Court File No. CV-15-11192-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, C. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN REGION

Applicants

FACTUM OF THE APPLICANTS, VICTORIAN ORDER OF NURSES FOR CANADA - ONTARIO BRANCH AND VICTORIAN ORDER OF NURSES FOR CANADA NOVA SCOTIA BRANCH

(Responding to the Motion of the Ministry of Health and Long-Term Care, Returnable January 19, 2016)

January 18, 2016

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Matthew Halpin LSUC#26208F
Tel: 613.780.8654
Fax: 613.230.5459
Email:
matthew.halpin@nortonrosefulbright.com

Evan Cobb LSUC #55787N
Tel: 416.216.1929
Fax: 416.216.3930

Email: evan.cobb@nortonrosefulbright.com

Lawyers for the Applicants, Victorian Order Of Nurses For Canada – Ontario Branch and Victorian Order Of Nurses For Canada Nova Scotia Branch

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PART I - OVERVIEW

1. At the commencement of this proceeding several separate legal entities provided home or community care services under the Victorian Order Of Nurses name to clients in Ontario and elsewhere in Canada.

2. In Ontario, substantially all such services are provided by Victorian Order Of Nurses For Canada – Ontario Branch ("**VON Ontario**"), an entity that is not an Applicant in this proceeding.

3. Services in Ontario are provided by VON Ontario and (to a very limited extent) by other non-Applicant entities under a number of contracts with the Ministry of Health and Long Term Care, the Local Health Integration Networks and the Community Care Access Centres (collectively, the "**Ministry**").

4. The Ministry pre-pays for these services.

5. The Ministry has raised concerns that: (i) these pre-payments may fall into the estates of the Applicants in this proceeding for distribution to their creditors; and (ii) any excess pre-payments determined to have been provided by the Ministry for services in Ontario at the end of each reconciliation period will not be dealt with in accordance with the existing contractual arrangements with the Ministry.

6. The Ministry seeks to resolve its concerns through the imposition of a trust over certain cash in the hands of VON Ontario and, to a much lesser extent, Victorian Order Of Nurses For Canada ("**VON Canada**") and through the provision of a court order requiring that any excess prepayments be returned to the Ministry at the end of each reconciliation period unless otherwise agreed.

7. The Ministry's requested relief should not be granted. The relief sought: (i) is largely beyond the jurisdiction of this Court to grant in this proceeding; (ii) is based upon theoretical concerns for which practical safeguards have already been, or can easily be, implemented; and (iii) requests that the Court take extraordinary steps to restrict the Applicants' and even non-Applicants' use of their property in a manner that would cause this restructuring process to fail.

PART II - THE FACTS

8. The Ministry's motion often refers simply to "VON". However, the distinction between the various entities operating under the Victorian Order Of Nurses For Canada name (collectively, the "**VON Group**") is essential to understanding both the response to the Ministry's motion and the rationale for this restructuring process as a whole.

A. VON Ontario

9. The vast majority of the Ministry's service agreements with the VON Group are made with VON Ontario.[1]

10. VON Ontario is not an Applicant in this proceeding.

11. VON Ontario is a core operating entity of the VON Group. It is not intended that VON Ontario will undertake any financial or operational restructuring in this proceeding. VON Ontario will continue operating in the ordinary course. Maintaining business as usual for VON Ontario is a primary goal of the Applicants' restructuring process.[2]

12. Since the commencement of this proceeding by the Applicants, VON Ontario has continued to service contracts with the Ministry without issue.[3]

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[1] Affidavit of Jo-Anne Poirier, sworn December 30, 2015 (the "**Poirier Affidavit**") at para. 10.
[2] Poirier Affidavit at para. 16.
[3] Poirier Affidavit at para. 17.

