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CHARITIES & NOT-FOR-PROFIT NEWSLETTER

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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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ONTARIO AND QUEBEC SUPPORT DONATIONS TO CHARITIES AND GIFTS OF ECOLOGICALLY SENSITIVE LAND AND QUEBEC CREATES NEW CATEGORY OF CULTURAL OR COMMUNICATIONS ORGANIZATIONS

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Ontario

The Ontario Ministry of Finance, Corporate and Commodity Taxation Branch, announced recently that the Ontario Government intends to parallel the Federal proposals which exempt from tax the capital gains realized on eligible donations of publicly listed securities and ecologically sensitive land made after May 1, 2006.

For this purpose, eligible donations are donations made to registered charitable organizations or public foundations (but not private foundations). Ontario has announced that it proposes to parallel the income tax treatment for individuals and corporations such that the appropriate changes will be made to the legislation governing corporate minimum tax and corporate income tax.

The Ontario announcement is welcome and ensures "that the tax system in Ontario does not create a barrier to charitable giving".

The Ontario measures will be effective for donations and gifts made after May 1, 2006, so the timing will accord with the federal announcement.

Quebec

The Quebec Government confirmed in its Information Bulletin "Harmonization to certain measures of the federal budget of May 2, 2006 and other fiscal measures" dated June 29, 2006, that it would amend the *Quebec Income Tax Act* to incorporate measures introduced to eliminate the tax on capital gains resulting from a gift of publicly listed securities and ecologically sensitive land. The Quebec Government also announced a new category of organizations that will be authorized to issue tax receipts in Quebec for donations and gifts. This new category will expand the category of recognized arts organizations to include organizations that are registered with the Quebec Minister of Revenue as cultural or communications organizations.

The Minister of Revenue may register such organizations if the organization is a non-profit entity, is recommended for registration by the Minister of Culture and Communications and is not a registered charity.

This new category will replace the current category of artistic organizations. Those organizations currently recognized as arts organizations will be deemed effective June 29, 2006 to be registered as cultural or communications organizations. Consequential amendments will be made to the *Quebec Income Tax Act* to permit donations to such organizations to be treated for Quebec purposes in a manner similar to gifts to registered charities. The Government will also introduce specific disbursement requirements that registered cultural or communication organizations must comply with. A future issue will provide further detail on this Quebec proposal.

ALBERTA VOLUNTARY SECTOR INITIATIVE LAUNCHED

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The Alberta Government has recently formed a new council called the Alberta Non-Profit/Voluntary Sector Initiative (the "Initiative"). The purpose of the Initiative is to encourage collaboration between Alberta non-profit/voluntary sector leaders and the Alberta Government. The goal of the Initiative is to ensure future stability, to build the non-profit/voluntary sector, and to help address current and future challenges such as the funding, human resources, insurance, and screening of non-profit organizations in Alberta.

Denis Ducharme, Alberta Minister of Community Development, was quoted in a July 18, 2006 press release as saying "by working together, we can address issues that reduce the ability of the sector to fulfill its vital role in communities across the province". The non-profit/voluntary sector in Alberta does a great deal to improve the quality of life for all Albertans. The Alberta Government recognizes this and decided to take an active role to continue to build and improve the quality of life in Alberta by launching the Initiative. The non-profit/voluntary sector has over 19,000 organizations in Alberta and employs more than 176,000 people in Alberta. Martha Parker, former Executive Director of Volunteer Calgary, will co-chair the Council along with Glen Werner from Alberta Community Development. Ms Parker has expressed the hope that through this Initiative, the non-profit/voluntary sector and the Alberta Government will work together proactively to build a long-term relationship. According to Canada's Survey of Giftgiving, Volunteering and Participating, over 1.2 million Albertans volunteer their time to a non-profit organization. Each volunteer dedicates an average of 175 hours a year. The annual economic impact that the non-profit/voluntary sector has on Alberta is estimated to be $9.6 billion.

The various government ministries currently involved with the non-profit/voluntary sector will have representation on the Initiative's Council. For example, government ministries such as Community Development, Justice and the Attorney General, Seniors and Community Supports, Children's Services, and Government Services, will all be involved. The framework for the Initiative is expected to be submitted to the Minister of Community Development some time in January of 2007.

Miller Thomson LLP will continue to monitor and report to you on the development of this Initiative.

GOVERNMENT PROPOSES TO OVERHAUL HUMAN RIGHTS PROCEDURE IN ONTARIO

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On April 26, 2006, the government of Ontario introduced the *Human Rights Code Amendment Act, 2006* ("Bill 107") which seeks to overhaul the current system of filing, investigating and adjudicating human rights complaints in Ontario by, according to the government, "modernizing Ontario's human rights system to better promote public education, prevent discrimination, and enforce human rights".

