MILLER THOMSON LLP

Barristers & Solicitors

Charities & Not-For-Profit Newsletter

Editor's Note
Due to the success of this newsletter, future issues will be circulated separately from the main newsletter. If you wish to continue to receive this newsletter (and have not yet advised us), please let us know by e-mail to: charitieseditor@millerthomson.ca.

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Recent Trends in Charitable Giving

We recently attended the annual conference of the Canadian Association of Gift Planners ("CAGP") in Halifax. To close the conference, Frank Minton, a leader in the gift planning field in North America spoke about recent trends in charitable giving. This article shares these trends with you.

1. There has been an increase in the size of the donations given to charities; however, the percentage of individuals in Canada filing tax returns and claiming donations in their tax returns claiming credits for the charitable donations has decreased from 25.9% of the tax filers in 1990 to 20.9% in 1999.
2. There has been a significant increase in gifts of listed public securities over the past couple of years. This is not surprising given the very beneficial tax credit available under the *Income Tax Act* (Canada) in respect of such gifts.
3. There has been a marked growth in international grant making by American foundations. Under the *Internal Revenue Code* an American registered charity is permitted to make donations to foreign charities not otherwise registered in the United States. Canadian charities should look to sister or similar charities when fundraising.
4. There has been a decrease in the use in Canada of the private foundation. This is not surprising given the relatively unattractive environment for private foundations under the Canadian tax legislation.
5. There has been an increase in "Gift Funds" which are being used in the United States as a replacement for private charities.
6. There has been a marked increase in the use of "Advised Funds". Such funds are like endowments but they are completed through a community foundation or any other type of charity; they allow a donor to give to the charity and other charities and to provide input and advice in the fund over time.
7. Investment policies for foundations and endowment funds reflect a total return on an investment type policy which focuses on preserving the funds and the cashflow for the charity. The CAGP would like to see amendments to the Canadian rules which would allow for the implementation of a true "total" return policy form of investing.
8. There is an increase in the role of the allied professional in planned giving. This is not surprising. As more allied professionals become aware of the role of planned giving in charities and in estate planning, the allied professional can be a useful source of donors for the charity over time.
9. It continues to be the fact that bequests are the primary source of donor gifts and planned gifts of any significance to charities. Statistics show that most gifts to charities come from wills which have been revised or drafted within five (5) years of the date of death. A subset statistic in this category is that 85% of the gifts which are made to charities through wills are not known to the charity until the death of the individual.

10. The internet and enhanced computer technology is becoming a more important tool for charitable giving. This trend is expected to continue.

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Gifts by Will

The *Income Tax Act* provides that "where an individual by the individual's will makes a gift," the gift is deemed to have been made prior to death so that the resulting charitable donation tax credit can be used against income in the year of death. Since death results in a deemed disposition of all assets prior to death there is often a large capital gain in the year of death. The donation tax credit can shelter some or all of the tax on this gain.

The Canadian Customs and Revenue Agency ("CCRA") recently began to take the position that where the executors of an estate could exercise discretion with respect to a charitable donation, the gift was not one made by will, with the result that it could not be carried back into the year of death. The CCRA has now issued a technical interpretation which revisits the issue and provides clarity.

The CCRA now accepts that where a will provides for the distribution of an ascertainable sum of money among a list of charities (with the specific portions to be determined by the executors), the gift is made by will. To the extent that the discretion relates to the identity of unlisted charities or even to whether to make a gift at all, the CCRA continues to take the position that the gift is not one made by will.

The technical interpretation also deals with the situation where an individual leaves a bequest to a private foundation which is created under his or her will. The CCRA used to take the position that since the foundation did not exist prior to death, a gift to it could not be carried back prior to death. The CCRA now accepts that this does not prevent the gift from being carried back into the year of death provided that the gift is transferred to the charity in a timely manner.

To the extent that large testamentary gifts are planned or received, it is likely worth obtaining specific advice to enable the appropriate tax treatment to be obtained.

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Bequest Administration Cases

***Silver Estate v. Silver* (2000), 35 E.T.R. (2d) 287 per Cullity J.**

Upon the death of the testator, the executors of the Will, who were also trustees under testamentary trusts, applied to the Court to vary the trusts pursuant to the *Variation of Trust Act,* so as to manage the trusts in a more tax-effective manner. All the beneficiaries under the Will consented to the variation. The Court's approval was sought on behalf of minor, unborn, or unascertained beneficiaries.

