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CHARITIES & NOT-FOR-PROFIT NEWSLETTER

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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.

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PROPOSED TAX LAW CHANGES

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On July 14, 2008, the Government proposed legislative changes to the *Income Tax Act*. The following summarizes the changes that affect the charitable sector.

Gifts of Tax Free Savings Accounts

The good news for the charitable sector is that the legislation proposes to allow an individual to designate a tax-free savings account ("TFSA") to pass to charity upon death. The individual receives a charitable credit on his or her income tax return in the year of death for the gift. The new TFSA will be available beginning in 2009. An overview of the TFSA is available online in the February 2008 edition of Miller Thomson's Tax Notes newsletter at http://www.millerthomson.com/docs/Tax_Notes_February_2008.pdf.

Excess Business Holdings Regime

Despite the hope that the government would completely abandon the unnecessary and needlessly complex excess business holdings regime for private foundations, the Government proposed further amendments to the regime.

Private foundations gained some relief. The obligation to dispose of shares can now no longer exceed the "exempt shares percentage" (formerly the "entrusted shares percentage"). The exempt shares provision was broadened. It formerly included shares received from a gift made before March 19, 2007, or pursuant to certain wills and trusts executed before March 19, 2007, subject to a direction that the shares continue to be held (not disposed). This concept now includes shares not listed on a designated stock exchange that were acquired before March 19, 2007, excluding shares of a corporation which owns shares of a public corporation that are listed on a designated stock exchange if:

- the corporation owning the shares is controlled by the private foundation, relevant persons to the private foundation or the private foundation together with relevant persons;
- the private foundation would have an excess corporate holdings percentage if it owned the public shares directly; and
- the private foundation together with controlled corporations own more than 2% of the class of shares.

The proposed legislation also extends the exempt share concept to shares substituted for exempt shares in the course of certain income tax rollover provisions.

As this proposal does not address future gifts of enduring property, private foundations will have to decline or seek to vary such gifts unless the gift allows the foundation to substitute the gift for other property.

Private foundations will also have to pay close attention to any corporation which it or relevant persons control, if the foundation owns shares in the corporation.

The proposed legislation also broadened the regime to address trusts where on both March 18, 2007 and at the current time, a private foundation is the sole trustee of a trust or the majority interest beneficiary in the trust. In these cases the private foundation is deemed to hold a proportion of the shares held by the trust. Similarly, the proposed legislation includes an anti-avoidance rule for a private foundation or a relevant person acquiring an interest in a corporation through a trust.

While the changes to the regime seek to lighten the burden on private foundations and close loopholes in the existing regime, we continue to question the need for these rules. We would argue that there is no apparent justifiable reason for this increasingly complex regime. Private foundations seeking assistance in understanding their obligations under this regime can contact us for advice.

CONSULTATION ON PROPOSED POLICY ON FUNDRAISING BY REGISTERED CHARITIES - AN UPDATE

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We confirmed in our April 2008 newsletter that the Charities Directorate of Canada Revenue Agency (“CRA”) had released draft guidelines applicable to the fundraising activities of registered charities. The policy was released as an eight page document and CRA advised at the time that detailed explanations of the individual elements set-out would be posted on the CRA website in late April or May. After some delay, the detailed explanations of the individual elements were released in late June. We recommend that charities review these documents and consider how these guidelines will apply to their operations. Charities wanting to make submissions in connection with the guidelines now have until August 31, 2008 to forward them to the Charities Directorate.

In our earlier article we identified the fact that, as proposed, the guidelines apply to all registered charities and that, in our view, the concept of one set of rules applying to all may prove to be problematic. The nature of fundraising and the appropriateness of the expenses have to be considered in the context of the particular organization. A one size fits all regime does not recognize that fundraising in support of research for children’s health is likely much more cost effective than fundraising for an organization that works to feed the homeless in our cities and provide resources for such individuals to assist them as needed. The concern that the policies do not recognize the distinctions between forms and missions of charities continues as we review the more detailed document.

Generally, we do applaud the CRA for attempting to clarify some of the issues around fundraising expenses which are incurred by charities. This is an area where there is inconsistency in understanding in the sector and among those who advise the sector. The lack of clarity leads to inconsistent reporting all of which works against the needed transparency and accountability. The commentary helps to mitigate against this by providing some helpful examples and clarification about expenditures in this area. The commentary should also assist by educating the public about fundraising costs, the fact such costs are necessary, and should be considered appropriate.

However, as drafted, the policy and the background information appear to be directed more at preventing tax shelter abuses and the small percentage of truly offensive behaviours than they are at assisting the sector in dealing with the complexity surrounding this issue. We also fear that the grid although a useful measure to assist an organization in its operation, will be relied on by the public and the CRA auditors as a sword to attack a charity rather than as the administrative tool we understand it is meant to be. As an audit tool it is problematic. It looks at costs on a year by year basis, thereby ignoring the multi-year nature of campaigns. It fails to take into consideration the fact that charities come in all shapes and sizes. The grid establishes a one size fits all structure. We acknowledge that the detailed explanation identifies circumstances where charities would be appropriately off the grid - but the question we are very concerned about is whether auditors or, even more importantly, the general public will look behind the grid when reaching their conclusions.

