MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade Mark Agents

# Charities & Not-For-Profit Newsletter

*The Miller Thomson LLP Charities & Not-for-Profit Newsletter is published periodically by the Charities & Not-for-Profit practice group as a service to our clients and the broader voluntary sector. We encourage you to forward the email delivering this newsletter to anyone (internal or external to your organization) who might be interested. Complimentary email subsciptions are available by contacting charitieseditor @millerthomson.ca.*

## May 2003

## Inside

Registered Charities and Political Activities

Expanded Property Tax Exemption for Charities

CCRA Policy on Volunteer Expenses

Corporate Record Keeping

Statutory Liability of Directors and Officers - An Overview

Around Miller Thomson LLP

## Registered Charities and Political Activities

**by**

Susan M. Manwaring
*Toronto*
*416.595.8583*
*smanwaring@millerthomson.ca*

The Canada Customs and Revenue Agency ("CCRA") has released a draft Information Circular (the "Concept Draft") summarizing its administrative position on Registered Charities and Political Activities. It can be found at the CCRA website <http://www.ccra-adrc.gc.ca/tax/charities/consultations/political_activities-e.html>. Under the *Income Tax Act*, a charitable foundation or charitable organization must devote all of its resources to its charitable purposes. However, subsections 149.1(6.1) and (6.2) deem a charity to have met this requirement if it devotes "substantially all" of its resources to its charitable purposes and devotes some remaining resources to ancillary and incidental political activities which are not prohibited political activities. These provisions ensure that charities that devote not more than 10% ( "substantially all" is often considered to be 90%) of their resources to political activity do not have their charitable registration revoked.

Political activities have historically been considered by the courts to be non-charitable. Such activities have been considered by the courts to include the support of a political party or candidate for public office and activities to retain, oppose or change the law or policy or decision of any level of government in Canada or a foreign country.

The Concept Draft is interesting for a number of reasons. First, the form of Draft and manner in which it was released on the website to the public is further indication of the new consultative process which is beginning to be used by the Charities Directorate.

Second, the Draft is relieving. CCRA confirms that it has narrowed what it considers political activities to no longer include many types of activities intended to inform public opinion on an issue. These types of activities have historically been treated as "political" by CCRA. CCRA expects that this change in policy should enable charities to more effectively carry out a public awareness program. This narrowing of the administrative position is welcome.

Third, the Concept Draft is helpful in that it comments on a number of quite detailed hypotheticals. For many organizations, the examples will provide a useful guideline for review when categorizing activities as political or charitable.

It is easy to think of many charities which are intended to educate the public and broaden support for charitable objectives. Their activities clearly could be considered to fall into attempting to alter public opinion. The question which many charities have to deal with is whether such activity is "political". For these purposes, political activity is divided in the Concept Draft into the following three categories:

1. Prohibited activities
2. Political activities
3. Charitable activities

Prohibited activities are those which would give grounds for revocation of the charity in any circumstance. There is no *de minimus* rule applicable to prohibited activities. These are partisan political activities and activities which involve the direct or indirect support of or opposition to any political party or candidate for public office. Charities should not be involved in such activities.

Political activities are activities which call for political action; communicate to the public that the law or policy of any level of Canadian or foreign government should be retained, opposed or changed; or activities which are intended to pressure a politician or bureaucrat to retain, oppose or change the law or policy of any level of Canadian or foreign government. These activities can be pursued, but must be incidental and ancillary to the charity's objectives; in other words, comply with the *de minimus* rule. Activities which do not fall in these two categories but which are communications with the public or public officials are appropriate charitable activities and need not be included when calculating the percentage of a charity's resources dedicated to political activity.

The Concept Draft expands the current administrative position that charities are limited in the amount of their resources which can be devoted each year to "political activities" to not more than ten percent of the charity's total resources. The term "resources" is not defined in the *Income Tax Act* but is stated to mean the aggregate of a charities total financial assets as well as everything the charity can use such as its staff, volunteers including directors, its premises and its equipment. For small charities, the CCRA's Concept Draft is expansive. In any year, a charity will be able to spend on political activities up to 20% of its resources if it has annual income less than $50,000, up to 15% if income is between $50,000 and $100,000, and up to 12% if income is between $100,000 and $200,000.

