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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.ca.

Inside

APPLICATION OF PRIVACY LAW TO NATIONAL ORGANIZATIONS

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In our July 2003 Newsletter, we reported on the new provincial laws protecting personal information which will apply in British Columbia and Alberta effective January 1, 2004. Since that earlier report, British Columbia has passed its new legislation for protection of personal information in the provincially regulated private sector, the *Personal Information Protection Act* ("*PIPA*"), which will come into force on January 1, 2004. At the time of writing, Alberta has not yet passed its private sector privacy legislation.

B.C.'s *PIPA* differs in its application to the charitable and not-for-profit sector from both *PIPEDA* and the proposed Alberta legislation. This article highlights those differences and comments on some the issues which arise for national organizations.

Application of Federal Legislation

In provinces which have not passed legislation substantially similar to the federally enacted *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"), the federal legislation will apply to the provincially regulated private sector as of January 1, 2004. However, the application of *PIPEDA* is limited to "commercial activities" and, for federal works and undertakings, information about employees.

"Commercial activities" are defined in *PIPEDA* to specifically include the selling, bartering or leasing of donor, membership or other fundraising lists. They will also include other activities of charities and not-for-profit organizations which are "commercial" in character (the legal debate regarding the constitutionality of the application of *PIPEDA* to charities has been discussed in previous articles).

New British Columbia Legislation

The situation in British Columbia under *PIPA* will be different. Commercial activities have not been carved out as the area of application of the *Act*. *PIPA* applies to the collection, use and disclosure of personal information by organizations in the Province of British Columbia by both the for-profit and the not-for-profit sectors. The exceptions are fairly limited and include the collection, use and disclosure of personal information in the following circumstances:

(a) For personal or domestic purposes.
(b) For journalistic, artistic or literary purposes.
(c) If PIPEDA applies.
(d) If the provincial public sector privacy legislation, the *Freedom of Information and Protection of Privacy Act,* applies to the personal information.
(e) In certain documents and records related to the courts and judicial administration.
(f) The collection of personal information that has been collected on or before *PIPA* comes into force.

British Columbia's *PIPA* applies to the collection, use and disclosure of personal information in the course of both commercial and non-commercial activities (such as fundraising). It also applies to the collection, use and disclosure of personal information about employees in the provincially regulated private sector.

Like the federal legislation, British Columbia's *PIPA* imposes a number of obligations upon organizations in respect of the collection, use and disclosure of personal information. The ten "Fair Information Principles" which are appended to and form part of *PIPEDA* are also at the core of the requirements of *PIPA,* although not specifically incorporated. Although the various provisions and exceptions are quite detailed, in essence British Columbia's new legislation prohibits the collection, use and disclosure of personal information without notice of purposes and the consent of the individuals. It also requires organizations to adopt and implement a privacy policy and to appoint an individual in the organization to administer the policy. Organizations must also permit individuals to access and correct their personal information on request and adopt reasonable procedures to restrict access to personal information and provide security to prevent unauthorized disclosure.

British Columbia's new laws apply (subject to the exceptions noted) to all organizations operating in the province. The fact that an organization may be headquartered elsewhere is not determinative. The starting point is that organizations collecting, using and disclosing personal information in the Province of British Columbia will be subject to *PIPA*. The jurisdictional issues in many circumstances will, however, be complex. We understand that the offices of the Privacy Commissioners for Canada, British Columbia and Alberta are reviewing jurisdictional issues with a view to avoiding overlapping enforcement. We expect some guidance to be forthcoming from these offices.

Other Provincial Legislation
In terms of the application of provincial privacy laws, it should be noted that Quebec has had legislation in this area since 1994. It is anticipated that Alberta will have its own privacy legislation in force by January 1, 2004, but at the time of writing, the statute had not yet been passed. Based on the tabled legislation, it appears that Alberta's privacy legislation will not apply to a "non-profit organization" or any personal information that is in the custody or control of a non-profit organization except for personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization.

"Non-profit organization" is defined in Alberta's bill as meaning an organization that is incorporated or registered under specified Alberta legislation or that meets the criteria to be established under the regulations. Unlike British Columbia's new legislation, the Alberta bill will therefore likely not extend the application of the privacy rules to the activities of charities and other not-for-profits beyond the application of those rules under *PIPEDA*.

Best Practices for National Operations
Organizations with operations in a number of provinces will need to determine which laws apply to them. As noted above, British Columbia's new laws will apply to all organizations operating in that province, whether or not they are headquartered there. Organizations subject to more than one legal regime may wish to adopt a standard of "best practices" that will provide uniformity to the organization's policies and practices while meeting the highest standard applicable. Miller Thomson's charity and privacy lawyers are experienced at providing privacy compliance advice to charities and not-for-profit organizations.

