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CHARITIES AND NOT-FOR-PROFIT NEWSLETTER

The Charities and Not-for-Profit Newsletter is published monthly by Miller Thomson LLP's Charities and Not-for-Profit Group as a service to our clients and the broader voluntary sector. We encourage you to forward the e-mail delivering this newsletter to anyone (internal or external to your organization) who might be interested. Complimentary e-mail subscriptions are available by contacting charitieseditor@millerthomson.com.

Inside

BENEFITS AND DISADVANTAGES OF INCORPORATING AN UNINCORPORATED ASSOCIATION

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On occasion we are asked to discuss the differences between associations and corporations. There are several important legal distinctions between charities and non-profits established as non-share capital corporations and charities establish as unincorporated associations.

Separate Entity

A corporation is a separate legal entity under Canadian law, whereas an unincorporated association is not a separate entity. An unincorporated entity is a collection of individuals acting together. An unincorporated association is not recognized as separate from the group of individuals administering it.

Governing Law

Charities and non-profits established as non-share corporations have members who have the right to elect directors in the same manner as shareholders in for-profit corporations, but unlike shareholders, the members do not participate in the financial success of the corporation. In Ontario, non-share capital corporations are established under the *Corporations Act*. Federally, non-share corporations are currently incorporated under the *Canada Corporations Act* and soon under the *Canada Not For Profit Corporations Act*. These statutes provide rules regarding the corporation's structure and powers.

Unincorporated Associations are not established and governed under a statute. Thus, an unincorporated association has more flexibility as to how the association is structured. Unlike corporations, these associations do not file annual corporate forms with the government. The individuals carry on the association's business and can take all of the actions of a Canadian individual. However, this lack of regulation means that there is no formal statute addressing how to resolve disputes within an association.

Powers

A corporation has the power to do acts in its own right such as contract, to sue and be sued, and hold title to property. These powers are set out in the governing statute of the corporation.

An unincorporated association has no independent power as it is not a separate entity. The unincorporated association itself does not contract, it cannot sue or be sued and it cannot hold property. It is the individuals who administer the unincorporated association who carry out these actions personally for the association. An unincorporated association must seek leave of a court to have the power to bring an action.

Liability

Incorporation limits the liability of the entity to the corporation's own assets. Section 122 of the *Corporations Act* (Ontario) provides that the members of the corporation are not liable for the acts and liabilities of the corporation. The new *Canada Not For Profit Corporation Act* has a similar provision.

An unincorporated association is not separate from the individuals running the association. Therefore, the individuals carrying out the association's activities are personally liable for the acts and liabilities of the association. This means that each individual's personal assets are exposed to the creditors of the association once the association has exhausted its insurance and assets.

While an unincorporated association is a flexible structure, if the organization is carrying on any activities that could give rise to liabilities it is prudent to consider incorporating to limit the liability of the organization to its own assets.

Miller Thomson LLP's Charities and Not-Profit lawyers can assist organizations to review and implement structuring choices.

AVOIDING MISTAKES WHEN FILING THE T3010B INFORMATION RETURN

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As the end of another year approaches, it is timely for charities to be reminded of common mistakes that occur when filing their annual T3010B *Registered Charity Information Returns*. The Return must be filed within six months after a charity's fiscal year end. The Canada Revenue Agency provides on its website a list of common mistakes made when filing the T3010B Return. Charities should strive to avoid these mistakes, as they can cause processing delays, missing returns and incorrect disbursement quota calculations.

In addition to the T3010B Return, charities must also attach Form TF725 *Registered Charities Basic Information Sheet*, and Form T1235 *Directors/Trustees and Like Officials Worksheet*. If the charity has made gifts to qualified donees, the charity must also attach Form T1236 *Qualified Donees Worksheet/Amounts Provided to Other Organizations*. A private foundation that at any time in the year held greater than 2% of any share class of a corporation must attach a separate Form T2081 *Excess Business Holdings Worksheet for Private Foundations* for each such class of shares.

