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CHARITIES & NOT-FOR-PROFIT NEWSLETTER

February 2004

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.ca.

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MILLER THOMSON / DELOITTE & TOUCHE SEMINAR

On March 4, 2004, Miller Thomson LLP and Deloitte & Touche LLP will be co-sponsoring a complimentary seminar at the National Club in Toronto entitled "Legal & Taxation Issues Facing Charities". To register, email: mmedeiros@deloitte.ca.

ARTHUR DRACHE JOINS MILLER THOMSON LLP

Miller Thomson LLP is pleased to announce that, effective March 1, Arthur Drache will become Associate Counsel to the firm and a member of its National Charities and Not-for-Profit practice group. The firm, which already has one of the largest dedicated charities and not-for profit practices in Canada, will benefit from Arthur's unparalleled reputation and more than 30 years of strong experience in charity tax law.

Arthur is Canada's leading expert in the tax treatment of charities and non-profit organizations and of the arts and artists. As Chief, Personal Income Tax at the federal Department of Finance in the early 1970s, Arthur wrote most of the Canadian charity tax rules. Arthur is the author of *The Canadian Taxation of Charities and Donations* and *The Charity and Non-Profit Sourcebook* looseleaf services and the *Canadian Not-For-Profit News and Canadian Taxpayer* newsletters and has published many charity law articles in prestigious journals. Arthur is perhaps best known to the public for his 27 years as a Financial Post columnist and contributing editor. He has taught at the University of Ottawa and Queen's University and has an international reputation as a charity law speaker. Arthur was called to the Ontario bar in 1968, obtained an LL.M. degree from Harvard University in 1969, and was appointed Q.C. in 1984. He was named a member of the Order of Canada in January, 2004.

Under the arrangement, Mr. Drache will be available to advise and act for Miller Thomson's clients, as required, while continuing as a partner of Ottawa-based Drache Buchmayer LLP. He can be reached at a 416.595.8681 or adrache@millerthomson.ca.

UPDATE ON FUNDRAISING AND ONTARIO HEALTH PRIVACY

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In our January, 2004, newsletter, we discussed Ontario's Bill 31, the *Health Information Protection Act*, 2003, which was introduced on December 17, 2003. Public hearings were held the week of

January 26, 2004 in Toronto and the week of February 2 in Sault Ste Marie, Kingston and London. Written submissions were due on February 6th, 2004. The legislation is now set to come into force on January 1, 2005, not July 1, 2004, as previously announced.

Halyna Perun, legal counsel to the Ministry of Health and Long-Term Care, spoke on February 12th to the Ontario Bar Association's Privacy Law and Health Law Sections about Bill 31. She noted that although the review of the written submissions has not been completed, the Bill went through the clause-by-clause review process on February 9 and amendments were made. Second reading is expected at the end of March.

Most significantly, section 31 of the *Personal Health Information Protection Act* (Schedule A of the Bill), which deals with fundraising, has been moderated. In the original draft, s. 31 required that a health information custodian obtain express consent from an individual to collect and use his or her personal health information for fundraising purposes. The provision was amended in the clause-by-clause process as follows:

> A health information custodian may collect, use or disclose personal health information about an individual for the purpose of fundraising activities only where:
>
> (a) the individual expressly consents; or
>
> (b) the individual consents by way of implied consent and the information consists only of the individual's name and prescribed types of contact information.

Ms. Perun advised that the government is developing the regulations to the legislation and the "prescribed type of contact information" will likely consist only of the individual's address and not information such as email addresses. The government continues to work with stakeholders to address issues raised by the public. There will be a further round of public consultation on the proposed regulations and a further clause-by-clause review to further amend the legislation.

GOVERNMENT DE-FUNDING AND TAKE-OVER OF A CHARITY'S OPERATIONS RULED ILLEGAL

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Many important provincially funded social programs and services are now provided by charitable organizations. Over the last decade of fiscal restraint by government, charities have become accustomed to having little recourse in the face of funding cuts. However, if the funding cut is not part of overall fiscal policy but is directed at a specific charity, the charity may be able to challenge the decision in court. De-funding decisions may be ripe for judicial review where the decision affects an organization that provides services to vulnerable people, there is an over-stepping of statutory authority and there is an arbitrary or unfair process leading up to the de-funding decision. Further, if the government has purported to take control of a charity's operations and property, the Courts will review carefully the government's statutory and contractual right to do so, and if Courts find that the government has not complied with the requirements of such a drastic step then the take-over can be ruled illegal. Absent any contractual or other legal basis for claiming an ownership interest, the mere fact that a government has provided substantial funding (even capital funding) to a charity does not give the government an ownership interest in the charity's assets.

These principles were reaffirmed in the recent decision of the Ontario Superior Court of Justice (Divisional Court) in the case of *Byl, St. Catharines Association for Community Living v. Her Majesty the Queen in Right of Ontario*. In that decision, the Court quashed as illegal the February 19, 2003 decision of the Ontario Ministry of Community, Family and Children's Services (the "Ministry"), to:

> (a) terminate without notice the program funding of the St. Catharines Association for Community Living ("SCACL"), a registered charity which provides services to developmentally disabled people and their families, and
>
> (b) to seize control of SCACL's assets and to purport to authorize a third party to operate and manage the SCACL assets and to use and occupy SCACL's property for this purpose.

