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CHARITIES & NOT-FOR-PROFIT NEWSLETTER

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The Charities and Not-for-Profit Newsletter is published periodically 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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MILLER THOMSON VANCOUVER SEMINAR

Miller Thomson is hosting a breakfast seminar for our B.C. clients on June 8 from 7:30 -10:00 a.m. at the Vancouver Four Seasons Hotel. We expect the seminar will include presentations on the protection of charitable assets, charitable gaming, intermediate sanctions, governance trends, and Arthur Drache on political activities by charities. Please contact Paula Stregger at pstregger@millerthomson.com or 604.643.1260 for details or to register.

DONOR'S COURT CHALLENGE TO RECEIPTING POLICY OF CRA REBUFFED*

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At some time or another, most readers will have attended (or helped to plan) a fundraiser sponsored by a charity. In the normal course, the charity will issue a donation receipt for the amount paid less the fair market value of the meal and entertainment provided. Allowing such a receipt has been a long-time policy of the CRA and in 2002, the government proposed amendments to the *Income Tax* Act which would give legal sanction to the practice (this provision has not as yet been enacted but the CRA is acting as though it is law).

Interestingly, a recent case out of British Columbia dealt with an attempt by a patron of such an event to obtain a refund of his payment because he did not get a receipt for the full amount he paid. The case involved a fundraising lunch sponsored by Stewards' Charitable Foundation, a Vancouver charity.

Harry Richert is a retired businessman who donates to a number of charities. In the fall of 2003, he attended a luncheon held by the defendant. The invitation said there would be a lunch and two speakers who would talk about "the AIDS/HIV pandemic in Africa from the perspective of medical anthropologists." For the $1,000 payment, guests would also receive "a beautiful coffee table book of Africa to keep the memory of Africa and its suffering people in their minds long after this memorable luncheon presentation by these leading academics and researchers." The invitation also said that "Official charitable donation receipts in compliance with the *Income Tax Act* will be issued by Stewards' Charitable Foundation, Registration Number 86917 9861 RR0001."

Richert paid the money on September 7, 2003. His accountant attended the luncheon in his place. He received a voucher for the book. On February 15, 2004, the Foundation issued a receipt in the amount of $855, following the CRA guidelines.

In his affidavit, Richert said he was offended by this characterization of the transaction. He took the position that he had donated $1,000 to the charity and was not interested in the speakers or the book.

> I have never gone to charitable luncheons thinking that they are part charity and part business deal. To me, meals, books, speakers, these are nice things that charities do to cater to people, to express appreciation, to make them comfortable, and to provide information to them. I made a cheque out to Stewards' intending the entire amount of $1000 to be a gift to a charity. Stewards' led me to believe that I had been invited to do just that. In my estimation, I was dealing solely with charity.
>
> But then, later, I found out that Stewards' had accepted a gift of only $855 and had regarded the balance of my contribution as a business transaction. That is not the gift I intended. That was not my agreement with Stewards'.

Richert, presumably as a matter of principle, sued to get his money back on the basis that the Foundation viewed the transaction as a contract and that there was a fundamental misunderstanding between the parties which voided the deal.

Mr. Justice T.M. McEwan of the British Columbia Supreme Court made this observation:

> The plaintiff recognizes that charities stage fundraising events. He says "it is almost a given." Such events obviously have some cost to the organizations that put them on. These were not the plaintiff's concern, and were not on his mind when he gave the defendant $1,000. There was, in essence, a perfected gift for $1,000 passing from the plaintiff to the defendant, and a gift back from the defendant in appreciation. While the transactions are related, on neither part are they a bargain or exchange of one thing of value for another.

But after giving a full exposition of the law as he saw it, the Judge decided in favour of the charity.

> The plaintiff's submission that the defendant's gestures of appreciation operate as consideration making the gift "voidable" confuses the treatment of his gift for tax purposes with the essence of the transactions themselves. The fact that the administrators of the *Income Tax* Act measure gifts against all but the most trivial forms of recognition in determining the amount of a gift eligible for tax purposes, may be reason for the plaintiff to enquire as to the value of such tokens in the future, but it does not change the fact that the plaintiff made a complete gift to the defendant effective upon presentation of the money, and that that gift cannot now be undone.

Despite being victorious, the case points out a significant difficulty for most charities. On one hand, most of them would willingly give a charitable receipt for the full amount paid by the donor. On the other hand, if they do so, they run the serious risk of having their charitable registration revoked by the CRA, denying them the chance to issue any receipt.

Mr. Richert, clearly a man of principle, has demonstrated the anomalous relationship between philanthropy and the tax rules. But charities in Canada can only breathe a sigh of relief that he lost this battle.