NEW CCRA POLICIES RELEASED

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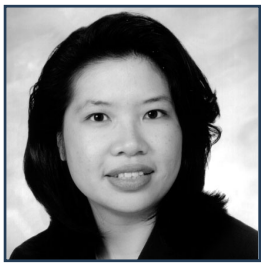
As first mentioned in the January 2003 issue of this Newsletter, the CCRA Charities Directorate continues to release new detailed legal guidance to registered charities. On October 31, 2003, the CCRA Charities Directorate added a significant number of its internal policy statements to its website. These are indexed by topic at http://www.ccra-adrc.gc.ca/tax/charities/glossary-e.html. While a certain number of policy statements had been available since late 2002, the volume continues to increase.

Of even more interest (to charity lawyers, at least) is that the CCRA Charities Directorate has also started to release sanitized versions of technical interpretation or advice letters written to particular registered charities. These are linked from the list referred to above and are distinguished by having a "CIL" (for charities information letter) document identifier instead of a "CSP" (for charities summary policy) or "CPS" (for charities policy statement) document identifier. These technical interpretation letters provide very helpful insight into how the CCRA Charities Directorate has been willing to apply its policies in individual circumstances. While there is, of course, no guarantee that the CCRA will take the same approach again, the existence of past practice is still very valuable information.

The CCRA Charities Directorate is to be commended for its new policy of openness. The release of its policy documents is concrete evidence that the Charities Directorate is working to implement the recommendations of the Voluntary Sector Initiative (see the September 2002 and July 2003 issues of this Newsletter for more detail) and the Future Directions project.

CHARITABLE GAMING LICENSING ELIGIBILITY AND USE OF PROCEEDS IN ALBERTA



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In January 2002, the Alberta Minister of Gaming established the MLA Review Committee on Charitable Gaming Licensing Eligibility and Use of Proceeds (the "Committee") which was charged with the responsibility of reviewing the current gaming licensing policies to ensure that they were current, specific, clear, transparent, equitable and consistently applied. This review was the first comprehensive examination of such policies in more than 20 years. Until now, the Alberta Gaming and Liquor Commission (the "Commission") has administered eligibility for gaming licensing and the use of proceeds on the basis of principles and policies established in 1980. There were 42 recommendations made by the Committee of which 41 were accepted. This article highlights some of the notable recommendations that were accepted:

1. The Commission will develop and implement an orientation program for the volunteer executive of charitable organizations interested in obtaining a gaming license. This recommendation recognizes that in most volunteer organizations there is high turnover of volunteer executives.

2 . The meaning of "charitable purpose" for the Commission is as follows:

   (a) Relief of poverty.
   (b) Advancement of education.
   (c) Advancement of religion.
   (d) Other purposes beneficial to the community.

It should be noted that the definition of "charitable purpose" for gaming will be determined by the Commission. The Commission may consider other definitions, but it is not bound by them. In other words, an organization might be accepted as charitable under the *Income Tax Act* (Canada) but not charitable under the gaming licensing requirements (although the opposite appears more likely).

3. The Commission had an existing policy that does not permit charitable groups "related" to one another to have more than one casino license at the same time, but had no definition of "related" groups. The Committee upheld the principle which prevented organizations from double dipping into gaming proceeds, but provided a definition for "related". Groups are considered related under the policy if one of the following factors apply:

   (a) Membership in the affiliate group is limited to members of the principal group.
   (b) The principal group appoints more than 25% of the directors to the affiliate group.
   (c) The affiliate group appoints more than 25% of the directors to the principal group.
   (d) Decisions of the affiliate group are subject to the approval of the principal group.
   (e) The principal group and affiliate group have identical or similar services, programs and objectives and the intent of forming the affiliate group was to obtain more gaming licenses than the principal group might otherwise be permitted to obtain.
   (f) The majority of funds of either the principal or affiliate group is given to the other group.
   (g) The principal and affiliate group donate to or use the majority of their funds in support of a common charity.

4. Sports groups that were made up mainly or exclusively of adults are now eligible for gaming licenses. Recognizing that sporting activities provide an educational benefit for youth and seniors, and are also therapeutic and relieve the suffering of the disabled regardless of age, such organizations are now eligible for gaming licenses. The Committee specifically noted that this category of gaming licensing eligibility should not include a group of adult friends or acquaintances who rent a school gymnasium to play recreational sport or groups of adults who can provide their own sporting activities through their own means. Therefore, for adult groups to be eligible, they must prove the following:

   (a) Such groups must demonstrate that their sporting activity is a sport that is open, advertised and promoted to the general public.
   (b) They must actively deliver a youth division or program in the same sport activity.
   (c) At least 50% of the gaming proceeds earned by such groups will be dedicated to the youth component of the sports program.
   (d) A youth sport division or program is defined as a division or program comprised of a minimum of 75% of youths competing against or participating with other youths.