The Court ordered the Ministry to restore funding to SCACL immediately and to direct its third party agent to vacate and return all of SCACL's assets and to return the management of the institution to SCACL. The Ministry sought and was denied leave to appeal in October, 2003 by the Ontario Court of Appeal. SCACL is now back in possession of its assets, has resumed control of its operations and its funding has been restored.

By way of background, on February 19, 2003, the Ministry announced that it was immediately ceasing to fund the SCACL and directed that another agency "take over" SCACL's programs and SCACL's assets. The Court found that this decision was made without notice to SCACL; in fact, the Ministry issued a press release prior to notifying SCACL of its decision.

SCACL has an annual operating budget of $9.7 million dollars, most of which came from the Ministry. SCACL is the fifth largest agency of its type in Ontario and is a registered charity with over 300 employees providing services to developmentally disabled people and their families. SCACL has been in existence for 50 years and, through its considerable fund raising efforts, has acquired significant assets, including 14 group homes, three independent living homes, an administrative building, program buildings and vehicles. SCACL's operations are funded primarily by the Ministry under the *Developmental Services Act* (Ontario) in accordance with an approved budget and are partially covered by a written agreement.

The Court determined that, in the circumstances, the decision to terminate funding and take over SCACL's assets was subject to judicial review since the decision did not fit within one of the three categories where judicial review is unavailable, which are: (1) the mere exercise of the commercial or business power such as the purchase of a product (e.g. a tender to build a highway); (2) general fiscal policy of reduction of all funds to recipients of funding; and (3) a first time funding request or request to increase existing funding where no clear, legal entitlement to such a benefit is established.

In SCACL's case, the Court found that the funding arrangement could not be characterized as merely a commercial contract because the funding was long-standing governmental assistance to a charity to provide services for the developmentally or physically handicapped in accordance with an annual budget, with government oversight and reporting requirements.

The Court determined that the decisions to terminate SCACL's funding and direct another agency to take over SCACL operations were in essence one decision. There were no alternative facilities to house and offer services to SCACL's clients and there were no other personnel immediately available to provide services to SCACL's clients. As a consequence, the Court determined that the decision to cease funding SCACL without notice and with immediate effect necessitated the take over of SCACL assets and operations. As a result, when the court determined that the take-over portion of decision was illegal, it determined that the entire decision was illegal and quashed the entire decision.

Further, even absent the ruling that the take-over was illegal, the Court made findings that the Ministry's decision to cease funding SCACL would be subject to judicial review and would have been quashed as a patently unreasonable decision. There was no evidence that the Ministry weighed considerations relevant to

the objects of the Ministry's administration of SCACL's funding. There was no evidence of an inability of SCACL to protect its clients and or that the Ministry had any legal interest in SCACL's assets. The Court also found that there was a duty of fairness which had not been met since there was no fair warning of the Ministry's decision and the Ministry abused its discretion. The announcement of the decision to the media before notifying SCACL was not what Canadian society expects as fair government action.

Finally, the Divisional Court awarded SCACL costs for the litigation on a "substantial indemnity" basis. This type of award, which is designed to pay most of the real costs of the litigation, is reserved for cases where a court views a litigant's behaviour as reprehensible.

The Divisional Court decision highlights that long term social program funding is not like other government appropriation decisions and that government ministries will not be able to terminate funding where there is no substantial basis demonstrated for such a decision. It further demonstrates that the Ministry does not acquire an interest in an organization's property simply because it has provided funding to that organization for its operations. Although circumstances where government ministries take illegal action are thankfully rare, it is important for charities to be aware that they may have legal recourse if faced with such dire circumstances.

SCACL was represented at the Divisional Court and on the application for leave to appeal by Andrew Roman and Margaret Sims of Miller Thomson.

CHANGES TO INFORMATION COLLECTED FOR REGISTERED CHARITY INFORMATION RETURNS

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In 2003, the Canada Revenue Agency T3010 Registered Charity Information Return took on somewhat of a "new look", in the form of the new T3010A. It is important to know that the Canada Revenue Agency ("CRA") now requires much more detailed information on the directors/trustees of a charity. This information includes:

- The last name, first name and initial for each director/trustee and like official;
- Date of birth;
- Residence address (including street number, street name, city, province or territory and postal code);
- Position in the charity;
- Telephone number;
- Whether or not the director/trustee or like official is at arm's length with other members of the charity's Board.

While CRA will retain all of this information, only the person's name, position in the charity and their arm's length status will be made public. All other information will remain confidential.

We recommend that requested charities collect this information each year at the time of the Annual Meeting. The information should be kept in minute book records and provided to the auditors to assist them in completing the T3010A. This could be easily accomplished by the distribution of a pre-printed form for completion by all relevant persons at the time of the AGM.