*Based on a similar article by Arthur Drache published in the National Post on March 29, 2005.

UPDATE – SECRET CHARITABLE TRUST

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In the March 2003 issue of this newsletter, we reported on the decision of the Court of Queen's Bench of Alberta, Trial Decision in the Estate of Edith Helen McRae. Prior to Mrs. McRae passing, she signed three Wills, the last of which left her entire estate to her two friends, Harold and Lynne Rufenack, who were also the co-personal representatives of her estate.

The trial judge ruled that, although on the face of the Will the beneficiaries were the Rufenacks, they in fact would not benefit from the estate as they held the entire estate in a secret trust for those charities to which Mrs. McRae regularly donated to during her lifetime. The Court further provided that if the Rufenacks required assistance in determining which charities to benefit, they were invited back before the Court to seek advice and direction.

To date the Rufenacks have not distributed the estate to charities, nor have they applied to the Court for further assistance. The Rufenacks have, however, appealed the trial decision with the hope of overturning the secret trust and becoming the sole beneficiaries of the estate. Since the Trial decision was rendered, there have also been two subsequent Court of Appeal Applications which were heard on February 28, 2005, and there are still two pending applications, one before the Court of Queen's Bench and another before the Court of Appeal.

The two Court of Appeal Applications which were heard both resulted in success for the charities. The first Application was made on behalf of six charities that had not previously been involved, but who now sought status before all levels of Court. The reason this application was made was to ensure that these charities (all ones to whom Mrs. McRae regularly gave) would be before the Court and be able to make representations to the Court in regard to the Rufenacks' pending Appeal. The second Application before the Court of Appeal was for the removal of the Rufenacks as the co-personal representatives of the estate because they were in a conflict of interest having made the Appeal to overturn the Trial Judge's decision. Further, the Court of Appeal also granted the charities now before the Court, the right to make a Cross-Appeal respecting the discretion given to the co-personal representatives by the trial decision. If the charities are successful in their Cross-Appeal, the discretion that the Trial Judge gave the co-personal representatives (now replaced by a trust company) to choose which charities are to benefit from the estate will be overturned, and the Court of Appeal will choose the charities that will benefit from the estate. If the Rufenacks are successful in their appeal, the secret trust will be overturned and they will be the beneficiaries of the estate. The Rufenacks' Appeal and the charities' Cross-Appeal will likely both be heard in early 2006.

The underlying question is why Mrs. McRae signed the third Will and left her estate to the Rufenacks if she intended it all to go to charity. The answer which came out at the trial was that she wanted to keep things "simple". Mrs. McRae felt that her first two Wills were too complicated because they named numerous charities as beneficiaries and contained a charitable foundation. While Mrs. McRae wanted to simplify things, she probably never imagined the depth of the complexities created by her efforts to keep things simple! Furthermore, the tax advantage that that Mrs. McRae and her estate could have enjoyed had she obtained proper advice, would have been considerable.

Careful Will drafting is very important - a Will is the last opportunity for a Testator to convey her wishes. If these wishes are not clearly set out, various time consuming and expensive court applications may be required to ascertain the wishes. Miller Thomson lawyers are available to assist and advise individuals and charities with philanthropic estate planning. We are also experienced at dealing with contested estate matters on behalf of charities (indeed, we are acting for a number of the charities involved in the unfortunate McRae estate litigation).

HELPING THOSE THAT HELP OTHERS –VOLUNTEER LIABILITY PROTECTION

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Volunteers are an integral element of charities. Without their work and dedication to the various charitable causes, the ability of charities to fulfill their missions would be severely curtailed.

The volunteer is proving to becoming not only an integral, but an essential, element of charities. As costs and needs rise, many charities are finding themselves more reliant upon volunteers than ever before.

While charities are wise to recruit and welcome volunteers into their organizations, charities must be aware of the legal liability that is inherent in using volunteers.

The following is our brief overview of the tort principles that can give rise to findings of liability. We then describe the statutory landscape which attempts to protect volunteers from lawsuits connected with their volunteer work. Finally, we will describe tools which a charity may wish to utilize to protect itself, and the volunteer, from claims of wrongdoing.

Tort Principles

There are several "types" of liability for which a charity may be held responsible in negligence.

First, a charity may be directly liable where it breaches a legal duty owed directly to a person (perhaps a client). Charities have a duty to maintain a reasonable standard of care, which includes among other things, provision of adequate and safe equipment, reasonable levels of staffing and recruiting qualified personnel. Generally, corporate liability creates a liability on the charity for what can best be defined as the charity's "systems responsibilities".

