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CHARITIES AND NOT-FOR-PROFIT NEWSLETTER

The Charities and Not-for-Profit Newsletter is published monthly by Miller Thomson LLP's Charities and 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.

Inside

CANADIAN GOVERNMENT TO MATCH HAITI GIFTS

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In response to the January 12 earthquake in Haiti, the Canadian government had originally set aside $50 million for granting to Canadian relief and development charities on a donor match basis (in addition to a further amount of $85 million in grants to UN relief agencies and to specific major Canadian charities involved in the relief effort). The announcement and some details are available at http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/ANN-114115719-MVV. The Government has since lifted the cap and will match all eligible donations.

In essence, gifts by individual Canadians (up to $100,000) to Canadian registered charities that are earmarked for Haitian earthquake relief will be eligible for dollar for dollar matching. CIDA will then review applications for matching grants and award them on the basis of an as-yet undetermined evaluation methodology (but one that will put significant weight on the applicant charity's existing infrastructure and experience in Haiti).

All Canadian charities are eligible to apply and charities that collect gifts for Haitian relief but end up not being eligible (either because they are turned down or because they choose not to apply to CIDA) to receive matching grants may forward the funds collected to another Canadian charity that is eligible. That eligible charity can assist in completing the CIDA declaration required in order to ensure grant eligibility for the recipient charity. Thus, Canadian charities like a local house of worship that have the capacity to collect funds for Haitian relief, but that have no real Haitian relief capacity, should contact reputable relief and development charities for assistance with this process.

SPECIAL QUEBÉC MEASURE: DEDUCTIBILITY OF 2009 DONATIONS MADE TO ASSIST VICTIMS OF THE EARTHQUAKE IN HAITI

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Québec announced on January 22, 2010 that donations made by February 28, 2010 will be deductible in 2009. The announcement states:

> The Minister of Finance of Québec, Raymond Baychand, announced an exceptional measure to support assistance, in the form of donations, to the victims of the earthquake that recently struck Haiti.

Mechanisms will be set-up to enable Quebecers, who so wish to deduct in their 2009 tax return, donations of money made from January 12 to February 28, 2010 to charities to assist victims of the earthquake.

Those individuals who make such donations of money will be deemed to have made the donation at the end of 2009. They will therefore be able to include, in the spring of 2010, the amount thus donated in the calculation of the tax credit for donations they claim for 2009.

To be eligible for this special measure, donations must be of money and made to a registered charity to enable it to assist victims of the earthquake in Haiti. Donations of money include: a donation made in cash, by cheque, credit card, postal money orders, by means of a text message (SMS), wire transfer, or points obtained under a reward program.

The Federal government has not announced a similar measure as of this date.

MEMBERSHIP RIGHTS UNDER THE *CANADA NOT-FOR-PROFIT CORPORATIONS ACT*

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One of the more significant and potentially challenging aspects of the *Canada Not-for-Profit Corporations Act* is its granting of the voting rights to members who, under the current regime, would not have the right to vote on corporate decisions. The new Act, which received Royal Assent on June 23, 2009, and which is expected to come into force within the next 12-18 months, will significantly constrain the ability of non-profit corporations to have non-voting members. It is thus important that federally incorporated charities and non-profit organizations review their membership structure and take action before they are subject to the new Act.

Under the new Act, members who do not otherwise have a right to vote will have the right to vote on certain fundamental corporate changes. In some cases, the non-voting members will have a class vote, while in others they will vote as part of the total membership of the corporation. Where the non-voting members have a class vote, they can as a group veto any action.

Non-voting members will be eligible to vote as part of the total membership on the following corporate matters that require the support of two-thirds of all of the members in order to pass:

- amalgamation with another corporation;
- continuance of the corporation into another jurisdiction; and
- the sale of substantially all of the corporation's assets.

