduciary obligation to use the money for that particular purpose. The fiduciary holding the funds cannot unilaterally change the use to which the funds are put without an informed consent of the beneficiary and, in the regulatory context applicable to Union, the informed consent of

the regulator that created the pass-through expenses component of the regulatory regime that applies.

Regardless of whether Union is a trustee, as we suggest, or merely a fiduciary, it is obliged to account to ratepayers for the amounts that it received on account of Upstream Transportation costs that were in excess of the amounts actually required for that purpose.

Yours very truly,



Peter C. P. Thompson, Q.C.

PCT\slc  
enclosure

c. Chris Ripley (Union)  
Crawford Smith (Torys)  
Intervenors EB-2012-0087  
Paul Clipsham (CME)

OTT01\5273017\vl

# TAB 10

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246



2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation

Victoria Order of Nurses for Canada and Victorian Order of Nurses for Canada — Ontario Branch, Applicants and Greater Hamilton Wellness Foundation, Respondent

Ontario Superior Court of Justice

Robert N. Beaudoin J.

Heard: May 12-14; August 2-4, 2011  
Judgment: September 27, 2011[FN\*]  
Docket: Ottawa 09-46843

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Proceedings: additional reasons at *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (2011), 2011 ONSC 6801, 2011 CarswellOnt 12731 (Ont. S.C.J.)

Counsel: David Sherriff-Scott, Peter C.P. Thompson, Q.C., for Applicants

Henry G. Blumberg, Ronald S. Segal, Scott Chambers, for Respondent

Dana De Sante, for Public Guardian and Trustee

Subject: Estates and Trusts; Civil Practice and Procedure; Corporate and Commercial

Estates and trusts --- Charities — General principles — Charitable purposes — Purposes beneficial to community

Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — VH was exclusive beneficiary under Foundation's corporate object based on proper interpretation of objects in Letters Patent — VO was VH's successor — Original object clause required Foundation to make distributions of property to VH or its successor for charitable or educational purposes related to patient and health care — Object clause did not authorize Foundation to distribute its funds to any entity so long as their purposes were consistent with purposes of VC — Objects clause included name of VC specifically — Solicitation material represented that donations were to be used for VC

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

programs — VH was source of Foundation's initial funding.

Estates and trusts --- Trusts — Purpose trust — Charitable purpose

Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — VH was exclusive beneficiary under Foundation's corporate object based on proper interpretation of objects in Letters Patent — VO was VH's successor — Original object clause required Foundation to make distributions of property to VH or its successor for charitable or educational purposes related to patient and health care — Object clause did not authorize Foundation to distribute its funds to any entity so long as their purposes were consistent with purposes of VC — Objects clause included name of VC specifically — Solicitation material represented that donations were to be used for VC programs — VH was source of Foundation's initial funding.

Estates and trusts --- Charities — Administration of charities

Fiduciary duty and trust obligations of directors — Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were expected to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — Foundation breached its fiduciary duty and trust obligations to VH and VO — It did not become impossible or impracticable for Foundation to carry out its original object, so it could not significantly amend its objects — Original Letters Patent did not provide for any exercise of discretion with respect to funding of VH.

Estates and trusts --- Charities — Miscellaneous issues

Remedy for breach of duty — Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were expected to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — Foundation breached its fiduciary duty and trust obligations to VH and VO — Remedy for breach required clean break between Foundation and VO — Foundation was ordered to transfer all of its as-

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

sets to another entity in trust — Assets were transferred to VO in trust to be used in accordance with Foundation's original objects — VO was legal successor to VH, and had not acted inappropriately — Adding another party at this time would cause further delay and add administrative costs.

Estates and trusts --- Charities — Practice and procedure — Miscellaneous issues

Standing — Charities.

Civil practice and procedure --- Parties — Standing

Charities.

Estates and trusts --- Gifts — Types of gifts — Inter vivos gift — Conditional gifts

Breach of conditions precedent and subsequent.

Estates and trusts --- Trusts — Resulting trust — Creation --- Miscellaneous issues

No proof of gift.

#### Cases considered by *Robert N. Beaudoin J.*:

*Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306, 45 D.L.R. 579, [1919] 1 W.W.R. 823, 1919 CarswellBC 24 (S.C.C.) — referred to

*Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2002), 22 B.L.R. (3d) 182, 2002 CarswellOnt 517, 44 E.T.R. (2d) 155 (Ont. S.C.J.) — considered

*Christian Brothers of Ireland in Canada, Re* (2000), 17 C.B.R. (4th) 168, 33 E.T.R. (2d) 32, 6 B.L.R. (3d) 151, 47 O.R. (3d) 674, 2000 CarswellOnt 1143, 132 O.A.C. 271, 184 D.L.R. (4th) 445 (Ont. C.A.) — considered

*Hoefle v. Bongard & Co.* (1945), [1945] 2 D.L.R. 609, 1945 CarswellOnt 98, [1945] S.C.R. 360 (S.C.C.) — referred to

*Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98, [1998] 1 W.L.R. 896, [1997] UKHL 28 (U.K. H.L.) — considered

*Johnson v. Crocker* (1954), 1954 CarswellOnt 195, [1954] O.W.N. 352, [1954] 2 D.L.R. 70 (Ont. C.A.) — referred to

*Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 1998 CarswellOnt 4170, 41 B.L.R. (2d) 42, 114 O.A.C. 357 (Ont. C.A.) — followed

*Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)* (2001), 39 E.T.R. (2d) 96, 2001 CarswellOnt 1971 (Ont. S.C.J.) — followed

*Ontario (Public Trustee) v. Toronto Humane Society* (1987), 1987 CarswellOnt 649, 60 O.R. (2d) 236, 40 D.L.R. (4th) 111, 27 E.T.R. 40 (Ont. H.C.) — considered

*Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society* (2010), 100 O.R. (3d) 340,

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

2010 ONSC 608, 2010 CarswellOnt 384 (Ont. S.C.J.) — referred to

*Pecore v. Pecore* (2007), 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, 32 E.T.R. (3d) 1, 37 R.F.L. (6th) 237, 361 N.R. 1, 224 O.A.C. 330, 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795 (S.C.C.) — considered

*Rowland v. Vancouver College Ltd.* (2000), 78 B.C.L.R. (3d) 87, [2000] 8 W.W.R. 85, 34 E.T.R. (2d) 60, 2000 BC-SC 1221, 2000 CarswellBC 1667 (B.C. S.C.) — considered

*Rowland v. Vancouver College Ltd.* (2001), [2001] 11 W.W.R. 416, 205 D.L.R. (4th) 193, 94 B.C.L.R. (3d) 249, 2001 BCCA 527, 2001 CarswellBC 2243, 41 E.T.R. (2d) 77, (sub nom. *Rowland v. Christian Brothers of Ireland in Canada (Liquidation)*) 159 B.C.A.C. 177, (sub nom. *Rowland v. Christian Brothers of Ireland in Canada (Liquidation)*) 259 W.A.C. 177 (B.C. C.A.) — referred to

*Schilthuis v. Arnold* (1996), 95 O.A.C. 196, 1996 CarswellOnt 4230 (Ont. C.A.) — referred to

*Toronto Aged Men's & Women's Homes v. Loyal True Blue & Orange Home* (2003), 68 O.R. (3d) 777, 2003 CarswellOnt 6169 (Ont. S.C.J.) — considered

*Women's Christian Assn. of London v. McCormick Estate* (1989), 34 E.T.R. 216, 1989 CarswellOnt 533 (Ont. H.C.) — referred to

#### **Statutes considered:**

*Charities Accounting Act*, R.S.O. 1990, c. C.10

Generally — referred to

s. 1(2) — considered

s. 4 — considered

s. 6 — considered

s. 6(1) — considered

s. 10 — considered

s. 10(1) — considered

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

#### **Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 39.01(5) — considered

#### **Words and phrases considered:**

### **Victorian Order of Nurses for Canada**

The Victorian Order of Nurses for Canada ("VON" or "VON Canada") is a national non-profit, registered charity since 1899. VON currently delivers programs and services, through six nominee regional corporations, at 52 sites across Canada. Its activities include the operation of adult day centers, home visiting programs, meals on wheels, educational health services, and services to women at shelters and children at risk. It also provides in-home nursing, personal support, therapy and palliative care services. VON operates flu clinics, blood pressure testing clinics, primary healthcare clinics, respite care programs, and provides school health services. It delivers private nursing and personal support work-services.

### **Victorian Order of Nurses for Canada — Ontario Branch**

Victorian Order of Nurses for Canada — Ontario Branch ("VON Ontario") is one of VON Canada's six nominee regional corporations . . . VON Ontario is responsible for delivering VON programs and services at 21 sites in Ontario . . .

### **The Victorian Order of Nurses Hamilton-Wentworth Branch**

[The Victorian Order of Nurses Hamilton-Wentworth Branch] was incorporated in January of 1969 as an amalgamation of two Hamilton area VON Branches. The Branch provided VON programs and services in the Hamilton area prior to the transfer of its operations to VON Ontario in 2003 and is hereinafter referred to as "VON Hamilton Branch" or "the Branch".

### **Greater-Hamilton Wellness Foundation**

The Greater-Hamilton Wellness Foundation ("GHWF") was formed in December 2009, shortly after its rights to operate under the auspices of VON [Victorian Order of Nurses] trademarks and banners were terminated by VON Canada. The GHWF operates as a general fundraiser in the Hamilton area since December 2009. It was previously known as the VON Hamilton Foundation.

### **Victorian Order of Nurses Hamilton-Wentworth Foundation**

The Victorian Order of Nurses Hamilton-Wentworth Foundation was founded on December 8, 1981. Its name was subsequently changed to Victorian Order of Nurses Hamilton Foundation. . . . The Foundation itself has never been a health care services provider.

### **Charities Accounting Act**

The *CA Act* [the *Charities Accounting Act*, R.S.O. 1990, c. C.10] is Ontario's statutory instrument for the supervision of charitable corporations. It provides a mechanism for the courts to control the behaviour of charities, including how they solicit, handle and disburse donations. The statute gives the power to the courts to ensure that a charity complies with its objects, the directions of donors, the interests of beneficiaries and the public at large.

APPLICATION by charities for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation.