The Background information for the policy is 30 pages long and a full discussion of the commentary is outside of the scope of this newsletter article. Charities should read it and consider how it applies to their organization. As an education piece it will assist organizations in identifying issues to think about when fundraising. It contains helpful commentary for organizations to consider when embarking on or continuing campaigns.

Transparency and accountability are very important to the public trust in the sector. The issue of fundraising expenses and how they should be allocated and reported is an important aspect of accountability. That said, setting arbitrary guidelines has potential to do more harm than good. Charities are encouraged to review and consider the policy and the explanations recently released and consider how these guidelines would apply to their particular circumstances. To the extent that your organization is concerned that the application of the detailed rules could inappropriately impact your organization, consider providing comments to the CRA setting out the concerns. It is hoped that if it can be demonstrated that the one size fits all form of guidelines is not helpful for the sector, CRA will reconsider parts of the fundraising policy before it is finalized.

The members of our Charities and Not-for-Profit Group would be pleased to assist you in making such comments to the CRA.

B.C. HUMAN RIGHTS TRIBUNAL CONSIDERS LIMITATIONS TO TEMPLE MEMBERSHIP

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Some of the most difficult legal situations of charities and not-for-profit revolve around battles within a religious organization. Sometimes these are based on doctrinal issues, sometimes about money and sometimes about membership issues. This last was the case which came before the British Columbia Human Rights Tribunal in a preliminary fashion. The Tribunal handed down a decision on July 9.

The Tribunal, in a decision written by Diane H. MacLean, has dismissed a complaint by two members of the Indo-Canadian community who were denied membership in a Burnaby Sikh temple because of their social ranking in India's caste system.

Gurshinder Sahota and Sohan Shergill said they were discriminated against by the Shri Guru Ravidass Sabha Temple because they belong to a higher caste in the traditional system of social ranking than do temple members. The 900 members of the temple belong to the lowest group, *Dalits*, formerly referred to as "untouchables." The complainants are from the *jat* caste, which is traditionally a land-owning class in the Punjab and now makes up much of Metro Vancouver's Sikh community.

There were several defences set out by the Temple. The Tribunal effectively decided that it did not have jurisdiction in the case, and that if it did have jurisdiction, it would have found for the Temple in any case.

The fairly lengthy decision was based on the specific provisions of the *Human Rights Code* of British Columbia and relied on a number of cases of the B.C. Courts. Interestingly, one of the cases revolved around the right of a private golf club to limit membership.

First, after considering the specific language of the legislation, the Tribunal pointed out that the primary purpose of the *Human Rights Code* was to address problems related to "full and free participation in the economic, social political and cultural life of British Columbia". There is a continuum ranging from issues related to economic and social matters, with the latter being less subject to review of complaints of a discriminatory character.

One test applied is whether the organization offers "service customarily available to the public." The Tribunal cited the court decision in the private golf club situation.

If organizations are seen as ranging across a spectrum from the purely economic to the purely social, trade unions, employers' organizations and occupational associations are at the economic end. The legislature intended them to fall within the scope of the legislation. There are then a large number of combined economic/social organization, and finally, at the other end,

purely social religious and cultural organizations. without putting too fine a point on it, private golf clubs must rank at the social end of the spectrum.

The Tribunal then determined that the Temple in this case was akin to the golf club situation.

Therefore, access to membership in the Sabha is not an accommodation, service or facility customarily available to the public. As in Buntain, the organization is a result of a private selection process based on attributes personal to the members. In this case, a purely private organization has chosen to restrict its membership to persons in the Ravidassia community and has defined that community to include only those of the Chamar caste. Therefore, the complaint is not within the jurisdiction of the Tribunal and is dismissed under s. 27(1)(a).

The Tribunal then goes on to say.

In addition to my finding that membership in the Sabha does not constitute an accommodation, service or facility customarily available to the public, I am satisfied that the complaint should also be dismissed pursuant to s. 27(1)(b). This is because s. 41 of the Code provides a complete defence to the allegations. Section 41 provides:

If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

What followed is that any discrimination which stemmed from the refusal of membership was acceptable as the Temple had as a major function the promotion of the interests and welfare of its own religious and caste community to which the applicants did not belong.

The case should of interest to any membership organization but we must caution readers to keep in mind the fact that it is based on British Columbia legislation and British Columbia jurisprudence. We are far from certain that the same facts would produce the same results in another province or whether different facts might produce the same decision in British Columbia.

EXTRA-PROVINCIAL AND EXTRA-TERRITORIAL REGISTRATIONS

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Following the incorporation of a not-for-profit organization (“NPO”), in addition to maintaining compliance in its home jurisdiction, it is important to consider whether the NPO should be registered elsewhere in Canada.