Non-voting members will have a class vote on:

- amendments to the articles or by-laws which would alter the rights of their class of members, or effect an exchange of one class of members into their class;
- amalgamation if it alters the rights of their membership class, or allows for an exchange of membership classes;
- the sale of substantially all of the corporation's assets, if the sale would affect their membership class differently from other membership classes; and
- Proposal to dissolve, or to liquidate and dissolve, the corporation.

Non-voting members will have the right to request that a public accountant attend a members' meeting, at the corporation's expense, to answer questions related to their duties. A non-voting member will also meet the definition of "complainant" under the new Act for the purposes of certain corporate remedies, thereby enabling non-voting members to apply for an oppression remedy or to apply for leave to commence a derivative action in the name of the corporation.

The new Act provides some scope to limit non-voting members' voting rights in respect of proposed alterations to the articles or by-laws in the corporation's articles. However, the right of non-voting members to vote on amalgamation, continuance, dissolution, or a sale of substantially all corporate assets cannot be limited.

Corporations that do not want their non-voting members to obtain these rights will want to eliminate their non-voting members under the current Act. These non-voting members may be renamed "supporters" and the by-laws of the corporation can provide that these individuals shall not be members. The rights of these supporters could be then specified in the by-law (for example, the supporter may have the right to receive annual reports or to attend "supporters' meetings"). The concept of supporters is discussed in an article by Arthur Drache, in the November 2009 Miller Thomson Charity and Non-For-Profit Newsletter. This approach should eliminate the non-voting member rights, unless a court should find that such "supporters" are in fact members under a different name. It should also be noted that such "supporters" would likely still qualify as "complainants" for the purposes of corporate remedies.

Thus, the new Act will significantly alter the decision-making structure of federal non-profit corporations that currently have classes of non-voting members. Once the new Act comes into force, current federal non-profit corporations will be required to continue under the new Act within three years. Once a corporation has continued under the new Act, it will not be able to alter its membership structure without approval of its current non-voting members. Thus, directors of such corporations should decide now whether this new regime makes sense for their organizations and make alterations before the corporation continues under the new Act.

We will continue to provide updates on developments related to the new Act and the options available to federal non-share capital corporations. Miller Thomson's Charities and Not-for-Profit lawyers can assist corporations to address these issues.

CHURCH PROPERTY OWNERSHIP DEBATE SPARKED BY DISPUTE OVER DOCTRINE OF THE ANGLICAN CHURCH

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In *Bentley v. Diocese of New Westminster B.C.*, former Labour Relations Board Chairman Stephen Kelleher, now Justice of the B.C. Supreme Court, combined two actions for trial which concerned disputes over church property within several parishes of the Anglican Church of Canada (ACC).

In the first, there were 22 plaintiffs. They were Anglican clergy and lay leaders from four incorporated parishes geographically situated in the Diocese of New Westminster (the "Diocese"). The plaintiffs were also trustees of their respective parish corporations, and also brought proceedings in that capacity.

The defendants were the Anglican Synod of the Diocese of New Westminster (the "Diocesan Synod") and Michael Ingham, the current Bishop of the Diocese.

These proceedings arose indirectly from Bishop Ingham's decision in June 2002 to accept the recommendation of the Diocesan Synod that he authorize a rite for the blessing of same-sex unions. The plaintiffs viewed this as an abandonment of Christian Scripture, and their respective congregations had left the Diocese as a consequence. They contended that church properties in their four parishes were held pursuant to a trust for "historical, orthodox, Anglican doctrine and practice", and that the blessing of same-sex unions was inconsistent with such doctrine and practice. Accordingly, the plaintiffs sought to have the church properties turned over to their congregations pursuant to the exercise of this Court's inherent jurisdiction over trusts and charities.

Certain parishes voted overwhelmingly to leave the local Diocese, and that raised the issue of the status of their Ministers and buildings. The Local Bishop issued a notice of a Presumption to Abandon Ministry, and then demanded "the orderly handing over of control of buildings and assets" from the dissenting congregations and ordered the removal of the elected Trustees of two of the congregations.