**Robert N. Beaudoin J.:**

### **Relief Sought in this Application**



2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

1 The applicants seek an order requiring that the Foundation assets be transferred to the applicant VON Ontario to be held in trust and distributed in an orderly way to benefit programs and services provided by VON Ontario at its Hamilton site in accordance with the original objects of the Foundation. The applicants had initially sought an order winding up the Foundation but did not pursue that relief in their final argument.

## **The Parties**

### ***VON Canada***

2 The Victorian Order of Nurses for Canada ("VON" or "VON Canada") is a national non-profit, registered charity since 1899. VON currently delivers programs and services, through six nominee regional corporations, at 52 sites across Canada. Its activities include the operation of adult day centers, home visiting programs, meals on wheels, educational health services, and services to women at shelters and children at risk. It also provides in-home nursing, personal support, therapy and palliative care services. VON operates flu clinics, blood pressure testing clinics, primary healthcare clinics, respite care programs, and provides school health services. It delivers private nursing and personal support worker services.

### ***VON Ontario***

3 Victorian Order of Nurses for Canada — Ontario Branch ("VON Ontario") is one of VON Canada's six nominee regional corporations as described in greater detail below. VON Ontario is responsible for delivering VON programs and services at 21 sites in Ontario, including Hamilton.

4 In the Hamilton area, VON programs and services are delivered by about 57 full-time and 85 part-time workers supported by about 885 volunteers. The resources located in Hamilton are supported by additional VON centralized resources located elsewhere. The VON Ontario operating division providing programs and services at the Hamilton site after 2003 is hereinafter referred to as "VON Hamilton".

### ***VON Hamilton Branch***

5 VON Hamilton's predecessor was The Victorian Order of Nurses Hamilton-Wentworth Branch. The Branch was incorporated in January of 1969 as an amalgamation of two Hamilton area VON Branches. The Branch provided VON programs and services in the Hamilton area prior to the transfer of its operations to VON Ontario in 2003 and is hereinafter referred to as "VON Hamilton Branch" or "the Branch". VON Canada was a member of the Hamilton Branch.

### ***Greater-Hamilton Wellness Foundation***

6 The Greater-Hamilton Wellness Foundation ("GHWF") was formed in December 2009, shortly after its rights to operate under the auspices of VON trademarks and banners were terminated by VON Canada. The GHWF operates as a general fundraiser in the Hamilton area since December 2009. It was previously known as the VON Hamilton Foundation.

### ***VON Hamilton Foundation***

7 The Victorian Order of Nurses Hamilton-Wentworth Foundation was founded on December 8, 1981. Its name was subsequently changed to Victorian Order of Nurses Hamilton Foundation. Its Letters Patent, describe the Foundation's corporate objects as follows:

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

3. (a) To receive and maintain a fund or funds and to apply from time to time all or part thereof and the income therefrom for such charitable or educational purposes related to patient and health care, of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor or any other Branch of the Victorian Order of Nurses in Ontario, which, in the discretion of its Directors, needs assistance.

The dissolution clause provides:

6. (d) Upon the dissolution of the Corporation and after the payment of all debts and liabilities, its remaining property shall be distributed or disposed of to any Victorian Order of Nurses' purposes in Ontario or to other organizations which carry on their work solely in the Province of Ontario for charitable and educational purposes related to patient and health care.

Finally, the Letters Patent specify:

6. (f) No person shall be elected as a director unless his or her election has the prior approval (expressed as a resolution) of the Board of Management of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor.

The Foundation itself has never been a health care services provider.

#### ***Relationship between the Foundation and the Branch***

8 It is evident on the record before me that the Foundation was created as a parallel fundraiser by and for the Hamilton Branch. That the Foundation existed to meet the expectations of the Branch was recognized at its inaugural meeting of Directors held on May 12, 1988 where, in his opening remarks, the then Vice-President asks "that the directors consider the question of what the VON wants and expects from the Foundation." Initially, the Foundation did not raise funds and its September 27, 1988 Minutes state: "All agreed that the role of this Foundation will be to receive funds and hold them as capital and disburse the income from that capita as needed by the Branch."

9 At a June 28, 1996 meeting, the Board of Directors agreed that the Foundation would assume a more active role in the fundraising area. This is corroborated by the financial summary prepared by counsel for the respondent which discloses no fundraising revenue for the Foundation until 1997.

10 By 1999, the Branch and Foundation had developed a Statement of Operating Principles described in the 2000 revision of the Branch's Bylaw as follows:

As outlined in the Statement of Operating Principles adopted between the Branch and the Foundation, the Foundation exists to provide resources to the corporation to assist it in meeting its mission, vision and obligations to the community as established by the Branch Board of Directors. Provision for representation on each other's Board also shall be made in the By-laws of both the corporation and the Foundation to facilitate this partnership and to enhance communication.

11 The Foundation's June 21, 2001 By-law described its function as follows:

The corporation is mandated to raising, investing and managing funds which will be used to support the programs of the Local Branch.

12 According to its financial statements, the Foundation was dormant until it commenced operations in 1989. For approximately 20 years and until December 15, 2009, the Foundation exclusively conducted its fundraising communica-

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

tions with the public on the basis that it raised money for VON programs and services and it funded only VON programs and services.

### ***The Public Guardian and Trustee***

13 The Public Guardian and Trustee ("PGT") appears in this proceeding to safeguard the public's interest, and to afford advice and assistance to the court. At common law, the Attorney General acted on behalf of the Crown in representing the objects of a charity, a role now assumed by the PGT as more recently re-stated in *Toronto Aged Men's & Women's Homes v. Loyal True Blue & Orange Home* (2003), 68 O.R. (3d) 777 (Ont. S.C.J.) at paras. 5-6:

[5] ... Whether or not the Attorney General might still have, in some circumstances, a residual role to play, the powers and responsibilities traditionally attached to that office are now, for most, if not all, practical purposes exercised in matters of charity by the Public Guardian and Trustee pursuant to the provisions of the Public Guardian and Trustee Act, R.S.O. 1990, c. P.51 and the *Charities Accounting Act*, R.S.O. 1990, C.10.

[6] Traditionally, the role of the Attorney General was limited to making inquiries with respect to particular charities, instituting legal proceedings where this was considered to be warranted, and aiding and assisting the court in their determination...

14 The PGT's duties under the *Charities Accounting Act* are engaged when a proceeding may involve a potential misapplication of charitable funds or breach of fiduciary duties. The PGT supports the position of the applicants in this proceeding.

### **Events Leading to the Application**

#### ***Preliminary comments on the affidavits filed in support of this application***

15 Diane McLeod ("Ms. McLeod") has set out the events leading to this application in her affidavit of January 8, 2009 and her reply affidavit of April 19, 2010. Ms. McLeod is currently the Executive vice-president of VON Canada. She has spent her entire working career with VON, first in her capacity as a nurse and later in positions of management including executive level positions. She has direct knowledge of the matters to which she deposes and where her evidence is based on information and belief she has carefully set out the source of that information.

16 The respondent relies on the affidavit of Kate Bursey ("Ms. Bursey"), currently the Chair of the Foundation. She has been in that position since June of 2007. She was previously a director of the Foundation since 2004. Her direct knowledge of the events is limited to that period of time. Ms. Bursey's affidavit is problematic. First, it offends r. 39.01(5) of the *Rules of Civil Procedure* and the Rules of Evidence generally in that much of the evidence she offers on contentious matters is pure hearsay. Her affidavit is also replete with insinuation, argument and opinion. Counsel for the Foundation countered the court's concerns by arguing that the parties agreed that this would be a "paper trial". That may be so, but I am unaware of any agreement that the parties would ignore the Rules of Evidence.

17 Ms. Bursey's affidavit reveals a tendency to make inflammatory statements that are not supported by any evidence other than her own self-serving analysis such as this statement at para. 29: "In total, the applicant, through VON — Ontario Branch, effected the removal of more than \$1,000,000.00 from local Hamilton control as part of its implementation of the applicant's Centralization Strategy." She relies on e-mail communications between others to support an allegation that "there is a money grab at play." At para. 24, she claims: "Since 2002, the applicant has systematically removed from local Hamilton control more than \$1,000,000.00 of funds ...".

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

18 These events took place at a time when she was not herself a director of the Foundation. At para. 23 she refers to the Asset Transfer Agreement ("ATA") entered into in 2003 wherein she alleges that the applicant "orchestrated the transfer of all current assets of the local VON corporation to its nominee." The Foundation was not a party to that agreement. She has no direct knowledge of it and she does not offer any source for that comment other than her own opinion.

19 In support of her views, she consistently refers to e-mail communications between Sandra Edrupt ("Ms. Edrupt"), a former Chair of the Foundation, and VON and between other third parties and she offers these communications for the truth of their contents. Ms. Edrupt, who was involved in many of these events, did not provide an affidavit. Without being qualified to do so, Ms. Bursey proceeds to offer her own *expert* opinion on VON Canada's solvency.

20 More troubling are Ms. Bursey's assertions that are completely contradicted by the Foundation's own documents. At para. 101 of her affidavit she claims that VON Canada would not approve a Bylaw approved by the Foundation's directors on October 31, 2006. The Foundation's own Minutes of November 28, 2006 indicate the very opposite:

C. Young clarified that the Bylaws were accepted by VON Canada. All Bylaws need to be redone in the spring to meet VON Canada's new guidelines. It is expected that the ByLaws of the Branch Foundation Board will fully meet these guidelines.

21 Perhaps the most troubling allegations contained in Ms. Bursey's affidavit are those that focus on her allegations that VON Canada wanted the Foundation to amend its objects clause in its Letters Patent so as to remove the Directors' exercise of discretion and requiring them to abandon their fiduciary responsibilities to their donors. This point was emphasized by the Foundation's counsel in argument. This is how Ms. Bursey described the proposed new objects for the Foundation at para. 21 of her affidavit:

To receive and maintain a fund or funds and to apply all or part of the principal and income therefore, from time to time, to the Victorian Order of Nurses for Canada and/or the VON Canada Foundation, which are registered charities under the *Income Tax Act*, Canada.

[Emphasis added.]