The Bill's amendments can be summarized by referring to: (1) changes to the Human Rights Commission; (2) changes to the Human Rights Tribunal; and (3) miscellaneous amendments.

CHANGES TO THE HUMAN RIGHTS COMMISSION

The proposed new role of the Ontario Human Rights Commission (the "Commission") will involve a dramatic change. Under the current system, complaints are filed directly with the Commission. The Commission then considers the merits of the complaint and, based on a preliminary review, decides whether to investigate. An investigation, if appropriate, would involve interviewing the parties to the complaint. Rarely does an investigation occur until at least two years after the complaint was first filed. If, at the conclusion of the investigation, the Commission determines that the complaint is founded, the

Commission may then refer the complaint for hearing to the Ontario Human Rights Tribunal ("Tribunal") for adjudication.

Under Bill 107, complainants will no longer initiate complaints with the Commission. Rather, they will file complaints directly with the Tribunal, which will also be responsible for investigating and adjudicating the complaint. The government hopes that this streamlined process will speed-up the time from when a complaint is filed to when it is adjudicated, and all steps in between.

The Commission's new role will be public education on human rights. The Commission will seek to accomplish this goal by developing public information and education programs that seek to create awareness of human rights. The Commission will also have the authority to investigate allegations of systemic discrimination in a community, institution, industry or sector of the economy.

CHANGES TO THE TRIBUNAL

As stated above, Bill 107 introduces the "direct access model" whereby complainants must file complaints directly with the Tribunal.

At the moment, it is not clear whether the Tribunal will investigate or hear all complaints, or when frivolous complaints will be distinguished from meritorious complaints. While Bill 107 will continue to permit the Tribunal to defer any complaint in accordance with the Tribunal rules, the criteria for determining when a complaint will be deferred on this basis have not yet been drafted.

Bill 107 will also allow employees of a non-unionized employer to choose whether to bring a human rights application before the Tribunal or to seek a monetary remedy for a human rights violation as part of a civil action before the Court. For example, if an employee files a wrongful dismissal law suit with a court, which involves a human rights aspect, the employee will be precluded from also filing a human rights complaint on the same facts with the Tribunal. This amendment will likely result in a much larger number of human rights complaints being decided by the courts.

Bill 107 also removes some limitations on damages. Under the current system, there is no maximum limit on special damages (such as wages and verifiable expenses) that can be awarded due to a human rights violation. In regard to monetary damages for injury to dignity, feelings and self-respect, the Code currently imposes a $10,000 maximum. Bill 107, if passed, will remove the cap on the monetary amount of compensation for injury to dignity, feelings, and self-respect.

MISCELLANEOUS AMENDMENTS

Currently, although the complainant has the right to retain independent legal counsel for a hearing before the Tribunal, the Commission acts as the "prosecuting" party before the Tribunal thereby effectively representing the complainant's interests. Under Bill 107, the Commission will no longer be a party before the Tribunal. While the details contained in the Bill are uncertain, it appears that that there may be financial or legal support available to complainants via a legal support centre. It is unclear, instead, whether the legal support centre will be providing legal representation to all complainants before the Tribunal, and what criteria will entitle a complainant to such representation.

Bill 107 passed Second Reading on June 6, 2006. Committee hearings throughout the province have already commenced.

The above proposed amendments could significantly alter the landscape of the human rights system in Ontario. Miller Thomson LLP will continue to keep you informed of developments in this matter.

GST UPDATE - THE NEW CRA WEB REGISTRY

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An important administrative change was made recently to the CRA website following up on the 2005 Federal Budget commitment to provide an online registry for checking GST numbers. Purchasers (or vendors of real estate, as discussed - see below) who want to confirm that their suppliers are GST registered, and remain

so on the date of the supply, can do so by going to the web registry on the CRA website (www.cra-arc.gc.ca) and filling in the supplier's name in the first box and the nine-digit GST number in the second box. The web registry will confirm registration on the effective date of choice if **both** pieces of information are correct. This will enable the purchaser to confirm that the person is indeed registered by printing off the confirmation and keeping it on file. This will provide proof to auditors of the registration status on a certain date. This is important because the ITC (input tax credit) is not available unless the vendor is GST registered and the purchaser (the GST recipient) has documentary proof thereof as of the date of the supply.

However, the ease of checking the GST registration status of the supplier raises more questions than it answers. Does the Web Registry availability mean that one must constantly be checking a supplier's status? Does it mean that one must check every supplier's status? This seems to put an undue onus on purchasers claiming ITCs. At a minimum, it would seem there is an onus on the purchaser to confirm the GST status of the supplier for any significant supply and on some sort of periodic basis for regular suppliers of consequence. It remains to be seen what best practices are or will be. It would seem prudent to confirm the seller's GST registration in any asset purchase transaction where significant GST is paid.

