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## CHARITIES & NOT-FOR-PROFIT NEWSLETTER

February 2008

*The Charities & Not-for-Profit Newsletter is published monthly by Miller Thomson LLP's Charities & Not-for-Profit Group as a service to our clients and the broader voluntary sector. We encourage you to forward the e-mail delivering this newsletter to anyone (internal or external to your organization) who might be interested. Complimentary e-mail subscriptions are available by contacting [charitieseditor@millerthomson.com](mailto:charitieseditor@millerthomson.com).*

### MILLER THOMSON CALGARY CHARITY AND NOT-FOR-PROFIT WORKSHOP

Miller Thomson's national Charity and Not-for-Profit law group will be hosting a complimentary workshop on Monday, March 17, from 8:30 a.m. to 1:15 p.m. at the Calgary Chamber of Commerce. The seminar will cover a wide variety of topics of interest to the Charity and Not-for-Profit sector.

More details are available on our website at [www.millerthomson.com](http://www.millerthomson.com) or by contacting Becky Leis at [bleis@millerthomson.com](mailto:bleis@millerthomson.com) or 403.262.0007.

### BUDGET 2008

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The Federal Government released its Budget today and as expected, there were few changes directed at charities and not for profit organizations. The few changes which were announced are technical in nature and directed at addressing concerns raised by the sector with measures previously introduced. The discussion below highlights these changes.

#### Capital Gains Tax Relief in Respect of Donation Securities - Exchangeable Shares

Capital gains realized on gifts of publicly listed securities to registered charities were exempted from tax in 2006. Budget 2008 proposes to extend this relief to certain types of securities that are not publicly traded but are exchangeable into other securities that are. Under the current rules, taxpayers who exchanged these securities into publicly listed securities which were to be gifted to charity may have realized the capital gain on the exchange and that gain did not qualify for the exemption from tax.

The proposals introduced exempt the capital gains realized on the exchange from tax where the securities acquired on the exchange are themselves eligible for a capital gains exemption (i.e. are publicly listed) and are donated to a registered charity within 30 days of the exchange. There will be certain limits applied where the exchange security is a partnership interest. These limitations will ensure that the capital gains exempted only arise as a result of appreciation of the securities and are not the result of various reductions to the adjusted cost base of the partnership interest which are available under the Act. Details of these limitations will follow.

#### Donations of Medicines

Last year's Budget introduced a tax incentive for corporations that make donations of medicines to qualifying charities for use in the developing world. However, there has been some confusion as to which charities were eligible to receive these gifts. The government proposes that the eligibility of charities that qualify to accept donations of medicine for the purpose of this tax incentive will be determined by the Minister of International Cooperation. The process for determining the eligible charities will be developed by the Minister in conjunction with the Canadian International Development Agency.

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The changes also propose that to be eligible for the special tax incentive the gift must be donated at least six months prior to the expiration date of the medicines.

### **Private Foundations: Excess Corporate Holdings**

In 2007 the government extended the exemption from tax on capital gains realized on gifts of publicly listed securities to such gifts made to private foundations. As originally enacted the exemption was only available on gifts of publicly listed securities to public charities. At the same time the government extended this exemption to private foundations, it introduced the "excess business holdings" regime to limit potential opportunity for persons connected with a private foundation to use their own and the foundation's shareholdings for their own benefit.

The excess business holding rules as enacted apply to private foundations that own more than 2% of the issued and outstanding shares of any class of share of a corporation, public or private. If the holdings of the foundation are over the 2% limit, the foundation must take into account its shares and the shares of the same class in the same corporation that are held by "relevant persons" being, generally those person that are not dealing at arm's length with the foundation. Where the combined shareholdings between the private foundation and the relevant persons are over 2% but less than 20%, the rules require reporting. Where the combined shareholdings are greater than 20% the rules as enacted require divestiture. The grandfathering available under the original rules was limited but did partially apply to "entrusted shares" being shares that were held by the Foundation subject to a direction or trust that they be held by the Foundation in perpetuity.

Budget 2008 contains proposals to make certain amendments to the regime introduced which are intended to address concerns raised by private foundations on the rules as originally enacted. In summary, these changes will exempt from this regime certain holdings of unlisted shares that were held by a private foundation on March 18, 2007. The changes announced also contain proposals to amend the entrusted share rules and to confirm that the substituted share rules which apply in other sections of the Act will apply for the purpose of this regime. Finally, suggestions had been made that trusts could be used to work around the regime and, not surprisingly, the government proposes to extend the anti avoidance rules to shares of a corporations held via a trust. All of these amendments will be effective as of March 19, 2007, the effective date of the new regime.

