
FOUNDATION IN BREACH OF FIDUCIARY AND TRUST OBLIGATIONS

*By Ryan M. Prendergast and Terrance S. Carter**

A. INTRODUCTION

In an unreported decision released on September 27, 2011, the Ontario Superior Court of Justice confirmed that charitable property raised for the benefit of a particular charitable purpose cannot be unilaterally applied for a different charitable purpose by simply amending its objects through supplementary letters patent. In the case of *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*¹, the applicants, the Victorian Order of Nurses for Canada (“VON Canada”) and its Ontario branch (“VON Ontario”), were successful in obtaining a court order finding that the Greater Hamilton Wellness Foundation (the “Foundation”) was in breach of its fiduciary and trust obligations to VON and that as a result, the assets and income of the Foundation as of December 15, 2009, were to be transferred in trust to VON Ontario in accordance with the Foundation’s original charitable purposes. Due to the applicants’ complaints of misapplication of charitable funds under the *Charities Accounting Act*² (“CAA”), the Public Guardian and Trustee (“PGT”) participated in the proceedings to protect the public’s interest, and supported VON Canada and VON Ontario’s position.

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¹ 2011 ONSC 5684. At the time of the writing of this article, the VON decision is not yet available on any free or subscription based services.

² R.S.O. 1990, c. C.10.

While the Court's conclusion is not at all surprising, given the facts of the case, the decision serves as a helpful reminder to charities that charitable property raised for the benefit of a particular charitable purpose must be applied to that purpose. Otherwise the charity will need to obtain court approval in order to change the purpose through a *cy-près* order, or in Ontario, the consent of the PGT on a non-contested basis under section 13 of the CAA. In addition, the case also provides useful guidance concerning the interpretation of a charity's purposes as set out in its corporate objects.

B. THE FACTS: CONFLICT BETWEEN THE CHARITY AND ITS PARALLEL FOUNDATION

For the sake of brevity, the following is a selective overview and timeline of the major issues pursuant to which relief was sought in the VON decision.

VON Canada is a registered charity that delivers healthcare-related programs and services through six regional corporations, one of which is VON Ontario. Prior to being replaced by VON Ontario, the local Hamilton-Wentworth branch ("VON Hamilton") of VON provided healthcare-related services and programs to the Hamilton area. The predecessor to the Foundation, the Victorian Order of Nurses Hamilton-Wentworth Foundation, which subsequently changed its name to the Victorian Order of Nurses Hamilton Foundation, was formed in December 1981 as a parallel foundation to fundraise for VON Hamilton. In this regard, one of the Foundation's corporate objects contained in its letters patent was as follows:

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 Victoria Order of Nurses in Ontario, which, in the discretion of its Directors, needs assistance.

In addition, the letters patent also stated that on dissolution or wind-up the remaining property of the Foundation was to be transferred to VON purposes in Ontario among other possible recipients and that individuals elected to the board of directors required the approval of VON Hamilton. For approximately 20 years until December 15, 2009, the Foundation exclusively conducted its fundraising communications to the public on the basis that funds raised from the public were to be used only for VON programs and services.

In the late 1990s VON Canada restructured its national operations pursuant to its “National Vision Achievement Strategy” (“NVAS”), resulting in VON Hamilton ceasing its operations and the newly created VON Ontario assuming the operational activities of VON Hamilton.

The Foundation alleged that the applicants used the restructuring of VON Canada as an opportunity to engage in an alleged “money grab” of funds held by the Foundation and to remove funds from local control. In turn, the Foundation responded by: refusing to amend its by-laws to clarify its role as a public foundation to fundraise for VON entities as required by agreements entered into between the parties; attempting to resurrect the former VON Hamilton branch and populating its board with individuals from its own board; moving out of the building it shared with VON Ontario and removing confidential and donor information in the process; repudiating agreements between the parties; and imposing stricter funding requirements on VON Ontario that were inconsistent with its own funding policy and past practices.

Eventually there was a complete breakdown in the relationship between the Foundation and VON leading to the Foundation unilaterally applying for Supplemental letters patent to expand its corporate objects. The supplementary letters patent, which the Court notes were approved by the PGT in error, now allowed the Foundation to use its property to fund any “other charitable organizations in Ontario registered under the *Income Tax Act*”. In December 2009, the Foundation renamed itself the Greater Hamilton Wellness Foundation after VON Canada had revoked the ability of the Foundation to use the name and intellectual property of VON pursuant to a trade-mark license.

C. THE DECISION

The following is an overview of the Court’s answer to the various issues raised in the VON decision.

1. Did VON Ontario have Standing to Request Relief?

A preliminary issue that Justice Beaudoin had to address was whether VON Ontario and VON Canada had standing to seek the relief that they requested. The court held that both parties had standing based on ss. 6(1) and 10(1) of the CAA. As described in previous *Charity Law Updates*, s. 6(1) of the CAA sections permit an individual to complain regarding the manner in which a person or organization has raised or disbursed funds solicited from the public. More importantly, however, s. 10(1) of the CAA permits any two or more persons to allege a breach of trust created for a charitable purpose or to seek

the direction of the court concerning the administration of a trust for a charitable purpose and to invoke the court's supervisory powers to make an order to carry out a trust created for a charitable purpose. Given that VON Canada and VON Ontario met the requirement of "any two or more persons", there was no issue of standing.

