The Canada Revenue Agency (the "CRA") has recently published a short but helpful information guide entitled "Giving to Charity: Information for Donors"). This new guide covers topics such as the donation tax credit, charitable donation receipts, tips for donating wisely, and information regarding protection against fraud.

In our practice we are often called upon to give advice to charities regarding the required contents for charitable tax receipts. However, knowledge of these requirements is of equal importance to donors. Upon receiving a charitable donation receipt, donors should be aware that the receipt must contain the following information in order for it to be a valid receipt:

- A statement that the receipt is an "official receipt for income tax purposes";
- The Donor's name and address;
- The name and Business Number/Registration Number of the charity;
- The amount of the eligible cash donation or the fair market value of the non-cash donation; and
- The date of the donation (the year is sufficient for donations of cash).

Donors should ensure that donation receipts that they receive from a charity include this information. Receipts that do not contain this required are invalid and cannot to be used to claim a charitable tax credit.

The new guide also cautions donors to be informed about the charities to which they are making a donation. In particular, the CRA suggests that donors gather information about a particular charity before making a donation. It suggests that donors take time to research and think about their donation decisions. Donors are cautioned not to submit to pressure when making a donation decision. The guide also cautions donors to be careful about how they make their donation. For instance, cheques should be made out to a particular organization and not to individuals, as it is the organization itself that is the registered charity. It is also important that donors keep all receipts with respect to such donations. The CRA also cautions donors to be aware of copycat charities. Sometimes fraudulent entities will use names that are similar to well known and respected charities. Individuals can contact PhoneBusters, the Canadian Anti-fraud Call Centre at 1-888-495-8501 or info@phonebusters.com, if they have any concerns about the activities of an organization or possible fraudster. The CRA also suggests that donors verify that a particular organization is registered with the CRA and therefore authorized to issue official donation receipts for income tax purposes. All registered charities are listed on the CRA's
website at www.cra.gc.ca/charities. By using the search function on the CRA’s website, potential donors can input the name of any registered charity in Canada and obtain information on that organization, including the charity’s last few T3010 Information Returns. This is a good way to ensure that a charity that you plan to donate to is in fact registered with the CRA and entitled to issue donation receipts.

POTENTIAL IMPLICATIONS OF PROPOSED ONTARIO LONG TERM CARE HOMES LEGISLATION FOR DIRECTORS AND OFFICERS

Kathryn Frelick
Toronto
416.595.2979
kfrelick@millerthomson.com

Bill 140, the Long Term Care Homes Act, 2006 (LTCHA) was introduced by the Ontario government with the stated purpose of enhancing the quality of life for residents of long-term care homes (“homes”) by strengthening enforcement, improving care and increasing accountability. In terms of enforcement, for example, the legislation promotes zero tolerance of abuse and neglect of LTC residents and whistle-blowing protection for staff who report. The standards of care for residents are quite prescriptive, and set out standards for care, service, staffing, training, operations and the like.

There are rather onerous accountability obligations for directors and officers of homes that are corporations and for members of the Committee of Management or Board of Management for Municipal and First Nations homes under the proposed LTCHA. Directors and officers each have a duty to "take all reasonable care" to ensure that the home complies with all requirements under the Act. It is an offence to fail to comply with this obligation.

Many homes have expressed concerns about their ability to fulfill these obligations, given their limited resources. Directors and officers are concerned about their potential personal liability should the home be unable to meet legislative requirements. Upon conviction of an offence under this proposed legislation, an individual is liable on first offence to a fine not exceeding $25,000 and/or 12 months imprisonment; and on a subsequent offence to a fine not exceeding $50,000 and/or 12 months imprisonment.

There is no immunity provision under the LTCHA for a director relating to non-compliance with the Act, nor is there any protection for individual directors for civil actions resulting from findings of negligence on the part of the Corporation. By contrast, section 13 of the Public Hospitals Act provides (sensibly in our view):

No action or other proceeding for damages or otherwise shall be instituted against any member of a committee of the medical staff of a hospital or of a board or of the staff thereof for any act done in good faith in the execution or intended execution of any duty or authority under this Act or the regulations or for any alleged neglect or default in the execution in good faith of any such duty or authority.