The fact that these changes do not go further is a frustration. The evidence of abuses which support the need for these rules is still not forthcoming. The excess business holding regime is unnecessarily complex for charities. Hopes that the government would replace these complicated rules with a more straightforward reporting regime have been dashed for now. That said, representations should continue to be made on why this regime is misguided in the first instance.

### **Anti-Terrorism**

The Budget confirms that combating terrorism remains an issue. The government announced funding of \$10 million over two years for the Canadian Security Intelligence Service and the Canada Revenue Agency's Charities Directorate in order to bolster existing capacity to combat terrorist financing.

## **CRA ON RESEARCH AS A CHARITABLE ACTIVITY**

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Recently, the Charities Directorate released its proposed policy on research. This policy will be of interest to any charity engaged in research or funding research, especially the commercial arms of universities and others collaborating with commercial entities and dealing with intellectual property issues.

The policy recognizes research as a charitable purpose under the charitable head of "other purposes beneficial to the community," as well as a charitable activity under the head of advancement of education, and sets out four requirements for a research activity to be charitable. In the following, we describe the new policy and provide our comments on it.

**First, the research activity must represent a reasonable way to achieve or further the organization's charitable purpose.** In order to meet this requirement the research must relate to the organization's formal charitable purpose as set out in its governing documents. Recognizing that research is speculative, the Canada Revenue Agency ("CRA") notes that the outcome of the research need not be certain, it must only have a reasonable prospect of achieving the organization's charitable purpose. Hopefully, the CRA will interpret the phrase "reasonable prospect" as meaning "a possibility or chance" -- otherwise, this will be a difficult hurdle for charities engaged in exploratory research.

**Second, the research must not be not frivolous and must be undertaken in such a way that it is likely that knowledge will be discovered or improved.** The CRA notes that it is not a charitable activity to merely accumulate or produce information on a subject or an event. The policy should be amended to state that where a charity can show that such activities have a charitable purpose, the CRA would allow such activities.

The policy notes that charities should plan how to assess whether or not the research produced constructive results. Where the CRA has concerns that the research is frivolous, the CRA may request a literature review or an independent expert's opinion. This requirement may be onerous. The CRA may request that the charity demonstrates that its employees have the training and experience necessary to carry out research. The CRA may also request an expert opinion on whether the research is capable of adding to the store of human knowledge or on the research methodology, analysis and evaluation techniques. The charity can demonstrate its results are constructive through an expert or peer review or by publicizing the research in a reputable journal.

**Third, the research must be carried out for the public benefit and not primarily for self-interest or mainly for private commercial consumption.** Research conducted for an organization's internal advantage, such as researching donation patterns, is not a charitable activity. The policy also requires that charities conducting or funding research involving human subjects consider the ethics and mitigate the risk of harm to humans. Hopefully, the CRA will recognize a charity as having fulfilled this condition where the charity has complied with the existing legal requirements of this type of research.

The CRA notes that a charity collaborating with a commercial entity should make it clear from the outset why and on what basis it has decided to enter into the collaboration. The agreement with the commercial entity should not prevent the charity from satisfying these requirements. Any private benefit flowing to the commercial entity must be incidental, reasonable, inevitable and necessary in order to achieve the charitable purpose. A commercial sponsor with an employee on the allocation committee to choose projects, will be incidental if the appointment is reasonable in exchange for the funds received, the employee provides a valuable contribution and the employee does not hold a casting vote or a veto. A charity may, for example, grant an exclusive license to produce a drug from the research results where the costs associated with developing it were so high that this was the only way the charity could secure the necessary research funds and ensure the drug was brought to the market for the benefit of all. The CRA cautions that if such licenses became the substantial focus of the charity, its activity might be questioned.

**Fourth, the results of the research should be disseminated and made freely available to others who might want access to them.** There is no universal requirement to disseminate information, unless the charity has an educational purpose. Dissemination includes publishing, posting on a web site, or submitting to an online database. Where possible, the charity should record its research in a public register, such as the Canadian Institutes of Health Research. The charity should indicate how to access the full set of results. The CRA sensibly notes that a charity does not have to disseminate if the research does not produce constructive results, but suggests that the charity should record the research title in a publicly accessible catalog, archive the research, and make it available on request. Where the results are highly technical or obscure, the charity can simply provide public access to the research.