5. Non-profit daycare centres are now eligible for gaming licenses by virtue of their structure as non-profit organizations and the programs they provide. To be eligible as a non-profit child care group, such a group must hold a government daycare license in good standing and meet the following conditions:

   (a) A childcare application process that is open to parents or guardians in the community at large must be in place.
   (b) There must be a wait list process that is open to all parents or guardians in the community at large who wish to have their children attend the childcare centre but for whom there is no space available at the time of application.

6. The Committee took great lengths to review arts programs that are considered non-profit (as opposed to commercial arts programs that are considered commercial activity). The Committee recommended that a policy be implemented to distinguish more clearly between

non-profit arts groups which are eligible for gaming licenses and commercial art organizations, which are not eligible for gaming licenses. A non-profit art program or activity must:

(a) Actively encourage participation by the community in the arts program.
(b) Give the public opportunities to participate in the arts program or activity.
(c) Deliver an arts program or activity to the public in the way of a public performance or the providing of training to the public in the arts activity.
(d) Promote the program or activity being delivered to the community.

7. A portion of gaming proceeds can now be used for support personnel required by groups to accompany participants when traveling to tournaments or events and invitational or exhibition tournaments which further the development of the group's participants.

8. Instead of permitting an indefinite time period in which to spend gaming proceeds, these must be disbursed by the organization within two (2) years of receipt of the proceeds.

9. There is now a limit of 10% of the net gaming proceeds that may be used on administrative costs where previously there was no limit to the amount of gaming proceeds that a group could spend on administrative costs. The Committee also clearly stated that salaries of bookkeepers are not a permitted use of gaming proceeds.

10. The Committee also recommended that gaming proceeds be available for use to cover expenses related to director's liability insurance.

The only recommendation that was made by the Committee that was not accepted was that gaming proceeds not be used to deliver or fund programs outside of Alberta.

The comprehensive review by the Committee on charitable gaming licensing eligibility and use of proceeds is welcomed. There are currently 9,000 charitable groups throughout Alberta licensed to conduct charitable gaming events. In the fiscal year ended 2002, these groups earned an estimated $200 million in proceeds from charitable gaming. The new policies provide some clarity to a previously inconsistent and confusing process.

REGISTERED CHARITIES AND POLITICAL ACTIVITIES

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Late last year, the Canada Customs and Revenue Agency ("CCRA") released a 2002 Concept Draft on Registered Charities and Political Activities. Submissions were requested and reviewed by CCRA and the final Policy Statement CPS-022 was released by CCRA effective September 2, 2003 (see http://www.ccra-adrc.gc.ca/tax/charities/policy/cps/cps-022-e.html).

Generally, the Policy Statement released continues to provide useful information to both charities and their advisors and reflects a helpful broadening of the administrative position which CCRA has taken historically in connection with political activities.

By way of background, subsections 149.1(6.1) and (6.2) of the *Income Tax Act* (Canada) are the statutory authority for the pursuit of political activities. Under the *Income Tax Act*, a charitable foundation and 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 clarify the law regarding political activity and 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. Political 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 Policy Statement as finally released is substantially similar to the 2002 Concept Draft. It has been amended to adopt a more plain language approach to discussing the legal concepts relating to political activities and charities and contains the general caveat now that the information and the policy statement is a general guide and that organizations should treat it as such with respect to particular activities.

The Policy Statement continues to be very useful in that it does define the types of activities which a charity can pursue and divides activities which could be considered to be political into three categories being:

(a) Prohibited activities.
(b) Political activities.
(c) Charitable activities.

Prohibited activities 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. 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. 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.

Further, the Policy Statement also confirms the expansion of the current administrative position on limiting charities to devoting not more than 10% of their total resources to political activities. The Concept Draft had announced and it continues to be the case that for small charities 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% income is between $100,000 and $200,000. Again, this relieving administrative position is welcome. Further, the administrative relief for charities that embark on a period of extraordinary political activity is retained and a 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 the two preceding years.

There are some new aspects to the Policy Statement which were not in the original Concept Draft. First the Policy Statement contains more specific comments on a charity operating exclusively for charitable purposes and a discussion of whether or not a particular activity will be determined to be a collateral political purpose, a non-charitable purpose or a charitable purpose. The Policy Statement reflects that CCRA will consider the purposes of activities in light of not only whether they appear to be political activity but also whether or not the charity is pursuing the charitable purposes for which it was registered. These comments are not unhelpful but they are obviously in response to questions raised about activities and whether or not they support charitable purposes.