The defendants counterclaimed for a declaration that the plaintiffs were not entitled to possession or control of the properties in question, and other ancillary relief.

The plaintiffs said that in these circumstances of broken communion, there is a supervening impracticability wherein the Court should exercise its inherent jurisdiction to rescue the trust.

The plaintiffs argued that granting the counterclaim would cast the largest congregation within the ACC out of its building because it stands against innovations in doctrine and practice which are, at the least, controversial. The same outcome would similarly befall the largest congregation in the Fraser Valley and almost the entirety of the Chinese Anglican community in the Diocese. This outcome should be avoided in order to minimize the existing conflict within the Christian community.

With respect to the form of Order, the plaintiffs said that the *cy-près* Order need go no further than that the plaintiff trustees be continued in each parish under the oversight of another Bishop.

The defendants submitted that the plaintiffs' case failed even on the legal framework upon which they rely. They said that the jurisprudence on religious purpose trusts contained three principles that are determinative of the present dispute.

First, it is only the "fundamental principles" or "defined doctrines" of a religious organization that can be the subject of a trust and there is no such fundamental principle of that sort in this case because the non-sanctity of same-sex relationships is not fundamental to the ACC. Second, the principle that the property of a religious organization is held on trust for the original purposes of the organization is subject to any mechanisms within the organization that allow for change. If a religious organization's structure allows for doctrinal changes, then any such changes cannot be a breach of an implied trust. Third, the defendants submitted that a substantial body of authority confirms that where a religious organization is hierarchical and has officers or tribunals to determine correct doctrine, civil courts ought to defer on religious matters to the determination of those officers or tribunals.

Kelleher J. noted that the plaintiffs' submissions started from the premise that church property is presumed to be held on a religious purpose trust. In contrast, the defendants contended that the issues in dispute could be resolved by reference to statutes and canon law, and that it is unnecessary to turn to trust principles.

The Court examined and appeared to accept the American approach of "neutral legal principles" in which property disputes in a religious context should be resolved with respect to neutral legal principles not doctrinal matters. Where the interpretation of the documents would require the courts to resolve a religious controversy, then the courts are to defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

Kelleher J. noted that: "the notion of civil courts deferring to ecclesiastical authority on questions of doctrine has deep provenance in Canada." Further, he reviewed founding documents and determined that within the ACC a parish does not have authority to unilaterally leave the Diocese, and it is consequently *ultra vires* for it to pass a resolution purporting to do so. Additionally, while parish corporations may hold title to real property, that property effectively remains within the Diocese unless the Executive Committee and Bishop agree to mortgage, sell or otherwise dispose of it, which had not happened in this case.

Kelleher J. noted that "Historic" and "orthodox" are uncertain and subjective terms that cannot form the basis of an enforceable trust, and trusts that freeze doctrinal development at a point in time would be inconsistent with the history of change and evolution in Anglicanism. Significantly, the ACC has concluded that the blessing of same-sex unions does not engage core Anglican doctrine. This clearly implies that such blessings are not contrary to the Anglican Church's founding documents. It is only a departure from the core tenets or fundamental doctrine of a church that can breach a religious purpose trust.

On the other hand, Kelleher J. found that Bishop Ingham had acted outside his authority in removing the Trustees that had been validly elected by their vestries and ordered them reinstated, provided that they exercise their authority in relation to the parish properties in accordance with the Act, as well as the Constitution,

Canons, Rules and Regulations of the Diocese and, in particular, that "...they do not have authority to use those properties outside of the Diocese; this includes using them for purposes related to [the organization of dissenting parishes]."