22 In fact, the proposed new objects clauses in question were much broader in scope than what is suggested by either Ms. Bursey or by the Foundation's counsel in his *factum*. There are nine paragraphs in total and they read as follows:

## SECTION 15 — ESSENTIAL OBJECTS OF THE COMMUNITY CORPORATION

### 15.1 ...

- (1) To receive and maintain a fund or funds and to apply all or part of the principal and income therefore, from time to time, to the Victorian Order of Nurses for Canada and/or the VON Canada Foundation, which are registered charities under the *Income Tax Act*, Canada;
- (2) To fund research and needs assessments for the purposes of identifying unmet health care and social support needs in the Local Community and **select and fund** the Charitable Programs to be delivered in the Local Community by VON Canada to meet these needs; [emphasis added]
- (3) To fund health and support services to be provided by VON Canada to persons with debilitating diseases, illnesses and other health conditions for the purpose of preventing disease and promoting good health;

- (4) To carry out Local Community capacity development activities and to build partnerships in the Local Community;
- (5) To advance the development of new health care and social program initiatives to be provided by VON Canada in the Local Community;
- (6) To promote awareness and educate the public for the purposes of:
  - (a) encouraging changes and/or new developments in delivery of health and social services in the Local Community; and
  - (b) developing meaningful responses to health and social issues and unmet or emerging needs to be provided by VON Canada in the Local Community;
- (7) To solicit and receive donations, bequests, legacies and grants and to enter into agreements, contracts and undertakings incidental thereto;
- (8) To prudently invest the funds of the Community Corporation; and
- (9) To ensure that, upon dissolution of the Community Corporation and after payment of all debts and liabilities, its remaining property is distributed or disposed of to Victorian Order of Nurses for Canada or the VON Canada Foundation, to be used in the Local Community.

23 As can be seen, the language of the proposed objects refers to the Foundation's authority to "select and fund" charitable programs once it entered into a new Association Agreement with VON Canada. There are no fewer than seven references to the local community. Later in this decision I will refer to the discretionary authority that was allegedly being removed from the Foundation's directors.

24 In her reply affidavit, Ms. McLeod identifies the inaccuracies in Ms. Bursey's affidavit under 15 separate topic headings. Given my own concerns about the misrepresentations in Ms. Bursey's affidavit, I accept the version of events as set out by Ms. McLeod. In any event, the background facts as I have set them out herein are not materially in dispute.

## **Restructuring of Von**

### ***Background***

25 Historically, VON delivered its services through a decentralized structure which included local Branches, which were separately incorporated, non-profit corporations that were also registered charities. These Branches provided operational services to their communities. In turn, they reported to provincial VON corporate entities. The provincial organizations acted as a liaison between individual Branch corporate entities and VON at the national level. VON nationally administered overall operations and established policy and direction for the organization.

26 VON's decentralized structure caused it to begin losing business and activity opportunities throughout the late 1980s and 1990s as private sector health care providers began to play an increased role in community health services traditionally served by VON. Accordingly, in the late 1990s and following, VON developed a strategy to maintain its position in the health care and charitable services area.

27 This strategy was called the "National Vision Achievement Strategy" ("NVAS") and its eventual implementation

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

had a significant impact on local corporate Branch structures. All provincial VON corporations were dissolved and VON incorporated a series of "regional VON corporations" which had Boards of Directors mirroring that of VON. In Ontario this resulted in the creation of the Victorian Order of Nurses — Ontario Branch. Regional VON corporations assumed all of the operational contracts, responsibilities and duties as well as assets, liabilities and employees of each individual Branch corporation. All Branch operational activity was assumed by VON regional corporations. The former Branch ceased all activity except for: (a) strategic plan development for local communities; (b) advocacy activities; (c) fundraising; and (d) community development activities. In Hamilton, it was expected that these activities were to be assumed by the Foundation.

28 Resources were restructured and rationalized to provide centralized payroll, financial reporting and auditing functions. Other resources and functions including human resources, namely, recruitment, hiring, termination, benefits, management and labour relations, were also centralized. Every VON site was charged a percentage amount of its revenues for services it receives from centralized VON resources located elsewhere.

29 These restructuring initiatives involved extensive communication and consensus building with the local Branches. The Foundation Directors were kept informed of VON Canada's consultations with the Hamilton Branch which commenced in the latter half of 2000. Hamilton Foundation and Branch staff occupied the same office space and information was shared informally as well.

***The Hamilton Branch Transfers its Assets and Liabilities to VON Ontario — Asset Transfer Agreement dated February 14, 2003***

30 As part of the NVA, the transfer of assets to VON Ontario needed to be sufficient to cover the liabilities it was assuming by acquiring responsibility for the provision of VON services in the Hamilton area. The Hamilton Branch executed an initial Asset Transfer Agreement dated February 14, 2003. The Foundation was made aware of this.

31 This is where Ms. Bursey complains about the "restructuring costs" which she infers was a "money grab" even though the Foundation is not a party to the ATA and she herself was not involved in the transaction. These facts do not deter her from offering her own opinion as to the nature of the transaction and to my knowledge Ms. Bursey is not qualified as an accountant. Article 2.02(4) of the Agreement discloses how the amount of \$613,226 of restructuring cost was calculated. The Agreement specified that the accrued expense was to cover the one-time cost of implementing the arrangements, including without limitations, "severance cost, infrastructure, setup cost, initial training and installation cost of new systems, the cost of software licenses required to consolidate operations and unexpected contingencies." A system-wide accounting of expenditures was subsequently provided. It is clear from a review of that document that any transfer of Branch funds to VON Ontario was to discharge an agreed upon liability and not a money grab as alleged.

***Lands and Building***

32 The lands and building at 400 Victoria Avenue, Hamilton, were not included within the ambit of the ATA of 2003. The Branch's "residual assets", including the land and building, were to be dealt with later. The building at 400 Victoria Avenue houses the Adult Day Care ("ADC") Centre which is a key program provided by VON Hamilton. The ADC provides daily and overnight respite services, including social services and entertainment programs for the families of those who are caring for persons suffering from cognitive impairments. The transfer documents reveal that the Branch had acquired the 400 Victoria Avenue property in 1986 for \$850,000 long before the Foundation began raising money. The Foundation was not involved in the initial acquisition of the property.

***The Memo of Intent***

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

33 Internal friction developed between Branch and Foundation staff as a result of the transfer of the Branch operations to VON Ontario. The issues were resolved following a meeting on September 11, 2003, that concluded with a written Memo of Intent between VON Canada and the Foundation. The Memo of Intent reads as follows:

STRICTLY CONFIDENTIAL  
FINAL VERSION  
MEMO OF INTENT  
between  
VON [CANADA] AND VON HAMILTON FOUNDATION  
RE: NATIONAL VISION ACHIEVEMENT STRATEGY

|                         |   |
|-------------------------|---|
| Present at the meeting: | Sandra Edrupt, Chair<br>Cathy Young, Vice-Chair<br>Maggie Carr, Past President<br>Ralph Hayman<br>Bob Simpson<br>Lois O'Sullivan<br>Keith Augustine<br>Adam Capelli<br>Lois Murray<br>Dennis Lugowy<br>Joe White<br>Ron Farrell, CEO VON Canada<br>Lynn Bessey, Chair Elect VON Canada<br>Jim McCaw, Treasurer VON Canada |
|-------------------------|---|

1) The Hamilton Board retain the name VON Hamilton Foundation. All directors resign immediately from the legacy Hamilton Branch Board in order that VON Canada Executive can assume responsibility for dissolving the Branch corporation. The branch's only asset (the adult day centre on Victoria Street) is to be gifted to the Hamilton Foundation Board. Details for this arrangement have to be finalized but the intent is that VON Canada will continue operating the day centre as in the past and that VON Hamilton Foundation will not charge VON Canada for the use of the building.

2) The VON Hamilton Foundation not be an employer. The Foundation's OPSEU staff be transferred to the VON Canada bargaining unit. It is understood that the Foundation is in the process of assessing their fundraising support staff requirements and that one or both of the support staff may not be required.

The contract with the Foundation's Executive Director be converted to a term appointment with VON Canada. Assuming a successful transfer VON Canada agrees to appoint the current Foundation Director as the dedicated senior fundraising resource for VON Hamilton Foundation for the length of the term appointment (subject to satisfactory performance management reviews for which the Foundation Board provides input).

3) The VON Hamilton Foundation to create new bylaws, to be approved by VON Canada, which clarify its role as a public foundation to undertake strategic planning, community development, public relations, advocacy, and fundraising. Proceeds from the Hamilton Foundation's fundraising initiatives be used at the discretion of the Hamilton Foundation Board, and be intended to support programs in the Hamilton community, as delivered by VON Canada's Hamilton Branch.

4) The Hamilton Foundation agrees to the provision of support services — staff, equipment, space, financial services — by VON Canada. The Foundation will retain an independent auditor for at least the current year. The use of an independent auditor will be reviewed by the Foundation Board at that time. Service level agreements will be promptly developed to include mechanisms for determining fair market value, performance expectations and conditions for termination of service.

With respect to financial services VON Canada agrees to have the VP of Finance oversee bringing the Hamilton Foundations financial information up to date as quickly as possible in order to mitigate any director liability, and to ensure timely and accurate information in the future.

With respect to fundraising the service agreement must include provision for one full time senior person dedicated to fundraising in Hamilton. This person is to be a member of senior management in the Hamilton Branch operation with appropriate title and office location and office space. The Foundation Board is to provide input to the job description, appointment, performance expectations and performance evaluation of the senior fundraiser.

5) When VON Canada Foundation has a formal proposal for pooling investment funds the Hamilton Foundation will consider it at that time.

A timetable for action needs to be developed in order to implement this agreement as quickly as possible.

September 11, 2003

34 The applicants submit that 400 Victoria Avenue was to be gifted to the Foundation in accordance with the Memo of Intent on two conditions. The first, a condition precedent, was that the Foundation would enact new bylaws, to be approved by VON Canada, to clarify its role and to assure that the proceeds from its fundraising are used to support programs in the Hamilton community delivered VON Hamilton. The second, a condition subsequent, was that VON Hamilton would continue to occupy the premises at 400 Victoria Avenue rent-free.

35 While the respondent's counsel now argues that the Memo of Intent is of no effect because it is unsigned, the Foundation's then President, Ms. Edrupt, was present at the meeting and in her e-mail of February 25, 2005 to VON Canada, she specifically acknowledges that there was an agreement. Moreover, the evidence shows that the parties acted in accordance with the Memo of Intent.