B. VON Canada

13. Very limited business dealings exist between VON Canada and the Ministry. These dealings involve:

(a) the Nurse Practitioner-Led Clinic at Belle River;

(b) the Nursing Graduate Guarantee Initiative; and

(c) the 9000 Nurses Initiative

(the "**VON Canada Agreements**").[4]

14. The VON Canada Agreements account for approximately $4 million of the approximately $145 million in aggregate funding provided by the Ministry to the VON Group in 2015. Any funding provided by the Ministry to the VON Group and not provided under the VON Canada Agreements is provided directly to VON Ontario.[5]

15. In all cases under the VON Canada Agreements, VON Canada is nothing more than the administrative conduit through which funds pass from the Ministry to VON Ontario or, in one case, an alternative non-Applicant entity.[6]

C. Funding of VON Ontario and VON Canada

16. The Ministry provides funding in advance of the provision of the services for which it has contracted in accordance with certain agreements (the "**Funding**

[4] Poirier Affidavit at para. 12.
[5] Poirier Affidavit at para. 13.
[6] Poirier Affidavit at para. 14.

Agreements"). Funding is provided in accordance with approved budgets that are agreed to by the Ministry and VON Ontario or, in the case of the VON Canada Agreements, the Ministry and VON Canada.[7]

17. Following the completion of a particular funding year, which runs annually from April 1st to March 31st, a reconciliation is undertaken to determine if the value of the services provided in connection with each particular service agreement exceeded or were less than the value of the services that were reflected in the approved budgets. If the value of the services provided are less than the budgeted amount, then the Ministry will have overpaid and the Ministry may demand the return of the overpayment or adjust the amount of any future instalments of funding accordingly. While in some cases excess funding has been returned to the Ministry by VON Ontario, in most cases excess funding has been carried forward as a credit against prepayments in the following year.[8]

18. No trust arrangement has ever been imposed in connection with funds provided by the Ministry to either VON Ontario or VON Canada and no trust arrangement has ever been agreed to by VON Ontario or VON Canada.[9]

19. The prepayments create a debtor-creditor relationship between VON Ontario and the Ministry or, in the case of the VON Canada Agreements, between VON Canada and the Ministry.

[7] Poirier Affidavit at para. 18.
[8] Poirier Affidavit at para. 19.
[9] Poirier Affidavit at para. 20.

D. Applicants' and VON Ontario's Cash Segregation

20. Upon the issuance of the Initial Order in this proceeding on November 25, 2015, the existing cash management system of the VON Group was replaced with a new modified cash management arrangement (the "**Modified Cash Management System**").[10]

21. Under the Modified Cash Management System there is no commingling of VON Ontario's funds with the funds of any Applicant.[11]

22. The only material funds that pass from VON Ontario to any Applicant are those funds paid over by VON Ontario to VON Canada to compensate VON Canada for the overhead functions provided by VON Canada for the benefit of VON Ontario (the "**Overhead Payments**").[12]

23. These Overhead Payments were made in the ordinary course prior to the commencement of this proceeding and continue to be made at this time.[13]

24. The Overhead Payments are reflected in the approved budgets agreed between VON Ontario and the Ministry.[14]

25. Without these Overhead Payments and VON Canada's continued freedom to use the funds transferred through these Overhead Payments, VON Canada would not be fairly compensated for the services and benefits it provides to VON Ontario, VON Canada would cease to operate, the proposed restructuring

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[10] Poirier Affidavit at para. 21.
[11] Poirier Affidavit at para. 24.
[12] Poirier Affidavit at para. 26.
[13] Poirier Affidavit at para 28.
[14] Poirier Affidavit at para. 30.

of VON Canada would fail, and VON Ontario and VON Nova Scotia would no longer receive necessary administrative support from VON Canada and would also be at risk of failure.[15]