Because the plaintiffs were not successful in the main part of their action, it became necessary for the judge to consider a discrete dispute over a bequest by an individual who had attended one of the dissenting parishes: was the bequest for the benefit of the Parish, the dissenting church or the wider Diocese? The judge found, on this aspect of the case, that the best interpretation of the testator's wishes was that she left the money for the building fund of a particular Chinese church, and that required that the money go to the dissenters as there was little likelihood of there being many other Chinese Anglicans in the Diocese (most, being conservative in belief, had left the Diocese).

Kelleher J. noted, somewhat wryly that "...it may be that in light of the other conclusions I have reached, the trustees will no longer wish to remain as such. I do not know. For now, I will leave it to the parties to arrive at a workable resolution. In the event it becomes necessary, they may return to court for further orders in this regard."

In sum, the Judge found for the Bishop with respect to the buildings and assets, with the Trustees in terms of them keeping their offices and with the dissenting Chinese Anglicans in terms of the monies (over 2 million dollars) left to them by a deceased parishioner. The dissenting parishes have appealed on the property ownership issue. The defendants have cross appealed, only on the issue of the bequest.

B.C. *SOCIETY ACT* REVIEW — GOVERNMENT CONSULTATION PROCESS

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The Ministry of Finance of the Province of B.C. has announced that it is now officially reviewing British Columbia's *Society Act*, the statute that provides rules for the registration and corporate governance of not-for-profit entities in British Columbia.

The purpose of the review is to identify and address any legislative obstacles that may prevent societies from functioning fully and efficiently, and ensure that the public interest is being protected. The government is seeking input from the public on any problems, gaps, inconsistencies or ambiguities in the *Society Act* and any reforms that the public would like considered. The Government has had the benefit of an extensive review of the *Society Act* by the BC Law Institute in a 2008 report recommending a new *Society Act*.

For example, the Government has identified two fundamental structural issues regarding the *Society Act* which are:

1. The nature of the corporate model most appropriate for societies and whether a sophisticated business law framework should be adopted; and
2. The extent to which the *Society Act* should contain regulatory provisions or other rules that constrain the operation of societies.

The *Society Act* review will likely consist of a number of consultation phases. In the first phase, the goal is to identify issues, priorities and objectives, and to explore possible structural frameworks.

The public is invited and encouraged to participate by commenting on the issues raised above, or other problems there may be with the current legislation, by April, 2010. It is the intention of the government to solicit as much input as possible.

For more detailed information, see http://www.fin.gov.bc.ca/society_act_review.pdf

Miller Thomson LLP's Charity and Non-Profit group in British Columbia can assist societies who require assistance preparing comments.

CRA'S NOT-FOR-PROFIT ADMINISTRATIVE POLICY REVISITED

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In the January newsletter we wrote about a recent technical interpretation that had been published by the Canada Revenue Agency Rulings Directorate ("CRA") regarding whether or not a particular organization or operation established as a non-share capital entity could qualify as a non-profit organization under the *Income Tax Act*.

Another technical interpretation was released by CRA which furthers this discussion. This article will highlight some of the comments in that letter and our thoughts on whether or not these comments are further evidence of a change in the direction of CRA when determining whether or not an entity qualifies as a tax exempt non-profit organization.

In this particular interpretation, the CRA responded to the following two questions:

1. Can a condominium corporation rent a suite for an amount in excess of its cost of operating and maintaining the suite and still qualify for the exemption from tax provided by paragraph 149(1)(l) of the Act?
2. If the rental profits are used to reduce members' fees, does this affect the tax exemption?

In responding to these questions, the CRA stated that in its view, where the condominium corporation leased the premises for an amount that could generate a surplus, that in and of itself could be considered to be indicative of an intention to make a profit, and thus the entity would not qualify for the exemption from tax provided under paragraph 149(1)(l) of the Act. Further, the response indicated that when a condominium corporation reduces members' fees as a consequence of intentionally charging rent in excess of costs, then that would be making the income of the condominium corporation available for the personal benefit of its members which is also contrary to paragraph 149(1)(l) of the Act.

