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CHARITIES & NOT-FOR-PROFIT NEWSLETTER

May 2008

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.

London Charities and Not-For-Profit Seminar

Miller Thomson's London Charities and Not-For-Profit Group will be hosting a complimentary breakfast seminar on Tuesday, May 27, 2008 from 8:00 to 10:00 am, at The London Club. The seminar will cover the following topics:

Employment Law Review - *Pat Forte*

Brand Protection - *Lorelei Graham*

Duties of Directors and Officers - *Kristina Shaw*

CBA Charity Audits - *Susan Manwaring*

If you are interested in attending please R.S.V.P. via email to cc_seminars@millerthomson.com or by telephone to 416.595.2991.

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The Ontario Human Rights Code protects individuals from discrimination in employment or the provision of services on grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status and disability.

However, the Ontario Code has an exception that allows religious, philanthropic, educational, fraternal or social institutions or organizations that are primarily engaged in serving the interests of persons identified by race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability to only employ, or give preference in employment to, persons similarly identified, where the qualification is reasonable and bona fide because of the nature of the employment. This means there are circumstances where certain employers may consider what would otherwise be discriminatory aspects in determining suitability for, or imposing conditions on, employment.

In order to fall under this exception, an employer must show that the otherwise discriminatory policy or practice is legitimately and directly connected to the nature of the employment in question, imposed honestly and in good faith, and objectively related and reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his or her fellow employees, or the general public. The exception in the Code cannot be relied on simply to permit an organization to employ only members of its own community.

In *Heintz and Ontario Rights Commission and Christian Horizons* released April 15, 2008, the Human Rights Tribunal of Ontario found that a religious organization whose primary purpose is not to proselytize or convert the persons it serves, or require such persons to be educated in or conform to the organization's faith beliefs, but rather to provide services to individuals regardless of their faith, cannot rely on the exception of the Code with respect to otherwise discriminatory hiring and employment practices. In determining whether the exception of the Code applied, the Tribunal looked beyond the nature of the organization to consider the audience to whom the services are provided.

In that case, an evangelical Christian organization operated a number of government funded, community living homes which focused on creating a Christian family home environment, but also accepted residents of other backgrounds and creeds. The organization required all its employees to agree to adhere to its religiously based Doctrinal Statement and Lifestyle and Morality Statement. A community support worker resigned after she disclosed that she was a lesbian. The former employee filed a complaint under the Code, claiming that she had been subjected to harassment and discrimination by co-workers and terminated from her employment on the basis of her sexual orientation, contrary to the Code.

The Tribunal found that the organization's primary purpose was to serve the interests of people who were not necessarily adherents to its articles of faith, and that requiring all its employees to agree to adhere to its Doctrinal Statement and Lifestyle and Morality Statement, which prohibited homosexuality, as a condition of employment was a breach of the Code that was not protected by the exception with respect to otherwise discriminatory hiring and employment practices. This decision is currently under appeal.

While the *Heintz* decision was based on the Ontario Human Rights Code, all other provinces have essentially the same prohibition on employment discrimination and similar exceptions.

The above decision, if upheld on appeal, represents a substantial change in approach for employers, particularly religious charities. Any employer that currently uses such an exception in its employment practices should consider immediately the appropriateness of this approach and obtain legal advice. Miller Thomson lawyers are experts in advising and representing charities on human rights law issues nationally.

A Fate Worse Than Death (Revocation)?

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Prior to the 2004 Federal Budget, the Charities Directorate of Canada Revenue Agency ("CRA") had no punitive power other than the revocation of a charity's registration. The Budget amendments included a series of "intermediate sanctions", which were heralded as being less harsh than revocation. They included financial penalties and a one year suspension from being regarded as a charity and from the right to issue tax receipts.

CRA's first application of a penalty and its second application of suspension fell upon a Montreal synagogue in March 2008. CRA's formal notice currently states:

Reason for Penalty:	Donation receipts giving false information
ITA Reference:	188.1(9)
Amount of Penalty:	\$499,055 The charity's tax receipting privileges and qualified donee status are suspended
Reason for the Suspension:	Penalty greater than \$25,000 under section 188.1(9)
ITA Reference:	188.2(1)(c)

The *Income Tax Act* tells us that the penalty for donation receipts which give false information is 125% of the amount reported on all of the receipts so issued and it requires an automatic one-year suspension if the penalty is in excess of \$25,000.

Newspapers have reported further information beyond the cryptic CRA statements. It has been reported that the synagogue ⁽¹⁾ sold burial plots and issued tax receipts for the cost; ⁽²⁾ offered burial plots to paid-up members of the congregation at a discount from the price charged to non-members, which CRA alleged was granting a "benefit" at the time the member paid the annual dues for membership; and ⁽³⁾ issued charitable tax receipts for the payment of fees for children attending a nursery run by the synagogue. It is also reported that an earlier audit by CRA had resulted in a warning to the synagogue that at least some of those practices were inappropriate and such warning had been ignored.