Finally, CCRA confirms a further relieving administrative provision applicable to a charity that embarks on an extraordinary political activity. The charity can overspend in one year by using the unclaimed portion of its resources it was allowed to spend but did not on political activities in up to two preceding years.

While submissions to CCRA on the Concept Draft were due April 30, 2003, further drafts are likely. Further, the Information Circular, when released, will confirm that charities or their advisors are entitled to contact CCRA, prior to the charity embarking on the activity, for assistance in determining which of the three categories the activity would fall under and how it would be dealt with for purposes of these rules. The Information Circular when released will certainly assist charities and their lawyers in understanding the CCRA's administrative position in this area.

## Expanded Property Tax Exemption for Charities

**by**

Michael L. Walker
*Vancouver*
*604.643.1288*
*mwalker@millerthomson.ca*

Recent amendments to the *Assessment Act* (Ontario) governing property tax exemptions for charities have been the subject of litigation in the Ontario courts. The result appears to be a more liberal interpretation of the notion of "occupation" of property by a charity, at least maintaining and potentially widening the application of property tax exemptions for some charities.

The decision involved Ottawa Salus Corporation, a registered charity providing housing and support services for people with mental illness. Salus owns several properties in Ottawa that were exempt from property tax for many years. In 2001, the Ontario Municipal Property Assessment Corporation determined that some of Salus's properties had lost their exemption following a 1997 amendment of the *Assessment Act*.

Until 1997, the exemption contained in s.3 (1) of the *Assessment Act* applied to:

> "land of an incorporated charitable institution organized for the relief of the poor…conducted on philanthropic principles and not for the purpose of profit or gain, that is supported, in part at least, by public funds, but only when the land is owned by the institution and occupied and used for the purposes of the institution." After the 1997 amendment, the exemption applied to:
>
> "land owned, used and occupied by…any charitable, non-profit philanthropic corporation organized for the relief of the poor if the corporation is supported in part by public funds."

The properties in question were small apartment buildings owned by Salus, each with self-contained apartments as well as office and resource space used for Salus programs. Salus provided limited staffing, but no support staff lived on site. Each resident entered into a lease with Salus giving the resident exclusive possession of the apartment, bringing the relationship under the law of landlord and tenant and the provincial *Tenant Protection Act.*

The Ontario Superior Court of Justice held at trial that the properties were no longer exempt from property taxation. The amended legislation, according to the trial judge, required the property to be physically occupied by Salus, as opposed to the previous requirement that it simply be occupied and used for Salus' purposes. Following a line of Ontario cases going back several decades, the trial judge held that the leases gave the residents actual occupation and control of the apartments; therefore, Salus was only entitled to an exemption for the portions of the buildings occupied by its offices and resource space.

On appeal, a three-judge panel of the Ontario Divisional Court overturned the trial judgment and gave Salus full exemption. Despite the fact that Salus had given exclusive possession of the apartments to its residents, the appeal court held that it could still be held to occupy the entire buildings:

> "The real property of Salus that is the subject of the assessment is "occupied" by Salus in the sense that it is controlled, held and employed by Salus as the necessary prerequisite and means to fulfill its charitable mandate. The land is used solely for the charitable purposes of Salus; without the land, it would be impossible for Salus to fulfill its charitable purposes. The fact of physical occupation by each tenant of a given rental unit does not detract from the fact that the land as an entirety is "occupied by" Salus in the carrying on of its charitable business or activity. Indeed, the only way that Salus can carry out the very core purpose of its charitable mandate is to have the rental units in its building…The tenants physically occupy their individual units; Salus occupies the property as an entirety…"

Argument before both the trial judge and the appeal court centred on an earlier British Columbia case involving an organization similar in purpose and approach to Salus. Coast Foundation Society, a registered charity, owned 17 scattered condominium apartments in Vancouver, and rented them under "license agreements" to psychiatric patients. The *Vancouver Charter* contained an exemption from property tax for:

> "real property…of which an incorporated charitable institution is the registered owner or owner under agreement, and which is in actual occupation by such institution and is wholly in use for charitable purposes."