Charities seeking intellectual property rights are cautioned that acquiring such rights might prevent them from satisfying these requirements. The CRA states that an organization that applies for a patent may have to keep its research results secret until the right is secured. CRA will nevertheless consider the dissemination requirement to be met if the organization promptly seeks the patent and makes the results public as soon as possible after the patent is secured. This policy should facilitate charities seeking to secure intellectual property rights. A further concession should be considered for charities that need to delay applying for a patent in order to conclude related research and apply for a series of patents.

Overall, the policy takes a sensible approach which recognizes the challenges charities face when collaborating with the commercial sector and obtaining intellectual property rights. Hopefully, the onerous literature review and expert opinion requirements will be applied only to questionable cases as suggested by the policy, rather than creating a difficult hurdle for new research charities seeking registration.

A full copy of the proposed guideline is available on-line at the CRA's Charities and Giving main page under "What's New". The CRA invites comments on the proposed guidelines by February 29, 2008; however, in our experience the CRA often will consider late submissions.

## **PART 2 OF ALBERTA'S "COMMUNITY SPIRIT PROGRAM" - THE GRANTS**

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In December of 2006, then newly-chosen Premier Ed Stelmach had the Alberta Minister of Tourism, Parks, Recreation and Culture form an MLA Committee to develop a "Community Spirit Program."

The goal was to increase charitable giving in Alberta in two ways:

1. Enhancing tax credits available to donors; and
2. Establishing a Community Spirit Fund.

In earlier newsletters, we reported on the Enhanced Charitable Tax Credit which fulfilled Part 1 of the promise. As of January 1, 2007, Albertans receive a \$0.50 tax credit for every dollar donated to charity in excess of the \$200 threshold.

To address Part 2, the Committee undertook public consultation, conducted a literature review of best practices in other jurisdictions, and received submissions from a number of stakeholders in the charitable and not-for-profit sector in Alberta. The committee recommendations were delivered to the Minister in the fall of 2007 and can be found at [tprc.alberta.ca/communityspirit/](http://tprc.alberta.ca/communityspirit/).

On February 1, 2008, the Minister issued a News Release confirming the intention of the Government to establish a Donation Grant Program ("DGP") as the second component of the Community Spirit Program.

Funding particulars for the DGP were to be provided as part of Budget 2008 with program specifics to follow on April 1, 2008. The election now called for March 3, 2008 in Alberta may impact the delivery of these important details. However, comparing the MLA Committee Report ("MLA Report") to the News Release gives an indication of what the DGP may look like should the Stelmach Government be re-elected.

### **WHO IS ELIGIBLE?**

The key appears to be that an organization must provide "direct services to Albertans and Alberta communities." Registration as a charity under the Income Tax Act is not a requirement for eligibility. Given that there is an element of "matching" to the DGP, organizations will no doubt find an advantage in being registered with CRA to encourage donors to provide the seed funds which create the eligibility for a grant. However, those not-for-profits which do not fit within the CRA criteria for registration will not be denied access to the DGP provided they meet the other criteria.

### **HOW MUCH IS AVAILABLE?**

The MLA Report recommended a maximum grant of \$50,000 in any one year with a cap of \$100,000 over three years. The News Release pares that recommendation back to \$25,000 and \$50,000 respectively.

The grant itself will be calculated on "a proportional basis" and "based on cash donations received". The MLA Report had suggested the proportional basis be determined by "dividing the annual program budget by the amount of eligible donations". Receiving the program guidelines will no doubt bring clarity to the way in which an organization can maximize its ability to access the funds to be provided by the Government.

The MLA Report noted submissions it had received about "in kind" donations, sponsorships and fundraising activities. It specifically limited eligible donations to "cash" and in defining "cash" did not include publicly listed securities. Given the enthusiasm for donating such securities in light of the favourable tax treatment

afforded by Federal Government initiatives, it is hoped that some consideration will be given to including those kinds of securities in the category of "eligible donation" when final details are provided.

### **WHAT USE CAN BE MADE OF FUNDS?**

The MLA Report acknowledged submissions in relation to the need for sustainable operating funds by many organizations. It recommended that grant monies be available for operations, programming and small capital projects (\$10,000). The News Release confirms this without specifying the dollar amount for capital projects.

One proviso in the MLA Report was that grants be used to support "philanthropic, benevolent, educational, health, humane, cultural, artistic, sport or recreational purposes". Both in the application process and in the required accountability report it will be interesting to see how the regulations handle the link between spending on operations and the foregoing list (if indeed that list is the one adopted by the Government).

In addition to the permitted uses, the MLA Report identified a need to list restricted uses for any grant funds such as "religious purposes" and "activities and benefits outside Alberta". How this may impact national organizations and their ability to access DGP is another detail the guidelines should address.