The other significant change to the Policy Statement is the addition of comments concerning payments to another charity to be used by the second charity to conduct political activities. The Policy Statement confirms that if a third party is hired on a fee for service basis to conduct what is permitted political activity, expenditure on such activity will not be included for purposes of calculating the charity's disbursement quota. Further, resources which are spent on permitted political activities by the charity itself will not be counted toward the charity's disbursement quota.

However, the Policy Statement does confirm that if a gift is made by a charity to another charity, such a gift will qualify for purposes of meeting the donor charity's disbursement quota (leaving the issue of how the recipient charity will treat the expenditure to be determined in the ordinary way).

A final factor which is clearly identified is that the onus for satisfying CCRA whether or not the charity has complied with the *Income Tax Act* rules relating to political activities, and has satisfied the test that it has devoted substantially all of its resources to charitable activities, will be on the charity. An organization is required to keep the appropriate documents to be able to satisfy CCRA that it has met its tests. The Policy Statement does not set out specific record-keeping requirements but does confirm that the charity should choose record-keeping methods suited to its operations.

Further, there is a clear statement that the sections of the T3010A related to political activities should have detailed responses to ensure that CCRA has the appropriate information it needs concerning the charity's involvement in political activities. The Policy Statement does not indicate that if those questions are not completed that there would be repercussions but it does repeat more than once that it is extremely important that registered charities complete the return as accurately as possible.

The Policy Statement continues to contain the very useful examples which were in the 2002 Concept Draft. For charities embarking on activities which involve working with controversial issues or providing information to the general public and political officials, the Policy Statement is a useful tool and guide for ensuring that the activities are pursued in a manner which is consistent with the provisions of the *Income Tax Act.*

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

In early November, **Susan Manwaring** participated together with members of the voluntary sector, sports organizations and individuals from CCRA Charities Directorate, in a policy discussion sposored by The Muttart Foundation on the issue of the qualification of sports organizations as charitable in Canada.

Throughout the Fall, the Canadian Fundraiser has published parts 1-3 of a five part series on "CCRA Audits" by **Robert Hayhoe** of our Toronto office.

In mid-November, **Susan Manwaring** spoke at the Advanced Gift Planning Symposium sponsored by the Canadian Association of Gift Planners in Ottawa on "Charitable Remainder Trust - CAGP-ACPDP™'s Proposal" (with Malcolm Burrows of The Hospital for Sick Children Foundation) and on "Charitable Remainder Trust Proposal: Analysis and Applications" (with Janice Loomer Margolis of the B.C. Cancer Foundation and Frank Minton of Planned Giving Services).

On October 28, Miller Thomson's Charities and Not-for-Profit Practice Group held a complimentary seminar "Privacy Law: Are You Ready for January 2004" in Vancouver. The Seminar was hosted by **Sandra Enticknap** of our Vancouver office and **Robert Hayhoe** and involved presentations by **Eve Munro** and **Victor Leginsky** of our Vancouver office. Since this presentation was full shortly after invitations were delivered, we are likely to repeat it in Vancouver early in 2004 - watch for an invitation.

On November 12, Miller Thomson's Charities and Not-for-Profit Practice Group held a complimentary seminar in the Waterloo-Wellington area. The overall title was "Legal Issues Affecting Charities and Not-for Profits" - the seminar was hosted by **Bob Berry** and **Jamie Martin** of our Waterloo-Wellington offices and **Susan Manwaring** and included presentations by **Lorelei Graham** and **Jamie Martin** of our Waterloo-Wellington offices on "Intellectual Property", **Brenda Taylor** of our Markham corporate services department on "Corporate Records", **Susan Manwaring** and **Jamie Martin** on "Duties and Responsibilities of Directors", **Hugh Kelly, Q.C.** of our Toronto office on the "Carver Governance Model", **Scott Galajda** of our Waterloo-Wellington offices on "Privacy Law - Are you Ready for January 2004" and **Stephen Cameron** of our Waterloo-Wellington offices and **Robert Hayhoe** on "CCRA Audits".**Rachel Blumenfeld** of our Toronto office presented in late November at REENA for families of REENA clients (and other similar agencies) on estate planning for families with disabled beneficiaries.

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Note:

Miller Thomson LLP's Charities & Not-for-Profit newsletter is provided as an information service to the voluntary sector and is a summary of current legal issues of concern to charities and not-for-profit organizations and their advisors. These articles are not meant as legal opinions and readers are cautioned not to act on the information provided without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome and should be directed to charitieseditor@millerthomson.ca.

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