

**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-36, 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**

FACTUM OF THE MOVING PARTY

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REGION**

FACTUM OF THE MOVING PARTY

(Motion Returnable January 19, 2016)

PART I – INTRODUCTION

1. On November 25, 2015 Victorian Order of Nurses for Canada ("VON Canada"), Victorian Order of Nurses for Canada – Eastern Region ("VON East") and Victorian Order of Nurses for Canada – Western Region ("VON West") were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended (the "CCAA"). Collins Barrow Toronto Limited was appointed as Monitor in the proceedings (the "Monitor").
2. The Initial Order was treated as having been made *ex parte* with an opportunity for affected parties to come back to apply to the court to vary or amend the order.
3. The within motion is the comeback proceeding on behalf of the Moving Party and its associated and affiliated entities.
4. Paragraph 25 of the Initial Order of the Honourable Mr. Justice Penny required that no Funder (as defined in the Poirier affidavit in support of the motion for an Initial Order) shall discontinue, fail to honour, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Victorian Order of Nurses for Canada – Ontario Branch ("VON Ontario").
5. The Ministry of Health and Long-Term Care Ontario (the "Ministry") and the Local Integration Health Networks (the "LHINs") are Funders as that term was defined in the CCAA proceedings.

6. VON Ontario was not an applicant for the protection of the court pursuant to the CCAA nor a party put under the protection of the court pursuant to the CCAA.
7. The Ministry and the LHINs wish to continue funding under the various agreements made between them, VON Ontario and VON Canada and their associated and affiliated entities. The Ministry and the LHINs wish to ensure that the moneys as funded are used solely for the purposes set out in the Funding Agreements made with VON Ontario and VON Canada and are expended in accord with the budget set out in the Funding Agreements.
8. Accordingly, the Ministry and the LHINs seek to vary or amend the Initial Order by setting aside the stay provided under paragraph 25 of said order or, in the alternative, to impress said funds with a trust until utilized for the purposes intended.

PART II -THE FACTS

9. The Ministry learned of this application on December 3, 2015. A copy of the motion to extend the stay was delivered by email to the Director of the Ministry's Legal Services Branch on December 2, 2015 at 8:16 PM.

Affidavit of Phil Graham, Motion Record, paragraph 2, p. 8

10. The LHINs learned of this application on December 3, 2015 in the same manner as set out in paragraph 9 above.

Affidavit of Judith Evah Marie Bowyer, paragraph 2

11. The affidavit of Jo-Anne Poirier, sworn November 24, 2015, was included in the Application Record of the Applicants. Under the heading "Business Overview", Ms. Poirier described the role of VON Ontario as "provid[ing] Home Care and Community Support through arrangements with Ontario's Community Care Access Centre ("CCACs"), Local Health Integration Networks ("LHINs") and other parties. The CCACs and LHINs are funded and mandated by the Ministry of Health and Long-term Care (Ontario)."

Affidavit of Jo-Anne Poirier, Application Record, paragraph 20, p. 17

12. In addition to the Ministry's funding of LHINs, the Ministry's Primary Health Care Branch and the Nursing Policy and Innovation Branch fund programs through transfer payment funding arrangements directly with the Victorian Order of Nurses ("VON") and its various associated or affiliated entities including but not limited to VON Ontario. The funding is provided to recipients such as VON to carry out a project or program for the benefit of the people of Ontario, and the funding, flowed in advance and exclusively designated for the program, is governed by the terms and conditions of funding agreements made between the parties.

Affidavit of Phil Graham, Motion Record, paragraph 4, p. 9

13. The agreements made between the Ministry and VON or the LHINs and VON require the recipient to expend all funding in accordance with a detailed approved budget attached to the agreement and only for the purpose of carrying out the program. The budget typically provides an amount for overhead expense. Any transfer of program funds to an entity not named in the funding agreement and/or any use of the program funds for any purpose other than in accordance with the approved budget of the program, is prohibited under the funding terms and conditions.

Affidavit of Phil Graham, Motion Record, paragraph 5, p. 9

Affidavit of Judith Evah Marie Bowyer, paragraph 12

14. A typical example of a Ministry funding agreement is the agreement made between the Ministry and VON Ontario, effective October 1, 2011 and attached as Exhibit "A" to the affidavit of Phil Graham (the "Ministry Agreement").

15. Article 4.1 of the Ministry Agreement provides, as follows:

4.1 Funds Provided. The Ministry shall:

(a) provide the Recipient with the Funds in accordance with the Budget, for the purpose of carrying out the Program; and

(d) deposit the Funds into an account designated by the Recipient ...

16. Article 4.3 of the Ministry Agreement stipulates as follows:

Use of Funding and Program. The Recipient shall:

(a) Carry out the Program:

- (i) In accordance with the terms and conditions of the Agreement ...
- (b) Use the Funds only for the purpose of carry out the Program; and
- (c) Spend the Funds only in accordance with the budget.

