

2012 Annual Church & Charity Law Seminar

RECENT JUDICIAL DEVELOPMENTS IN FIDUCIARY DUTIES FOR CHARITIES

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All the world's a stage, and all the
men and women merely players:
they have their exits and their
entrances; and one man in his time
plays many parts,
"As You Like It"

William Shakespeare

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ROLE of The PGT

- Historically, the role of protecting property donated for charitable purposes rested with the Attorney General
- In Ontario, the role of the Attorney General has been assigned by Statute to the Public Guardian and Trustee
- The Public Guardian and Trustee plays a role in protecting the public's interest in charitable assets in Ontario

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COMPLAINTS

The Office can act on complaints about the misuse of charitable property, such as allegations that:

- using property for purposes outside of the charity's authorized purposes;
- use of excessive amounts for fundraising or other administrative expenses;
- misappropriation of charitable property;

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COURT PROCEEDINGS

Represent the public's interest in court, protecting the charitable interest where there is no named individual or organization able to act, including review of estate and trust accounts that are presented to the court for approval where there is a charitable interest

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INCORPORATION DOCUMENTATION

Reviews applications for incorporation and corporate change documents of Ontario non-profit, charitable corporations to ensure compliance with charities law

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CRA'S Charities Directorate

Responsible for the Federal role in administration of charitable property

Income Tax Act (Canada):

- > registered charity does not have to pay tax on income and can provide donors with a tax receipt for any donation to the charity;
- > the receipt may allow the tax payer credit on their income tax

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PGT / CRA

- | | |
|---|---|
| <ul style="list-style-type: none"> > Monitors compliance with laws re proper use of charitable assets and ensures trustees carry out fiduciary duties > No annual filing but initial report and when information changes > No power to revoke charitable status can apply to court if property misused > Court can make order requiring fiduciaries (Directors) to repay any misused property | <ul style="list-style-type: none"> > Focus on tax law and tax principles to prevent abuses of the charitable donation tax credit system including disbursement quota and receipt system > Requires filing of annual return (T3010) > Can revoke registration or impose administrative penalties e.g. fines or loss of receipting privileges |
|---|---|

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Role of the Court

- > The court has inherent jurisdiction over charitable property that arose originally as part of its jurisdiction over trusts.
- > The Ontario Superior Court of Justice's inherent jurisdiction continues today, however, it is enhanced by legislation.
- > Historically, while the court had inherent jurisdiction, it had to rely on the Attorney General for investigations and to bring matters before the court.
- > Even though Ontario has had charities legislation for over 95 years, the existing system for the supervision of charities continues to be court based. The net effect of the common law and legislation is to continue the key role of the court in the supervision of charities.

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Fiduciary Duty - Definition

"Fiduciary Duty" – a legal duty of loyalty and faithfulness towards another person

- > Comes from the Latin word "fiducia", which means "trust"
- > "Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
 - (1) The fiduciary has scope for the exercise of some discretion or power.
 - (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
 - (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

* -- Supreme Court of Canada in *Frame v. Smith*, [1997] 2 S.C.R. 99 at 136

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Charitable Fiduciary Duties

Those who are responsible for charitable property must comply with their fiduciary duties which include:

- > carry out the charitable purposes
- > manage the assets in a responsible, prudent and judicious manner including expenses
- > avoid conflict of interest situations
- > act gratuitously
- > maintain records and accounts
- > invest surplus funds

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VON

Three Reported Decisions:

Decision

Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation, 2011 ONSC 5684, 209 A.C.W.S. (3d) 161, 94 B.L.R. (4th) 246 (OntSupCt).
CanLII link: <http://canlii.ca/v/1nq15>

Supplementary Decision

Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation, 2011 ONSC 6801, 210 A.C.W.S. (3d) 282, 75 E.T.R. (3d) 207 (OntSupCt).
CanLII link: <http://canlii.ca/v/mv63>

Cost Judgment

Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation, 2012 ONSC 1527, 2012 CarswellOnt 3098 (OntSupCt).
CanLII link: <http://canlii.ca/v/qhvs>

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Parties

VON – a national health care charity, until 2003 operated a provincial and local branch structure when it reorganized into regions

VON Ontario – responsible for Ontario including previous Hamilton branch

Greater Hamilton Wellness Foundation (name as of 2009) – incorporated in 1981 as a parallel foundation for the local branch office. After restructuring the Foundation & VON negotiated an agreement whereby Foundation would continue to support the local work of VON. In 2009 breakdown in relationship which lead to court action.

PGT – to safeguard the public's interest, and to afford advice and assistance to the court.

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Original Objects of Foundation

To receive and maintain a fund or funds and to apply... 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.

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New Objects of Foundation

In addition to changing its name in 2009, it changed its objects.

