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## CHARITIES & NOT-FOR-PROFIT NEWSLETTER

*October 2006*

*The Charities & Not-for-Profit Newsletter is published monthly by Miller Thomson LLP's Charities & 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.*

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## FOR PROFIT PHILANTHROPY?

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As reported widely in the press, the Google search engine giant recently established Google.org as a vehicle for the company's philanthropy. In addition to a $90 million US charitable foundation, Google.org is organized as a taxable for-profit subsidiary. While we are not aware of any similar Canadian structures, it appears that something similar could be done in Canada.

Why would a corporation set up its philanthropic activities as a for-profit? In Canada, the main reason would be to avoid the relatively restrictive tax rules that apply to charities. For example, a Canadian registered charity is restricted in that it may not engage in political activities beyond an incidental level (partisan political activities are strictly forbidden). A Canadian registered charity is also prevented by tax law from making grants to foreign charities, and must instead enter into complex agency or joint venture agreements with them if it wishes to fund their activities. A for-profit corporation would not be bound by any of these restrictions.

Would the inability of the for-profit philanthropy subsidiary to issue official donation receipts be an obstacle? A registered charity established by a corporation is often funded only by that corporation. A corporation making a gift to a charity is entitled to a deduction from its income. However, a corporation making a grant to another entity (whether a charity or not) where the granting corporation receives a promotional benefit, is also entitled to a deduction from its income. Where the philanthropic for-profit bears the name of the parent company, it should not prove too difficult to conclude that operating payments by the parent company to the subsidiary are deductible for the parent. Capital payments to the subsidiary might not be deductible, but could remain available for return to the parent company on request.

Would the taxable status of the for-profit entity not be inefficient? The ostensibly taxable status, if managed properly, would be more apparent than real. It should be possible for the philanthropy subsidiary to be managed so that it does not have net income, and therefore does not pay tax.

Obviously, there are a number of legal and public relations issues that are not discussed above and that might lead, on a complete analysis, to the conclusion that using a for-profit subsidiary for philanthropy is not a good substitute for a corporate foundation in Canada. Nonetheless, innovative philanthropy is to be commended. Miller Thomson lawyers practice at the leading edge of the Canadian charitable sector - we are available for consultation on structures similar to that used for Google.org.

## AMATEUR YOUTH SOCCER ASSOCIATION APPEAL

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In the May, 2006 Newsletter, we wrote about the decision of the Federal Court of Appeal in *Amateur Youth Soccer Association* ("AYSA") in which the Court upheld the Minister of Revenue's refusal to register AYSA as a charity.

We commented on the reasoning the Federal Court used in reaching its decision and noted that it was likely that application would be made to the Supreme Court of Canada for leave to appeal the AYSA decision. We confirm at this time that the application for leave was successful and that leave has been granted. We will follow the case as it moves forward and will keep readers posted concerning the decision of the Supreme Court and its ramifications for the law of charity in Canada generally.

## RECEIPTING FUNDRAISING EVENTS

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We recently ran into a situation where the CRA challenged the eligible amount recorded on receipts issued with respect to the purchase of tickets to a fundraising dinner. To our surprise, the CRA seemed to be taking the view that the personal benefit of such an event was to be determined by reference to what the organization's costs were. While this position is incorrect, it did not stop the CRA from demanding invoices for all the costs.

One benefit of having been involved in the charitable sector for so long is that we can trace the development of policy. The CRA and its predecessors have always had a special rule with regard to what they call "fundraising events", such as dinners or shows, where the price paid to attend was substantially more than what a person who was not supportive of the organization would pay.

In its first Interpretation Bulletin on the subject, Revenue Canada (as it then was) said that a receipt could be issued for (a) the fair market value of the ticket or admission or (b) "a reasonable part of the total cost."

In the late 1980s, the "cost" test was dropped because it produced anomalous results.

On the one hand, if all the food and other costs were given at little or no costs by supporters, then using the second test, the full price of admission could be receipted. On the other hand, assuming fixed expenses, the amount of the receipt issued would be linked to the numbers attending. Thus if the costs were $10,000 and 1,000 people attended and paid $25, a receipt for $15 could be issued. But if only 500 people attended, the receipt would be only $5.