2. Is VON Hamilton beneficially entitled to the Foundation's assets held at December 15, 2009 and income attributable thereto?

While VON Canada and VON Ontario supported their position with various arguments, the court concluded that their claims to an equitable entitlement in the Foundation's assets could be dealt with on the basis of the interpretation of the Foundation's original objects alone. In this regard, while Justice Beaudoin provides a well reasoned summary of the law with respect to charitable corporations, the court's guidance concerning the interpretation of corporate objects is instructive.

a) Approach to Interpreting the Objects in Letters Patent

To interpret the Foundation's corporate objects as set out in the Foundation's original letters patent, the court applied the rules of construction and the modern approach to interpretation. The rules of construction are a set of rules that courts have developed for interpreting documents, such as adhering to the grammatical and ordinary sense of the words used in the letters patent, unless that would lead to an absurdity, or some repugnance or inconsistency with the rest of the letters patent.³ The modern approach to interpretation provides that the interpretation of a written document "is the meaning that a reasonable person, having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time the document was executed."⁴

The court stated that the modern principles of construction required it 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."⁵ In addition, if there was any ambiguity in the letters patent, all of the surrounding circumstances including the conduct of the

³ *Supra* note 1 at para. 88.

⁴ *Ibid.*

⁵ *Ibid.*, para. 89.

parties after the incorporation of the Foundation would be admissible to reach the true meaning of the objects.⁶

b) Application of Approach to Interpretation

As stated above, one of the Foundation's original corporate objects was that the Foundation was to:

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 education 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.⁷

VON Ontario argued that this clause required the Foundation to distribute its assets and income up to December 15, 2009 to VON Hamilton 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.⁸ The Foundation argued that its corporate property was held for particular purposes consistent with those of VON (i.e., charitable or educational purposes related to patient and health care), and that there was no obligation for it to exclusively make distributions to VON entities as long as it disbursed its funds pursuant to those particular objects in the Hamilton area.⁹

Based on the ordinary and grammatical meaning of the above object clause, the court found there was no intention between the parties to authorize the Foundation to distribute its funds to any entity whose purposes were consistent with certain purposes of VON. If such was the case, then the clause would have simply provided for the particular VON objects and there would have been no need to refer to VON. By way of comparison, as a separate freestanding reason as to why it agreed with the applicants, the court noted the explicitly broad scope of the dissolution clause in the original letters patent. The dissolution clause provided that property remaining upon dissolution would be distributed to "Victorian Order of Nurses' purposes in Ontario or to other organizations

⁶ *Ibid.*, para. 90.

⁷ *Ibid.*, para. 7.

⁸ *Ibid.*, para. 92.

⁹ *Ibid.*, para. 93.

which carry on their work solely in the Province of Ontario for charitable and educational purposes related to patient and health care.”¹⁰

A third clause in the original letters patent that constituted another freestanding reason to favour the applicants’ position was the veto therein which granted VON Hamilton a veto over whom may be elected as a director of Foundation. This clause provided that, “[n]o 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 provider.” Although the court noted that there may be an issue regarding the legal validity of the veto, it nonetheless considered the clause to be indicative of the parties’ intention that VON Hamilton control the Foundation’s board.¹¹

While it is arguable that the court’s analysis of these three clauses should have been sufficient to settle the issue of whether VON Hamilton was the beneficially entitled to the corporate property of the Foundation, the Court provided a list of ten additional reasons that supported the applicants’ position. These reasons were not organized in a manner that strictly reflected the approach to interpretation that the court set out. For example, two freestanding reasons that favoured the applicant’s position were that the original name of the Foundation had included “Victorian Order of Nurses” and that the Foundation’s initial source of the funding was provided by VON Hamilton.

In addition, the Foundation’s fundraising and solicitation materials had made “voluminous representations” to the public that its funds would be used for VON programs.¹² Second, VON Hamilton and the Foundation developed a Statement of Operating Principles in the late 1990s that was described in the former’s by-law. The by-law stated that, “[a]s 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 other obligations to the community as established by the Branch Board of Directors.”¹³

¹⁰ *Ibid.*, para. 96.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

Other reasons the court listed in support of the applicants' position included the Foundation's history of exclusively funding VON entities, as well as the financial statements and annual information returns of the Foundation which indicated that VON Hamilton was the exclusive beneficiary of its efforts.¹⁴ Additionally, there was also the close relationship between the Foundation and VON Hamilton, as indicated by their shared office space, the active participation of VON Hamilton representatives in Foundation board meetings, and the presentation of VON Hamilton's budget and the making of the Foundation's funding decisions at the same Foundation board meeting.