### ***Implementation of Memo of Intent***

36 Following the Memo of Intent, the then Directors of the Branch Board resigned and VON Canada representatives were established as Branch Directors so that VON Canada could proceed to wind up the residual assets of the Branch. On October 30, 2003, VON Canada representatives were named as Directors of the Branch Board.

37 An October 4, 2004 e-mail from VON Canada prompted Ms. Edrupt to question VON Canada's plans with respect to the residual assets of the Branch and, in particular, the lands and building at 400 Victoria Avenue. That e-mail exchange led to a meeting on November 1, 2004, between the Foundation Directors and the Chief Executive Officer of



2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

VON Canada. It was confirmed that the lands and building would be gifted to the Foundation once it had enacted bylaws that complied with the requirements of the September 11, 2003 Memo of Intent. Ms. Edrupt later reported to the Foundation Directors on January 11, 2005 that "the deed to the VON Adult Daycare Centre property would be released once the Branch Foundation Board has established bylaws based on the template for the National Vision Achievement Strategy for Branches." [FN1]

38 The Minutes of the Meetings of the Foundation Directors between January 2005 and October 2006 further reflect the steps taken by the Foundation to comply with the Bylaw Enactment condition precedent to the gift of the 400 Victoria Avenue property to it. The Foundation and VON Ontario entered into a Purchased Services Agreement on March 4, 2005. VON and the Foundation entered into a Trademark License Agreement on April 1, 2006.

#### ***ByLaw Enactment***

39 To comply with the by-law enactment condition of the gift, on October 31, 2006, the Foundation enacted and ratified ByLaw No. 1. This recognized the commitments made in the September 11, 2003 Memo of Intent to allocate funds to VON Hamilton and to include VON Canada as a Foundation Board member. The bylaw was executed by the Chair and the Vice-Chair of the Board who, at that time, was Ms. Bursey. The bylaw states that it was:

Unanimously Confirmed, Ratified and Approved by the Directors of the Corporation at a General Meeting assembled for that purpose this 31<sup>st</sup> day of October, 2006.

40 The Minutes of the Foundation's Meeting of October 31, 2006 further comment on the bylaws at item 5.4:

J. North reported that K. Bursey and C. Young met briefly with Esther Shainblum, Director of Corporate Support & General Counsel VON Canada at the VON Canada AGM. There was discussion regarding the Hamilton Foundation ByLaws and the transfer of the ADC building to the Foundation.

In this Board's view, VON Canada has accepted the ByLaws as prepared as they were returned to Hamilton without statement and they are consistent with the new template for Branch Foundation Board Bylaws.

41 The Minutes reveal that there was a motion by Ms. Bursey, that the bylaws as presented be unanimously confirmed and approved. That motion was carried. At the next meeting, on November 28, 2006, Board member Cathy Young clarified that the bylaws were accepted by VON Canada.

42 The Foundation then acted in accordance with the intent of the bylaw provisions by treating VON Hamilton as one of its members and providing it with notice of all Foundation meetings. According to VON Hamilton, its reliance on these circumstances, as further evidence of the Foundation's commitment to the September 11, 2003 Memo of Intent, led to the transfer of the 400 Victoria Avenue property to the Foundation on June 4, 2007.

#### ***Further Bylaw Re-Alignment and Association Agreement***

43 In the summer of 2007, VON Canada notified all Branches and the Foundation that they would be required to sign "Association Agreements" to clarify their roles under the NVAS including the agreed upon roles of the delivery of strategic planning and community development advocacy and fundraising. In its November 28, 2006 Minutes, the Foundation previously recognized that the October 31, 2006 bylaws would need to be revised in the spring of 2007 to meet VON Canada's new guidelines. While the Foundation's initial response to the proposed Association Agreement was positive, as time passed, its resistance to the proposed Association Agreement hardened.

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

## **The Subsequent Chain of Events**

### ***Ms. Bursey's Conflict with VON Canada***

44 In June 2008, VON held a National Board Meeting to set deadlines for the execution of Association Agreements and to discuss the need for the Foundation to sign such an Agreement. At VON's June 2008 Board Meeting, Ms. Bursey, who was then both the Chair of the Foundation's Board and a member of the National Board of VON, opposed the idea that the Foundation would be required to sign an Association Agreement.

45 The Foundation then attempted to re-invigorate the defunct Hamilton Branch and to re-populate its Board of Directors with members of the Board of Directors of the Foundation. The objective of this action was to have this new entity carry out the roles of advocacy, community development and strategic planning which the Foundation was to carry out in the Association Agreement. This action was inconsistent with the NVAS which was designed to discourage the proliferation of VON entities as well as the agreement between VON — Ontario and the Foundation.

### ***Termination of the Purchased Services Agreement***

46 In July 2008, the Foundation insisted that VON Ontario fire an employee who was on maternity leave. This employee had provided all her services to the Foundation under the Purchased Services Agreement. When this matter was not resolved to the satisfaction of the Foundation, it arbitrarily and abruptly terminated the Purchased Services Agreement on August 11, 2008 and refused to enter into the dispute resolution procedures set out therein. The Foundation then withheld payment to VON Ontario of hundreds of thousands of dollars in fees that were owed pursuant to the Purchased Services Agreement. These were not paid in full until there was threat of litigation.

### ***Foundation's Departure from 414 Victoria Avenue***

47 The Foundation had shared space with VON Ontario at 414 Victoria since the Foundation began its operations in the late 1980s. It continued to occupy this space pursuant to the Purchased Services Agreement. Within two days of its termination of the Purchased Services Agreement, the Foundation moved out of the 414 Victoria Avenue premises after hours without notice. Files relating to confidential and donor information were removed. Ms. Bursey acknowledged that the Foundation had the files and claimed that these belonged to the Foundation.

### ***Ms. Bursey's Further Conflict with VON Canada***

48 At the September 2008 Meeting of VON Canada's Board of Directors, Ms. Bursey refused to recognize the conflict of interest in which she found herself and now strenuously objected to the requirement for the Foundation to sign an Association Agreement. The VON Canada Directors found her to be in conflict of interest and rejected her submissions on the issue. Shortly thereafter, on or about November 21, 2008, Ms. Bursey submitted her resignation as a Director of VON Canada.

### ***Foundation Demands Lease from VON Ontario***

49 Within days of the rejection of Ms. Bursey's September 2008 submission to VON Canada's Board of Directors, VON Hamilton received a demand from the Foundation that it pay annual rent in the amount of \$86,000.00 subject to annual increases for its occupation of the 400 Victoria Avenue premises. The Foundation advised that no off-setting funding would be provided. Branch staff were no longer invited to Foundation meetings.

### ***Foundation Decides to Broaden its Objects***

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

50 The Minutes of the Meeting of Foundation Directors held on October 28, 2008 record that Ms. Bursey stated that the Foundation was free to change its Letters Patent at its discretion, as long as they did not contravene Canada Revenue Agency guidelines. At the November 25, 2008 meeting, a motion was passed to change the Letters Patent to enable the Foundation to disburse to other organizations. In particular, the Foundation was exploring how it could assist the McMaster University Gerontology Program. Minutes of the Meeting of Foundation Directors on November 25, 2008 read as follows:

The current Letters Patent state that **all funds must flow back to VON in Ontario** for charitable or educational purposes (patient and health care). They need to be changed to reflect the ability to disburse to other organizations as long as it is related to patient and health care.

[Emphasis added.]

### *Foundation Changes its Approach to Funding*

51 VON Ontario attempted to work with the Foundation during this time. At the meeting of Foundation Directors on January 27, 2009, Ms. Bursey expressed a need for the Foundation to carefully outline what kind of information it requires to consider VON Hamilton's funding requests. Shortly thereafter, the Foundation imposed for the first time more stringent requirements for requests for funding from VON Hamilton. In January of 2009, VON Hamilton submitted its funding request in the amount of \$202,700. The Foundation refused \$69,723 of that funding request. The Foundation maintains that it was simply using appropriate procedures to review funding requests as part of their fiduciary responsibilities to its donors.

52 In argument, the Foundation's counsel suggests that not all of VON Hamilton's requests related to charitable programs. This argument makes no sense. Counsel could not adequately explain the distinction as to which of a registered charity's programs were charitable and which were not. For example, he could not explain why monies used to express appreciation to the many volunteers who deliver the VON's charitable programs such as "Meals on Wheels" was not a charitable purpose. More importantly, Ms. Bursey makes no mention of this lack of charitable purpose in her affidavit as a justification for the rejecting the funding requests.

53 These new requirements were completely at odds with the Foundation's own Charitable Giving Policy and Procedural Guidelines established in May 1999. Under those Guidelines, all that the former Branch had to do was submit a budget or a memo and the Foundation would transfer the requested funds. There never was an exercise of a discretion that Ms. Bursey and her counsel now claim was so critical. The original objects clause only permitted an exercise of discretion when the Foundation chose to fund VON programs outside of Hamilton — elsewhere in the Province. There was no exercise of discretion when it came to funding VON Hamilton Branch's requests.

### *The Commencement of these Proceedings*

54 The developments led to unsuccessful negotiations between the parties through their solicitors. In May 2009, VON served notice that it would terminate the Trademark License Agreement pursuant to which the Foundation was entitled to use VON's name and trademarks unless there was some resolution of outstanding issues. By letter dated October 15, 2009, the Foundation's counsel repudiated the commitments the Foundation had made in the September 11, 2003 Memo of Intent and subsequently. Counsel asserted that VON was not a member of the Foundation and was not entitled to have a Director on the Foundation's Board of Directors. At this time, the applicants' solicitors learned that the Foundation had filed an application for Supplementary Letters Patent to change its corporate objects. They also learned of the Foundation's plan to donate funds for McMaster University.

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

55 The Foundation's Supplementary Letters Patent now allowed the Foundation to use its monies to fund any "other charitable organizations in Ontario registered under the *Income Tax Act* (Canada)." In early October 2009, the applicants' solicitors notified the Foundation, its Directors, and the Public Guardian and Trustee of their concerns with the actions taken by the Foundation and of the plan to commence legal proceedings.

56 The application was issued in November 2009. VON terminated the Trademark License Agreement with the Foundation effective December 15, 2009. On or about December 21, 2009, the Foundation changed its name to GHWF. The Foundation ceased to operate as a VON-specific fundraiser in December 2009 and since that date it has purported to operate as a general fundraiser in the Hamilton area.