Now allowed the Foundation to use its monies to fund any "other charitable organizations in Ontario registered under the *Income Tax Act* (Canada)".

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Court Decision

- 1) Confirmed the role of the Court, PGT and *Charities Accounting Act* when dealing with charitable corporations. The Court has broad inherent jurisdiction to make any order that is just.
- 2) Court dealt with VON's claim to the Foundation property by interpretation of the Foundation's charitable objects.
- 3) Court to interpret objects, in addition to using rules of construction will look at the meaning a reasonable person, with all the background, would give. If ambiguity, surrounding circumstances including conduct of parties, is admissible.

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Court Decision Cont'd

- 4) Foundation could only change its objects if it had become impossible or impractical to carry out the original objects. No significance can be attached to the administrative approval by the OPGT. That approval does not confer on the Foundation authority it did not have.
- 5) Court found the Foundation committed 14 breaches of its fiduciary and trust obligations to VON Ontario. Assets of the Foundation **\$1,470,670.60** to be transferred to VON Ontario.

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Foundation Breaches

(some of the 14)

- 1) Unilateral broadening of its objects
- 2) Adopting a stringent funding criteria and refusal to advance funds requested by VON
- 3) Manufactured a break down in relationship with VON Ontario and used self-help to remove Foundations assets from VON Ontario. Breach of duty to VON Hamilton and the Foundation's historical donors
- 4) Continued allegations of wrongdoing and misappropriation in their court material

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Crossroad Christian Fellowship

Murray and Vermeulen v. Highfield et al. (7 May 2012), Sarnia 4533/06 (OntSupCt).

(unreported decision)

Small unincorporated non-denominational church in Wallaceburg shut down as a result of the decrease in membership.

The issue was what to do with the funds.

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Parties

The applicants (one of whom was the Pastor) claimed that the charity had moved to Sarnia and changed its name, and that the assets passed to this "successor" church.

The respondents (one a trustee of the church) claimed the membership had voted to close church and distribute assets to charity. They also alleged the pastor had breached his fiduciary duties by misusing church assets.

The PGT at the cost hearing.

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Court Decision

- 1) After an 8 day trial, Court ruled the applicants' position completely without merit. The pastor, for his own indirect personal benefit, had improperly attempted to divert funds intended for other charities to the new church that he had established.
- 2) Pastor had committed 4 breaches of trust and ordered to personally pay to the church \$4,100. Pastor not relieved of his breach of trust under s. 35 of *Trustee Act* as court could not conclude he acted "honestly and reasonably".
- 3) The total amount owned by the church was \$83,686. After dealing with the claims for costs the court distributed the funds to 4 charities.

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Deol v Grewal

Deol v Grewal, (2008), 170 A.C.W.S. (3d) 523, 2003 CarswellOnt 5060 (OntSupCt).

CanLII link: <http://canlii.ca/t/20m8n> Superior Court Judgment

Deol v. Grewal, [2009] O.J. No. 3217, 179 A.C.W.S. (3d) 527 (OntSupCt).

CanLII link : <http://canlii.ca/t/24xbf> Costs

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Sikh Cultural Society of Metropolitan Windsor v. Kooner

Sikh Cultural Society of Metropolitan Windsor v. Kooner, 2011 ONSC 5513, 108 O.R. (3d) 490, 209 A.C.W.S. (3d) 839, 96 B.L.R. (4th) 232, (OntSupCt). Superior Court Judgment

Canlii link: <http://canlii.ca/t/tp50l>

Sikh Cultural Society of Metropolitan Windsor v. Kooner, 2012 ONSC 2835, 2012 CarswellOnt 7252 (OntSupCt). Costs

Canlii link: <http://canlii.ca/t/ftmv>

Sikh Cultural Society of Metropolitan Windsor v. Kooner, 2011 ONSC 5513, [2011] O.J. No. 5430, 108 O.R. (3d) 490, 96 B.L.R. (4th) 232 (ONCA). Court of Appeal

Canlii link: <http://canlii.ca/t/frpofm>

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Membership and Control

Parties – in each case feuding Directors
Result – after extensive legal wrangling and court time the membership lists and authorized Directors were named and each organization was required to hold elections at a membership meeting to be called.

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Fiduciary Duty Breaches

In Deol :

1. Failure to keep proper records;
2. Failure to comply, and to document compliance, with bylaw requirements on the admission of new members;
3. Using charity's resources to pay **\$51,000** to individual's lawyers which the individuals were required to pay back.

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Fiduciary Duty Breaches

In Sikh Cultural Society of Metropolitan Windsor:

1. Record keeping inadequate and in some cases non-existent;
2. Records kept in executive member's home and not at the charity;
3. Former executive refusal to turn over books and records to new executive.