17. Article 15 of the Ministry Agreement states:

15.1 **Funds at the end of a Funding Year.** Without limiting any rights of the Ministry under Article 14, if the Recipient has not spent all of the Funds allocated for the Funding Year as provided for in the Budget, the Ministry may:

- (a) Demand the return of the unspent Funds ...

18. A typical example of a LHIN funding agreement is the Multi-Sector Service Accountability Agreement made between the Mississauga Halton Local Health Integration Network and Victorian Order of Nurses for Canada – Ontario Branch Peel Site, effective April 1, 2014 attached as Exhibit “A” to the affidavit of Judith Evah Marie Bowyer (the “Service Agreement”).

19. Article 4.1 of the Service Agreement provides, as follows:

4.1 **Funding.** Subject to the terms of this Agreement, and in accordance with the applicable provisions of the Accountability Agreement, the LHIN:

- a) will provide the funds identified in Schedule B to the HSP for the purpose of providing or ensuring the provision of the Services;
- c) will deposit the funds in regular instalments, once or twice monthly, over the term of this Agreement, into an account designated by the HSP ...

20. Article 4.5 of the Service Agreement stipulates as follows:

Conditions of Funding:

- d) The HSP will:
 - (i) Fulfill all obligations in this Agreement;

- (ii) Use the Funding only for the purpose of providing the Services in accordance with Applicable Law, Applicable Policy and the terms of this Agreement ...

21. Article 5.1 of the Service Agreement further stipulates that:

- (a) **At the end of a Funding Year.** If, in any Funding Year, the HSP has not spent all of the Funding the LHIN will require the repayment of the unspent Funding...

22. The funding agreements referred to above were implemented exclusively to address the health care needs of residents of Ontario and to assist in the future delivery of health care services in Ontario. Neither the Ministry nor the LHINs have ever agreed to fund applicants to these proceedings, or any other affiliated or associated entity of VON for any purpose other than as stated in the specific program delivery terms, conditions and budgets set out in the funding agreements.

Affidavit of Phil Graham, Motion Record, paragraph 12, p. 10

Affidavit of Judith Evah Marie Bowyer, paragraph 20

23. The VON Group has been described as not operating under a traditional vertical corporate structure. VON Canada is a not-for-profit charitable corporation incorporated under Royal Charter December 28, 1897. VON Canada was continued under the *Canada Corporations Act* in 2014. VON Ontario is described as a regional operating entity within the VON Group and incorporated as a not-for-profit corporation under the *Corporations Act* (Ontario.)

Affidavit of Jo-Anne Poirier, Application Record, paragraph 12, p. 14

24. VON Canada performs the administrative and overhead related functions of the VON Group whereas the regional entities, including VON Ontario enter into and perform the service agreements made with the funding parties.

Affidavit of Jo-Anne Poirier, Application Record, paragraph 15, p. 16

25. VON Canada has experienced significant and negative cash flows attributable primarily to overhead expenditures that benefit the rest of the VON Group.

Affidavit of Jo-Anne Poirier, Application Record, paragraph 59, p. 24

26. In order to assist program recipients to carry out the funded program elements, transfer payment funding is provided in advance of the anticipated expenditure by the funding recipient based on approved annual budgets covering the fiscal year April 1 to March 31.

Affidavit of Phil Graham, Motion Record, paragraph 13, p. 10

Affidavit of Judith Evah Marie Bowyer, paragraph 21

27. The Ministry and the LHINs wish to continue funding under the various agreements made with VON Ontario and VON Canada. However, the fund transfer payment programs cannot be continued unless assurance is provided that the funds will be used for the clearly stated purposes of the health care programs. The Ministry and the LHINs are not prepared to allow funding under the various agreements save and unless used for the purposes described in the funding agreements.

Affidavit of Phil Graham, Motion Record, paragraph 14, p. 11

Affidavit of Judith Evah Marie Bowyer, paragraph 22

28. In his Endorsement dated November 27, 2015 Penny J. found that:

[10] The corporate structure of the applicants does not conform to the parent/subsidiary structure that would be typically found in the business corporation context. I am satisfied however, that VON East and VON West are under the control of VON Canada from a practical perspective. They are affiliated companies with the same board of directors. Accordingly, while VON East and VON West do not, on a standalone basis, face claims in excess of \$5 million, the applicants, as a group clearly do. The applicants have complied with s. 10(2) of the CCAA....

Endorsement, Penny J., paragraph 10, December 9, 2015 Motion Record, p. 38

29. Penny J. further held that:

[16] Slightly more unusual is the request for a stay of proceedings against VON Ontario and VON Nova Scotia, neither of which are applicants in these proceedings. However, the evidence of Ms. Poirier establishes that VON Canada is a cost, not a revenue, centre and that VON Canada is entirely reliant upon revenues generated by VON Ontario and VON Nova Scotia for its own day-to-

day operations. There is a concern that VON Canada's filing of this application could trigger termination or other rights with respect to funding relationships VON Ontario and VON Nova Scotia have with various third party entities which purchase their services. Such actions would have a material prejudice to VON Canada's potential restructuring by interrupting its most important revenue stream.