The most common mistakes when filing the Return include the following:

- The Return is mailed to an address other than the Charities Directorate. The correct address for filing a Return is:

  Charities Directorate
  Canada Revenue Agency
  Ottawa, Ontario
  K1A 0L5;
- The Return is filed on the wrong form – all charities with fiscal year ending on or after January 1, 2009 should be using the T3010B Return;
- The financial statements are not attached or do not have the same fiscal year end as the T3010B Return;
- Form TF725 *Registered Charity Basic Information Sheet* is not attached;
- Fundraising activities of the charity are not described in Section C2 of the T3010B Return;
- Director/trustee dates of birth are missing from Form T1235 *Directors/Trustees and Like Officials Worksheet*;
- Directors/trustees' arm's length status is missing from Form T1235;
- Directors/trustees' postal codes are missing from Form T1235;
- Qualified Donees' BN/Registation numbers are missing from Form T1236;
- The Certification area in Section E of the T3010B Return is not signed.

To report financial information, charities can complete Section D or Schedule 6, depending on the criteria set out on the T3010B Return. Common mistakes where the charity has completed Section D include:

- lines 4500 to 4650 do not add up to the amount on line 4700;
- lines 4860 to 4920 do not add up to the amount on line 4950;
- there is no entry on line 5000 for charitable program expenditures.

If the charity has completed Schedule 6, common mistakes include:

- lines 4500, 4510 to 4580, and 4600 to 4650 do not add up to the amount on line 4700;
- lines 4950, 5050, 5060 and 5070 do not add up to the amount on line 5100;
- there are entries on lines 5500 to 5520 when the charity has not been granted permission to accumulate funds;
- there are no entries on line 5900 and 5910 when required.

CRA has published Guide T4033B *Completing the Registered Charity Information Return* to assist charities in completing the Return properly. In addition, the CRA website includes detailed instruction on completing the Return, along with sample completed Returns for guidance.

Miller Thomson LLP's Charities and Not-for-Profit lawyers can assist charities with issues regarding their annual Returns.

MEMBERS HAVE RIGHTS SO WHY HAVE MEMBERS?

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We have regularly espoused the notion that the most effective boards are small rather than large. But the same might also be said for members of non-profit organizations including charities.

Many charities take the approach of "the more, the merrier", but when it comes to membership, this may not necessarily be so.

The rights of members may vary somewhat depending upon the jurisdiction in which the organization has been created. Generally speaking though members have at least the following rights.

- They vote to elect directors, perhaps the most powerful position in an organization
- They have the right to attend meetings…at least the Annual General Meeting where board members are usually elected
- They must agree to any by-law changes
- They appoint auditors
- In most jurisdictions, they have the right to see financial statements

The larger the number of members the more unwieldy meetings become. There is a greater chance of not getting a quorum, and there is the possibility of electing a director who for one reason or another may not be beneficial to the working of the Board.

The worst single case I ever saw of an unwieldy membership involved a hospital foundation which conferred membership on every donor, a number which grew over two decades to several thousand. In fact, the foundation did not keep track of addresses and contact numbers on these members given the plethora of quite small donations. Membership, once conferred, did not lapse.

When the province mandated the consolidation of the hospital, it was also necessary to make substantial

corporate changes to the foundation's Letters Patent and by-laws, both of which required the sanction of the members. The legislation also required that members be notified of the meeting(s) and the issues which would be before them. In this case, the Board had to make a Court application because it simply did not have an accurate or full record of its members. This required the involvement of the provincial Public Guardian and Trustee who oversees charities in Ontario. Tens of thousands of dollars later and pursuant to a court order, the necessary changes were made.

The "solution" to this problem is to keep the membership small with perhaps a significant overlap between membership and board membership.