The City of Vancouver argued that the scattered apartments could not be considered to be occupied by Coast, as Coast had no on-site staffing presence. The BC Supreme Court held that staffing was irrelevant. The court concluded that occupation by the residents constituted occupation by Coast in this situation, particularly in light of the fact that the residents did not have exclusive possession as tenants, but were licensees who could be removed or relocated by Coast at will and without notice. The decision was upheld on appeal to the BC Court of Appeal.

The lower court in *Salus* distinguished its case from Coast on the basis that Salus's residents were full-fledged tenants, whereas Coast's were mere licensees. The court concluded that Coast was applicable only where residents occupied their units under revocable licence agreements.

The appellate decision in *Salus* appears to cast aside this distinction. In the view of the appeal court, premises may be occupied by a tenant with the right to exclusive possession, without ousting the owner as "occupant" for property tax exemption purposes, as long as the occupation by the tenant is consistent with the charitable purposes of the owner.

The result may be that other residential properties owned by registered charities with the purpose of housing specific population groups may become exempt from property taxation, regardless of whether the residents occupy their premises as licensees or as full-fledged tenants. Any conclusion, of course, must be based on the specific exemption provisions of the applicable statutes.

## CCRA Policy on Volunteer Expenses

**by**

Robert B. Hayhoe
*Toronto*
*416.595.8174*
*rhayhoe@millerthomson.ca*

As part of our continuing series on new and newly released CCRA Charities Directorate policies, we wish to draw attention to CPC - 025 which clarifies the CCRA's position on volunteer expenses <http://www.ccra-adrc.gc.ca/tax/charities/policy/cpc/cpc-025-e.html>.

The CCRA confirms that expenses of volunteers can properly be the subject of a charitable gift, provided that the payment of the expenses by the volunteer on behalf of the charity meets the legal definition of gift as modified by the *Income Tax Act* (voluntary transfer of property without consideration and with donative intent). The CCRA then proceeds to discuss certain situations that arise with some frequency.

The first example is of a volunteer paying travel expenses for a trip abroad to do work for a charity then following the trip with a long vacation. The CCRA confirms that unless the vacation is short in comparison to the volunteer work period, the value of the vacation would be sufficiently large as to suggest that the volunteer did not intend to make a donation, but rather intended to take a vacation.

The next example is of a missionary who is travelling on behalf of a charity but who donates her own travel expenses. The CCRA confirms that the travel expenses must be reasonable in order for the cost of them to constitute a gift. Specifically, the example is of the missionary travelling economy class and staying at a bed and breakfast while doing missionary work. The CCRA confirms that the cost of these travel expenses (if paid by the missionary) would be properly receiptable by the charity.

## Corporate Record Keeping

**by**

Brenda Taylor (Law Clerk, Corporate Services)
*Markham*
*905.415.6739*
*btaylor@millerthomson.ca*

It is common for corporate records of not-for profit corporations and charitable organizations to be maintained "in house" for cost efficiency reasons, with lawyers being involved in the establishment of a corporation and subsequently only when specifically requested by the client. We have noted common threads when reviewing records maintained by clients:

- Actions are not always properly tracked or documented by the appropriate parties (i.e. Directors vs. Members);
- The "technical detail" necessary in tracking corporate action and recording changes frequently gets missed or is done incorrectly; and
- Government reporting is frequently out-of-date.

Directors, officers and members are the people who are responsible for either making the decisions, generally managing a Corporation and/or electing its Board. Proper approvals must be obtained and documented. While Directors and Members may be the same people, they have different responsibilities and are subject to different legal requirements depending on the role. In order to maintain corporate records efficiently, we suggest a plan:

- Assign responsibility for maintaining corporate records - the same people should have ongoing responsibility and familiarity with ALL corporate records. Those people should also be well trained in the requirements for corporate record keeping.
- Consider a legal due diligence review of your records- to make sure that the actions taken have been properly documented and reported. If problems have occurred, they can be identified and rectified before they are repeated or give rise to adverse consequences.
- Perform regular checkups - use preparing for the annual meeting as a benchmark for assessing what has gone on over the last year, what may have to be ratified or repaired as part of the annual meeting, as well as what kinds of things should be considered for the upcoming year.
- Use checklists for documenting actions - There are a series of steps to be taken with any corporate action or change. Using a checklist not only tells you what those steps are, it helps with keeping track of what has been done, what remains to be done, and who is doing what.
- Utilize available electronic search/filing - There is more and more that we can both search and file on-line. Information contained on paper filings is frequently re-entered into a data base by government agency personnel - because of the repetitive and tedious nature of this work, errors frequently occur. Electronic filing through our office eliminates this frustration and ultimately reduces costs.