If monies were paid to the synagogue to purchase burial plots, or for nursery fees, clearly these amounts were not "gifts" or "donations", as a tangible benefit was received for the payments. The synagogue was not right in issuing those receipts. It may very well be that those members will be re-assessed.

It is another question whether the "right" to receive a burial plot at a discount from the price charged to non-members, is a "benefit" at all. If so, is the "benefit" received each year the member pays annual dues to the synagogue, or only if and when a plot is actually purchased? The member may never actually buy a burial plot. How is the value of that unexercised "benefit" calculated? There are other instances of various "rights" being available to taxpayers, where CRA has determined that there is no "benefit" until the right is actually exercised (e.g. airmiles). Arguably the same logic should apply and there would only be a benefit, easily valued and deducted from the value of the charitable receipt in the year in which a member exercises the benefit. Hopefully this issue will be tested in Court.

Lessons to be learned by charities:

1. If you receive a warning as a result of an audit, either follow what CRA tells you, and/or retain counsel for advice.
2. Remember that a payment to a charity cannot be regarded as a "gift" if any kind of consideration is received by the one making the payment. Under proposed legislation and current CRA practice, however, if a charity receives a payment, partly as a "gift" and partly in payment for something given by that charity, a charitable receipt can be issued for the part of the payment which is a true "gift".

The effect of the "interim sanctions" on some charities could be permanent. Suspension may be a fate as bad as revocation.

Donors Bring Class Action Against Tax Shelter Charity

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In February 2008, two donors commenced a class action seeking damages on behalf of all donors to the Banyan Tree Gift Program (the "Program"), a tax shelter program recently investigated by the Canada Revenue Agency ("CRA"). The plaintiffs are seeking compensation for the costs of reassessment by CRA, as well as for funds paid into the tax shelter scheme. The lawsuit is the first of its kind in Canada, and represents a new danger to charities who participate in tax shelter arrangements.

The Banyan Tree Gift Program

According to the Statement of Claim, the Program is a leveraged donation arrangement orchestrated by a tax shelter promoter. Donors would receive loans from a corporation, Rochester Financial Ltd. ("Rochester"), and would secure the loan with a cash payment to Rochester. The donors would provide a direction to Rochester that the loan proceeds be forwarded directly to the recipient charity, the Banyan Tree Foundation (the "Foundation"). The Foundation would issue official donation receipts for the full value of the loan. The loans limited the donors' liability for repayment to the amount of their cash security deposits. Thus, donors received receipts for amounts approximately seven times greater than their actual cash contribution. The representative plaintiffs had each personally made cash contributions totalling approximately \$17,000, and had received receipts in the amount of \$120,000.

The CRA audited donors to the program and concluded that payments into the Program were not valid charitable gifts. It concluded that the loans were not true loans, as there was no expectation of repayment, and that payments to the Program were made in exchange for tax benefits. CRA reassessed the donors for tax arrears in respect of their participation in the Program in 2003, together with interest owing on the unpaid taxes. It also indicated its intention to audit all claimed tax credits for the years 2004-2007. Furthermore, in 2006, Rochester issued invoices to the donors demanding repayment of the full value of the loans, despite its previous assurance that liability would be limited to the amount of the cash security deposits paid.

The Class Action

The representative plaintiffs in the class action, Kathryn and Rick Robinson, brought an action seeking class certification on behalf of all donors to the Program. They named as defendants Rochester, two other corporations involved in the tax shelter scheme, the Foundation, and the law firm which issued the opinion blessing the Program as compliant with the *Income Tax Act*. The plaintiffs are seeking \$50,000,000 in general damages plus \$5,000,000 in punitive damages.

The plaintiffs claim that the defendants misled them into believing that contributions to the Program were valid charitable donations, that CRA would accept them as such, and that the donors' liability in respect of the loans would be limited to the amount of their actual cash payment. The plaintiffs are seeking damages for their tax liability, as well as for interest accrued. They also seek repayment of security deposits paid to Rochester, and a declaration voiding all promissory notes executed in Rochester's favour.

In addition, the plaintiffs have claimed that punitive damages are appropriate in this case, on the basis that the defendants wilfully disregarded their interests and because the defendants continue to operate the Program despite the reassessments of its donors.

Implications

It remains to be seen whether the Ontario courts will certify this class action, and permit the Robinsons

to sue on behalf of all donors to the Program. Often the crucial fight in class proceedings comes at the certification stage, where defendants argue that the claim should not proceed as a class action, but rather should be pursued individually by the class members. If the action is certified as a class proceeding, however, the defendants face considerable potential liability.

It also remains to be seen whether the courts will accept the plaintiffs' claim and award damages. The novelty of the claim makes its outcome difficult to predict. However, it is clear that the risks to charities that participate in tax shelter programs have increased. The charity's liability for participation may now extend beyond de-registration and the revocation tax to include compensation to donors injured by the program. In light of this new development, charities are well-advised to be cautious about participating in tax shelter arrangements. Charities should not participate in tax shelter programs without first obtaining independent legal advice on the validity of the program. Lawyers providing opinions about the validity of tax shelter programs should likewise be vigilant in vetting these programs before issuing opinions as to their legality.

