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## COURT ISSUES SUPPLEMENTARY REASONS IN VON DECISION

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

### A. INTRODUCTION

On November 16, 2011, the Ontario Superior Court of Justice issued supplementary reasons for the decision of *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (the “Decision”). For a summary of the Decision, see *Charity Law Bulletin* No. 265.<sup>1</sup> Both the Decision and supplementary reasons are now publicly available on CanLII.<sup>2</sup> By way of background, the Greater Hamilton Wellness Foundation (the “Foundation”) was found in the Decision to have breached its fiduciary duty and trust obligations to the successor to the Hamilton branch of the Victorian Order of Nurses. The applicants in the Decision, the Victorian Order of Nurses for Canada (“VON Canada”) and its Ontario branch (“VON Ontario”), were successful in obtaining a court order that the Foundation transfer all of its corporate property as of December 15, 2009 to VON Ontario as the successor to the Hamilton branch. The parties disagreed on the amount of administrative and overhead costs that the Foundation would be permitted to deduct from the corporate property to be transferred to VON Ontario. The court resolved this dispute by issuing the supplementary reasons.

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<sup>1</sup> Ryan M. Prendergast and Terrance S. Carter, *Charity Law Bulletin* No. 265. Available online at: <http://www.carters.ca/pub/bulletin/charity/2011/chylb265.pdf>.

<sup>2</sup> The Decision is available online at: <http://www.canlii.org/en/on/onsc/doc/2011/2011onsc5684/2011onsc5684.html> The supplementary reasons are available online at: <http://www.canlii.org/en/on/onsc/doc/2011/2011onsc6801/2011onsc6801.html>.

## B. POSITION OF VON ONTARIO AND THE FOUNDATION

The court framed the issue to be resolved as whether the Foundation should repay any funds that it used to cover its administrative and overhead expenses pending the determination of the Decision from the \$1,470,670.60 that was to be transferred to VON Ontario. The crux of the disagreement was the parties' differing approaches to calculating the amount of such administrative and overhead expenses.

### 1. Approach of the Foundation to costs and its position

The Foundation argued that all of its expenses between December 15, 2009, the date set out in an injunction of the court, dated January 28, 2010, barring the Foundation from disbursing or in any way transferring any money or assets raised or received by it to a non-VON entity (the "Order"), and September 30, 2011, were administrative and overhead costs. According to the Foundation's calculations, the Foundation incurred \$122,636.50 in overhead and administrative expenses, which lowered the amount due to VON Ontario, less accumulated interest and an earlier transfer to VON Ontario, to \$1,243,691.00.

The arguments advanced by the Foundation that it should be permitted to draw on the funds restrained by the Order for its administrative and overhead costs included that the Order was negotiated by the parties on the understanding that the Foundation would be permitted to exclude overhead and administrative costs from the funds it was restrained from disbursing. In addition, the Foundation also argued that scope of the Order encompassed nearly all of its property at the time and to prevent the Foundation from using any such funds to pay its administrative and overhead costs would have effectively required the Foundation to cease operating, given the period of time that passed between the Order and the hearing of the application.

### 2. Approach of VON Canada and VON Ontario to costs and their position

While VON Canada and VON Ontario accepted the amount of \$1,243,691.00, they noted that the administrative and overhead expenses claimed by the Foundation exceeded its revenue by an amount of \$109,608.08. VON Canada and VON Ontario took the position that this "shortfall" amount plus any costs awarded to them should be paid by the Foundation and/or the Foundation's directors personally.

In this regard, VON Canada and VON Ontario argued that the Order was for all intents and purposes an asset preservation order. Since the Order was not designed to relieve the Foundation of its responsibilities to meet its financial obligations, the shortfall between the funds raised by the Foundation after December 15, 2009 and its total expenses should not to be borne by VON Ontario. As well, VON Canada and VON Ontario argued that VON Ontario should be restored to the position that it would have been, had the Foundation met its fiduciary obligations (i.e. there would have been no depletion of the funds by the amount of the costs because VON Ontario would be controlling the funds).

In addition, VON Canada and VON Ontario pointed out that the directors of the Foundation had the opportunity to take steps in order to mitigate their exposure to costs, including for example, a mediated settlement. Although not stated by the court in the supplementary reasons, it can be presumed that the directors did not accept an offer by VON Canada and VON Ontario to deal with these issues through mediation.

### **C. THE DECISION**

The court agreed with VON Canada and VON Ontario in characterizing the Order as an asset preservation order. While the court noted that the Order permitted the Foundation to continue to operate as a general fundraiser, the court concluded that an interpretation of the Order which allowed the Foundation to permanently encroach on the funds restrained by the Order would have defeated the essential purpose of the Order. The court order permitted the Foundation to access the funds on a temporary basis in order to prevent it from ceasing operations during litigation. The court stated that, “The Directors cannot reward themselves with the payment of their own expenses during their dispute with [VON Canada and VON Ontario], no matter how reasonable they might be.”

In addition, while the court recognized that there was some delay between the Order and the hearing of the application, VON Canada and VON Ontario had raised the issue of encroachment on the funds restrained by the Order when they sought to bring a motion to deal with the issue in February of 2011. However, the court intervened to schedule a hearing of the application instead. As such, the Foundation had been aware of the position that VON Canada and VON Ontario would take for some time. The court concluded that the “short-fall” amount should be added to the \$1,243,691.00, for a total of \$1,344,607.07.

## D. CONCLUSION

These supplementary reasons indicate that fiduciaries in breach of their duties will not be permitted to run up administrative and overhead costs during litigation in order to deplete the property that they are holding in trust. While the supplementary reasons do not break down the administrative and overhead expenses claimed by the Foundation, the comment from the court that the directors are not permitted to reward themselves by paying their own expenses implies that some of the administrative and overhead expenses claimed were with respect to the costs of the litigation. While the facts and circumstances in this case are unique and unlikely to reoccur, the supplementary reasons confirm the duty of directors of charitable organizations to act gratuitously in their capacity as directors and to not receive any benefit from their position, whether it be directly or indirectly. This is a continuing duty even when the future of the charity is uncertain, such as in extended litigation over the assets of the charity.