In the light of the contrasting language of these two statutes, it is not entirely clear how far directors and officers must go to be able to demonstrate that they have complied with the duty under the LTCHA to "take all reasonable care".

Having said this, depending upon the legislation governing the institution, there may be some statutory protections available, for example, under the Corporations Act (Ontario).

Charitable organizations governed by the Corporations Act and the Charities Accounting Act are permitted to obtain insurance to indemnify individual directors and officers against personal liability arising out of the execution of their duties, as long as they perform their duties in good faith and do not impair the purposes of the charitable corporation. As such, it will be important to determine what insurance coverage may be available for directors and officers in relation to their statutory obligations under the LTCHA.

Corporations Act and the Charities Accounting Act

Members (as such) of the corporation operating a home are afforded protection from liability with respect to obligations or liabilities of the home pursuant to section 122 of the Corporations Act. Further, under section 80 of the Corporations Act, directors and officers may be indemnified and saved harmless out of the funds of the corporation operating a home with respect to any law suits or proceedings that are brought in respect of
any act or omission done in the execution of their duties of office, provided that the membership of the
corporation consents. This is the case provided that the damage is not a result of the wilful neglect or default
of the director or officer.

In the case of a charitable corporation, section 2 of Regulation 4/01 made under the Charities Accounting Act
provides, in part:

(1) In the circumstances and subject to the restrictions set out in this section, … each director or
officer of the corporation may be indemnified for personal liability arising from their acts or
omissions in performing their duties as … director or officer.

(3) In the circumstances and subject to the restrictions set out in this section, insurance may be
purchased to indemnify the executor, trustee, director or officer for the personal liability described
in subsection (1).

The primary restriction on indemnification for is for liability "that relates to their failure to act honestly and in
good faith in performing their duties" (other restrictions include a prohibition against giving the indemnity, or
against the insurance purchase, if either acts would make the corporation insolvent; and a prohibition against
a purchase of insurance if that would impair carrying out the purpose of the corporation).

Subsection 2(5) of this Regulation prescribes the factors to be considered before giving an indemnity or
purchasing insurance:

1. The degree of risk to which the executor, trustee, director or officer is or may be exposed.
2. Whether, in practice, the risk cannot be eliminated or significantly reduced by means other than the
   indemnity or insurance.
3. Whether the amount or cost of the insurance is reasonable in relation to the risk.
4. Whether the cost of the insurance is reasonable in relation to the revenue available to the executor
   or trustee.
5. Whether it advances the administration and management of the property to give the indemnity or
   purchase the insurance.

Summary

Thus, while there is no specific protection for individual directors and officers relating to their obligations
under the LTCHA, the Corporations Act and Charities Accounting Act allow for the indemnification of directors
and officers by the Corporation itself where personal liability may arise out of the duties or obligations of such
persons, provided these persons act honestly and in good faith in the performance of their duties. The home
should be able to purchase insurance to protect against these potential liabilities, subject to any coverage
restrictions.

Recommendation

It is our recommendation that directors and officers of the Board protect themselves from personal liability by
taking, and causing the corporation to take, all preventative measures possible with respect to this Act. In
order to do so, they must be aware of the legislation as it is relevant to both the home and the Board, and
comply with all portions set out in the Act. Such awareness could be raised through Board education
sessions at regular board meetings and through distribution to all board members of information and
materials.
It is important that those involved with not-for-profit organizations (NPO) comply with the Income Tax Act ("Act"). Failure to comply may result in the organization losing tax exempt status. In general terms, the Act provides that the income of an association that is otherwise taxable is exempt from tax provided the association complies with all of the following conditions:

(a) It is organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit;

(b) It is, in fact, operated exclusively for the same purpose for which it was organized or for any of the other purposes mentioned in (b);

(c) It does not distribute or otherwise make available, for the personal benefit of a member, any of its income unless the member is an association which has its primary purpose and function is for the promotion of amateur athletics in Canada; and

(d) It is not a charity;

In order to qualify as a tax-exempt organization under the Act, an association must be both organized and operated exclusively for social welfare, civic improvement, pleasure or recreation. In order to determine the purpose for which an association is organized, the instruments creating the association, such as the Letters Patent, Articles of Incorporation, or Memoranda of Agreement, will be reviewed.