#### Events Subsequent to the Initiation of the Application

57 On January 28, 2010, I issued a Consent Order containing, *inter alia*, injunctive relief and asset preservation provisions that prohibited the Foundation from continuing to act on the basis that it is a VON entity. That order enjoined the Foundation from dispersing or transferring any assets or monies that it had raised or received prior to December 15, 2009, to any non-VON entities as follows:

16. THIS COURT FURTHER ORDERS that the Foundation will be bound by an interim injunction, pending the disposition of the Application, restraining it from disbursing or in any way transferring any money (other than for the purpose of overhead and administrative costs) or assets raised or received by it prior to December 15, 2009 to any non-VON entity. For greater certainty, the Foundation will be restrained, in this regard, from disbursing or transferring any assets or monies (other than for the purpose of overhead and administrative costs) raised or received by it prior to December 15, 2009 to any registered charity, qualified donee or other person or organization other than VON Ontario Branch, the Applicant herein or any other VON entity.

58 The Order established a schedule for the provision by the Foundation and its solicitors of certain specific information, the delivery by the Foundation of its responding materials, and the delivery by VON Canada of reply evidence. The Order called for a mediation to be held and for cross-examinations to be conducted in the event the matter could not be settled.

59 Initially, VON Canada was the sole applicant and the respondent was described as VON Central Ontario Foundation. On consent of the parties, the title of the proceedings was amended to add the Victoria Order of Nurses for Canada — Ontario Branch and the respondent's current name was substituted.

60 The Foundation has refused to deliver to the applicants the list of donors it compiled during its 20 years of activity as a VON-specific fundraiser.

61 The funding requests made by VON Hamilton to the Foundation in 2010 and 2011 were also subjected to the new approval process resulting in further denials of VON Hamilton's requests.

62 The Foundation continues to use a "break open ticket" funding mechanism that is licensed by the Ontario Alcohol and Gaming Commission. This funding mechanism was used to raise funds prior to December 15, 2009, to support VON Hamilton. A "break open ticket" is a device made of cardboard that has perforated cover window tabs which have symbols revealed by tearing open the cover tab. The winning combination of symbols is specified on the back of the ticket. "Break open tickets" are also known as "Nevada tickets" or "pull tabs". The Ontario Alcohol and Gaming Commission issues a license to an eligible charity or religious organization in circumstances where the licensed charitable organization has a provincial mandate. The license that the Foundation continues to use was granted to support VON Hamilton. The

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

funds the Foundation currently holds that are attributable to this funding mechanism total slightly in excess of \$18,000. There appears to have been little activity in that account for some time.

63 Throughout 2010, although it avoided a specific use of VON's trademarks, the Foundation continued to represent itself as being associated with the programs and services that it has funded since 1981, being the very programs and services provided by VON Hamilton.

64 On or about October 25, 2010, a representative of the applicants asked the Foundation to consent to a minor zoning variance pertaining to the ADC Centre at 400 Victoria Avenue, Hamilton, to increase the capacity of the Overnight Respite ("ONR") program from four to six beds. The Foundation's consent was necessary since title was registered in its name. Officials from the Hamilton-Niagara-Haldimand-Norfolk Local Health Integration Network ("LHIN") have been urging VON Hamilton to increase the ONR bed capacity since the beginning of 2010. Initially, the Foundation refused to execute the minor zoning variance request and demanded the execution of a lease by VON Hamilton. This was resolved on a without prejudice basis during the course of the hearing of this application.

### ***Relief Sought***

65 As the successor to the VON Hamilton Branch, VON Ontario claims it is beneficially entitled to all of the funds the Foundation currently held as of December 15, 2009. Moreover, VON Ontario claims it is beneficially entitled to the lands and building at 400 Victoria Avenue because all of the money used to acquire the lands and premises either belonged to the Branch or was raised by the Foundation for the purposes of benefiting the Branch. The entitlement of VON Ontario to the lands and building is further claimed on the principles of resulting trust and conditional gift.

### **The Issues**

Issue 1: *Do the applicants have standing to seek the relief in this application?*

Issue 2: *Is VON Hamilton beneficially entitled to the Foundation's assets including real property accumulated to December 15, 2009, and the income attributable thereto?*

Issue 3: *Has the Foundation breached its fiduciary and/or trust obligations to VON Hamilton and, if so, what is the appropriate remedy?*

### ***Issue 1: Do the applicants have standing to seek the relief in this application?***

66 Section 6(1) of the *Charities Accounting Act*, R.S.O. 1990, c. C.10 ("*CA Act*") states that:

**Any person** may complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which any such funds have been dealt with or disposed of.

[Emphasis added.]

67 Section 10(1) of the *CA Act* enlarges the court's supervisory powers by providing that:

Where any two or more persons allege a breach of trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

law.

[Emphasis added.]

68 As noted, prior to the amendment to these pleadings, there was a single applicant. The requisite number of persons was in place prior to the hearing of this application and there is no issue as to standing.

***Issue 2: Is VON Hamilton beneficially entitled to the Foundation's assets including real property held at December 15, 2009, and income attributable thereto?***

69 With respect to this issue, VON Ontario's position at law may be summarized as follows:

(a) As the successor to the VON Hamilton Branch, VON Ontario has been and is the beneficial owner of all of the money and property historically held and raised (including all accruals thereon), by the Foundation;

(b) VON Ontario position as beneficial owner arises because:

- VON's predecessor created the Foundation through Letters Patent which endowed it with specific corporate objects. Under those objects, VON Hamilton Branch was to be the exclusive beneficiary of all of the Foundation's fundraising activities;
- the conduct of both VON Hamilton Branch and the Foundation, including the Foundation's representations to the public, during the Foundation's active, corporate life, demonstrated that VON Hamilton Branch and later VON Ontario were intended to be exclusively, beneficially entitled to all of the assets raised by the Foundation;
- both VON Hamilton Branch and the Foundation shared a mutual assumption that VON Hamilton Branch was beneficially entitled to all of the money raised by the Foundation;
- the *Charities Accounting Act* of Ontario deems the Foundation to be a trustee and its Directors to be fiduciaries of and in relation to the assets held beneficially for VON Hamilton Branch and its successor. VON Ontario is entitled to enforce those obligations under the *Charities Accounting Act*;
- the Foundation holds all or some of its assets in trust, at law for VON Ontario;
- the Foundation holds all or some of its assets beneficially for VON Ontario pursuant to special charitable purposes trusts;
- the Foundation is the constructive trustee of its assets for the benefit of VON Ontario;
- the assets of the Foundation, and in particular the real property owned by it, are held on a resulting trust in favour of VON Ontario;
- the Foundation's real property was, moreover, conditionally gifted to it by VON Hamilton Branch. The conditions of that gift failed with the result that the property must revert to VON Hamilton.

70 While the applicants claimed beneficial "ownership" of the Foundation's assets in their initial application, they are in fact seeking beneficial or equitable "entitlement". Their use of the word "ownership" in their original application may have initially confused the respondent's understanding of the equitable claims in issue but by the time of the hearing

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

of this application, the nature of these claims was very clear. Regardless of whether the equitable interest of the Applicants' stems from what might be characterized as a trust, constructive trust, resulting trust, near trust, fiduciary relationship, and/or something else, the end result is the same. While the applicants assert various bases in support of their claims that are amply supported by the evidence and the applicable law, I have concluded the applicant VON Ontario's claims to an equitable entitlement to the Foundation's assets can be resolved solely on the basis of the interpretation of the Foundation's original objects.

71 I propose to review the law with respect to charitable corporations including the jurisdiction of this Court to deal with this application and then to focus on the interpretation of the Foundation's objects as of December 15, 2009. Finally I will deal with the transfer of the property at 400 Victoria. Although I have come to the conclusion that the Foundation held all of its assets, including its real property, beneficially for VON Ontario, I will also address the alternate basis for the applicants' claim to 400 Victoria since this was the focus of much argument on the application. Finally, I will decide if the directors of the Foundations are in breach of their fiduciary responsibilities and, if so, the appropriate remedy

### Charitable Corporations

72 Two relatively recent decisions, one in Ontario and the other in British Columbia; namely, *Christian Brothers of Ireland in Canada, Re* (2000), 47 O.R. (3d) 674 (Ont. C.A.) and *Rowland v. Vancouver College Ltd.*, [2000] 8 W.W.R. 85 (B.C. S.C.) affirmed (2001), 205 D.L.R. (4th) 193 (B.C. C.A.) affirm the principle that a charitable corporation holds its corporate assets beneficially to be used only and strictly in accordance with its charitable objects. In this context, a charity's directors have fiduciary obligations to ensure that a charitable corporation's assets are applied in accordance with its corporate objects

73 In *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)* (2001), 39 E.T.R. (2d) 96 (Ont. S.C.J.) Haley, J. observed that charitable corporations owe fiduciary duties to the beneficiaries of its charitable objects and further "that a charitable corporation owes a fiduciary duty to the public in general which supports the privileges extended to charitable corporations and to the public in particular which turns over its money to the charitable corporation for the charitable purposes it wishes to support." [FN2]

74 It has also been held that a breach of trust occurs when a charitable corporation applies its property to purposes that are beyond the scope of its objects. This principle applies regardless of whether those other purposes to which property has been diverted to are charitable or non-charitable. [FN3]

75 As noted by the PGT, courts have recognized that there are substantive differences between a corporation and a trust. The existence of bylaws, statutory corporate remedies, members, and corporate governance requirements, are but some of the factors which distinguish an incorporated charity from a trust. A charitable corporation nonetheless may be in a position analogous to a trustee in relation to its corporate assets when the corporate machinery is insufficient to protect the charitable assets. The court has exercised supervisory inherent equitable jurisdiction over incorporated charities to restrain directors from receiving remuneration either in their capacity as a director or for professional services, unless court approval is first obtained. Similarly, the court has intervened in the administration of incorporated charities to direct and oversee the election of directors, require an accounting, appoint an interim receiver or to direct a *cy pres* scheme in respect of surplus assets of a defunct incorporated charity that has been directed to be wound up.

76 As Justice Anderson said in *Ontario (Public Trustee) v. Toronto Humane Society* (1987), 60 O.R. (2d) 236 (Ont. H.C.) at p. 243:

... is a charitable corporation a trust and, second, are its directors trustees?