[17] In the circumstances, I am satisfied that the stay requested of VON Ontario and VON Nova Scotia, which is limited only to those steps that third party entities might otherwise take against VON Ontario and VON Nova Scotia due to the applicants being parties to this proceeding, is appropriate.

Endorsement, Penny J., paragraphs 16 and 17, December 9, 2015 Motion Record, p. 38

PART III – THE ISSUES

30. The issues on this motion are:

- i) Is the relief sought herein appropriate for purposes of the comeback provision allowed by Justice Penny in his endorsement of November 27, 2015?
- ii) Can the funds advanced by the Ministry, its associated or affiliated entities, be impressed with a trust?
- iii) If the funds cannot be impressed with a trust, can the stay imposed under paragraph 25 of the Initial Order be set aside?

PART IV – THE LAW

31. It is respectfully submitted that the Ministry and the LHINs are interested parties affected by the Initial Order and seek comeback relief by way of the following order:

1. that all moneys funded, directly or indirectly, by the Victoria Order of Nurses for Canada – Ontario Branch be impressed with a trust until such time as the moneys have been spent for the purposes of providing the service set out in the Funding Agreement and in accord with the budget made part thereof.

2. that the Monitor do, from time to time, report on the cash flows from VON Ontario to VON Canada with sufficient particularity to identify whether those cash flows properly relate to overhead expenses reasonably incurred by VON Canada in respect of services set out in the Funding Agreement pursuant to which funds are advanced to VON Ontario,
3. that, if, at the end of the Funding Year, as defined in the Funding Agreement pursuant to which the funds are advanced, the recipient has not spent all of the Funding, the unspent Funding shall be returned to the party that provided the Funds, unless otherwise agreed to in writing by such party, and
4. that the stay as provided in paragraph 25 of the Initial Order dated November 25, 2015 (Protection for Non-Applicant Entities) be and the same is hereby set aside.

The Special Purpose (Quistclose) Trust

32. It is respectfully submitted that the moneys advanced by the Ministry are in the nature of a special purpose trust and cannot be used for any purpose other than as stipulated in the funding agreement. As stated by Lord Millet in *Twinsectra Ltd. v. Yardley*, [2002] 2 All E.R. 377:

“Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower’s insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable to pay his creditors or some of them, but the principle is not limited to such cases.

When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower’s assets, in which case it passes to his trustee in bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the

intention of the parties collected from the terms of the arrangement and the circumstances of the case.”


Twinsectra, supra at paragraphs 68 and 69

33. It is respectfully submitted that the circumstances of the within proceeding can be differentiated from *Ontario (Minister of Training, Colleges and Universities) v. Two Feathers Forest Products LP*, 2013 CarswellOnt 13601. There the Ontario Court of Appeal considered an agreement similarly worded to the form of agreement used by the Ministry in its dealings with VON and its related entities. The Court of Appeal reversed the findings of the Motions Court judge who held that such agreement created a special purpose or *Quistclose Trust* in favour of the Crown.
34. The facts in *Two Feathers* were not the same as in the case at bar. The funds advanced to *Two Feathers* were not at the free disposal of the recipient. However, the budget allowed use of the moneys for purposes other than the special purpose set out in the agreement; ie, the training of individuals in northern Ontario for employment in the lumber industry. In particular, the Court of Appeal found that the agreement between the parties allowed the funds to be spent for business purposes generally including the rental of classroom space and equipment.
35. In addition, the Court of Appeal found that the moneys funded to *Two Feathers* were in the nature of a grant and, if not used, became a debt due to the Crown. In the case of VON Ontario, the moneys are paid in consideration of the provision of health care services. The payments are not in the nature of a grant nor a loan but are made in advance of the service being provided and upon condition that the moneys will be used for that purpose only.
36. It is respectfully submitted that until the moneys are used for the purposes intended, the recipient is not free to apply the funds to any other purpose nor does the recipient acquire any beneficial interest therein.

37. If the court determines that the funds advanced are not impressed with a trust, it is respectfully submitted that it is fair and reasonable to set aside the stay provided in paragraph 25 of the Initial Order. If that stay is set aside and the Ministry determines that its funds are not being used for the purposes intended, it will, at least, have the option to terminating agreements with VON Ontario and preventing further flow of funds to that entity.

All of which is respectfully submitted.

January 15, 2016



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TO: The Service List

SCHEDULE "A"

Authorities Referred to in the Factum

1. *Twinsectra Ltd. v. Yardley*, [2002] 2 All ER 377
2. *Ontario (Minister of Training, Colleges and Universities) v. Two Feathers Forest Products LP*, 2012 CarswellOnt 11809
3. *Ontario (Minister of Training, Colleges and Universities) v. Two Feathers Forest Products LP*, 2013 CarswellOnt 13601

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