The Canada Revenue Agency ("CRA") has stated that the facts and particular circumstances will determine whether an association is carrying on a trade or business and if so, whether it will result in a finding that an association is not operated exclusively for non-profit purposes. CRA will look at the characteristics that might indicate that an activity is a trade or business, such as if it is operated in a normal commercial manner; whether its goods and services are not restricted to members and their guests; whether it is operated on a profit basis rather than a cost recovery basis; or whether it is operated in competition with taxable entities carrying on the same trade or business. The exception is that if the carrying on of a trade or business is directly attributable to, or connected with, pursuing the non-profit goals and activities of an association, it will not cause it to be considered operating for profit purposes.

CRA will examine whether an entity carries an excess of profit over expenditures as surplus from year to year period, and if the excess has resulted from the activity for which it was organized or from some other activity. If a material part of the excess is accumulated each year and the balance of accumulated excess at any time is greater than the association's reasonable needs to carry on its non-profit activities, profit will be considered to be one of the purposes for which the association was operated. This will be particularly so where assets representing the accumulated excess are used for purposes unrelated to the objects of the organization, such as making investments in long term vehicles to produce income, or enlarging or expanding facilities used for normal commercial operations, or making loans to members, shareholders or non-exempt persons. The CRA may review investments in term deposits or GICs to see if they are regularly renewed within a year and from year to year and whether or not the principal is adjusted from time to time.

In considering the question of "what is the reasonable excess that a not-for-profit entity can carry?" the CRA has stated that "The amount of accumulated excess income considered reasonable in relation to the needs of an association to carry on its non-profit activities and goals is a question of fact", to be determined with regard to the association's particular circumstances, including such things as future anticipated expenditures and the amount and pattern of receipts from various sources (for example: fundraising, membership fees, training course fees). The CRA has warned that to qualify for exemption, an association must not only be organized exclusively for non-profit purposes, but it must in fact be operated in accordance with these purposes in each year for which it seeks exemption under the Act.
NPO organizers must also remain cognizant of CRA’s policy that if the Minister of National Revenue considers an association to be a “charity” (that is a charitable organization or charitable foundation), then it cannot qualify as a tax-exempt NPO. An association may be considered to be a charity even if it is not a registered charity or if its designation as a registered charity has been revoked.

An association that qualifies as a tax-exempt NPO may be required to file a T3 income tax return, in the event that it is deemed to be an inter-vivos trust under subsection 149(5) which otherwise has tax payable, or has disposed of, or realized taxable capital gain on the disposition of any capital property that is not used directly in the course of providing dining, recreational or sporting facilities to its members. The Minister may also require that the organization files a return. An NPO that is incorporated has similar filing requirements as a share capital corporation and must file a T2 corporate tax return.

A tax exempt association is also required to file form T1044 Non-Profit Organization (NPO) Information Return if (a) the total of all amounts received or receivable by the association the fiscal period for taxable dividends, interest, rentals, or royalties is more than $10,000, (b) if the total assets of the association (determined in accordance with generally accepted accounting principles) at the end of its immediately preceding fiscal period exceeded $200,000; or (c) if the association had to file an NPO Information Return for a preceding fiscal period. An NPO Information Return must be filed within six months after the end of the association’s fiscal period.

Whether or not an association that qualifies as tax exempt files an annual income tax return or the appropriate information return, it must still comply with the other requirements of the Act such as making payroll deductions on wages paid and filing relevant T4 Supplementary and T4 Summary and any other forms relevant to the payroll deduction account.

Miller Thomson lawyers have significant experience advising NPOs on maintaining tax exempt status.

**FEDERAL COURT OF APPEAL REQUIRES GST ON RELIGIOUS CAMP FEES**

Katherine Xilinas  
Toronto  
416.595.8165  
kxilinas@millerthomson.com

In *Camp Mini-Yo-We v. Her Majesty the Queen*, 2006 FCA 102, the Federal Court of Appeal recently considered the question of whether GST was exigible on fees charged to campers for attending a Christian summer camp for children and youth. The Court held that such fees are subject to GST.

Camp Mini-Yo-We was a registered charity that operated various camps aimed at children of different age groups. The services supplied at its camps included supervision, religious instruction, and instruction in recreational and athletic activities including canoeing, kayaking and swimming. The services also involved overnight supervision of each child through the entire duration of the child’s stay. A single fee was charged to cover the cost of the entire camping program.