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

... In Ontario, the question cannot be examined without some regard for the Charities Accounting Act. ... It is not in dispute that the Society is subject to the provisions of this Act. It is clear, therefore, that for certain purposes the Society is a trustee and its property is trust property...

77 In his article, *The Charitable Corporation: A "Bastard" Legal Form Revisited*, *The Philanthropist* (2000) Vol. 17, No. 1, p. 17 at p.29, Maurice Cullity comments on the *PGT v. THS* decision:

It is suggested that the decision in the *Toronto Humane Society* case was landmark in the development of the law of charity in this jurisdiction in the following respects:

- (1) It recognized that the internal affairs and the regulation of the finances of incorporated charities are not governed exclusively by corporate law and the provisions of Part III of the *Corporations Act*. Advice and directions under the *Trustee Act*, generally and with respect to compensation, can be given and the inherent jurisdiction of the court in matters of charity is applicable;
- (2) The jurisdiction may justify intervention both in the internal affairs of an incorporated charity with respect to its governance and election of its directors, and with respect to the expenditures of its fund on non-charitable or borderline purposes;
- (3) However, generally, the affairs of an incorporated charity may be left to its members and the intervention of the court will be limited to cases where corporate law is inadequate to protect the interests of charity; and
- (4) Statutory provisions applicable to trustees may be applied to incorporated charities and their governing bodies.

### ***Charities Accounting Act***

78 As noted, charities are considered to have trust obligations and their directors to be fiduciaries with respect to the management of their assets. These obligations are enforceable through the court's inherent jurisdiction and, in addition, in Ontario, under the *CA Act*.

79 The *CA Act* is Ontario's statutory instrument for the supervision of charitable corporations. It provides a mechanism for the courts to control the behaviour of charities, including how they solicit, handle and disburse donations. The statute gives the power to the courts to ensure that a charity complies with its objects, the directions of donors, the interests of beneficiaries and the public at large.

80 Subsection 1(2) of the *CA Act* contains a "deeming" provision which provides that a charity "shall be deemed to be a trustee" and that "any real and personal property acquired by it" is deemed to be held as trust "property" within the meaning of this *Act*.

81 Section 4 of the *CA Act* allows for an application to the court where executor or trustee in default:

4. If any such executor or trustee,

- (a) refuses or neglects to comply with section 1, 2 or 3, or with any of the regulations made under this Act;
- (b) is found to have misapplied or misappropriated any property or fund coming into the executor's or trustee's hands;



2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

(c) has made any improper or unauthorized investment of any money forming part of the proceeds of any such property or fund; or

(d) is not applying any property, fund or money in the manner directed by the will or instrument,

a judge of the Superior Court of Justice upon the application of the Public Guardian and Trustee, may make an order,

(e) directing the executor or trustee to do forthwith or within the time stated in the order anything that the executor or trustee has refused or neglected to do in compliance with section 1, 2 or 3, or with the regulations made under this Act;

(f) requiring the executor or trustee to pay into court any funds in the executor's or trustee's hands and to assign and transfer to the Accountant of the Superior Court of Justice, or to a new trustee appointed under clause (g), any property or securities in the hands or under the control of the executor or trustee;

(g) removing such executor or trustee and appointing some other person to act in the executor's or trustee's stead;

(h) directing the issue of an attachment against the executor or trustee to the amount of any property or funds as to which the executor or trustee is in default;

(i) fixing the costs of the application and directing how and by whom they shall be payable;

(j) giving such directions as to the future investment, disposition and application of any such property, funds or money as the judge considers just and best calculated to carry out the intentions of the testator or donor;

(k) imposing a penalty by way of fine or imprisonment not exceeding twelve months upon the executor or trustee for any such default or misconduct or for disobedience to any order made under this section;

(l) appointing an executor or trustee in place of an executor or trustee who has died, or has ceased to act, or has been removed, or has gone out of Ontario, even if the will or other instrument creating the trust confers the power to make such an appointment upon another executor or trustee or upon any other person. R.S.O. 1990, c. C.10, s. 4; 1999, c. 12, Sched. B, s. 1 (1, 2); 2000, c. 26, Sched. A, s. 2 (4).

82 Section 6 of the *CA Act* gives the court the authority to ensure that charitable donations are disbursed in a way which is consistent with any restriction or special purpose imposed by a donor. As well, s. 6 of the *CA Act* gives authority to the courts to ensure that donations are dealt with in a manner which is consistent with how a charity has represented to the public that donations will be used.

83 Section 10. (1) provides:

10. (1) Where any two or more persons allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law. R.S.O. 1990, c. C.10, s. 10 (1); 1999, c. 12, Sched. B, s. 1 (5).

84 The breadth of the power identified under both s. 10 of the *CA Act* and the court's own, broad, inherent jurisdiction to regulate charities was further described in this way:

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

[39] ... the relief requested by these two applicants, who allege a breach of trust by the THS of its charitable purpose, must be considered by the court within its broad, historic jurisdiction to supervise the activities of a charitable corporation to ensure that they accord with its charitable purpose and to intervene if the charity is not administered in accordance with its purpose or if charitable funds are misapplied.[FN4]

85 I accept the applicants' submissions that both the court's broad, inherent jurisdiction and s. 10 of the *CA Act* allow this court to make any order that "is just" must include, without limitation, all of the powers described in s. 4 of the *CA Act*, such as the power to remove from a charity all or any of its property, the payment of such money or property into court, or into the hands of a new trustee, the removal of any trustee or director and the appointment of a substitute, the power to make orders as to how to deal with money and its disposal in order to best ensure that the intentions of donors and the purposes of the charity are respected.

86 In summary:

- (a) The *CAA* deems a charity to be a trustee and its directors to be fiduciaries for the implementation of a charity's objects and the management and disbursement of donations both in accordance with the directions of donors as well as the representations made by the charity to the public about how donations are sought and how they are to be used;
- (b) The *CAA* deems property received by a charity to be trust property;
- (c) The *CAA* provides a mechanism which allows anyone, including beneficiaries of a deemed trust under the *CAA*, or any other trust at law, to apply to the Superior Court of Justice to enforce the trust; and
- (d) The courts possesses an inherent jurisdiction to supervise charities as well the extremely broad powers conferred under the *CAA*, to make any order it considers to be just. This allows a court to wind up a charity, to remove from it all or any of its property, to remove and replace any of its officers or directors, to appoint substitute trustees and to provide any other appropriate relief.

### Interpretation of Objects

87 Courts will apply well recognized rules of construction to assist in the interpretation of written documents. These rules are applicable to letters patent and are summarized in *Palmer's Company Law*[FN5] as follows:

- The whole document must be read and considered.
- The expressed intention is to have effect; we are not to speculate as to what the parties intended, but to ascertain it from the words used, for the expressed meaning is to be taken to indicate the intention.
- The "golden rule" must be observed, namely, that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, or some repugnance or inconsistency with the rest of the instrument, ...
- Popular words are to be taken *prima facie* to be used in their popular sense, and technical words in their technical sense; but in each case the *prima facie* sense may be displayed or qualified by the context.
- The words used must be read with reference to the subject-matter.
- The *ejusdem generis* rule and the maxim *expressio unius est exclusio alterius* are also at times applicable.

88 As noted by the House of Lords in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

(1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at p. 912, these rules of interpretation must now be read in light of the modern rules of construction. Under the modern approach, interpretation is the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the document was executed.

89 Modern principles of construction require the court to have regard for the background, the context of the document and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result. The Court of Appeal expressed agreement with this approach in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 at 363 (Ont. C.A.), holding that "the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance."

90 If there is any ambiguity in the Letters Patent, all of the surrounding circumstances, including the conduct of the parties themselves after the Foundation was incorporated, are admissible to derive the true meaning of the objects since "there is no better way of seeing what they intended, than seeing what they did under the agreement [objects] in dispute." [FN6]

***VON Hamilton is the Exclusive Beneficiary under the Foundation's Corporate Objects***

91 The Foundation's objects are repeated here:

To receive and maintain a fund or funds and to apply from time to time all or part thereof and the income therefrom for such charitable or educational purposes related to patient and health care, of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor or any other Branch of the Victorian Order of Nurses in Ontario, which, in the discretion of its Directors, needs assistance.

92 The applicants submit that the original object clause required the Foundation to make distributions of its corporate property to the Hamilton Branch or its successor, for its charitable or educational purposes related to patient and health care, or for any other VON Branch that the Foundation considered to be in need of assistance. The object clause did not authorize the Foundation to distribute its funds to any entity so long as their purposes were consistent with certain purposes of the VON. The PGT supports this interpretation of the object clause.

93 The Foundation submits that under its original objects, its corporate assets were beneficially held for particular purposes consistent with those of the VON, and that it was not obliged to make distributions to a VON entity as long as it applied its funds to those particular objects in the Hamilton area. The Foundation invites a comparison to the decision of Pitt J. in *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2002), 22 B.L.R. (3d) 182 (Ont. S.C.J.).

94 In that case, the directors of the then Bloorview Childrens Hospital had transferred its unrestricted funds (\$10,000,000.00) to a foundation since they concluded that the good health of the hospital's balance sheet would be an impediment to their receipt of funds from the Ministry of Health. That foundation's objects were as follows:

(1) Primarily, to apply the funds for the benefit of the patients of Bloorview Childrens Hospital, including capital expenditures;

(2) Secondly,

(i) to use the funds for the improvement of patient care or other charitable activities related to disabled

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

young persons carried on by hospitals or organizations or other persons, which are registered charities, related to the health of disabled persons in Canada; and

(ii) to apply funds to the advancement of health care education including research related to disabled persons in Canada.

[Emphasis added.]

95 The main issue in that case was the ownership of the funds which the hospital now wanted to use in order to finance new construction. In reference to the objects clause, Justice Pitt noted that the focus was on the patients of the hospital and extended to disabled persons across Canada. The focus was not on the hospital. The object clauses in that case were much broader in scope than the narrow objects clause that is in issue here; one that makes specific reference to the charitable and educational programs of VON Hamilton-Wentworth. Moreover, that court did not have the mountain of evidence that has been put before me to establish how the parties themselves interpreted the charitable objects of the Foundation.