This author questions the responses provided by CRA, and also is reminded of the age old adage – 'be careful what you ask for'. There is not a large body of case law on when an organization qualifies for tax exempt status as a non-profit organization, nor has CRA historically devoted much time to this issue. It is therefore difficult to conclude whether these responses are an accurate statement or interpretation of the Act.

Paragraph 149(1)(l) provides:

> A club, society or association that in the opinion of the minister was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was available to or was otherwise available for the personal benefit of any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada.

It is this author's view that in today's world, many legitimately non-profit entities that operate for social welfare, civic improvement, recreation, or other purposes (other than profit) operate as effectively and efficiently as they can to achieve their objects in a fiscally prudent manner. This may involve generating revenue from one activity and using that revenue for another activity while operating on an overall cost recovery basis. CRA's response in this letter appears to suggest that if any activity earns a surplus, the test in paragraph 149(1)(l) is not met. I think that to conclude that such a manner of operation is indicative of the entity as a whole having an intent to make a profit is questionable.

Further, to conclude that when these entities operate prudently with the result that their membership fees do not increase or are reduced is an indication that there is a personal benefit to the member seems to be a conclusion reached out of context. Suggesting that an entity must plan to spend all revenues – even if such expenditures are not necessary at that moment in time, seems to be inconsistent with the overwhelming

public interest for organizations to be fiscally prudent and responsible. CRA has acknowledged this in the past, Interpretation Bulletin IT-496R *Non-Profit Organizations* states that a non-profit can accumulate a reasonable amount of excess income.

We concluded our earlier article by suggesting that we were hopeful that the answers in the particular technical interpretation were driven mostly by the particular questions asked (which of course are not available as the original letter sent to CRA is not posted on the website). We remain of that view, but are concerned that these responses are indicative of new administrative positions in this area.

2010 MILLER THOMSON FOUNDATION NATIONAL SCHOLARSHIP PROGRAMME

The Miller Thomson Foundation Scholarship encourages and promotes the attainment of higher education for individuals who have demonstrated a high level of academic achievement, have made a positive contribution to their school through involvement in extracurricular activities and have made significant contributions of time and energy to community service programs. The awards are granted to Canadian students in their graduating year of high school or CÉGEP to attend a college or university in Canada.

The deadline for receipt of applications is March 15, 2010. To obtain an application form and further information about the National Scholarship, please visit our website at www.millerthomson.com and then link to MT Foundation, or e-mail Lesley Lawson, Executive Director of the Miller Thomson Foundation, at llawson@millerthomson.com.

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

Iain Benson was quoted in mid-December in National Post articles covering the Judicial Review of the Ontario Human Rights Tribunal Christian Horizons decision. Iain intervened in the case on behalf of our client the Assembly of Catholic Bishops of Ontario.

Martin J. Rochwerg was elected a member of the Board of Governors of the Canadian Tax Foundation at its 2009 Annual Meeting held in Toronto.

Arthur Drache wrote "C.D. Howe paper Proposes Changes to Donation Credit System", "The Stretch Tax Credit: Déjà Vu All Over Again", "International Comparisons of Political Activity by NGOs Studied", "FCA Rules on Case Involving Foundation Divestiture of Assets", "Personal Use Property or Capital Property", "Finance Committee Recommendations on Charity Incentives" in the January 2010 issue of Canadian Not-For-Profit News.

Susan Manwaring and **Kate Lazier** wrote "Ontario Proposing Significant Regulatory Relief for Charities in Province" in the January 2010 issue of Canadian Not-For-Profit News.

Susan Manwaring and **Kate Lazier** published "Ontario's *Good Governance Act* Includes Positive Changes for Charities" in *Charity Talk*, Canadian Bar Association, January 2010 issue.

Andrew Valentine published "CRA Draft Guidance on Foreign Activities" in *Charity Talk*, Canadian Bar Association, January 2010 issue.

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