Non GST Registrants

In the case of municipalities, schools, hospitals and charities, and other public sector bodies, to obtain the refund of the tax (or a percentage thereof), the need for retaining documentary proof of the supplier's GST status is not as clear-cut. There is no provision equivalent to sub-section 169(4) of the *Excise Tax Act* applicable to the public sector rebate calculation. However, the rebate is based on tax payable (or tax paid without being payable) in the applicable period. There is an argument that if the vendor is not GST registered then "tax" was not payable. The Public Service Body Rebate Regulations do not directly address this question and neither does the relevant CRA publication. A prudent course of action would be to confirm the GST status of the vendor of a significant supply before paying the GST on the invoice or built in on a tax included basis.

Does it Work?

The writer has successfully used the Web Registry in a GST appeal to prove the registration status of suppliers to enable recovery of ITCs where the suppliers were independent sales consultants who received selling commissions directly and did not "invoice" the recipient ITC claimant. As the consultants did not send an invoice with their GST number thereon, the ITCs were initially denied. However, the Input Tax Credit Regulations in conjunction with the Web Registry were used to establish the ITC eligibility without the invoices.

There are problems with the Web Registry. The Registry seems to require the complete name of the purchaser as well as the correct GST number. The Quebec QST number registry only requires one or the other. At a minimum, the trade name should be acceptable, if this name was on the GST application. Representations have been made to the CRA by the author in this respect and we will see what happens.

It is also noted that if spelling of the purchaser's name is incorrect the Registry may not confirm registration, so it is absolutely necessary to have and spell the correct legal name of the purchaser along with the correct GST number. In some cases, using the trade name will suffice if the registration application is close to that trade name. If the application is made only in the legal name, the legal name must be the name inputted.

Use of GST Web Registry to Confirm Non-Collection from Purchaser of Real Estate

The Web Registry can also be used to confirm the GST status of purchasers. This is important in real estate transactions. In fact, this would be the most important use of the Registry. A vendor of real estate does not collect GST from the purchaser if the purchaser is GST-registered. The difficulty is determining if the purchaser is *GST registered and retaining proof of registration* as of the date of closing. One can rely on statutory declarations and affidavits, but it is better to enter the purchaser's name in the web registry along with the GST number and confirm it is registered as of the date of closing. This would be absolute proof to the auditor as to why GST was not collected pursuant to section 221 of the legislation.

WHY SHOULDN'T ALL OUR MEETINGS BE *IN-CAMERA*?

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Traditionally (but certainly not uniquely) directors of not-for-profit organizations have displayed a reluctance to conduct their meetings as fully open meetings, during the course of which the members of the organization, and perhaps others, are permitted to attend and listen to the deliberations. Typically, the reasons - fears really - put forward for refusing open meetings usually include:

> "I can be more candid if the only persons present are directors";
>
> "I am embarrassed to speak out in front of other people";
>
> "I am uncomfortable discussing board business in the presence of [members of the organization] / [staff of the organization] / [the public] / [the media]"; or
>
> "It is impossible to conduct an efficient meeting when there are all sorts of other persons present at the meeting, especially if and when they want to join in the debate".

With the growing, and now almost universal, awareness that the directors are and must be accountable for their actions, comes the desirability of making sure that directors' meetings are open and welcoming to any who chose to attend. This in turn calls for a reasoned articulation as to what are acceptable reasons for excluding others from such meetings, that is, conducting private or *in camera* meetings. (Note that the terms are interchangeable.)

Analysis, as well as experience, suggests that use of *in-camera* meetings should be quite restricted. There is only one real justification for prohibiting non directors from attending, and therefore being able to hear what is said: that disclosures made in the presence of non directors are reasonably likely, on an objective basis, to prejudice the interests of either the organization or some other person whom the organization has an obligation to protect. Putting this principle into practice, the exclusion of non-directors from meetings is acceptable when the subject matter under consideration includes or is likely to include:

- the disclosure of intimate, personal or financial information about an identifiable person;
- the possible acquisition or disposition of property;
- issues as to identifiable staff;
- collective bargaining;
- legal advice and litigation; and
- sensitive information the disclosure of which can prejudice the interests of the organization or certain third parties.

Please note that the above is not an exhaustive list.

The fears that open meetings will somehow prevent or inhibit good discussion, that candour will no longer be possible, or that a meeting will become less efficient or effective or get out of control, are unfounded in fact. Many boards have a practice of holding open meetings, either because they are required to do so by law (as is the case in some jurisdictions, for example, Florida condominiums) or because they have chosen to do so. Their experience demonstrates that the directors' good sense and understanding of their duties will always prevail, and soon after initiation of open meetings, it is "business as usual".