There is no question that the Stelmach Government, if re-elected, intends to move forward on this initiative. While the News Release of February 1, 2008 leaves us with more questions than answers, the overall thrust is generally good news for the sector in Alberta.

### **THE IMPORTANCE OF CORPORATE MAINTENANCE**

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An article in the June 2007 issue set out the considerations and requirements for conducting an annual meeting. This article provides other considerations for the effective consolidation, tracking and maintenance of corporate records of any not-for-profit corporation, whether it is charitable or non-charitable.

### **CONTENTS OF CORPORATE RECORDS**

Your minute book and other corporate records should include the following materials (recommended to be organized under marked tabs and/or files, and sorted by date):

- Up-to-date contact list, including names, addresses, phone, fax and email for each Director, Officer, Member and Auditor;
- All original charter documents;
- All By-Laws in force;
- Registers of Directors, Officers and Members (including addresses, dates of election, appointment and/or resignation);
- Duplicate filed copies of all government filings;
- Minutes/written resolutions of Directors and Members, organized by date;
- Copies of financial statements;
- Duplicate copies of banking documents, including a summary of the current signing authority on the Corporation's bank account(s);
- Copies of T3010A Charity Information Returns, T1044 Information Returns, T2 Corporations Tax Returns, or other tax returns, as applicable, and as filed with relevant taxation authorities;
- For charities, duplicate copies of charitable tax receipts.

### **TRACKING OF EVENTS**

In order to create, maintain and preserve a valid and ascertainable trail of principles capable of approving corporate actions that effectively bind the Corporation, the corporate proceedings should properly track the

following events (all passed pursuant to relevant statutes, by-laws, other government or regulatory requirements and best practice standards):

- Where applicable, the application, admission resignation or removal of all Members;
- The election, consent, resignation or removal of all Directors;
- The election or appointment, resignation or removal of all Officers;
- The appointment, retirement or removal of any Auditor or Accountant;
- The approval of all relevant corporate actions (including post-incorporation organization, annual meetings, and all action items passed by the Board or Members);
- Any other proceedings required by statute, by-law or other government or regulatory requirement.

## **GOVERNMENT FILINGS**

The importance of ongoing and timely government filings cannot be over-emphasized. These filings are critical to ensuring that the Corporation will continue to exist and remain in good standing, not only in its home jurisdiction, but also in any jurisdiction in which the Corporation is registered to carry on its operations, and with any relevant taxation or other regulatory authorities.

I have not specified the filing requirements in any one jurisdiction in this article. Your legal advisers or Auditors can provide you with the requirements that relate to your Corporation, or we can assist you with making the necessary determinations and keeping your Corporation in compliance.

Here are some of the filings to be aware of:

### **Corporate Filings**

- Annual Return in home jurisdiction and in any jurisdiction in which the Corporation carries on its operations;
- Notice of any change of information on file with any corporate registry, which may include changes of Directors, Officers, Head Office, Mailing Address, or Attorney for Service.

### **Tax Filings**

- For corporations that meet the tests under relevant legislation, tax filings in home jurisdiction and, if applicable, in any jurisdiction in which the Corporation carries on its operations;
- Compliance with ongoing reporting requirements for any taxing authority (such as copies of charter documents, by-laws, details of current Directors and Officers, etc.).

### **Regulatory Filings**

- Such regulatory filings as may be required from time to time.

Failure to file could result in penalties and even revocation of the Corporation's charter or other registrations. If in doubt about any of the above filing requirements, we would suggest you contact the relevant government or regulatory authority and confirm their requirements and your current status -- or just ask us -- we would be happy to assist.

## **CRA PERMITS GIFTS THROUGH A MUNICIPALITY TO A NON-PROFIT ORGANIZATION**

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In a recent ruling by the Canada Revenue Agency ("CRA", document number 2006-0215921R3), a Canadian corporation asked the CRA for an advanced ruling concerning a proposed gift to a municipality. The corporation intended to make a donation to a Quebec municipality (a municipality incorporated pursuant to la Loi sur les Cite et Villes, L.R.Q., c. C-19), which is a qualified donee pursuant to subsection 149.1(1) of the *Income Tax Act* (the "Act"). The municipality then intended to make a gift of an equal amount to a not-for-profit

corporation that was not a qualified donee pursuant to the Act. Surprisingly, the CRA ruled that the gift by the Canadian corporation to the Quebec municipality was a valid charitable gift, in spite of the fact that the Canadian corporation appeared to be using the municipality as a flow-through vehicle. Had the Canadian corporation made the gift directly to the not-for-profit corporation, the gift would not have qualified for a charitable gift receipt, and the Canadian corporation would not have been able to take a deduction against its income.