Revenue Canada agreed that the benefit to each person attending should not logically be linked to the actual expenditure of money or to the number of people who actually bought tickets for the event. This is the key reason why Revenue Canada reverted to a straight fair market value.

The most recent version of IT-110R3 states:

> To calculate the gift portion (of the admission price), the charity may consider that two payments have been received: one for the fair market value of admission and the second as a gift to the charity.
>
> The fair market value of admission to a fund-raising dinner, ball, concert or show should be determined by making a comparison to the regular or usual charge for attendance at the same or a similar function or event for which a donation is not solicited. In the absence of a comparable event, the value is the estimated price that would have been charged for a function or event of this nature carried out as a profit-making venture.

The important thing here is the idea that the actual expenditure by the organization is not considered to be a factor in determining fair market value.

When the split receipting rules were introduced in late 2002, the CRA issued a number of documents which set out its views on receipting admissions to fundraising events. While there was no change in the position that the correct test is fair market value, there were clarifications which worked to the benefit of those who purchased ticket.

The following comes from the Charities Directorate Newsletter No. 14 - Winter 2003 (slightly edited)

> The attendance of celebrities at fund raising events will not be viewed as an advantage [i.e., something received by the donor, that reduces the amount of the receipt so, even if your organization spent $100,000 for Bill Clinton to attend, that cost will not be factored in to the fair market value for tax receipt purposes] per se. Any incremental amount paid for the right to participate in an activity with a particular individual (e.g., dinner, golf) would, however, not be viewed as a gift.
>
> - The value of any complimentary benefits provided to all participants for attending the event (e.g., pens and key chains) and the value of door and achievement prizes that all attendees are eligible for by simply attending the event will be viewed as an advantage unless the aggregate value of such items, per ticket sold, does not exceed the lesser of 10% of the ticket price and $75. For the purpose of establishing the eligible amount, and therefore the amount of the tax receipt, the value of door and achievement prizes will be aggregated and allocated on a pro rata basis to all participants.
> - For the purpose of determining which items will be viewed as an advantage for purposes of applying the *de minimis* rule, the CRA will adopt the position that the value of the activity that is the object of the fund raising event, while an advantage to be taken into account in determining the eligible amount, will not be included for this purpose (e.g., the value of a meal at a fund raising dinner, the value of a comparable ticket for a concert, the value of green fees, cart rental and meal at a golf tournament).

In the case of a fundraising dinner, the test according to the CRA is the value of a comparable meal provided by a comparable facility which will have to be ascertained. If the event is held at a restaurant, then the price the restaurant would charge a regular customer would be the comparable value. In this regard, it is acceptable to take into account group or banquet rates.

Generally, the right to participate in an auction to be held at the dinner will not be viewed as constituting an advantage.

The point of course is that it has been twenty years since the actual costs spent by an organization in running a fundraising event was included as a factor in determining what fair market value (or in modern parlance, the "advantage received") for the purpose of receipting.

## B.C. *SOCIETY ACT* REFORM PROJECT

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In July 2006, the British Columbia Law Institute commenced a major project to consider reform of British Columbia's not-for-profit incorporation statute, the *Society Act*. Over the course of the next two years, a volunteer project committee will study the major legal issues related to the Act, examine the leading models for reform, and make recommendations for a new *Society Act*. The project is funded by the Law Foundation of British Columbia. The members of the project committee are BC lawyers (including the author) and community representatives.

The *Society Act* provides for the incorporation, organization, governance, financial affairs, amalgamation, and termination of non-profit bodies in British Columbia. The current version of the *Society Act* was enacted in 1977 and has only been amended in a noteworthy way three times since that date.

The law, both in British Columbia and elsewhere, has not stood still since 1977. In British Columbia, the most significant development has been the enactment of a new statute governing for profit corporations-the *Business Corporations Act*. The need for a new not for-profit corporate statute is just as great as many of the legal issues facing not-for-profit and for-profit corporations are similar. Other Canadian jurisdictions, including the Federal government, have reformed or considered reforming their laws governing not-for-profit corporations.