96 I agree with the position taken by the applicants and the PGT for the following reasons:

(a) The ordinary and grammatical meaning of the object clause. If the intention had been to authorize the Foundation to distribute its funds to any entity whose purposes were consistent with certain purposes of the VON, the object could have simply stated the particular VON objects, namely, for charitable or educational purposes related to patient and health care. There would have been no need to reference VON. Similarly, there would have been no need to authorize the Foundation to make distributions to other VON entities in need of assistance;

(b) The inclusion of "VON" in the original name of the Foundation;

(c) The voluminous representations in fundraising and solicitation material of the Foundation that donations shall be used for VON programs. A selection of these comprises an entire volume of documents. As recently as January 2008, Ms. Bursey as Chair of the Foundation published a giant "Thank You" in the *Hamilton Spectator* expressing the Foundation's appreciation for the community's support for VON programs. Many of the publicity items do not differentiate between the Foundation and the Branch; they simply refer to VON Hamilton. Where the Foundation is named in a fundraising announcement, there is usually a reference that proceeds from any fundraising will benefit only VON's charitable programs. The Foundation's letterhead uses the VON Canada trademark and lists the programs it funds; these are all VON programs and services;

(d) The Hamilton Branch was the source of the initial funding provided to the Foundation. The Foundation's own financial documents disclose an operating surplus in 1996 in excess of one million dollars. The Branch was the source of these funds as the Foundation had yet to commence its own fundraising;

(e) The dissolution clause of the Foundation states that it may dispose of its assets to VON purposes or to other organizations which carry on charitable or educational purposes related to patient and health care. This clearly states the Foundation's assets may be distributed to a non-VON entity. If the Foundation's object clause was intended to be as broad, then the same or similar wording could have been used in the object clause;

(f) By 1999, the Branch and Foundation had developed a Statement of Operating Principles described in the 2000 revision of the Branch's Bylaw as follows:

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

As outlined in the Statement of Operating Principles adopted between the Branch and the Foundation, the Foundation exists to provide resources to the corporation to assist it in meeting its mission, vision and obligations to the community as established by the Branch Board of Directors. Provision for representation on each other's Board also shall be made in the By-laws of both the corporation and the Foundation to facilitate this partnership and to enhance communication.

(g) When the Foundation amended its Letters Patent, its corporate Minutes of November 25, 2008 constitute an admission that the applicants' interpretation is correct:

The current letters patent state that all funds must flow back to VON in Ontario for charitable or educational purposes (patient and health care). They need to be changed to reflect the ability to disburse to other organizations as long as it is related to patient and health care.

(h) Historically, the Foundation only provided funding to VON entities; until the events leading to this application, the Foundation has never funded or considered funding any other organization;

(i) The Letters Patent of the Foundation granted the Hamilton Branch or its successor, a veto power over whom may be elected as a director of the Foundation. (While there may be a question about the legal validity of this provision, it nonetheless indicates that the intention of parties at the time of incorporation was to enable the Hamilton Branch to control the Foundation's Board);

(j) The financial statements of the Foundation and the Annual Information Returns of the Foundation filed with the Canada Revenue Agency and in Minutes the Foundation Directors disclose:

(a) Its Financial Statements from 1989 to 2000 said:

The Victorian Order of Nurses, Hamilton-Wentworth Foundation was incorporated on December 8, 1981 to receive and maintain funds for charitable or educational purposes related to patient and health care of the Victorian Order of Nurses, Hamilton-Wentworth Branch.

(b) In 2003 the Foundation added the additional following text to its Financial Statements:

During the year, the Victorian Order of Nurses Hamilton-Wentworth Branch transferred its operations to Victorian Order of Nurses Canada Ontario Branch — Hamilton ("the Branch").

**This statement acknowledged VON Hamilton as the successor to the Hamilton Branch. The Foundation's Financial Statements maintained the same statement until 2007.**

[emphasis added.]

(c) In 2007 the Foundation's Financial Statement said:

Victorian Order of Nurses Hamilton Foundation (the Foundation) was incorporated December 8, 1981 to receive and maintain funds for the charitable purposes of the Victorian Order of Nurses Canada — Ontario to be used solely in Hamilton.

(d) In 2008 the Foundation's Financial Statements declared:

VON South Central Ontario Foundation (formerly Victorian Order of Nurses Hamilton Foundation), the

Foundation, was incorporated December 8, 1981 to receive and maintain funds for the charitable and educational purposes related to patient and healthcare of the Victorian Order of Nurses Canada — Hamilton Site (the Hamilton Site), to be used solely in Hamilton.

(e) Tax returns of the Foundation for the years 2000 to 2003 declared:

The purpose of the foundation is to fundraise for specific programs of the Victorian Order of Nurses — Hamilton-Wentworth branch.

(f) From 2004 to 2006 the Foundation's Tax Returns declared:

Provides funds for specific programs of the Victorian Order of Nurses Hamilton branch.

(g) The Foundation's 2007 Tax Returns stated:

Provides funds for specific programs of the Victorian Order of Nurses Canada — Ontario to be used solely in Hamilton.

(h) In 2008 the Foundation's Tax Returns declared:

Provides funds for specific programs of the Victorian Order of Nurses Canada — Hamilton site.

(i) The Foundation's 2009 Tax Return stated:

Receive and maintain funds for the charitable and educational purposes related to patient and healthcare of the VON Ontario Ltd. — Hamilton or any other branch/site of the VON Ontario Ltd.

(j) VON Hamilton Branch began reporting in its Financial Statements that it "controlled" the assets of the Foundation from 1998 to 2002. The Minutes of the Foundations Annual General Meeting of June 17, 1998 refer to the "controlling relationship that exists between the Branch and the Foundation."

(k) The close relationship between the Foundation and the Hamilton Branch prior to the restructuring, in which the Branch and the Foundation shared office space at the same location. Representatives of the Branch were active participants in the meetings of Foundation Directors. The presentation of Branch budgets and Foundation funding decisions were traditionally made during the course of a single meeting of the Foundation's Directors.

97 I am satisfied that a proper interpretation of the Foundation's corporate objects in its Letters Patent made VON Hamilton Branch and its successor VON Ontario the exclusive beneficiary of the Foundation's fundraising activities. I am further satisfied that VON Ontario is the Branch's successor. Both the Foundation and VON Hamilton conducted themselves for nearly 20 years on the basis of shared assumptions of law and the fact that VON Hamilton was the exclusive beneficiary of the Foundation's fundraising activities.

#### ***Transfer of 400 Victoria***

98 While VON Ontario relies on the Interpretation of the Objects clause as set out above to claim its beneficial entitlement to the premises at 400 Victoria, VON Ontario further submits that title to 400 Victoria should revert to it on the basis of the doctrines of Resulting Trust and of Conditional Gifts.

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

99 Historically, the Hamilton Branch owned two buildings situated side by side at 400 and 414 Victoria in the City of Hamilton. 414 Victoria was sold in the late 1990s in exchange for 10 years of rent-free occupation. That building houses the management and administrative offices of VON Ontario. From the time the Foundation began its fundraising operations on behalf of the Hamilton Branch, it shared offices with the Branch at 414 Victoria. During the restructuring, the Foundation's continued use of the space was formalized through the Purchased Services Agreement.

100 The 400 Victoria Avenue building was acquired by the Branch in 1986. This was before the Foundation began its fundraising activities. It has always been used for the Adult Day Care Program. It is acknowledged that in excess of \$750,000 of funds that were held by VON Ontario as deferred revenues were used to fund renovations to 400 Victoria Avenue. While Ms. Bursey claims that the Foundation pressured VON Ontario to release these funds, the possibility of using these funds for the renovation of the building had been an item of discussion of the Branch and the Foundation since late 2002.[FN7] In accordance with the Memo of Intent, the 400 Victoria Avenue Building was transferred to the Foundation on June 4, 2007 for the nominal consideration of \$1.00. The affidavit of Land Transfer Tax describes the transaction as a "gift".

101 The applicants submit that 400 Victoria Avenue was to be gifted to the Foundation in accordance with the Memo of Intent on two conditions. The first, a condition precedent, was that the Foundation would enact a new Bylaw to be approved by VON Canada to clarify its role and to assure that the proceeds from its fundraising are used to support programs in the Hamilton community delivered by VON Hamilton. The second, a condition subsequent, was that VON Hamilton would continue to occupy the premises at 400 Victoria Avenue rent-free.

#### **Conditional Gifts**

102 Gifts of money or property, including land can be made subject to conditions. In this regard, there are two kinds of conditions: conditions precedent and conditions subsequent. The operation of these conditions and what they mean has been described as follows:

A condition precedent is one to be performed before the gift takes effect. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift; but if a condition subsequent is void, the gift remains good.[FN8]

103 It has been held that if a condition precedent is not satisfied, the gift fails. It must then be returned to the party with original title. Similarly, where a condition subsequent is unsatisfied, a gift fails and the property reverts to the original owner.[FN9]

104 In this case, the Memorandum of Intent reveals that the transfer of VON Hamilton's real property was made subject to a condition precedent, that the Foundation amend its bylaws in a certain way and a condition subsequent, that it provide rent-free occupancy of the real property.

105 The Foundation breached both conditions. While the Foundation commenced the process of bylaw amendment by enacting ByLaw No. 1, it refused to further re-align its ByLaw to meet VON Canada's guidelines. The Foundation then demanded the VON Ontario pay rent for the ADC site. The real property must therefore revert to the Branch's successor, VON Hamilton.

#### **Resulting Trust**

106 Equity recognizes and reinforces the distinction between legal and beneficial ownership of property. The benefi-

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

cial owner of property has been described as "the real owner of property even if it is in someone else's name".[FN10]

107 A resulting trust arises when title to the property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner. This is because "equity does not assume gifts."[FN11]

108 As discussed by the Supreme Court of Canada in *Pecore v. Pecore* at pp. 806 — 807:

Whenever A transfers property gratuitously into the hands of B, a legal presumption of a resulting trust arises. This will allocate the legal burden of proof to the transferee to demonstrate that a gift was intended. This presumption, therefore, alters the general practice and places the onus on the transferee to rebut the presumption that a resulting trust was intended and has been established.

The court went on to hold at pp. 813-814 that:

Rebutting the presumption of a resulting trust requires the transferee to tender specific evidence establishing that a full, unrestricted gift was intended. That evidence must meet the civil standard of proof on a balance of probabilities in order to defeat the presumption.