## NEW MILITARY RESERVIST LEAVE FOR ONTARIO EMPLOYEES

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On December 3, 2007, the Ontario government added military "reservist leave" provisions to the Employment Standards Act, 2000. In doing so, Ontario joined Nova Scotia, Manitoba and Saskatchewan, which already have similar laws.

Under the new law, all employees who have worked at least six months for an employer are entitled to a job-protected leave of absence if they are deployed to a military operation by the Canadian Forces. This includes emergency military operations within Canada, and also includes any pre or post-deployment training. It should be noted that all employers, regardless of their size, are required to grant this leave.

Reservists are required to give employers "reasonable notice" of their deployment. If reservists must join the operation before they are able to give notice, they must advise their employers as soon as possible after beginning their leave. Employers are entitled to require evidence of the deployment. Reservists ending their leave must give employers "reasonable notice" that they intend to end the leave.

When the deployment comes to an end, employers must reinstate the reservist to their previous position, or a comparable position if the previous position no longer exists. Employers may postpone the reinstatement for a maximum of two weeks after the leave ends, or until the first payday after the leave ends, whichever is later. Employers are not obliged to pay wages, or to continue pension or benefit plans during the leave. However, they are obliged to continue pension and benefit plans during any postponement period. Employees on reservist leave must continue to accumulate seniority and length of service credits.

The new law will be enforced by the Ministry of Labour Employment Practices Branch in non-unionized workplaces, or under the applicable collective agreement in unionized environments.

## WHAT'S HAPPENING AROUND MILLER THOMSON LLP

The January 2008 Canadian Not-For-Profit News contained "Looking Back and Looking Forward", "First Charity Publicly Sanctioned", "Tax Executives Have Some Questions We Do", "International Treaty Protection for NGOs", "Private Member's Bill Offers Imaginative Policy on Gifts", "Non-Profit Sector and Economic Activity" and "Sports Can Be Charitable" by **Arthur B.C. Drache**.

The Canadian Taxpayer's January 2008 edition contained "Tax Court Refuses to Delay Suspension" by **Arthur B.C. Drache**.

The February 2008 issue of The Canadian Not-For-Profit News contained "Budget Likely to Have Little Good to Offer", "Tax Court Refuses to Delay Suspension", "Charity Policy Proposals in Action", "Donation of Aeroplan Points Gives Valuation Problems", "Split Receipting Ruling", "U.S. Tightens Gifting Proof Rules", "Museum Fees a Pre-Election Issue in the U.K." and "Director Liability Insurance" by Arthur Drache.

On February 4 and 5, 2008, the Federated Press "2nd Tax Planning for the Wealthy Family Course" course was held in Calgary. **Bill Fowlis** spoke on "Advanced Income Tax Planning for Maximizing Asset Protection and Owner-Manager Tax Planning". **Sandra Enticknap** from the Vancouver office spoke on "The Use of Trusts in Estate Planning: Planning vs. Litigation". **Gail Black** spoke on "Wills: Avoiding Excess Taxation".

**Susan Manwaring's** presentation "Introduction to Charity Law" at the 2007 Canadian Bar Association national conference was featured in "Sharing the Wealth: the National Charities and Not-for-Profit Law Section Participates in the 2007 Canadian Legal Conference" By Janice Pasay in the February 2008 issue of Charity Talk.

**Rachel Blumenfeld** participated as part of the faculty at the Osgoode Professional Development 5th Annual Intensive Wills and Estates Workshop held on January 30, February 6 and 13th in Toronto. Rachel led the Estate Administration portion of the workshop.

**Rachel Blumenfeld** presented on "Pitfalls in Wills and Trusts" on February 5 at the Etobicoke C.A. programme.

**Rachel Blumenfeld** spoke on Estate Planning at the BAYT Synagogue Sisterhood program entitled "Dollars and Sense for Women" on February 17.

On February 20, Miller Thomson's national Charity and Not-for-Profit law group hosted a complimentary workshop at the Calgary Chamber of Commerce. The seminar covered a wide variety of topics of interest to the Charity and Not-for-Profit sector. **John Phillips, Erin Viala, Fred Fenwick** and **Greg Shannon** of Miller Thomson's Calgary office presented on the following topics: "Understanding Structures and Terminology in the Sector", "Fundraising in Alberta", "Employment Law Issues for Charities" and "Governance Issues". Part II of the workshop will take place on March 17, at the Calgary Chamber of Commerce.

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