Failure to provide this information to CRA will result in the T3010A being rejected for filing and returned to the head office address of the charity for correction and re-submission. During that time, the charity will be considered in default of filing. Failure to file can result ultimately in the revocation of the charity's charitable registration.

PROPERTY TAX EXEMPTION UPHELD

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In January, the Ontario Court of Appeal upheld an earlier decision of the Ontario Divisional Court in *Ottawa Salus Corp. v. Municipal Property Assessment Corp*. concerning the interpretation of the word "occupied" in a 1998 amendment to the *Assessment Act* (Ontario). As discussed in a more detailed article in our May 2003 Newsletter, the liberal interpretation of the notion of "occupation" of property which the courts have accepted could potentially widen the application of property tax exemptions for charities.

The statutory exemption from property tax for charitable institutions in Ontario is contained in paragraph 12 of s.3(1) of the *Assessment Act*:

> 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. [emphasis added]

Ottawa Salus Corporation ("Salus") is a charitable corporation which provides housing and support services for the mentally challenged and chronically unemployed. The Municipal Property Assessment Corporation assessed several Salus properties as taxable on the basis that Salus did not "occupy" the residential spaces. Salus brought an application to the Ontario Superior Court seeking property tax exemptions for its residential properties. Although Salus did not receive a favourable ruling at the initial application, an appeal panel from the Ontario Divisional Court overturned this judgment and granted the full property tax exemption.

The Ontario Divisional Court stated that the word "occupy" is not limited in its ordinary meaning to physical occupation, and concluded that there was a sufficient link between the residents of the properties and Salus' charitable objectives to permit Salus to receive the exemption.

The Ontario Court of Appeal adopted the Divisional Court's approach:

> …the Divisional Court's interpretation of the word "occupied" in paragraph 12 is correct, and is to be preferred over the application judge's narrower interpretation. There are two features of the Divisional Court's interpretation which, taken together, create a balanced and just interpretation of the exemption. The expansive feature of the interpretation is the court's rejection of a definition that would require Salus itself to occupy the residential units in order to receive an exemption. However, that feature is linked to an important limiting feature. *The exemption applies only to land that is used directly by a charity in carrying out its charitable work.* [emphasis added]

If the Legislature had intended to limit the exemption for a charitable institution to land occupied exclusively by the charity itself, the language of "occupied solely by" could have been employed.

The result of this expanded interpretation may be that other residential properties owned by registered charities whose purpose is to house specific populations may become exempt from property taxation. This, of course, would depend upon the specific exemption provisions of the applicable provincial property tax statute.

CHANGES TO ONTARIO HOURS OF WORK LIMITS PROPOSED

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On January 19, the Ontario provincial government signalled its intent to put an end to the 60-hour work week that was introduced by the previous government as part of the *Employment Standards Act, 2000*. In a press release, the Ministry of Labour indicated that it intended to introduce legislation in the upcoming spring legislative session ensuring that employees cannot be forced to work more than 48 hours in a week.

The government has stated that the proposed legislation will provide more government oversight to ensure that employees have a choice when requested to work longer hours. More specifically, the legislation will address the government's concern that under the current legislation, employees are too worried about their jobs to say 'no' to an employer's request to work up to 60 hours in a week.

Input from business, labour and other interested parties is being sought to develop a balanced, fair and responsible system for regulating hours of work that will still provide employers with the necessary flexibility.

To that end, the government has released a discussion paper and has requested input from interested parties by the end of February, 2004. The discussion paper includes two proposed models for regulating hours of work. Both models are permit systems that require Ministry of Labour approval for working hours in excess of 48 per week. The Ministry is also interested in any other possible options that would help achieve the goals of the legislation. A copy of the discussion paper can be found at Ministry of Labour website (www.gov.on.ca/lab).

Any Ontario charities that now require staff to work long hours should obtain specific advice on the new law and may wish to consider making representation to the Ministry of Labour. Miller Thomson lawyers would be pleased to advise or assist with submissions.

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

Arthur Drache was awarded the Order of Canada in January in recognition of his commitment to the arts, philanthropy and charity law.

In early February, **Arthur Drache** spoke on "The Ten Year Rule: Does it Really Exist?" at a continuing legal education seminar in Toronto sponsored by the Ontario Bar Association Charities Section.

Robert Hayhoe of our Toronto office published "CCRA Shuts Down Charitable Donation Tax Shelters" in *The Lawyers Weekly* in late January.

Susan Manwaring of our Toronto office published "CCRA Policy on Political Activities a Useful Guide" in *The Lawyers Weekly* in late January.

Robert Hayhoe published "An Introduction to the Canadian Tax Treatment of the Third Sector" in the *International Journal of Not-for Profit Law* in February.

Susan Manwaring published an article "Third Party Civil Penalties: What Every Gift Planner Should Know" in the February issue of *Gift Planning in Canada*.

Robin-Lee Norris of our Waterloo-Wellington offices was the guest speaker at the February Annual General Meeting of the Waterloo-Wellington Fundraising Executives Group. She spoke on the application of privacy legislation to charities and non-profit organizations.

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