E. Stay of Proceedings for VON Ontario

26. The Ministry's motion mischaracterizes the stay of proceedings that affects VON Ontario in paragraph 25 of the First Amended and Restated Initial Order. That paragraph limits the stay of proceedings to steps that may be taken in respect of VON Ontario due to the Applicants being parties to this proceeding, having made an Application to this Court pursuant to the Companies' Creditors Arrangement Act (Canada) (the "**CCAA**") and the Courts of Justice Act (Ontario) including any declarations of insolvency contained therein, the appointment of a receiver in respect of the Applicants, or taking any steps in furtherance thereof, or complying with the terms of any Order granted in this proceeding or under the Courts of Justice Act (Ontario).[16]

27. The stay of proceedings in paragraph 25 of the First Amended and Restated Initial Order is irrelevant to the Ministry's motion. The Ministry does not seek to enforce any rights that it currently has against VON Ontario as a result of the Applicants being parties to this proceeding, the Applicants' CCAA application, the receivership of the Applicants, any compliance with Orders granted in this proceeding or any declarations of insolvency by any person.[17]

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[15] Poirier Affidavit at para. 31.
[16] Poirier Affidavit at para. 32.
[17] Poirier Affidavit at para. 33.

PART III - ISSUES AND THE LAW

28. The Ministry's motion raises the following matters for the Court's consideration:

a) Does this Court have jurisdiction in this proceeding to declare that all moneys funded directly or indirectly by the Ministry to VON Canada or VON Ontario are impressed with a trust and, if so, is such a declaration appropriate?

b) Does this Court have jurisdiction in this proceeding to order that any excess funding paid by the Ministry in a funding year shall be returned to the Ministry unless otherwise agreed and, if so, is such an order appropriate?

c) Should the stay of proceedings in paragraph 25 of the First Amended and Restated Initial Order be set aside?

29. The Applicants recognize that if VON Canada were to cease to operate at the exact time when any portion of the relatively limited funds paid to VON Canada under the VON Canada Agreements were temporarily held by VON Canada, those funds may become trapped in the VON Canada estate and may not be made available for use in accordance with the VON Canada Agreements.

30. The Applicants would agree that any funds payable to VON Canada by the Ministry in connection with the VON Canada Agreements (the "**VON Canada Agreement Funds**") would instead be paid directly to the entity that will be responsible for providing services under the VON Canada Agreements. This is effectively what is achieved under current practices, whereby VON Canada re-directs these funds to the applicable service provider. As a result of this proposed modification to the existing contractual arrangements between the

parties, the Ministry's concerns regarding the payment of the VON Canada Agreement Funds should be resolved and will not be dealt with in the Applicants' and VON Ontario's response to the Ministry's motion.[18]

A. Imposition of A Trust

(i) The Court Does Not Have Jurisdiction In This Proceeding To Impose A Trust On The Assets Of VON Ontario

31. The Applicants submit that the CCAA provides the court with jurisdiction to make orders that affect non-debtor parties only in very limited circumstances. These orders can only be made where such orders are important to the restructuring process and where the non-Applicant entities affected by such orders are sufficiently intertwined with the Applicant entities and their restructuring process to justify such orders. For example, such orders are sometimes granted to provide for stays of proceedings in favour of third parties that are sufficiently intertwined with the restructuring process or releases in favour of third parties under CCAA plans if those releases are reasonably connected to the restructuring.[19] The goal when imposing such orders is the furtherance of the restructuring process for those entities that the court is overseeing.

32. The CCAA does not provide broad jurisdiction for a court to make orders in a CCAA proceeding that affect any non-Applicant's property simply because an

[18] Certain of the VON Canada Agreement Funds may ultimately end up in the hands of VON Canada as a result of the Overhead Payments, but for the reasons described herein, the Overhead Payments must continue.

[19] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 43.

interested party has requested such order be made. The legislation specifically limits those provisions that deal with property rights to the property of debtor companies. For example, Section 11.2 of the CCAA provides for charges to be granted to secure interim financing and Section 11.51 and 11.52 of the CCAA also provide for charges to secure director indemnities and professional costs associated with the CCAA filing.[20] In each case, such charges are expressly limited to the applicable debtor companies' assets and do not extend to non-Applicants' assets.