The not-for-profit sector has also changed significantly since 1977. Participants in the sector and their advisors have always appreciated that the range of activities taken on by societies rivals those of for-profit corporations in scope and complexity. Over the course of the last 30 years, the not-for-profit sector has grown and expanded into new areas and at present there are 24,421 societies active in British Columbia.

There are three main developments in the law and the not-for-profit sector that make reform of the *Society Act* necessary today. First, the *Society Act* is no longer in harmony with the *Business Corporations Act* of B.C.; secondly, many of the substantive rules and procedures contained in the *Society Act* fail to respond to the needs of the not-for profit sector; and thirdly, reform (or the prospect of reform) of not-for-profit legislation elsewhere in Canada provides models and challenges for British Columbia.

In view of the close relationship between not-for-profit and for-profit corporations, it has always been important to ensure that the *Society Act* and the *Business Corporations Act* of B.C. do not diverge too greatly. The *Business Corporations Act* of B.C. effected a significant change in corporate law in B.C. with the result that some of the rules and procedures in the *Society Act* now appear cumbersome and out of date.

A consultation paper setting out arguments for reform and the project committee's tentative positions will be published in April 2007. A formal consultation will be held over the spring and summer of 2007. The final report, including a draft *Society Act*, will be published in August 2008.

## PRE-INCORPORATION FINANCIAL ACTIVITIES OF A CHARITY

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Expenses incurred before the incorporation of a corporation are not usually deductible from the revenue of the corporation. However, section 123.7 of the Quebec *Companies Act* and section 14 of the *Canada Business Corporation Act* allow the deduction of pre-incorporation expenses to companies in accordance with the CRA's Interpretation Bulletin IT-454. But what about charities?

In the province of Quebec, articles 319 and 320 of the *Civil Code of Quebec* state that:

> **319.** A legal person may ratify an act performed for it before it was constituted; it is then substituted for the person who acted for it.
>
> The ratification does not effect novation; the person who acted has thenceforth the same rights and is subject to the same obligations as a mandatary in respect of the legal person.
>
> **320.** A person who acts for a legal person before it is constituted is bound by the obligations so contracted, unless the contract stipulates otherwise and includes a statement to the effect that the legal person might not be constituted or might not assume the obligations subscribed in the contract.

Considering these articles and the CRA's Interpretation Bulletin IT-454, it is easy to conclude that the logic applicable to companies should be applicable to charities in the province of Quebec. For charities regulated by the *Canada Corporations Act* ("CCA"), there are no provisions directly applicable to this situation. Nevertheless, section 16(2) of the CCA states:

> The company shall from the date of its letters patent become and be vested with all property and rights, real and personal, theretofore held for it under any trust created with a view to its incorporation.

The "trust" in question is a common law trust. Therefore, the same solution accorded by the *Civil Code of Quebec* is indirectly allowed by the CCA, the only difference being that, to be sure to avoid all personal liability, it is important to stipulate under the CCA that the contract is signed by the incorporators "without personal liability".

As it is possible for a charity to ratify the acts done in its name before its incorporation, what about the issuance of an official receipt for a donation received before its actual incorporation? CRA Policy CPC-009 states that when a registered charity's objects and activities are charitable throughout the year, the charity may issue official donation receipts for all cash gifts it receives in the calendar year during which it is registered. However, a registered charity cannot issue an official donation receipt for a gift-in-kind received prior to the charity's effective date of registration. Regulation 3501(1) requires a registered charity to indicate on the official donation receipt the day on which the gift-in-kind was received. For example, if an organization's effective date of registration is March 1, 2006 and the organization received a gift-in-kind on January 12, 2006, since the gift was received prior to the organization's effective date of registration, a receipt cannot be issued for the gift-in-kind.

## THE PURPOSE AND EFFECT OF A REALISTIC QUORUM

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When preparing or reviewing by-laws, reviewing corporate records or providing guidance to our not-for-profit and charities clients, we are frequently asked the following questions on the following quorum issues:

- What are the statutory requirements?
- What are our recommendations?
- What do we do if quorum is not met at any meeting?