The Minister of National Revenue assessed Camp Mini-Yo-We on the basis that GST was exigible on the fees it charged for attendance at its camps. Camp Mini-Yo-We objected to this assessment and appealed to the Tax Court of Canada. At trial, the Tax Court concluded that the services offered by Camp Mini-Yo-We fell outside the general exemption for charities set out in Section 1 of Part V.1 of Schedule V to the *Excise Tax Act* (Canada) (the “ETA”) and were therefore subject to GST.

Section 1 of Part V.1 of Schedule V to the ETA generally exempts supplies of personal property and services made by a charity but excludes from this general exemption the property and services listed in paragraphs (a) to (m) of section 1. Specifically at issue in *Camp Mini-Yo-We* was paragraph 1(f), which excludes a service involving supervision or instruction in any recreational or athletic activity from the general exemption for charities. There are two exceptions from this exclusion: (1) where the service is provided primarily to children 14 years of age or under, and the service does not involve overnight supervision throughout a substantial portion of the program; and (2) where the service is intended to be provided primarily to individuals who are underprivileged or have a disability.
Like many other religious camps, Camp Mini-Yo-We had stopped collecting GST on fees paid in respect of its youth camps after the Minister of National Revenue discontinued its appeal of the Tax Court of Canada's decision in *Camp Kahquah v. The Queen*. In that case, the Tax Court determined that the camp's sole purpose was religious instruction, and the athletic instruction and recreational facilities provided to campers were incidental to this purpose. The Tax Court held that the fees charged by Camp Kahquah did not therefore fall within the exclusion set out in paragraph 1(f) of Part V.1 of Schedule V and were thus exempt from GST.

In *Camp Mini-Yo-We*, in direct contrast with its decision in *Camp Kahquah*, the Tax Court of Canada found that the predominant element of the service provided by Camp Mini-Yo-We was supervision and teaching in recreation and sports, and that this element was not altered either by the camp's religious purpose or by periods of prayer and reflection. The Court considered but distinguished its previous decision in Camp Kahquah.

On appeal, the Federal Court of Appeal held that, in determining whether paragraph 1(f) applies, it is the nature of the services supplied by the camp and not the purpose underlying the camp's activities that is relevant. In this case, Camp Mini-Yo-We's program involved the supervision or instruction of religious, athletic and recreational activities. The Court held that the wording of paragraph 1(f) of part V.1 of Schedule V does not require that the recreational and athletic activity constitute the major component. As a result, Camp Mini-Yo-We's program was caught by paragraph 1(f) and thus subject to GST.

The Federal Court of Appeal also considered the application of the "incidental supplies" rule found in section 138 of the ETA. Section 138 provides that, where a particular property or service is supplied together with any other property or service for a single consideration and it is reasonable to regard the provision of one property or service as incidental to the other, the incidental property or service is deemed to form part of the primary property or service for the purposes of determining the application of GST. Throughout both the trial and appeal, Camp Mini-Yo-We argued that the athletic and recreational services supplied to its campers were incidental to religious training, which constituted the primary service.

The Court followed its decision in *Hidden Valley Golf Resort Assn. v. Canada* (2000), and held that section 138 applies only in the context of multiple supplies. Since it was not possible to charge separate fees for the religious, recreational and athletic services supplied by Camp Mini-Yo-We because these activities were too closely integrated, the Court concluded that section 138 could not apply to deem the whole of the service provided by Camp Mini-Yo-We to be exempt from GST.

Finally, the Court considered the application of the principle of judicial comity, which dictates that one judge cannot lightly decide not to follow a previous decision of another judge of the same court. The Court noted that, faced with conflicting decisions of the Tax Court, the function of the Federal Court of Appeal was to decide which of the decisions, if either, correctly stated the law. Faced with conflicting decisions in *Camp Kahquah* and *Camp Mini-Yo-We*, the Federal Court of Appeal decided that *Camp Kahquah* was wrongly decided. Both cases involved supervision or instruction in the context of various recreational or athletic activities, and this was enough to remove them from the general exemption from GST afforded to charities under section 1 of Part V.1 of Schedule V of the ETA.