Second, a charity is vicariously liable for the negligent acts of its employees, performed within the scope of their employment.

In some provinces, charities can also be found vicariously liable for the negligent acts of volunteers.

Protecting Volunteers

The Volunteer Protection Act ("VPA") was enacted in Nova Scotia on January 1, 2003. The intent of the VPA is to shield volunteers from liability. To date, there is no similar legislation in other provinces.

The definition of volunteer in the VPA is an individual, including a director, officer, trustee or employee, performing services for a non-profit organization who does not receive:

- compensation, other than reimbursement for expenses, or;
- more than $500.00 a year.

The VPA protects a volunteer from any liability for damages caused by an act or omission of the volunteer on behalf of the organization as long as:

- the volunteer was acting within the scope of the volunteer's responsibilities at the time of the act or omission; and
- the volunteer was properly licensed, certified or authorized for the activities or practices undertaken by the volunteer at the time the damage occurred.

The VPA does not protect a volunteer from liability for damages if:

- the damage was caused by wilful, reckless or criminal misconduct or gross negligence by the volunteer;
- the damage was caused by the volunteer while operating a motor vehicle, vessel, aircraft or other vehicle;
- the act or omission which caused the damage constitutes an offence; or
- the volunteer was unlawfully using or impaired by alcohol or drugs a the time of the act or omission which caused the damage.

The VPA states that if the non-profit organization makes payment on behalf of the volunteer, and the volunteer is not liable as described above, the non-profit organization cannot recover the money from the volunteer.

The VPA states that if a plaintiff sues a volunteer for damages caused by an act or omission of the volunteer on behalf of the non-profit organization, and the plaintiff is not successful, the volunteer is entitled to his or her legal costs on a solicitor-client basis.

Protecting the "Good Samaritan"

In addition to protection for the volunteer, there are statutes and case law which shield those individuals who go out of their way to assist people who have been injured in an accident. Prince Edward Island, Alberta and British Columbia have passed "Good Samaritan" laws. Ontario has legislation "on the books" which has yet to be proclaimed in force. Quebec is the only province in the country which imposes a positive duty on everyone to assist a person in peril.

Prince Edward Island

As an example of a Good Samaritan statute, the *Volunteers Liability Act* ("VLA") was enacted in Prince

Edward Island in 1988.

The definition of volunteer in the VLA is any individual,

> not in receipt of fees, wages or salary therefor, who renders services or assistance, whether or not that individual has special training to render the service or assistance and whether or not the service or assistance is rendered by the individual alone or in conjunction with others.

Volunteer fire fighters are expressly included within this definition, even if they receive payment in recognition of services performed.

The VLA protects all "volunteers" or "Good Samaritans" that provide "services or assistance" to a person who is "ill, injured or unconscious as a result of an accident or other emergency." Emergency is not defined. This protection extends to any possible injuries or death suffered by the person. This protection ends if it is demonstrated that the volunteer committed "gross negligence" in causing the injuries or death.

If real or personal property is "in danger", a volunteer is not liable for any damage resulting to the property if the volunteer was rendering service or assistance to protect or preserve the endangered property. "Danger" is not defined. This protection ends if it is demonstrated that the volunteer committed "gross negligence" in causing the damage.

The VLA assists volunteers further in protecting them from any proceeding, or possible suit, unless the claims are based on the volunteers' gross negligence.

Ontario

The *Good Samaritan Act*, 2001 ("GSA") received third reading in 2001. It has yet to be proclaimed in force.

The GSA stipulates that a person who voluntarily and without expectation of compensation or reward provides emergency assistance is not liable for damages that result from the person's negligence in acting or failing to act while providing the services, unless the person committed gross negligence.

The GSA states that it applies to health care professionals, as long as the services are not provided in a hospital or other place having appropriate facilities and equipment.

What can you do?

As noted above, an equivalent to the VPA does not exist in most jurisdictions. However, a charity could utilize the principles enunciated in these statutes as a risk management measure. For example;

- A volunteer's responsibilities can be accurately described in an "Expectation List." This list can be utilized to demonstrate what was inside and outside of the volunteer's scope of responsibilities.
- Identify any volunteers within your organization that have special skills or licenses (nurse, physician, ACLS certification) and request a copy of their certificate or license, annually, so that the charity is always aware of any special skills that exist within its organization.
- Keep a detailed list of all reimbursement monies paid out to volunteers so that no claims of employer/employee status can be alleged.
- Perform background checks by thoroughly contacting each reference. Some organizations are extending their background check to include police checks.
- Conduct regular seminars and training outlining the charity's appropriate standards and expectations. This will ensure that the volunteer is aware, at all times, of acceptable actions and behaviours.
- Draft a volunteer handbook setting out the charity's philosophy and expectations. This handbook should be provided to every volunteer within the organization. A list denoting distribution and acceptance should be maintained. This will again demonstrate that the volunteer was aware at all times of acceptable actions and behaviours.