The following are sample statutory requirements:

**FEDERAL CORPORATIONS**

The quorum requirements for meetings of the board and members are set out in the policy directives of Industry Canada, which provide:

**Board meetings** - The number must be fixed in the by-laws either by number or by percentage and must be no fewer than two directors.

**Members' meetings** - The quorum must be fixed in the by-laws at either a fixed number, a percentage or a determinable formula and must consist of at least two members present.

**ONTARIO CORPORATIONS**

The quorum requirements for meetings of the board and members are set out in the Corporations Act (Ontario), which provides:

**Board meetings** - Unless the letters patent, supplementary letters patent or a special resolution otherwise provides, a majority of directors constitutes a quorum, but in no case shall a quorum be less than two-fifths of the board.

**Members' meetings** -The quorum for meetings of the members shall be as set out in the by-laws.

As for our recommendations, this is done strictly on a case-by-case basis. A federal hospital foundation with a board of 25 may very well want a majority of directors to constitute a quorum, while the board of an Ontario minor hockey association may be content to have its quorum the bare statutory minimum, as they may find it difficult to get enough directors to attend all meetings.

While it may be perfectly logical to have a majority of members constitute a quorum for a small private family foundation, it would not be at all practical to have the same quorum for a trade association that has hundreds of members.

It may also be practical to include a level of control in a by-law that requires a certain number of members of a certain member class to be present in order for quorum to be achieved.

The goal is to have a quorum for both board and members' meetings that is realistic and achievable for the corporation in question - that is, high enough so that an appropriate percentage is required to attend to vote on what could be a very important issue, yet low enough to make quorum, and therefore a decision, achievable.

There are additional provisions that can be built into a corporation's by-laws to assist in achieving quorum:

1. **Federal Corporations** - Industry Canada permits by-laws to include that both board and members can attend meetings by electronic means, provided that the by-laws specify how security issues will be handled, the procedure for establishing quorum and recording votes, and further that the board or members, as applicable, consent in advance of the specific method of communication to be used.

2. **Ontario Corporations** - Section 283(3.1) of the *Corporations Act* (Ontario) permits directors to attend meetings of the board, or a committee of the board by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously. There is no provision for members to attend meetings by electronic means.

Persons attending meetings in the foregoing circumstances are deemed to be present at the meeting (and can therefore be counted as part of the quorum).

A meeting called that does not meet the quorum requirements as set out in a corporation's by-laws or other governing documents cannot be considered properly constituted for the transaction of business.

In the event that a meeting is inadvertently held and resolutions passed without a quorum being present, the business conducted cannot be considered valid or the decisions made acted upon, until that business is later approved or at least ratified at a properly called meeting at which a quorum is present.

Regardless of the type of corporation or size of the board or membership, quorum for both board and members' meetings should be carefully considered and detailed in the by-laws to ensure that decisions can be made with an appropriate level of attendance and authority.

We would be happy to discuss these and other governance issues with you further and invite you to contact us with any questions.

## PRE-EMPLOYMENT DRUG TESTING: THE *CHIASSON* DECISION*

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The Alberta Court of Queen's Bench recently overturned the Alberta Human Rights Tribunal's decision in *Chiasson* v. *Kellogg, Brown & Root* and substituted a judgment consistent with the Ontario Court of Appeal decision in *Entrop*. The end result is that pre-employment drug testing continues to be seen as discriminatory, even where the individual affected is not addicted to drugs and therefore does not suffer from an actual disability.

Mr. Chiasson was dismissed nine days into his employment after a pre-employment drug test was found to contain positive results for marijuana metabolites. Company policy was clear that a positive result would lead to dismissal or refusal to hire. There was no evidence that Chiasson was addicted to marijuana, and he in fact denied any addiction. Rather, he stated that his marijuana use was recreational. The Tribunal therefore found that Chiasson did not suffer from a disability, and was therefore not discriminated against on the basis of a disability. Furthermore, the Tribunal found that since there was no disability, there was no obligation on the part of the employer to accommodate Chiasson.