33. A CCAA proceeding provides a forum in which to deal with the assets of the Applicants on notice to, and with input from, all applicable stakeholders with claims to those assets; not to deal with the assets of third parties whose stakeholders are not involved in the proceeding. Non-Applicant entities must remain free to deal with their assets and property in the ordinary course and in accordance with their contractual obligations.

34. The Ministry's motion seeks to impose a trust on property in the hands of VON Ontario, a non-Applicant in this proceeding. The proposed trust is entirely unconnected with the restructuring of the Applicants. It is respectfully submitted that the CCAA provides no basis upon which the Court could order any trust in respect of the assets of VON Ontario.

[20] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") at s. 11.2, 11.51 and 11.52.

(ii) The Court Should Not Impose A Trust On The Property Of VON Ontario Or VON Canada

35. The Funding Agreements between the applicable VON Group entities and the Ministry create a debtor-creditor relationship between the Ministry and the applicable counterparty. The terms of the Funding Agreements are very clear:

(a) There is no requirement to segregate funds for any particular program[21];

(b) Upon termination of the program agreement the Ministry may demand repayment of funds provided but unspent, net of wind down costs of the service provider;[22] and

(c) If a service provider owes any monies to the Ministry, including repayment of any portion of the funding provided by the Ministry, such monies shall be deemed a debt due and owing to the Ministry by the recipient.[23]

36. The Funding Agreements do not create any trust in favour of the Ministry. The Funding Agreements do not indicate any intention to create a trust; rather the Funding Agreements indicate the opposite intention, as noted above. The Funding Agreements do not suggest that any particular funds would be the subject of the trust, nor do the Funding Agreements identify any objects of such a trust. The three certainties to establish a trust do not exist in this case.[24]

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[21] Affidavit of Phil Graham, sworn December 21, 2015 ("**Graham Affidavit**"), Exhibit "A", Section 4.1.
[22] Graham Affidavit , Exhibit "A", Section 12.2 and 13.2.
[23] Graham Affidavit, Exhibit "A", Section 16.1.
[24] *McGee v. London Life Insurance Co.*, [2011] O.J. No. 4206 (Ont. S.C.J.) at para. 78.

37. The Ministry argues that the circumstances of this case justify the imposition of a special purpose *Quistclose* trust.

38. The decision of the Ontario Court of Appeal in *Ontario (Ministry of Training, Colleges and Universities) v. Two Feathers Forest Products LP* (2013), 6 C.B.R. (6th) 129, provides a full response to the Ministry's assertion that a *Quistclose* trust should be imposed in the current case.

39. In the *Two Feathers* case, the Court of Appeal determined that on the facts of that case no *Quistclose* trust could be imposed. The relevant facts in *Two Feathers* are indistinguishable in all material respects from the current case. In the *Two Feathers* case:

(a) The Ministry sought to impose a trust over certain amounts that had been funded to a service provider under a form of funding agreement that, as in the current case, provided for funding in advance of the provision of services.[25] The service provider was subsequently placed into receivership.

(b) The funding agreement in the *Two Feathers* case stated that on expiry, the service provider was required to return any unused funding and this obligation shall be deemed to be a debt due and owing to the Ministry.[26] The exact same words are used in the Funding Agreements that are the subject of the current motion.

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[25] *Ontario (Ministry of Training, Colleges and Universities) v. Two Feathers Forest Products LP* (2013), 6 C.B.R. (6th) 129 (Ont. C.A.) [**"*Two Feathers C.A.*"**] at para. 1.
[26] *Two Feathers C.A.* at paras. 26-28, 30 and 32.

(c) As in the current case, the funding agreement in the *Two Feathers* case provided significant discretion to the service provider with respect to spending decisions within general budget parameters.[27]

(d) The service provider in *Two Feathers* did not receive funds from the Ministry for emergency or special purposes. The funds were a basic source of business funding.[28] Again, this is indistinguishable from the current case.