*Minute Books in General*
Minute books and other corporate records should include:

- All original charter documents;
- All by-laws;
- Up-to-date registers for directors,oOfficers and members (including addresses for service and residence addresses, as applicable, dates of election, appointment and/or resignation);
- Duplicate copies of all government filings, including annual filings, change notices and other specialty filings;
- Contact list, including addresses for each director, officer, member and auditor (for sending required notices of meetings and other mailings);
- Copies of meeting notices or waivers;
- Minutes/corporate proceedings of directors and members organized in date order;
- Copies of financial statements; and
- Copies of banking documents.

*For Charities*
- Charitable registration particulars;
- Copies as filed/issued:
- T3010 charity information returns; and
- Duplicate charitable tax receipts.

*For Non-Charities*
- Copies as filed/issued of information returns.

Government filings are mandatory and are critical to maintaining legal status. There are different government filing requirements, depending on whether a corporation is federally or provincially incorporated, and whether it is charitable or non-charitable. We would be pleased to advise a on the filings that a corporation is required to make or perform electronic searches to help in determining compliance.

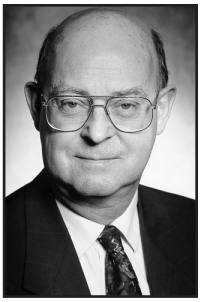
Failure to keep up with government filings can result in:

- The cancellation of a charter;
- Loss of registered charity status;
- Slow-down of government approvals for amendments; and/or
- Time-consuming and costly clean-up charges.

It is important to ensure that corporate and legal status is protected at all times. Properly maintaining your corporate records results in:

- Meeting various legal or statutory requirements;
- Maintaining regulatory compliance with all applicable levels of government;
- Validating corporate actions taken by the Board of Directors, Officers and Members;
- Minimizing time spent on correction or clean-up; and
- Maximizing time available for non-profit or charitable purposes.

Miller Thomson LLP lawyers (assisted by experienced law clerks) are available to provide a range of corporate recordkeeping services, from preparing and maintaining all necessary records to providing custom training to staff with corporate recordkeeping responsibilities.



## Statutory Liability of Directors and Officers - An Overview

**by**

Hugh M. Kelly, Q.C.
*Toronto*
*416.595.8176*
*hkelly@millerthomson.ca*

Charities and not-for profit organizations are often incorporated as not-for-profit or non-share capital corporations, under either federal or provincial statutes. They carry on their businesses mostly in accordance with their charter documents. Their members, directors and officers are by and large comfortable that because of the incorporation, none of them is likely to be exposed to personal liability. And although this may be true in a very general sense, directors and officers are not immune from personal responsibility for their own acts, or in many cases for the acts of the corporations in which they participate. As personal responsibility increases in the commercial world, so too does it increase in the non-share capital world.

There are many statutes that impose liability upon directors in their personal capacities for the acts of the corporations of which they are directors. In some cases, a director may be able to assert a defence, and generally that defence will be that the director has acted with due diligence (more on this in a moment). In other cases, the liability is absolute, that is, if the corporation has committed the offence, then the director may have personal liability.

What follows are a few of the instances that are more likely to arise in the course of the activities of a non-share capital corporation. Note that this is not intended to be a complete or exhaustive list, but merely to provide illustrations of the kind of statutory obligations imposed upon directors. Each Board of Directors should seek its own counsel as to a more complete list of the obligations that may be imposed upon the directors of a particular Board.

First on the list, of course, are the personal obligations imposed upon directors by the various taxing statutes, starting with the *Income Tax Act* (Canada), to ensure that the corporation makes source deductions in respect of remuneration of employees and remits those deductions to the Canada Customs and Revenue Agency (the "CCRA"). If the corporation fails to do so, directors are liable (jointly with the corporation) for the amount of the deduction plus interest and penalties.There are corresponding obligations imposed in respect of *Canada Pension Plan* contributions and *Employment Insurance Act* contributions. Similarly, where a corporation fails to collect and remit federal goods and services tax, or provincial sales tax, liability for the uncollected and/or unremitted amount together with interest and penalties falls upon directors.