AUDIT EXEMPTION EXPANDED FOR ONTARIO CHARITIES AND NOT-FOR-PROFIT CORPORATIONS

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In "We are so Small - Must We Have an Audit?" published in the August 2004 issue of this newsletter, the examination of audit requirements included a reference to the statutory authority in Ontario permitting members to elect not to have an audit. As the law stood then and now stands, an Ontario non share capital corporation is exempt from the obligation to appoint auditors and to have an audit conducted only if:

> the annual income of the corporation is less than $10,000;
>
> all members of the corporation consent in writing to the exemption for a named year; and
>
> the corporation is not a charity.

Included in Bill 190 *An Act to promote good government by amending or repealing certain Acts and by enacting one new Act* introduced on 27 April 2005 are provisions that will expand the right of non-share capital corporations to avoid an audit. The Explanatory Note accompanying First Reading says it all:

> The *Corporations Act* currently exempts … a corporation under Part III from the requirement to appoint an auditor for a financial year, if certain conditions are met. One of the conditions is that the annual income of the … corporation must be less than $10,000. This condition is amended to provide that the annual income must be less than an amount to be prescribed by the regulations. The reason for the amendment is that the threshold amount of $10,000 is out of date, such that few corporations currently qualify for the exemption. The intention is to allow the threshold amount to be set by regulation and to be changed by regulation from time to time to reflect changing economic conditions, without the need for continual statutory amendments.
>
> In addition, the provision of the Act that prevents the above exemption from applying to a [charitable] corporation … is repealed.

So, assuming that in due course Bill 190 becomes law, smaller Ontario non-share capital corporations – "small", in terms of annual income, will be defined from time to time by Ontario Regulations passed by the Cabinet – will have the legal right, for one year at a time, to avoid incurring the expense of an audit. Still required, it should be noted, will be the written consent of all members, specifying the particular year for which the exemption is to apply.

Around Miller Thomson

Arthur Drache published "Prudence Does Not Equate with Conservatism When Investing", "Community Foundation "Bookstore"", "Spending Up But No tax Breaks for Sector in Budget", "Non-Profit Organization Information Return", "Ontario Public Trustee Fails Prudent Investor Test", "Transferring Charitable Donations" and "Annulment Decisions Will Be Complex" and **Robert Hayhoe** published "U.S. Governance Reform Proposals" in *Canadian Not-For-Profit News* in April.

Arthur Drache continues as editor of the *Canadian Taxpayer* - the first April issue includes his article "Klotz Appeal to be Heard in May", and a later April issue included his article "Same Sex Marriage Debate Should Trigger Political Activity Review".

At the April 2005 Annual Conference of the Canadian Association of Gift Planners in Quebec City, Miller Thomson sponsored a plenary presentation by Frank Minton titled "Letting Go". **Rachel Blumenfeld** moderated a panel discussion on "Donor-Advised Funds" and **Robert Hayhoe** presented on "Legal Issues with New Vehicles: a planned giving refresher."

Arthur Drache published "Prudence Does Not Necessarily Equate with Conservatism" in the *Canadian Fundraiser* in April.

On April 21, Miller Thomson, Deloitte and the Guelph Volunteer Centre sponsored a charity law seminar. Speakers included **Lorelei Graham** on "Intellectual Property Issues for Charities", **Craig Mills** on "Charities

and Fraud", **Robert Hayhoe** on "Cross-Border Operations by Charities" **Arthur Drache** on "Charities and Politics", as well as Peter Barr and Karen Wilkinson of Deloitte on "Governance" and "Current Tax Issues" respectively.

Robert Hayhoe presented on "Establishing Laws and Regulations that Support Planned Giving in Other Countries - Charitable Remainder Trusts in Canada" at the *International Symposium on Cross-Border Charitable Giving* in New York City on May 2, 2005.

Rachel Blumenfeld contributed "Foundation for Leaving a Legacy" and **Robert Hayhoe** contributed "Basic Canadian Donation Tax Law" to *Your Guide to Charitable Giving and Estate Planning*, published as an insert to the Toronto Globe and Mail on May 5, 2005 by Leave a Legacy Greater Toronto Area, a project of the Greater Toronto Area Roundtable of the Canadian Association of Gift Planners.

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