(e) Funds were not provided to the service provider based on a short or quickly drawn contractual arrangement; instead they were the subject of a detailed government-approved funding agreement in which contractual rights and remedies were carefully and extensively defined.[29] All of the above statements could also be made about the Funding Agreements that are the subject of the current motion.

40. The Court of Appeal rejected the Ministry's argument that a Quistclose trust would be appropriate. While all of the above facts were considered, and all such facts are also present in the current matter, the Court of Appeal was very clear that the most important fact was Article 17 of the funding agreement, which defined the relationship between the parties as a debtor-creditor relationship, not a trust.[30] The Court of Appeal explained that "if the grant monies that Two Feathers has not yet spent constitute a debt that Two Feathers owes to the Ministry, they cannot be held by Two Feathers on trust for

[27] *Two Feathers C.A.* at para. 35.
[28] *Two Feathers C.A.* at para. 36.
[29] *Two Feathers C.A.* at para. 37
[30] *Two Feathers C.A.* at para. 39.

the Ministry."[31] It is respectfully submitted that upon review of an identical provision in the Funding Agreements in the current case, the Court can only come to the same conclusion that the Court of Appeal did in *Two Feathers.*

41. The Ministry's attempt to distinguish the *Two Feathers* case is unpersuasive:

(a) The Ministry suggests that the degree of discretion that Two Feathers had in its use of funds is a distinguishing factor. VON Ontario also has significant discretion in its use of funds. While budgets are agreed with the Ministry, those budgets only provide high level categories of spending and do not link funding to all of the specific items that VON Ontario needs to carry on its business. Even if this was a differentiating factor, this would not outweigh what was determined to be the most important factor – the debtor/creditor relationship that is expressly set out in the Funding Agreements.

(b) The Ministry suggests the characterization of funding in the *Two Feathers* case as a grant is relevant. This factor was not identified by the Court of Appeal as a key element of its consideration in *Two Feathers.* Whether the funding is described as a grant or otherwise, the key fact that is present in both the *Two Feathers* case and the current case is the express establishment of a debtor-creditor relationship in a sophisticated commercial agreement prepared by a sophisticated party.

42. When considering whether to apply a *Quistclose* trust, it is submitted that the Court must also be mindful of the policy considerations highlighted by the Court of Appeal in the *Two Feathers* case. The Court of Appeal cautioned that any

[31] *Two Feathers C.A.* at para. 28.

application of a *Quistclose* trust in Ontario beyond the most narrow of constructions will have to consider a number of commercial consequences, one of the most significant of which is the potential effect on creditors who may have claims to the subject assets.[32] This policy concern is very relevant in the current circumstances, where the Ministry seeks, through this motion, to improve its position and its claim to VON Ontario's assets beyond what it bargained for in its agreement.

43. For the above reasons, it is respectfully submitted that the application of a *Quistclose* trust in the current circumstances would be in appropriate.

44. Absent any express trust or a *Quistclose* trust, the Ministry must argue that some other form of constructive trust should be imposed in this case. In the current circumstances a constructive trust could only be imposed if the Ministry identified an unjust enrichment or an element of wrongdoing necessary to be the basis for a constructive trust.[33]

45. The imposition of a constructive trust to remedy unjust enrichment requires the Ministry to show, among other things: (i) enrichment of VON Ontario or VON Canada, a corresponding deprivation of the Ministry and absence of a juristic reason for the enrichment; and (ii) that a monetary award is insufficient to remedy the unjust enrichment, having regard to the probability of recovery or whether there are other grounds for granting a proprietary remedy.[34]

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[32] *Two Feathers C.A.* at para. 23.
[33] *McGee v. London Life Insurance Co.*, [2011] O.J. No. 4206 (Ont. S.C.J.) at para. 181.
[34] *Kerr v. Baranow*, [2011] 1 S.C.R. 269 at paras. 36 -41 and 50.