Charity Tax Appeal Jurisdiction

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Recently, the Canadian Bar Association (“CBA”) roposed formally that initial jurisdiction over all tax appeals involving registered charities be given to the Tax Court of Canada. This is a welcome proposal and we hope that the Minister of Finance accepts and implements it.

Until recently, all appeals by registered charities went to the Federal Court of Appeal by way of judicial review. The Federal Court of Appeal is a court with a highly technical (and therefore very expensive) set of procedural rules. As an appeal court, it is designed to hear appeals from other courts, not to review decisions of the government. As well, because charity registration appeals were heard by way of judicial review, they were decided on the basis of the documents in the CRA file and without the benefit of any new evidence.

The result of the appeal system is that very few cases are ever heard and decided and a significant number of those that are heard are decided on the basis of procedural technicalities. Charity registration law stagnates. Meritorious appeals are not advanced because of the complexity involved.

Charity tax lawyers have been complaining about the appeal system for a long time. A few years ago, it appeared that the appeal system would be replaced. The Joint Regulatory Table of the Voluntary Sector Initiative recommended that an internal CRA administrative appeal of Charities Directorate decisions be introduced and that CRA Appeals decisions be appealed to the Tax Court of Canada (with new evidence being permitted). The 2004 Federal Budget introduced all of these changes, except that Tax Court of Canada appeals were limited to intermediate sanctions and registration appeals were left as direct appeals to the Federal Court of Appeal.

This inexplicable failure of nerve on the part of the then Minister of Finance was unfortunate. We hope that the current Minister of Finance will accept the submission of the CBA. The Tax Court of Canada has the institutional expertise to hear charity registration appeals and is positioned to do so more efficiently than the Federal Court of Appeal.

British Columbia 2008 Budget

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The British Columbia 2008 Budget included proposed amendments to the *Social Service Tax Act* and the *Taxation (Rural Area) Act* that relate to charities.

Goods of Nominal Value

Effective February 20, 2008, it is no longer necessary for registered charities to collect PST on donations given in exchange for tokens or gifts of nominal value - e.g., key chains, bookmarks, pins, etc. However, registered charities are required to pay the PST on the purchase of these goods. If goods of nominal value are sold in charity-run gift stores, they will be subject to PST. The exemption also does not apply to goods of more than nominal value or to goods sold by, or on behalf of, a charity for a fixed price.

Definition of "Charity Funds" Clarified

Retroactive to February 21, 2007, "charity funds" is now defined in the *Social Service Tax Act* to include bingo affiliation grants for the purposes of the medical equipment refund. As a result, registered charities or eligible hospital auxiliaries may receive a PST refund on medical equipment purchased using their bingo affiliation grants.

Rural Property Tax Exemption for Camps of Registered Charities

Effective for the 2009 tax year, eligible camps that are owned, held in trust for, or occupied by a registered charity under the *Income Tax Act* (Canada) are exempt from rural property tax. This measure, made in response to a decision of the Property Assessment Appeal Board, changes the exemption criteria. If camps were exempt under the old criteria and do not qualify under the new criteria, they will be exempt from rural property tax for the 2008, 2009, and 2010 tax years in order to allow them an opportunity to transition to the new rules.

WHAT'S HAPPENING AROUND MILLER THOMSON

Rachel Blumenfeld published "Charitable Giving with Life Insurance" in the Leave A Legacy insert of the London Free Press circulated on April 29, 2008.

Richard Fontaine presented to the members of Canadian Association of Gift Planners and Heritage à Partager as a member of a panel entitled: "Les Différentes Façons de Maximiser la Situation Financière du Donateur et de ses Héritiers".

Robert Hayhoe presented on the topic of "The New Excess Business Holding Rules for Private Foundations: Practical Considerations in Advising Clients" at the Canadian Bar Association 2008 National Charity Law Symposium on May 7, 2008.

Alan Hobkirk and **Amanda Stacey** presented on the topic of "Trustee Review and Account Challenges" at the 15th Annual Conference of the Canadian Association of Gift Planners on April 23 to 25, 2008 in Vancouver, British Columbia.

Kate Lazier presented on the topic of "Charitable Gaming: How to Avoid a Criminal Record While Trying to Make a Buck" at the Canadian Bar Association 2008 National Charity Law Symposium on May 7, 2008.

Susan Manwaring presented on the topics of "CAGP-ACPD - Government Relations Committee Year in Review" and "Protecting the Donor's Intention" at the 15th Annual National CAGP-ACPD Conference on April 23 & 24, 2008.

Susan Manwaring attended the most recent consultation sponsored by the Muttart Foundation in early May, which covered the topic "Social Enterprise".

Andrew Valentine's article from the April newsletter "Competition Bureau Launches Education Campaign to Help Organizations Combat Fraud" was republished in the 18:9 of the *Canadian Fundraiser eNews* dated May 15, 2008.

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