It may be possible to keep membership small and continue to generate funds through membership fees. Once you determine the optimum size of the membership list, you can then create a second class of member. In many cases though the word "member" is not used with a descriptor such as "supporter" being the most favoured term. In the by-laws the enabling provision should spell out the rights of supporters and perhaps limit this group to those who have made donations. The terms could be limited on an annual basis or could be "in perpetuity". The rights of the supporters might include:

- The right to get annual reports and other documents which the board wishes to distribute
- The right to attend meetings of "supporters" arranged for by the organization as information sessions.
- Supporters will have no voting rights and no right to attend either the AGM or Board Meetings except by invitation

Of course, the foregoing are just examples of what might be included in "supporter" rights and could be adapted according to the nature of the organization. Thus, organizations which rely on mass "membership" dues for income can have the best of both worlds. We have rarely found that the average donor to major charities have any serious desire to be involved in the corporate operations…so long as they are kept informed as to what is happening and what the issues of the day might be.

As we have said in the past, no one-size fits all. The important thing is to understand what the organizational options are and to chose a legal framework which fits with the organizational requirements. The key as we have suggested is to understand that members have statutory rights (and not much in the way of obligations) and in the vast majority of cases in our experience, keeping the operational group small (while having a different inclusive option) is likely the best bet.

RECEIPTING FOR SERVICES

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The CRA recently issued a reminder that charities cannot receipt for donated services. This position is based on the common law definition of gift. Charities can only receipt for donations that legally qualify as gifts. A gift is defined as a voluntary transfer of property without consideration. Because services (for example, time, skills, or effort) do not qualify as property, a donation of services does not qualify as a gift and is thus not eligible for a receipt. The CRA's Summary Policy CSP-S03 and CRA Policy Commentary CPC-017 addressed this issue in further depth.

As a matter of tax policy, individuals and corporations are taxed on income and are entitled to receive a tax credit (in the case of individuals) or a deduction (in the case of corporations) when they make a gift to a registered charity. However, there is no tax on the services that one donates to a charity, and as such, it would arguably be unfair to allow a charitable credit or deduction for such a donation.

According to CRA policy, where a charity is faced with a donor who wishes to donate his or her services to the charity, it may be possible to issue a receipt under the certain circumstances. For instance, where a

charity pays a service provider for services rendered, the service provider may choose to donate the payment back to the charity. In such a case, the charity can receipt for the cash gift to the charity. It is essential that the charity actually pays the service provider for the service and that the same service provider makes a *voluntary* gift back to the charity. The charity should keep a copy of the invoice, the payment to the service provider, and a record of the gift back from the service provider. We would recommend that payments in both cases be made by cheque. Please note that the service provider would be required to claim the income on his or her tax return. This transaction may be beneficial if the service provider is an individual in a lower tax bracket. If the service provider is a corporation or an individual in the highest tax bracket, then the service provider is usually better off volunteering his or her services and not structuring it as a charitable gift.

The CRA cautions that a charity should not issue a donation receipt to a service provider in exchange for an invoice marked "paid". The CRA states that this procedure raises questions as to whether any payment has been made from the charity to the service provider and whether any payment has been made back to the charity.

Note that if it was permissible to receipt for services (without the need to structure the gift as described above), a charity would potentially be asked to receipt for the services of all its volunteers. For charities that rely heavily on the services of volunteers, this would be administratively difficult and could result in problems meeting the disbursement quota.

Charities wishing to structure a gift of services are encouraged to contact us if they have any questions about this policy.

SECRET BALLOTS AND PUBLICALLY ACCOUNTABLE ENTITIES– A RECONSIDERATION

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The parliamentary system of government that we inherited from England has, since the earliest times, required that the making of laws governing the people shall be open and visible. Our traditions have thus required that all proceedings of Parliament take place in full view of the community. The Charter right of "freedom of thought, belief, opinion and expression, including freedom of the press" inherently protects and fosters such traditions. As Robert Marleau and Camille Montpetit note in the 2000 edition of *House of Commons Procedure and Practice:*

> The will of the House is ascertained by means of a vote. Once debate on a motion has concluded, the Speaker puts the question and the House pronounces itself on the motion. A simple majority of the Members present and voting is required to adopt or defeat a question. … A decision on a motion before the House can be made with no dissenting voices, in which case the motion is adopted and no division is taken. When there are dissenting voices, a vote (or division) is taken. This can be either a voice vote or a recorded vote where the House is called on to divide into the "yeas" and the "nays".