46. A remedial constructive trust to address other forms of equitable wrongdoing can only be imposed if:

(a) the Ministry shows that VON Ontario or VON Canada are under an equitable obligation of a type that courts of equity have enforced in relation to the activities giving rise to the assets in its hands;

(b) the assets in the hands of VON Ontario or VON Canada are shown to have resulted from deemed or actual agency activities of VON Ontario or VON Canada in breach of an equitable obligations to the Ministry;

(c) the Ministry shows a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like VON Ontario or VON Canada remain faithful to their duties; and

(d) there are no factors which would render the imposition of a constructive trust unjust in the circumstances of the case.[35]

47. There is no basis in this case to impose a constructive trust either for unjust enrichment or on other equitable grounds. There is no evidence that VON Ontario or VON Canada have been unjustly enriched or breached any equitable obligations to the Ministry. All available evidence suggests that all funding has been provided and all service obligations have been met in accordance with contractual obligations and that the Ministry has experienced no loss that must be remedied. There is also no indication that a personal remedy under the

[35] *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 45.

existing contractual framework would not be sufficient in the event VON Ontario or VON Canada breaches any obligations to the Ministry in the future.

48. The imposition of a trust in this case as requested by the Ministry is neither necessary nor justifiable based upon applicable trust principles.

49. Even leaving aside applicable trust principles, the CCAA provides a sufficient basis to refuse to grant this order. The only statutory basis upon which the Ministry could request its proposed order in this case is under Section 11 of the CCAA, which provides the Court with the power to make any order that the Court considers appropriate in the circumstances.[36] Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA -- avoiding the social and economic losses resulting from liquidation of an insolvent company.[37]

50. The trust that the Ministry seeks to impose would frustrate the policy objectives of the CCAA and would have significant negative practical implications for both VON Canada and VON Ontario.

51. Restrictions on VON Canada's receipt and use of its ordinary course Overhead Payments would cut off a primary source of liquidity to support the ongoing overhead functions provided by VON Canada and would result in a failure of this restructuring. These overhead functions provided by VON Canada,

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[36] CCAA at s. 11(1).
[37] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70.

including necessary back office support, senior management oversight, payroll services and quality control and training of front line staff,[38] are essential to the entire VON Group. There is no clear and immediate replacement service provider for these functions if VON Canada ceases to operate, meaning that many of these necessary overhead functions would not be available to VON Ontario in the case of a failure of VON Canada.

52. Segregation of funds within VON Ontario or restrictions on VON Ontario's ordinary course dealings with its funds would also have a negative impact on VON Ontario's ability to continue operating in the ordinary course, particularly given the very limited liquidity with which VON Ontario operates and the fact that the funds in the VON Ontario bank account, along with other assets of VON Ontario, serve as collateral for any borrowings by VON Nova Scotia or VON Ontario under their existing credit facility with The Bank of Nova Scotia.[39]

B. Return of Excess Funding

(i) The Court Does Not Have Jurisdiction In This Proceeding To Order The Repayment Of VON Ontario's Property

53. For the reasons set out above the CCAA does not provide the Court with jurisdiction to direct a non-Applicant's dealings with its assets, particularly in a circumstance where the requested relief is not important to or reasonably connected to the restructuring process of the Applicants.

[38] Poirier Affidavit at para. 27.
[39] Poirier Affidavit at para. 42.

(ii) The Court Should Not Order The Repayment Of Funds

54. The Funding Agreements currently in place with the Ministry set out in detail the manner in which the service provider is to deal with any excess funds in its possession at the end of each funding year. This contractual arrangement has always worked to the satisfaction of all parties, including the Ministry.

55. The Ministry now seeks to import into a Court order certain substantive contractual terms that were agreed to between VON Ontario and the Ministry and that are currently functioning properly. The Ministry has shown no reason why this extraordinary step is necessary.