109 The Foundation has failed to tender any admissible evidence on this issue. Ms. Bursey relies on another hearsay e-mail document between Janis North, a former Executive Director, to herself dated January 18, 2008 and a self-serving exchange between Ms. Edrupt and VON Canada to argue the intention of the parties. In short, the respondent's sole argument is that the transfer documents specify that the transfer of 400 Victoria was made on the basis of a gift and that no other evidence is admissible. This fails to address the equitable arguments in issue.

110 As a result of the Foundation's agreement to amend its bylaws and provide VON Hamilton with rent-free occupancy, VON Hamilton transferred its real property to its sister Foundation for nominal consideration. The Foundation has failed to meet the legal burden of proof to establish that an outright gift was intended and, as such, it holds the real property pursuant to a resulting trust and must return it to the Branch's successor VON Hamilton.

**Issue 3: Has the Foundation breached its fiduciary and/or trust obligations to VON Hamilton and, if so, what is the appropriate remedy?**

111 The Foundation submits that following the restructuring of VON branches:

- (i) Funds distributed by the Foundation to the VON Ontario were reportedly improperly accumulated;
- (ii) A portion of funds paid by VON Ontario to VON Canada were reportedly diverted to fund restructuring costs of VON Canada;
- (iii) The Foundation was unable to meet its disbursement *quota* in 2009, as required by provisions of the *Income Tax Act* (Canada) in force at that time;
- (iv) VON Canada's request that the Foundation to amend its Letters Patent was incompatible with the Directors fiduciary responsibilities to its donors by removing its exercise of discretion over funds;
- (v) The Foundation had concerns about VON Canada's solvency; and
- (vi) The Foundation purportedly found it necessary to amend its object clause by Supplementary Letters Patent dated



2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

May 1, 2009, to clarify that it was indeed authorized to make distributions to non-VON entities.

112 The PGT submits that it must have become impossible or impracticable for an incorporated charity to carry out the originally intended objects for it to amend its objects with a significant departure from their original intent. I accept that submission and I agree that no significance can be attached to the fact that its office administratively approved the Supplementary Letters Patent in error. That approval did not confer authority on the Foundation that it itself did not possess.

113 In this case, there is no convincing evidence that the Foundation's property was not being used by VON entities to benefit patients and health care in Hamilton or that the Foundation's funds were being used to pay VON Canada's restructuring cost, or that VON Canada is insolvent. While the Foundation purportedly may have been unable to meet its disbursement *quota* in 2009, it had the option of distributing its funds to other VON entities to meet its disbursement *quota*, or to ask for a waiver for that year from Canada Revenue Agency. In any event, the relevant part of the disbursement *quota* was repealed in March 2010 thereby making this issue moot.

114 The Foundation's concerns about the requested changes to its Letters Patent are without any merit. The original Letters Patent did not provide for any exercise of discretion with respect to funding the local Branch. The Foundation's own policies and guidelines do not provide for the exercise of any discretion. In the nearly 20 years of funding programs, Ms. Bursey cannot identify a single instance of any such exercise of discretion. The Branch requested funds by submitting a memo or a budget and the Foundation transferred the funds. In contrast, the proposed objects clause would have given the Foundation the opportunity to select the charitable programs to be funded; thereby conferring even more discretion than it previously had.

115 The Foundations' concern about the threats to its fiduciary responsibilities is somewhat ironic. I am satisfied from a review of Ms. Bursey's affidavit and its references to "a money grab" and "orchestration of the removal of funds" that the Foundation held an unfounded belief that local funds were going to be absorbed into VON Canada's overhead and restructuring costs. As a result, the Foundation's Directors manufactured a breakdown of the relationship and resorted to the rarely sanctioned strategy of "self-help" in removing the Foundation's assets from VON. In doing so, they breached their fiduciary responsibilities to VON Hamilton and the Foundation's historic donors. Had the Foundation held genuine concerns about the impact of VON's reorganization on its charitable assets, it could have sought the assistance of the PGT and sought the remedies available under the *CA Act*.

116 There was no basis upon which the Foundation could apply its expanded objects to its corporate funds already on hand. In the result, corporate property held by the Foundation as of December 15, 2009 continues to be held beneficially for the Foundation's original objects together with all of the income therefrom.

117 I accept the submissions of the applicants that the following constitutes a long list of the Foundation's breaches of its fiduciary and trust obligations to VON Ontario:

- (a) Its failure to adhere to the commitments made in the September 11, 2003 Memo of Intent;
- (b) Its failure to abide with the bylaw enactment and rent-free conditions of the gift to it of the lands and building at 400 Victoria Avenue, Hamilton;
- (c) Its arbitrary and abrupt termination of the Purchased Services Agreement, including a failure to pay significant sums of money owing thereunder for a lengthy period of time;

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

- (d) Its sudden after hours departure from 414 Victoria Avenue, Hamilton, including the removal of files without notice;
- (e) Its exclusion of VON Hamilton representatives from Foundation Board meetings;
- (f) Its refusal to execute an Association Agreement reflecting the commitments it made in the September 11, 2003 Memo of Intent;
- (g) Its unilateral broadening of its corporate objects to enable it to support charities other than VON Ontario with funds raised under the VON banner and trademarks;
- (h) Its adoption of stringent funding criteria and the subsequent refusals to advance funds requested by VON Ontario;
- (i) Its refusal to deliver the VON Hamilton donors list;
- (j) Its continuing demands for a lease from VON Hamilton without the provision of off-setting funding;
- (k) Its refusal to consent to a minor zoning variance pertaining to the ADC Centre at 400 Victoria unless VON Ontario signed a lease. This would have allowed VON to increase the capacity of the Overnight Respite program from four to six beds. The Foundation only agreed to this when the court suggested that it could do so on a without prejudice basis;
- (l) The continued allegations of wrongdoing and misappropriation by Ms. Bursey in her affidavit material;
- (m) The Foundation continues to use the "break open ticket" funding mechanism;
- (n) Despite acknowledging in its Financial Statements that VON Ontario is the successor to the Branch and despite my order prohibiting the Foundation from continuing to act on the basis that it is a VON entity, the Foundation's solicitors wrote to the Executors of the Stanley Mills Memorial Fund claiming that the Foundation is the successor to the Branch.

### ***The Appropriate Remedy***

118 Relying on this Court's broad inherent equitable jurisdiction in charitable matters to make such transfers, I am of the view that a clean break must be accomplished by requiring the Foundation to transfer all of its assets as at December 15, 2009 to another entity in trust for its Hamilton site. In anticipation of such a ruling, the respondent allowed that it would not object to the transfer of the assets to a new appointee or fiduciary subject to judicial supervision. The applicants themselves suggested this possibility in supplemental submissions.

119 In final argument, both the applicants and the PGT submit that the assets should be transferred to VON Ontario in trust to be used in accordance with the Foundation's original objects. This does appear to be the most appropriate recourse. I have concluded that VON Ontario is the legal successor to the Branch. There is no evidence that VON Ontario has acted inappropriately at any time. Adding another party at this stage would cause further delay and add administrative costs which will further deplete the resources that can be made available to the community.

120 Relying on this court's broad inherent equitable jurisdiction in charitable matters I therefore order as follows:

- (i) The Foundation will transfer to VON Ontario in trust for the Foundation's charitable objects all of its corporate

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

property as at December 15, 2009, including land and buildings and any accumulated interest and investment income thereon, less any funds that may have been transferred to VON funds in response to its funding requests and any amounts properly authorized to be deducted as administrative and overhead costs. I understand that the parties agree that the amount held by the Foundation as of December 15, 2009 was \$1,470,670.60. It is also acknowledged by the applicants that the Foundation made two payments to VON Hamilton in the amount of \$97,253.00 on March 31, 2010 and a second payment of \$30,281.00 on March 31, 2011. If the parties cannot agree on the allowable administrative and overhead costs, they are to make additional submissions in writing within 20 days of the release of this decision.

(ii) VON Ontario shall not dispose of any real property without court approval sought on notice to the PGT.

(iii) The Foundation will immediately transfer to VON Ontario its donors list as it existed as at December 15, 2009.

(iv) The Nevada license should be amended to show the holder is the Greater Hamilton Wellness Foundation and any reference to VON should be deleted. The Foundation shall account for any proceeds from their use of the "break open tickets" and transfer to VON Ontario all funds received until such time as the license has been amended;

(v) The current asset preservation order continues in effect until all documents necessary to give effect to the judgment have been executed. Any remaining funds should stay with the Foundation.

121 Unless there are any further submissions with regard to paragraph 120(i) above, the applicants are to make their written submissions as to costs within 20 days of the release of this decision, The Respondent is to make its submissions within a further period of 20 days and the applicants will have a further 10 days to deliver reply submissions if they so choose.

*Application granted.*

FN\* Additional reasons at *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (2011), 2011 ONSC 6801, 2011 CarswellOnt 12731, 75 E.T.R. (3d) 207 (Ont. S.C.J.).

FN1 Minutes of Meetings of Foundation Directors January 11, 2005.

FN2 *at para 26*

FN3 *Weinberg et al v the Grey Bruce Humane Society et al.* (1999) (Ont. G.D.) unreported.

FN4 *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society* (2010), 100 O.R. (3d) 340 (Ont. S.C.J.) at para. 39.

FN5 C. Schmitthoff, *Palmer's Company Law*, vol. 1, 25<sup>th</sup> ed., (London: Sweet & Maxwell, 1995) at p. 2126, para. 2.607.

FN6 *Hoefle v. Bongard & Co.*, [1945] S.C.R. 360 (S.C.C.) at p. 377; *Johnson v. Crocker*, [1954] 2 D.L.R. 70 (Ont. C.A.); and *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 (S.C.C.) at p. 307.

FN7 Minutes of Foundation Directors meeting on September 18, 2002, Item 6.0.

FN8 *Halsbury's Laws of England, supra*, at para. 50, p. 33

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

FN9 *Women's Christian Assn. of London v. McCormick Estate* (1989), 34 E.T.R. 216 (Ont. H.C.); *Schilthuis v. Arnold* (1996), 95 O.A.C. 196 (Ont. C.A.) at p. 197

FN10 *Pecore v. Pecore*, [2007] 1 S.C.R. 795 (S.C.C.), at pp. 805-806. Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 3<sup>rd</sup> ed. (Toronto: Carswell, 2005) pp 362-368.

FN11 *Waters' Law of Trusts in Canada*, *supra*, at pp. 363.

END OF DOCUMENT