As a result of the Federal Court of Appeal's decision in *Camp Mini-Yo-We*, as a general rule, charities that run youth camps involving supervision or instruction of campers in recreational or athletic activities should collect GST on their fees unless they fall within the further exceptions to the exclusion in paragraph 1(f) related to day camps or camps for individuals who are underprivileged or who have a disability.
WHAT’S HAPPENING AROUND MILLER THOMSON LLP

The January 29 issue of Law Times contained an article "Making the Art of Giving Less Taxing". The article quoted Arthur Drache extensively and referred to Susan Manwaring and Robert Hayhoe.

The January 31 issue of Canadian Fundraiser referred extensively, in an article entitled "TAX SHELTERS - Can they be outlawed soon enough to save 2006 filers?", to Kate Campbell's article "No Charitable Deduction for Tax Shelter Donation" from the January 2007 issue of this newsletter.

Robert Hayhoe published "Quebec Changes Tax Treatment of Clergy" in the February 13 issue of Canadian Taxpayer.

The Winter 2007 Advisor published by the Canadian Cancer Society included "Update on Flow Through Shares by Susan Manwaring.

The February 6 National Post contained an article "Cheat the Taxman After Death - Charitable receipts helps offset taxes paid on RRSP". The article quoted Rachel Blumenfeld extensively (and included Rachel's photo). The article was also published in other CanWest Global papers.

Susan Manwaring completed the Governance Essentials Program for Directors of Not-for-Profit Organizations offered by the Institute of Corporate Directors and The Joseph L. Rotman School of Management, University of Toronto - January 21-23.
### Toronto/Markham
- Rachel L. Blumenfeld 416.596.2105
- Kate Campbell 416.595.8197
- Arthur B.C. Drache, Q.C., C.M. 416.595.8861
- Mark R. Frederick 416.595.8175
- Kathryn M. Frelick 416.595.2979
- Robert J. Fuller, Q.C. 416.595.8514
- Robert B. Hayhoe 416.595.8174
- Hugh M. Kelly, Q.C. 416.595.8176
- Michael Kerr 416.595.8620
- Jacqueline L. King 416.595.2966
- Peter D. Lauwers 905.415.6470
- Susan M. Manwaring 416.595.8583
- Rosanne T. Rocchi 416.595.8532
- Martin J. Rochwerg 416.596.2116
- Amanda Stacey 416.595.8169
- Brenda Taylor (Corp. Services) 905.415.6739
- Michael J. Wren 416.595.8184

### Vancouver
- Kenneth Burnett 604.643.1203
- Sandra L. Enticknap 604.643.1292
- Martin N. Gifford 604.643.1264
- Alan A. Hobkirk 604.643.1218
- Eve C. Munro 604.643.1262
- Monique P. Trépanier 604.643.1274

### Calgary
- Esmail Bharwani, TEP, FCGA 403.298.2418
- William J. Fowlis 403.298.2413
- John D. Phillips, Q.C 403.298.2431
- Gregory P. Shannon 403.298.2482
- Bryant Frydberg 403.298.2456

### Edmonton
- Bruce N. Geiger 780.429.9774
- Dragana Sanchez Glowicki 780.429.9703

### London
- Kristina Shaw 519.931.3511

### Kitchener-Waterloo
- Stephen R. Cameron 519.593.3207
- John J. Griggs 519.593.3231
- J. Jamieson K. Martin 519.593.3247
- Richard G. Meunier, Q.C. 519.593.3251

### Guelph
- Frank O. Brewster 519.780.4618
- Lorelei Graham 519.780.4650
- Robin-Lee A. Norris 519.780.4638

### Montréal
- Ronald Auclair 514.871.5477
- Richard Fontaine 514.871.5496
- Marie-Michele Lavigne 514.871.5490
- Louise Tremblay 514.871.5476

**Note:**
This newsletter is provided as an information service to our clients and is a summary of current legal issues. 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. Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with subcontractors who have agreed to abide by its privacy policy and other rules.

© Miller Thomson LLP, 2007  All Rights Reserved.
All Intellectual Property Rights including copyright in this publication are owned by Miller Thomson LLP. This publication may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP, which may be requested from the editor at charitieseditor@millerthomson.com.