

## COMMUNIQUÉ

For the Health Industry

April 12, 2004

A publication of Miller Thomson  
LLP's Health Industry Practice  
Group

### **GOVERNMENT TAKE-OVER AND DEFUNDING DECISION RULED ILLEGAL. FUNDING RESTORED.**

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It is a reality of modern Canadian society that many important health services are provided by not-for-profit organizations which are entirely dependent on government funding. As a result, provincial governments have developed long-standing relationships with not-for-profit organizations to which the government provides substantial funding and may also act as a regulator. Over the last decade of tightening fiscal policy by government, not-for-profit organizations have become accustomed to having little recourse in the face of funding cuts. However, if the funding cut is not part of overall fiscal policy but is directed at a specific organization, the organization may be in a position to examine the decision and potentially seek judicial review.

De-funding decisions may be ripe for judicial review where the decision affects an organization that provides services to vulnerable people, there is an overstepping of statutory authority and there is an arbitrary or unfair process leading up to the de-funding decision. Further, if the government has purported to take control of an organization's operations and property, the Courts will carefully review the government's statutory and contractual right to do so, and if Courts find that the government has not complied with the requirements of such a drastic step then the take-over will be ruled illegal. Absent any contractual or other legal basis for claiming an ownership interest, the mere fact that the government has provided substantial funding (even capital funding) to a not-for-profit organization does not give the government an ownership interest in the organization's assets.

Note:

This *Communiqué* is provided as an information service and is a summary of current legal issues of concern to the Health Industry.

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These principles were reaffirmed in a September 8, 2003 decision of the Ontario Superior Court of Justice (Divisional Court). In that decision, the Divisional Court quashed as illegal the February 19, 2003 decision of the Ministry of Community, Family and Children's Services (the "Ministry"), to:

- (a) terminate without notice the programme funding of the St. Catharines Association for Community Living ("SCACL"), a registered charity which provides services to developmentally disabled people and their families, and
- (b) to seize control of SCACL's real and personal property (the "SCACL Assets") and to purport to authorize a third party to operate and manage the SCACL Assets and to use and occupy SCACL's property for this purpose.

The Divisional Court ordered the Ministry to forthwith restore funding to SCACL, to direct its third party agent to vacate and return all of SCACL's Assets and to return the management of the institution to SCACL.

By way of background, on February 19, 2003 the Ministry announced that it was immediately ceasing to fund SCACL and directed that another agency in Niagara Falls "take over" SCACL's programs and property. SCACL had an annual operating budget of \$9.7 million, most of which came from the Ministry. SCACL is the fifth largest agency of its type in the province and is a non-profit, registered charity with over 300 employees providing services to 500 developmentally disabled people and their families in and around the City of St. Catharines. SCACL has been in existence for 50 years and over that time, through its considerable fund raising efforts, has acquired significant assets, including group homes, independent living homes, an administrative building, program buildings and vehicles. SCACL's operations were funded by the Ministry under the *Developmental Services Act* and a written agreement.

The Court determined that in the circumstances of this case, the decision to terminate funding and take-over SCACL's assets was subject to judicial review. The Divisional Court found that because there was legislation in place which might permit the government, in appropriate circumstances, to take over the property and the operation of the charity, then the Ministry could not avoid judicial review by not following that statutory mechanism. The Court found that the governing legislation provides a mechanism for the government by Order in Council to make regulations to designate such an organization to be subject to the control of the Minister or to the Minister's designate. The Lieutenant Governor in Council had not made such a regulation and the Ministry simply notified SCACL that the other service organization would be immediately occupying and operating its assets and programs. The primary ruling of the Divisional Court was that the Ministry's decision to designate and direct a third party to take over all of the operations, property, employees and funding of SCACL, without satisfying the statutory requirement of obtaining a Regulation or Order in Council, was unlawful.

In addition, the Court found that the Ministry would have been entitled to terminate a contractual relationship with SCACL had there been a fundamental breach, and such a decision would be subject to judicial review. The Court found that the Ministry's decision was unreasonable since there was no evidence of a weighing of considerations pertinent to the objects of the Ministry's administration, there was no evidence of an inability of SCACL to protect its clients, and there was no evidence to demonstrate any financial interest by the Ministry in the property of SCACL. The Court also found that there was a duty of fairness which had not been met since, among other deficiencies, there was no fair warning of the Ministry's decision. The Court also found that there was an abuse of discretion. In addition to the other deficiencies in the Ministry's decision-making, the Court also noted that the method of announcing the decision to the media before it was announced to SCACL was not what Canadian society expects in regard to fair government action.

The Divisional Court decision highlights that long term social program funding is not like other government appropriation decisions and that government ministries will not be able to terminate such funding where there is no basis for such a decision. It further demonstrates that the Ministry does not acquire an interest in a not-for-profit organization's property simply because it has provided funding to that organization for its operations.

The Ministry sought leave to appeal, and leave to appeal was denied on October 27, 2003 by the Ontario Court of Appeal without reasons. The Divisional Court ordered that the Ministry must pay SCACL's legal costs on a substantial indemnity basis (formerly known as solicitor client costs).

SCACL was represented at the Divisional Court and on the application for leave to appeal by Andrew J. Roman and Margaret R. Sims of Miller Thomson LLP.

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