The issue for the Court was whether the variation should/could be approved as the Will had not been probated. The application was granted. The Court found that as the validity of the Will was not in issue, the general requirement that a grant of probate of a Will must be obtained before a Court may hear a matter thereunder did not apply. It depended on the circumstances. In this case, none of the parties were relying on the right or title of the executors to deal with the property of the deceased, the variation would affect no one else, there would be no detriment to the beneficiaries who were not *sui juris,* and there was no evidence that creditors were at risk without probate. Accordingly, the Court held that it should not intrude and insist that the validity of the Will be proved. However, it did feel obligated to exercise its jurisdiction to determine whether, in fact, the Will was valid before addressing the merits of the proposed variation. It was. Having made that determination, the Court was not compelled to require the executors to obtain probate against their wishes.

***Curley v. MacDonald* (2000), 35 E.T.R. (2d) 201 per Durno J.**

The deceased held a Registered Retirement Savings Plan ("RRSP") and three life insurance policies, which named three children of a previous marriage as beneficiaries. The deceased's Will named his second wife as estate trustee, directed her to pay income taxes and debts due in respect of the estate, and made her the residual beneficiary of the estate. The estate did not have sufficient funds to pay the taxes on the RRSP or to repay loans taken on the three insurance policies and refused to pay the debts. Accordingly, the beneficiaries sought a Court Order requiring the wife to pay the taxes and loans out the estate. The Application was granted in part.

The Court, noting that section 160.2 of the *Income Tax Act* makes no reference to either the estate or the beneficiaries as having primary responsibility for tax payment, determined that the primary responsibility rests on the estate, when it has sufficient assets to pay the taxes. In addition, with respect to the RRSP, the funds were deemed a payment to the deceased immediately before his death pursuant to subsection 146(8.8); and, in conjunction with subsection 153(1) of the *Income Tax Act,* the income tax was payable by the estate.

With regard to the loans payable on the insurance policies, the Court noted that as the deceased had not entered into any agreements to repay the loans taken on the insurance policies by a particular date, the deceased was not personally liable. The amounts payable under the policies were the value of the policy less the loans and interest, which were to be deducted from the proceeds payable on the policy.

***Re Nicholson Estate* (2000), 35 E.T.R. (2d) 126 per Durno J.**

Four of twelve beneficiaries of the deceased's estate filed objections to the passing of the accounts, as it related to the sale of certain items. The objections were rejected and the accounts passed as submitted.

The Court confirmed that the onus of proof on a passing of accounts is on the trustee. The standard of care and diligence required of a trustee in administering a trust is, "a person of ordinary prudence in managing his or her own affairs"; a trustee is not to be held to a standard of perfection.

With respect to the sale of certain items, the Court held that not every sale of estate property must be an open sale, in a sense that the sale is advertised and all members of the public are given an opportunity to purchase the property. Rather, what is required is that "a fair price be obtained having regard to the market value of the subject property". Even the stated intentions of the deceased inconsistent with his Will are irrelevant. While noting that advertising of property is usually required in the case of a home or a farm, the Court found that it was not an absolute rule. Thus, there was no restriction on how an item is sold as long as a fair market price is obtained.

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Payment of Director Fees – Ontario Non Share Capital Corporations

We all make assumptions as a consequence of conventional wisdom. As a case in point, conventional wisdom has often postulated that it is not lawful for an Ontario Non Share Capital Corporation to pay remuneration to Directors for serving as such. This view is fostered at least in part by the position (which we believe is fundamentally flawed) taken by the (Ontario) Public Guardian and Trustee that, since Directors of charitable corporations cannot profit from their position, they cannot be remunerated for their services as Directors.

This typically results in the perception that a clause is required in the Letters of Patent, or in the General Working By-law of Non Share Capital Corporations to the effect that:

> The Directors of the Corporation shall serve as such and as members of any Committee (including, without limitation, the Executive Committee and a Standing, Ad Hoc or other Committee) without remuneration; provided however that nothing in this Section shall prohibit a Director from receiving:
>
> > Reimbursement for the reasonable expenses of such Director in connection with that person's services to the Corporation as a Director and as a member of a Committee; and
> >
> > Reasonable remuneration and expenses for the services of that person to the Corporation in any other capacity.