Parliamentary Standing Orders make only one exception to the requirement for public voting in Parliament. In 1986, Speaker Bosley resigned as the Speaker and 11 ballots were required for the House to elected John Fraser as the new Speaker. As a consequence of the protracted election, the Standing Orders were amended in 1987 to include provision for a secret ballot for the election of the Speaker, and a provision that excludes from a subsequent ballot, candidates receiving five percent or less of the total votes cast.

This requirement of openness has extended into the forms of government below the level of parliament, sometimes reinforced by legislation of superior bodies requiring observance by the inferior bodies of this cardinal principle. In recent times, much has been made of the desirability, even need, of transparency and accountability.

I have always held the view that section 207 of the *Education Act*, requiring school trustees to conduct their meetings in full view of the public, was designed to ensure public trust in the deliberative process, and to prevent possible abuses such as secret "deal-making". The exceptions, available only in the case of meetings of committees and only where the matter being considered is limited to one of very few topics expressly identified in the statute, are logical in that they each protect the interest of the Board from premature disclosure where the interest of the Board could be irretrievably prejudiced by any such premature disclosure. I have likewise always considered that this open process extends to the single most essential action of the trustee, the vote upon the relevant matter. In point of fact, all debate is just lead-up, perhaps almost window-dressing, to the vote on a matter. Ultimately, only the vote has significance.

As a consequence, I have consistently advised Boards that are accountable to the public that the taking of the vote must be as public as the debate/deliberations, and that the members of the public have the same right to know how a Trustee votes on a matter as they have a right to know what a Trustee says about the matter. Similarly, when committee proceedings take place in private or in-camera session, all trustees are entitled to know how other Trustees vote on a any matter.

Much of the foregoing was wrapped up in an article I wrote a couple of years ago titled "Open and Closed Meetings". But recently, a professional colleague made the argument that the Supreme Court of Canada decision in *Houde v. Quebec Catholic School Commission* permitted secret ballots. That case arose in the context of the *Quebec Education Act*, the language of which differs from the Ontario legislation. The 5-4 majority of the Court noted:

> Public meetings and secret balloting are not incompatible. No authority has been cited which holds that a public body, whose meetings and deliberations are in public, is precluded as a matter of broad policy from voting by secret ballot. Such a proposition runs directly to the broad discretion all public bodies have, absent statutory direction otherwise, to regulate their internal procedures.

In the dissent, Pigeon, J, noted at paragraph 25:

> Voting by secret ballot means that the details of the votes are withheld from the publicity required under the Act. An essential feature of the decision is concealed from the taxpayers attending the meeting, namely, the way each commissioner present voted.
>
> It seems quite reasonable to me to draw this conclusion from the commission's obligation to meet in public. Members of Parliament do not vote by secret ballot. Judges of our courts sitting *en banc* do not take refuge in anonymity, even if their deliberations, like those of a jury, are secret. When the decision is rendered, the individual opinions are declared, and when there is a jury verdict, the litigants are entitled to require that each of the jurors be called to declare his conclusion individually.

In the more recent case of *London (City) v. RSJ Holdings Inc.*, the Supreme Court of Canada noted:

> [The] democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when intra vires, are less worthy of deference.
>
> Admittedly, the *RSJ* case was decided in respect of the provisions of the *Municipal Act 2001* which expressly provides, subject to named exceptions
>
> that all meetings shall be open to the public; and that a meeting shall not be closed to the public during the taking of a vote; and
>
> no vote shall be taken by ballot or by any other method of secret voting, and that every vote so taken is of no effect.

The exceptions in this statute generally parallel but are more extensive than the exceptions permitted to school boards in s. 207 of the *Education Act*. Two specific additional exceptions, paralleling the selection of the Speaker under the Parliamentary Standing Orders, are permitted in the case of an upper-tier

municipality which may appoint of the head of council by secret ballot and in the case of a municipality's procedural by-law which may provide that the presiding officer may be designated by secret ballot.

So where does this leave us, particularly in the light of the views I have expressed?