There is no uniformity to the defences available to directors under these taxing statutes. Generally, however, a proceeding against a director personally must be commenced within a time limit set out in the particular statute, ranging from two to six years. In addition, in the case of former directors, the claim must be brought against the director personally within a specific limited period of time after (s)he ceased to be a director. In some cases, a director may avoid personal liability by showing that (s)he exercised the degree of care, diligence and skill to prevent the failure of the corporation that a reasonably prudent person would have exercised in comparable circumstances. The CCRA, for example, suggests in Information Circular IC 89-2R <http://www.ccra-adrc.gc.ca/E/pub/tp/ic89-2r-err/README.html> that a director should take positive action to establish the defence of due diligence by:

1) Establishing a separate account for withholdings from employees and remittances;
2) Calling upon financial officers of the corporation to report regularly on the continued implementation of these controls; and
3) Obtaining regular information that withholding and remittances have in fact been made during all relevant periods.

Turning next to the *Canada Corporations Act*, this statute makes directors personally liable for a maximum six months unpaid wages due to employees for services performed for the corporation. Although the "due diligence" defence may not apply, a director must be pursued within six months after the corporation has been sued and failed to pay in full, and then only while the person was a director or within a short period after ceasing to be a director (one year). There is no consistency in the case of provincial corporations, only some of which parallel the federal concept.

Then, under provincial occupational health and safety legislation, there are the personal responsibilities for the health and safety of employees imposed upon directors and officers to take all reasonable care to ensure that the corporation complies with the statute, regulations, and orders under the legislation. Penalties for conviction for failure to ensure compliance under these statutes vary and can include significant fines ($25,000 for example) and/or imprisonment (for up to a year or more). In part because of these penalties, the defence of due diligence is available to an officer or director, and a prosecution must be commenced within some period, (one year is typical) after the last act or default occurred.

Under some statutory regimes like the *Canada Human Rights Code*, personal liability of a director can follow in circumstances in which the director engages directly in prohibited practices. Correspondingly, under other statutes like the *Canada Labour Code*, a director may be held personally liable for authorizing, permitting or acquiescing in the contravention of the statute.

Then there is environmental legislation where a duty is imposed upon officers and directors of corporations when there is a possibility of environmental damage from the corporation's operations, or for failure to provide information to the Minister, or to take protective measures or warn the public. Directors may be exposed to personal liability for failure of the corporation itself to take all reasonable care, regardless of whether the corporation itself has been charged and/or convicted. Penalties are severe: fines up to one million dollars and imprisonment for up to five years. And it gets worse: in addition to the costs of the investigation, directors may have to indemnify persons proving loss or damage as a result of the breach of applicable environmental regulation. To defend him/herself successfully, a director will likely have to either:

- Establish that the corporation did not commit the offence, or
- Raise a reasonable doubt with respect to the question of whether the accused director directed, authorized, assented to, acquiesced or participated in the commission of the offence by the corporation, that is, whether the accused had the authority to prevent the commission of the offence and whether the accused had actual and not constructive knowledge of the facts underlying the offence - this is not quite the same as due diligence as such.

As environmental issues come to have a greater public profile, the prospect of future actions against directors personally also increases, as they are the directing minds by which the corporation acts.

It should be noted that typical by-law provisions granting indemnities to directors and officers may not be of much protection where directors face penalties for their failure, and the failure of the corporation, to observe these statutory obligations. Even directors and officers indemnity insurance may not protect against some liabilities.

There are other (perhaps dozens of) provisions in the federal and provincial statutes that may impose a personal liability upon directors of non-share capital corporations. Prudence suggests the wisdom of seeking the assistance of legal counsel for the corporation to identify which of these requirements might apply to the members of the Board of Directors, and what actions the directors individually may or must take in order to protect themselves. Miller Thomson LLP lawyers are active in many of the legal areas where personal liability can arise. We are well-suited to defend claims against directors and officers and to provide preventive advice to directors and officers.