In sum, Justice Beaudoin held that VON Hamilton was beneficially entitled to the Foundation's corporate property. As successor to VON Hamilton, VON Ontario inherited that beneficial entitlement.¹⁵

c) Building - Gift and Resulting Trust

In addition to the corporate property, VON Ontario argued that a building that VON Hamilton had gifted to the Foundation should revert back to the former based on the doctrines of resulting trust and conditional gifts.¹⁶

VON Hamilton had gifted a building to the Foundation for nominal consideration, subject to the satisfaction of two conditions, as part of the restructuring of VON Canada under the NVAS. The first condition was a condition precedent that the Foundation had to enact a new by-law, subject to the approval of VON Canada. The second condition was a condition subsequent that VON Hamilton would be able to continue to occupy the building rent-free.¹⁷ According to the law on conditional gifts, a condition precedent must be performed before the gift takes effect. A condition subsequent must continue to be performed after the gift takes effect, and if the condition subsequent is no longer met, then the gift is brought to an end.¹⁸ Both conditions were breached by the Foundation. Although the Foundation had enacted a new by-law, it had refused to re-align the by-law to meet the new VON Canada guidelines, and thus breached the first condition. The second

¹⁴ *Ibid.*

¹⁵ *Supra* note 1 at para. 97.

¹⁶ *Ibid.*, para. 98.

¹⁷ *Ibid.*, para. 101.

¹⁸ *Ibid.*, para. 102.

condition was breached because the Foundation demanded that VON Ontario pay rent for the building.¹⁹ Accordingly, the gift of the building was brought to an end and the building reverted to VON Hamilton.

VON Ontario also argued that the building was subject to a resulting trust. A resulting trust arises when title to property is registered in one party's name, but because that party is a fiduciary or gave no value for the property, it is under an obligation to return it to the original title owner.²⁰ The first party has an obligation to show that a gift was intended by the original title owner, otherwise there is a presumption that a resulting trust was intended.²¹ The court noted no admissible evidence was tendered by the Foundation to establish that a gift was made. The court also noted that VON Hamilton gave the property to the Foundation in exchange for the latter's agreement to amend its by-laws and to permit VON Hamilton to occupy the building rent-free.²² Accordingly, a resulting trust was created in favour of VON Hamilton.

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

The Foundation made several arguments that it had not breached its fiduciary and/or trust obligations to VON Hamilton. All of these arguments were rejected by the court. In particular, the Foundation defended expanding its corporate objects in order to allow the Foundation to provide funds to non-VON entities on the basis that it was necessary to clarify that it was indeed authorized to make distributions to non-VON entities.²³ In rejecting this argument, the court accepted the PGT's submission that "it must have become impossible or impractical 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."²⁴ Based on that submission, the court stated that no significance could be attached to the approval by the PGT of the supplemental letters patent in error and that the approval did not confer authority on the Foundation that it itself did not possess.²⁵

¹⁹ *Ibid.*, para. 105.

²⁰ *Ibid.*, para. 107.

²¹ *Pecore v. Pecore*, [2007] 1 S.C.R. 795 at 806-807.

²² *Ibid.*, para. 110.

²³ *Ibid.*, para 111.

²⁴ *Ibid.*, para. 112.

²⁵ *Ibid.*, para. 112.

In addition, the court was not persuaded by the Foundation's concerns about the threatened amendments proposed to its letters patent by VON Canada posed to its fiduciary responsibilities. In fact, the court found such arguments "somewhat ironic" and stated that the Foundation had an unfounded belief that its funds were being misused to pay VON Canada's overhead and restructuring costs and that its directors "manufactured a breakdown of the relationship"²⁶ between the Foundation and VON. By engaging in the drastic remedy of self-help, which the Court noted is rarely approved, and by removing its assets from the reach of VON, the Court held that the Foundation breached its fiduciary responsibilities to VON Hamilton and, importantly, to its historic donors.²⁷

The Court ultimately granted, amongst other relief, the applicants' desired relief for the corporate property of the Foundation as of December 16, 2009, or approximately \$1,470,670.60, to be transferred to VON Ontario in trust. The Court also ordered that the Foundation transfer its donor list as it existed as of December 15, 2009 to VON Ontario.

D. COMMENTS AND CONCLUSION

What is interesting in the VON decision is that the court states at paragraph 71 that, "I will decide if the directors of the Foundation are in breach of their fiduciary responsibilities, and, if so, the appropriate remedy." However, as discussed above, the court's conclusions concerning the breach of fiduciary responsibility is only with respect to the corporate respondent and not the directors, which was surprising.

Notwithstanding this fact, the VON decision is a useful reminder to both the directors of charitable corporations and the corporations themselves that they have a fiduciary duty to their historic donors to apply the charitable property of the charitable corporation in a manner consistent with the charitable purposes set out in its corporate objects at the time that the gifts were made. In this regard, the court stated that, "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."

²⁶ *Ibid.*, para. 115.

²⁷ *Ibid.*

As noted by the court, where a charity has concerns related to its charitable assets, in particular, the ability for those charitable assets to be utilized in accordance with their original purpose, the assistance of the PGT and remedies under the CAA should be sought as opposed to resorting to “self-help” remedies.