There are two further areas respecting private or *in camera* meetings that require some thought and preparation: (1) what controls there should be on keeping records of such meetings; and (2) what special provisions should be implemented for such meetings that are conducted by telephone or other electronic means.

As to content of minutes, the same principles as to what records should be kept apply to minutes of *in camera* meetings as apply to other meetings:

- the place and date of meeting, and the start time;
- the persons present, and who served as chair and secretary;
- the text of all resolutions;
- the results of votes on all resolutions;
- any formal objections of directors; and
- the time of adjournment.

Records of the in camera meetings themselves should be kept separate from the other records, maintaining confidentiality as long as warranted by the circumstances. As a general rule, that requirement for confidentiality continues as long as the organization may have to deal with the subject. For example, a confidential reserve bid on a sale of property should remain confidential until after the sale has been completed, but even later still, until any security on the property (such as a mortgage back) in favour of the organization remains outstanding.

Special provisions are required for meetings that are conducted by telephone or other electronic means. When the directors hold private or *in camera* meetings on the basis that the subject matter falls within those areas where it is justified, consideration must be given to what protection will be maintained. The following are sample rules that might be adopted:

> Telephone conference meetings should be permitted only on/over secure telephone lines; in particular, participation on cell phone lines should **never** be permitted. Similarly, participants should ensure that no persons except authorized participants have access on extension phones on the participants' lines.
>
> The taping or other recording of meetings should be prohibited except by the person to whom the responsibility for taking minutes is assigned.
>
> Each participant should be required to ensure that no other person at his/her location is able to hear any of the content of any discussion.
>
> Each participant should be required to notify the Chair (and the meeting) when (s)he joins the conference call, and when (s)he leaves, even temporarily.
>
> In order that all participants may be aware of who is speaking, each speaker during the meeting should identify him/herself prior to each time of speaking.
>
> The Chair should ensure that, during the telephone conference meeting, each participant is expressly given the opportunity to speak on each matter that is the subject of discussion.
>
> As with all *in camera* session, board members and other persons attending electronically should be required not to disclose any details of any discussion conducted at an *in camera* session.

Private or *in camera* meetings should be considered as the exception not the rule. And before holding private or *in camera* meetings, consideration needs to be given as to how the meeting will be conducted (especially if electronically) and how it will be recorded.

UPDATE ON THE B.C. *CHARITABLE PURPOSES PRESERVATION ACT*

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In our October 2004 newsletter, we advised that the *Charitable Purposes Preservation Act* (the "Act"), S.B.C. 2004, c. 59, which was introduced in the British Columbia Legislature as Bill 63, received Royal Assent on October 21, 2004 and was to come into force by regulation. Our inquiries indicate that the Act is still not in

force and officials with the Ministry of the Attorney General of British Columbia's Constitutional and Administrative Law Unit are not able to provide any indication as to when it might come into force.

The Act is a response to cases in Ontario and British Columbia involving the Christian Brothers of Ireland in Canada, a Roman Catholic teaching order which was forced to wind-up following claims for damages resulting from the sexual abuse of boys by members of the order in the Christian Brothers' Newfoundland orphanage. As a result of decisions in both the B.C. and Ontario courts, all of the assets of the Christian Brothers, including two schools in B.C. that were held pursuant to a special purpose charitable trust, were made available to satisfy the claims for damages, even though the claims arose out of circumstances wholly unrelated to the special purpose trust. The rationale behind the Act is to provide some protection for the charitable purpose behind gifts given to charities and dealt with in accordance with the Act. The Act provides that charitable gifts given for a discrete purpose cannot be made available to satisfy the claims of creditors against the charity, unless the claim relates to the discrete purpose.

Miller Thomson Charities and Not-for-Profit Specialist and Commodity Tax Specialists work together extensively to assist our clients with GST and PST compliance.

AROUND MILLER THOMSON

The August issue of *Canadian Not-For-Profit News*, edited by **Arthur Drache**, contained the following articles by him: "Backsliding", "Putin Addresses NGO Law at Civil G8 Meeting in Moscow", "Feds Set Up Panel to Look at Granting Process", "Outside Analysis of VSI Published", "Creating a Non-Profit Requires Care", and "British Foundation Issues Bond to Raise Investment Capital", as well as "Limited Partnership Investments by Charities", by **Robert B. Hayhoe**.

The August 2006 edition of *Charitable Thoughts*, edited by **Susan Manwaring** contained "Backsliding" by **Arthur Drache and** “Charitable Donations and Flow-Through Shares” by **Susan Manwaring** and **Bryant Frydberg.**

The August issue of *The Canadian Taxpayer* contained the following article by **Arthur Drache** "Buffett Gift Should Be A Spur to Flaherty".

The September 8, 2006 edition of *The Lawyers Weekly*, contained the following article by **Amanda J. Stacey** "Father's transfer of funds through charity found to be valid gift to family".

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