## Around Miller Thomson

**Hugh Kelly** published "You mean I could be responsible for that? - Directors Are Not Immune From Responsibility For Their Acts" in the March 2003 *Association Magazine* (published by the Canadian Society of Association Executives). In addition, **Hugh Kelly**. and Dr. Richard Biery of the Broadbaker Group published an article "Industry Canada's Unjustified Criticism of Carver Policy Governance©" in the *CCCC Bulletin* published by the Canadian Council of Christian Charities.

In March, **Jasmine Sweatman** spoke at the Ontario Bar Association's Annual Institute on "The Charity as Estate Beneficiary".

**Susan Manwaring** published an article "Registered Charities and Political Activities" in the *Lawyers Weekly* in April.

**Robert Hayhoe** published an article "December Tax Changes for Charities" in the March issue of *The Bottom Line*.

In April, **Sandra Enticknap** spoke to a lunch meeting of the Pionairs (an organization for retired airline industry employees) on the topic of "Elder Law", which included a portion related to charities and charitable giving.

In May, **Sandra Enticknap** took part in a panel (with Diana Reid of BMO Harris Private Banking, Janice Margolis of the B.C. Cancer Foundation and Grant Monck of Lester B. Pearson College of the Pacific) titled "Will Challenges: a Potpourri of Issues Related to Charities and Bequests" sponsored jointly by the Canadian Association of Gift Planners, Vancouver Roundtable and the Estate Planning Council of Vancouver.

Miller Thomson LLP was a Plenary Sponsor of the 10th Annual National Canadian Association of Gift Planners Conference in Vancouver in late April. **Susan Manwaring** spoke on "How to Ensure That You, the Gift Planner, Are Not Exposed to Liability." **Sandra Enticknap** chaired and **Rachel Blumenfeld** (replacing **Jasmine Sweatman** who is on maternity leave) took part in "Navigating Capacity and Undue Influence Issues - a Panel Discussion" along with Dr. Martha L. Donnelly of the University of British Columbia and Malcolm Burrows of The Hospital for Sick Children Foundation.

## Miller Thomson LLP Charities & Not-For-Profit Group


*Toronto*

| | |
|---|---|
| Jennifer E. Babe | 416.595.8555 |
| Alan Belaiche | 416.595.8511 |
| Rachel L. Blumenfeld | 416.596.2105 |
| Mark R. Frederick | 416.595.8175 |
| Kathryn M. Frelick | 416.595.2979 |
| Robert J. Fuller | 416.595.8514 |
| Robert B.Hayhoe | 416.595.8174 |
| Hugh M. Kelly, Q.C. | 416.595.8176 |
| Jacqueline L. King | 416.595.2966 |
| Susan M. Manwaring | 416.595.8583 |
| Rosanne T. Rocchi | 416.595.8532 |
| M. Jasmine Sweatman | 416.595.8623 |
| Michael J. Wren | 416.595.8184 |

*Vancouver*

| | |
|---|---|
| Sandra L. Enticknap | 604.643.1292 |
| Martin N. Gifford | 604.643.1264 |
| Alan A. Hobkirk | 604.643.1218 |
| Donald H. Risk | 604.643.1207 |

*Calgary*

| | |
|---|---|
| William J. Fowlis | 403.298.2413 |
| Sandra M. Mah | 403.298.2466 |
| Greg P. Shannon | 403.298.2482 |

*Edmonton*

| | |
|---|---|
| Bruce N. Geiger | 780.429.9774 |
| Dragana Sanchez Glowicki | 780.429.9703 |

*Markham*

| | |
|---|---|
| Peter D. Lauwers | 905.415.6470 |
| Brenda Taylor (Corporate Services) | 905.415.6739 |

*Waterloo-Wellington*

| | |
|---|---|
| Frank O. Brewster, Q.C. | 519.822.4680 |
| Stephen R. Cameron | 519.579.3660 |
| Teresa A. Douma | 519.579.3660 |
| William R. Greenwood | 519.579.3660 |
| John J. Griggs | 519.579.3660 |
| Thomas P. Jutzi | 519.579.3660 |
| J. Jamieson K. Martin | 519.579.3660 |
| Richard G. Meunier, Q.C. | 519.579.3660 |
| Robin-Lee A. Norris | 519.822.4680 |


**Note:**