It remains my view that the democratic obligations of openness and transparency of school board proceedings require votes to be held by means of an open vote where all can observe how a Trustee has voted on a matter – which would exclude the possibility of a secret vote or secret ballot. With due deference to the majority in the *Houde* case, I find it impossible to accede to the concept that form – a secret ballot – can and should prevail over substance – open and transparent proceedings. In fact, the Court in the *RSJ* case rightly pointed to how secrecy undermines the democratic legitimacy of a decision.

There are two possible remedies:

> either, the Legislature of Ontario could, as it has done in so many prior instances, apply the same principles for school boards as it does for municipalities, and enact provisions parallel to those of the *Municipal Act, 2001* already noted; or
>
> a board could "take the high road" and make sure that its general operating by-law does not permit votes to be taken by secret ballot, or any other method that hides how Trustees vote on any matter.

Until the legislation requires transparent voting, I will be urging school boards and others publicly accountable entities to "take the high road".

ALBERTA LOBBYIST ACT UPDATE

Our October 2009 *Charities and Not-for-Profit* newsletter contained an article respecting Alberta's new lobbyist legislation. We note that the new Alberta *Lobbyists Act* does not apply to the directors, officers and employees of any non-profit organization, association, society, coalition or interest group that is not constituted to serve management, union or professional interests nor having a majority of members that are profit-seeking enterprises or representatives of profit-seeking enterprises. However, directors, employees and officers of charities and non-profit organizations may voluntarily register, even though they are not obligated to register.

IN THE COMMUNITY

The Canadian Donor's Guide, now in its 25th year, provides a directory of registered charities. The digital edition, with search functions, and live links to charities websites, is available to the public free of charge at www.donorsguide.ca.

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

Iain Benson wrote "Religious Rights Are Not Just About Individualism" in the October issue of *The Lawyer's Weekly*.

Susan Manwaring presented "Endowed Gifts – The Impact of the Economic Downturn and Lessons Learned for Structured Gifts in the Future" at the Philanthropic Foundations Canada in Calgary, Alberta on October 28, 2009.

Hugh Kelly was one of the facilitators of "Volunteer Directors and Executive Directors" at the Roundtable luncheon sessions at the York Region Community Foundation Charities Workshop on October 29, 2009.

Kate Lazier presented "Gifts of Securities From A Legal Perspective" at the Canadian Association of Gift Planners Toronto Roundtable on November 4, 2009.

Arthur Drache wrote "Members Have Rights So Why Have Members", "Imagine Canada Pushing for Fundamental Disbursement Quota Changes – Rethinking the DQ concept", "Support of Donation Relief on

Gifts of Real Estate and Private Company Shares", "Fundraising in Ontario", "Beaverbrook Legal Saga Continues", "Charities and Politics U.K. Style" and "Camp Fee Payments for Unrelated Children are Deductible" in the November 2009 issue of *Canadian Not-For-Profit News*.

Hugh Kelly presented the perspective of Catholic District School Boards regarding the provisions of Bill 177, that amends the *Education Act* to make changes to the governance of school boards at a meeting of the Education Law Section of the Ontario Bar Association on November 2, 2009.

Rachel Blumenfeld is a panel speaker on the topic "A potpourri of insurance planning topics: Beneficiary designations, life insurance trusts, policy transfers, and charitable gift planning" on November 11, 2009.

Susan Manwaring presented "Endowments – How to Structure and Plan for the Future?" at the Ontario Bar Association, Toronto, Ontario on November 17, 2009.

Susan Manwaring presented "Challenges Posed by Recent Ecomonic Events" at The Fairmont Royal York on November 18, 2009.

Robert Hayhoe co-presented with Pierre Picard of the CRA "Audits, Sanctions and Appeals" as part of a University of Ottawa Law School course on charity law on November 23, 2009.

Susan Manwaring presented at a workshop hosted by Miller Thomson LLP and the Canadian Council for International Co-operation on November 23, 2009 at Miller Thomson LLP entitled "Working Overseas A Review of Canadian Regulations and Rules Relating to Foreign Activities".

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