The Tribunal's decision was appealed. In rendering its decision on the appeal, the Court of Queen's Bench considered the focus or intent of the policy, which was workplace behaviour generally, and more specifically drug use in the workplace and impairment while working.

The Court also considered the nature of drug testing by urinalysis, and confirmed, as previous decisions had, that such testing cannot and does not measure actual impairment levels. Rather, all it does is confirm previous drug use. However, the employer argued that such testing is useful in that

- A positive result indicates that the cognitive potential of the individual may have been altered in the recent past;
- A positive test is a red flag that the person has been in contact with a potentially dangerous drug; and
- A positive test result indicates that the person may have a problem with drug abuse or dependence.

The Court did not accept this argument and confirmed, as the Tribunal had, that pre-employment drug testing is *prima facie* discriminatory against those who are drug dependent. However, the Court found that the Tribunal had erred in concluding that the policy did not discriminate against recreational users such as Chiasson, following cases such as *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Boisbriand (City)* in holding that claims of discrimination may be made based upon perceived, rather than actual, disabilities. This is consistent with the decision in *Entrop*.

Once there is a finding that a policy is *prima facie* discriminatory, as there was here, a court or Tribunal must then consider whether the policy can be justified as *bona fide*. The applicable test is as follows:

The parties agreed that the first two prongs of the test were satisfied. On the last prong, the Court found that Chiasson's job could properly be classified as safety-sensitive. The Court found that the zero tolerance policy for positive drug tests, combined with automatic termination, included no effort to accommodate those who apply for employment. As a result, the Court found that the only way that the employer could succeed was if it could show that no accommodation was required in the circumstances. The onus is on the employer in this regard.

The Court took particular note of the fact that Chiasson worked for nine days before he was dismissed due to the positive drug test result. This suggested that

- The link between a positive drug test and impairment at work was questionable;
- The employer's claim that drug testing is essential due to Chiasson's safety-sensitive position was also questionable;
- With respect to the level of accommodation required, Chiasson could be treated as an existing employee.

The Court noted that other forms of testing are available, and that other measures could have been considered or employed in order to accommodate Chiasson and others. As a result, the Tribunal's decision was overturned and Chiasson's claim upheld.

This decision confirms that pre-employment drug testing is *prima facie* discriminatory, even for recreational drug users, and that employers must accommodate individuals who test positive.

**Based on an article published in Canadian Employment Law Today.*

## WHAT’S HAPPENING AROUND MILLER THOMSON

**Amanda Stacey** published "Father's transfer of funds through charity found to be valid gift to family" in the *Lawyers Weekly* in September.

The September issue of *Canadian Not-For-Profit News*, edited by **Arthur Drache**, contained the following articles by him: "Listed Shares and Private Foundations", "CIDA Establishes Voluntary Sector Fund", "Anti-Terrorism Chill for Charities Around the World", "Airline Points, Tickets and Charity", and "What is Education?".

**Hugh Kelly** conducted a seminar in late September on "Education and the Law" as part of the Supervisory Officers' Qualification Program.

*The Canadian Taxpayer* contained the following articles by **Arthur Drache**: "Art Flip Settlement Offers" and "Donor Anonymity Requires Careful Planning" in September.

The Fall 2006 issue of *The Advisor Update* contained an article by **Arthur Drache** entitled "Anonymous Gifts May Get Tax Relief"

**Robert Hayhoe** presented (with Heather Card of the Canadian Council of Christian Charities) on "Getting a Grip on Designated Support Raising" and participated in a panel (with Rhéal Dorval of the CRA, David Amy and Michael Loewen) on "CRA Charities Audits" at the Annual Conference of the Canadian Council of Christian Charities. **Rachel Blumenfeld** presented on "Split Receipting and Gifts in Kind" at the Conference.

**Hugh Kelly** published "There are few valid reasons for in camera directors' meetings" in *Canadian Fundraiser* in September.

**Dragana Sanchez-Glowicki** presented an early October seminar on "Estate Planning" as part of the Annual Wills Week sponsored by the Edmonton Community Foundation.

On September 13, 2006 **Kathryn Frelick** resented "Privacy for Not for Profits" workshop for Volunteer Lawyer Service and United Way of York Region.

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