56. It is respectfully submitted that this Court should not in the ordinary course grant orders to deal with matters that are properly within the scope of contractual arrangements between parties and that appear to have been complied with. Contracts represent, in effect, a law which private parties have agreed applies to them.[40] As long as those contracts are functioning in accordance with their terms, the Court's involvement is not necessary.

57. In the current case, VON Ontario and the Ministry have agreed upon a method to deal with excess funding. Those agreements are being complied with. The parties should be left to govern themselves in accordance with those agreements without Court intervention and without importing selected portions of those agreements, as identified by the Ministry, into a Court order.

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[40] *Allarco Entertainment Inc. (Re)*, (2009) 58 CBR (5th) 140 (Alta. Q.B.) at para. 5.

C. Stay of Proceedings in favour of VON Ontario

58. Contrary to the Ministry's assertion, this Court has jurisdiction to extend a stay of proceedings in favour of VON Ontario, notwithstanding the fact that it is not an Applicant in these proceedings. Courts have exercised such jurisdiction where, as in the current case[41]:

a) it is important to the reorganization process; and

b) the operations of the Applicants and the third party non-applicants are intertwined and the third parties are not "debtor companies", as defined in the CCAA.

59. VON Ontario's obligations to comply with the substantive service deliveries under its contracts are unaffected by the stay.

60. The Ministry has not indicated any intention to take any steps that would be barred by the stay. The Ministry has not suggested that the commencement of this proceeding, the declarations of insolvency contained therein, or any steps taken in furtherance of this proceeding have triggered any rights that the Ministry intends to act upon.

61. The stay in favour of VON Ontario is appropriate, within the court's jurisdiction, and does not prejudice the Ministry in any way. The stay should not be set aside.

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[41] *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) at paras. 27-30; *Jaguar Mining Inc. (Re)* (2013), 12 C.B.R. (6th) 290 at paras. 27 and 37; and 4519922 Canada Inc. (Re) (2015), 22 C.B.R. (6th) 44 at paras. 36-38.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2016.

Norton Rose Fulbright Canada LLP

Norton Rose Fulbright Canada LLP
Lawyers for the Applicants, Victorian Order Of Nurses For Canada – Ontario Branch and Victorian Order Of Nurses For Canada Nova Scotia Branch

Schedule A

SCHEDULE "A"
LIST OF AUTHORITIES

1 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.).

2 *McGee v. London Life Insurance Co.*, [2011] O.J. No. 4206 (Ont. S.C.J.)

3 *Ontario (Ministry of Training, Colleges and Universities) v. Two Feathers Forest Products LP* (2013), 6 C.B.R. (6th) 129 (Ont. C.A.)

4 *Kerr v. Baranow*, [2011] 1 S.C.R. 269

5 *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217

6 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379

7 *Allarco Entertainment Inc. (Re)* (2009), 58 CBR (5th) 140 (Alta. Q.B.)

8 *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.).

9 *Jaguar Mining Inc. (Re)* (2013), 12 C.B.R. (6th) 290 (Ont. S.C.J.).

10 *4519922 Canada Inc. (Re)* (2015), 22 C.B.R. (6th) 44 (Ont. S.C.J.).

Schedule B

SCHEDULE "B"
RELEVANT STATUTES

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault..

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA

Court File No: CV-15-11192-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS, VICTORIAN ORDER OF NURSES FOR CANADA - ONTARIO BRANCH AND VICTORIAN ORDER OF NURSES FOR CANADA NOVA SCOTIA BRANCH

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Matthew Halpin LSUC#26208F
Tel: 613.780.8654
Email:
matthew.halpin@nortonrosefulbright.com

Evan Cobb LSUC #55787N
Tel: 416.216.1929
Fax: 416.216.3930
Email: evan.cobb@nortonrosefulbright.com

Lawyers for the Applicants