In a recent experience, conventional wisdom and our assumptions based on that conventional wisdom turned out to be dead wrong.

Although in the case of a charitable corporation it may not be acceptable to pay Directors for their services as such, in the case of a Non Share Capital Corporation that is **not** a charity, there is no restriction preventing payment to Directors for their services as Directors, unless a restriction to that effect is expressly found in the Letters Patent, Supplementary Letters Patent or the By-laws. Note the universal caveat – that actions taken by the Directors must be in the best interest of the Corporation – applies just as much to this issue as to any other.

If there is no restriction in Letters Patent or Supplementary Letters Patent: all that is required is a by-law, enacted by the Directors and approved by the members, that authorizes such payment.

If Letters Patent or Supplementary Letters Patent contain a restriction and Directors and members wish to provide remuneration, there are two steps required. First, an Application must be made for Supplementary Letters Patent to remove the restriction. Second, the Directors must enact a by-law to authorize the payment, and that by-law must be approved by the members.

Note that even after the (further) Supplementary Letters Patent have been issued, no payment may be made to the Directors until a further by-law authorizing the payment is enacted by the Directors and approved by the members.

We would be pleased to assist any Non Share Capital Corporation, that is not a charity, to make whatever revisions are necessary to implement this type of payment for Directors.

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Anonymous Charitable Donations

The *Income Tax Act* provides that in order for an individual or corporate taxpayer to receive a tax credit or a tax deduction for a donation to a registered charity, it is necessary to file with the tax return a charitable donation receipt in prescribed form. The Income Tax Regulations provide that an official receipt must contain the donor's name. Thus, on the face of the Regulations, it is not possible for a donor to a registered charity to make an anonymous donation yet still receive an official donation receipt.

In 1997, the Canada Customs and Revenue Agency ("CCRA") issued a ruling (which is now publicly available) to a particular taxpayer which permitted anonymous receipting in certain circumstances. The ruling accepted that a donation could be made by an agent for the donor (in that case, the agent was the donor's accounting firm) without the disclosure of the donor's identity to the registered charity. CCRA accepted that if a receipt was issued in the name of the agent, the charitable donation tax credit could still be claimed by the donor if the donor provided to CCRA proof that the donor had advanced funds to the agent (cancelled cheques) as well as documentary proof of the agency agreement between the donor and his agent.

Since this ruling is not based in any obvious way upon the *Income Tax Act* and Regulations, a donor wishing to rely on such a structure in order to make an anonymous donation, would be well advised to seek their own income tax ruling. We have recently contacted the CCRA Rulings Division and have received informal confirmation that it has not abandoned the position described in its published ruling.

As an aside, one wonders if the infamous donation from the law firm of Bennett Jones LLP to the Canadian Alliance political party was actually an anonymous donation made in a way similar to that in the published ruling.

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What's Happening Around Miller Thomson

On April 13, 2001, **Jasmine Sweatman, Robert Hayhoe** and **Linda Pearson** of the Canadian Cancer Society, spoke on "Planned Giving: Nuts and Bolts" at a seminar offered by the Volunteer Lawyer Service of the Canadian Bar Association – Ontario.

At the CAGP National Conference held from 8 to 12 May 2001 in Halifax, **Susan Manwaring** spoke on "Gift Planning with the Private Company Owner/Manager" and **Jasmine Sweatman** was part of the presentation on LEAVE A LEGACY™ at the Leader's Forum.

Robert Hayhoe is the author of a book entitled *Fundraising from Canada – The Complete Guide for Charitable Organizations Outside of Canada,* published by Chapel & York of London, England.

Jasmine Sweatman co-chaired a CBA-O Charities and Not-For-Profit Section Program on "The Taxation of Non-Profit Organizations" on May 29, 2001 and **Robert Hayhoe** spoke on "The Taxation of Non-Profit Organizations".

On June 7, 2001, **Jasmine Sweatman** and **Debbie Campbell** conducted an educational seminar and workshop for charities on Estate Administration, Accounting, and Litigation Management.

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Note:

Miller Thomson's Charities and Not-For-Profit Newsletter is provided as an information service to our clients and is a summary of current legal issues of concern to business persons and their advisors. These articles are not meant as legal opinions and readers are cautioned not to act on information provided in this newsletter without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome and should be directed to:

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