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Primary Fiduciary Duty

"It is in the interests of the future of the Society for all the members to demonstrate that their own personal interests must be secondary to the continuation of the goals of the Society, goals that can be summed up in the words "Freedom", "Justice" and "Equality" that adorn the front cover of the Constitution. The democratic voice of the majority of the membership must be given the opportunity to speak by secret ballot in the upcoming election."

Madame Justice Nolan - *Sikh Cultural Society of Metropolitan Windsor v. Koener*, 2011 ONSC 5513, 108 O.R. (3d) 490, 209 A.C.W.S. (3d) 839, 96 B.L.R. (4th) 232, (OntSupCt), paragraph 70

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Costs of failure to comply with Fiduciary Duties

VON:

1. Foundation lost its assets;
2. Foundation ordered to pay VON and PGT's costs in the amount of **\$479,540.14**;
3. VON and PGT could claim unpaid costs from Foundation's insurer or directors .

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Costs Cont'd

Sikh Cultural Society of Metropolitan Windsor:

1. Respondent directors personally liable for costs of **\$160,000** to the applicants;
2. Directors responsible for payment of their own legal fees;
3. Applicant had legal bills of **\$280,000**; **\$120,000** more then cost award.

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Costs Cont'd

Deol - Defendant Directors:

1. To personally pay the plaintiff's legal fees of **\$186,000**;
2. Claim by some defendants that they should not be liable for costs as they had no connection to the factual issues in dispute, denied. No evidence they took issue with the improper actions of the board;

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Deol - Defendants Costs Cont'd

3. Required to pay back **\$51,000** improperly paid from charity for their own lawyers;
4. Any additional legal fees owed to their own lawyers.

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Indemnification Cont'd

Mr Justice L.A. Pattillo made several important statements on this issue;

1. "...the defendants were not acting in the best interests of the Sikh Centre. Rather, it is my view that the defendants were acting in pursuit of their own interests to gain control of the Sikh Centre in circumstances where they knew that if they proceeded in accordance with the By-Law and the Act, they would not be in control."
2. "...the defendants' actions are more than sufficient in my view, to support a finding of breach of duty by them."

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Costs - Indemnification

5. Defendants claim for indemnification from charities funds denied. Test is a director of a charity ought to be indemnified only for those acts properly undertaken in the administration of the charity or undertaken in breach of trust under an honest and reasonable mistake. Ontario (Public Guardian and Trustee) v. Unity Church of Truth, [1998] O.J. No. 1291 (Gen. Div)

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Indemnification Cont'd

- The defendants submit that their actions do not constitute *mala fides*. While it is true that the defendants did not misuse corporate funds, misappropriate corporate property or appropriate a corporate opportunity, they did pursue their own interests over that of the Sikh Temple for the purpose of taking control. In *Bennett Environmental*, supra, at para. 29, Lang J.A. noted that opportunistic or self-seeking behaviour may be encompassed within the term *mala fides* because such behaviour exhibits a type of dishonesty that should not be countenanced for an award of indemnification. In my view, the defendants' conduct here constituted *mala fides* and does not entitle them to indemnification. The Sikh Centre should not be required to pay their legal fees or legal costs they have been ordered to pay to the plaintiffs in the action."

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Costs Deol - Plaintiff

Legal fees: \$404,500
Costs recovered: \$186,000
Difference: \$218,500

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Costs - Crossroads

Charity's Assets - **\$83,686** (being \$79,586 from sale of church and \$4,100 paid back by Pastor).

- Applicants sought costs of **\$103,000** from funds held for the charity;
- Respondents sought costs of **\$106,000** some from the charity's assets and balance from applicants;
- Costs claimed were more than **250%** proceeds from sale of the church property.

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Costs Cont'd

Applicants – Pastor his conduct was found to be reprehensible and he was in breach of trust.
“(he) was not acting in the interests of the church but, rather, was pursuing his own interests to utilize the assets of the church to establish a new church where he was the pastor” *Mr Justice Victor Mitrow*
None of the applicants were entitled to reimbursement from the charity’s funds.

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Costs Cont'd

Respondents – Court found they were entitled to substantial indemnity costs but was concerned with what was the correct amount and how much should come from the charity’s assets.
Court looked at the principles of reasonableness and proportionality and determined the case had spun out of control with the parties investing time and effort and resources well beyond the value of the case.

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Cost decision

Respondents' cost award	\$60,000
Paid: (i) Charity's assets \$20,000	
(ii) From the Pastor \$40,000	
(other applicant	
liable for \$20,000	
of the \$40,000)	

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Costs to the Parties

Respondents

Unrecoverable legal fees \$ 46,000

Applicants-

breach of use of charity's property \$ 4,100

Costs awarded to the respondents \$ 40,000

Their legal fees \$103,000

Crossroads Christian Fellowship \$ 20,000

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Breach of Fiduciary Duty - Cost to Charity

Uncalculable
-and-
Unacceptable

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Contact Information

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