In most provinces and territories in Canada, an NPO is required to be registered before or within a short period of time of commencing to carry on operations. This article provides summary information on those registration requirements.

An extra-provincial or extra-territorial corporation is defined as a corporation incorporated otherwise than by or under an act of the respective legislature; in other words, a corporation in most instances incorporated (or continued or amalgamated, where the laws permit) by Letters Patent.

The following is a summary of the requirements of each Canadian jurisdiction for registration of an NPO.

The common thread in all jurisdictions requiring registration is that, in addition to consequences shown below, an NPO is unable to either commence or maintain an action in any jurisdiction in which it is not registered.

Mandatory Registration

The following jurisdictions have mandatory registration under the circumstances set out below:

A Alberta

Relevant Statute: *Business Corporations Act*, R.S.A. 2000, c. B-9, Part 21

An NPO must register in Alberta, as an extra-provincial corporation, within 30 days of commencement of its operation in that province.

Penalty for Non-Registration: A fine of not more than \$5000.

B. Saskatchewan

Relevant Statutes: *The Non-Profit Corporations Act*, 1995, c. N-4.2 of the Statutes of Saskatchewan, 1995, as amended, Part III. This Act does not specify the time frame in which the Corporation must register as an extra-provincial corporation.

Note: Corporations Branch of Saskatchewan has confirmed that soliciting charitable funds by mail would be considered carrying on business.

Penalty for Non-Registration: A fine of not more than \$500.

C. Manitoba

Relevant Statute: *The Corporations Act* C.C.S.M. c. C225, as amended.

An NPO must register as an extra-provincial corporation in Manitoba prior to commencing its operations in that Province. Federal corporations must register within 30 days of commencing operations (subsection 187 (3)).

Penalty for Non-Registration: \$50 fine for every day the business or undertaking is carried on without the proper registration.

D. Ontario

Relevant Statute: *Corporations Information Act*, R.S.O. 1990, c. 39, as amended.

Only foreign corporations are required to register an extra-provincial licence in Ontario and, in that event, are required to register under the *Extra-Provincial Corporations Act* (Ontario). Domestic corporations are only required to register in Ontario as set out below:

A Form 2, Initial Return must be filed within 60 days after the date the corporation begins to carry on business in Ontario (s.3). An Ontario corporation number will be assigned, but this is not a licence. A Form 2 Notice of Change must be filed within 15 days of the change of any information.

Penalty for Non-Registration: None.

E. Quebec

Relevant Statute: *An Act Respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons* R.S.Q. c. P-45, as amended.

An NPO must register as an extra-provincial corporation in Quebec no later than 60 days after the date on which it commences its operations (s.9).

Penalty for Non-Registration: A fine of not less than \$200 and not more than \$2,000. For a second or subsequent offence, the fines are doubled.

Relevant Statute: *Business Corporations Act*, S.N.B. 1981, c. B-9.1, as amended, Part XVII.

An NPO must register as an extra-provincial corporation within 30 days of commencing its operations (s.196). NPO's are governed by the same rules and regulations as share capital corporations, however subsection 194(3) provides that the Director may exempt an extra provincial corporation from the operation of this Part except subsection (4) if he is satisfied that it does not carry on business for the purpose of gain.

Penalty for Non-Registration: A fine of not more than \$5000 and in default of payment the NPO is liable to levy by distress and sale in accordance with section 35 of the *Summary Convictions Act*.

Whether or not the extra provincial corporation has been prosecuted or convicted, any director or officer of the extra provincial corporation who knowingly authorizes, permits or acquiesces in such failure commits an offence and is liable on a summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 6 months or to both and in default of payment of a fine is liable to imprisonment in accordance with subsection 31(3) of the Province's Summary Convictions Act (subsection 214(2)).

G. Prince Edward Island

Relevant Statute: *Licensing Act*, R.S.P.E.I. 1988, c. L-11, as amended.

An NPO must register as an extra-provincial corporation within 30 days (s.6(2)).

Penalty for Non-Registration: liable to a penalty not exceeding \$100 and costs, recoverable on summary conviction or by suit in a court of competent jurisdiction; a similar penalty is recoverable for each successive month during which the omission or revocation is continued.

H. Newfoundland

Relevant Statute: *Corporations Act*, R.S.N. 1990, c. C-36, as amended.

An NPO must register prior to commencing its operations (s.433).

Penalty for Non-Registration: None.

I. Northwest Territories

Relevant Statute: *Business Corporations Act*, S.N.W.T. 1996, c.19

An NPO must register within 30 days (subsection 281(1)).

Penalty for Non-Registration: A fine not exceeding \$10,000.

J. Nunavut

Relevant Statute: *Business Corporations Act* S.N.W.T. 1998, c. 34

An NPO must register within 30 days (s.281).

NPO's are subject to the requirements of the *Business Corporations Act* with a reduced registration fee of \$100.

Penalty of Non-Registration: A fine not exceeding \$10,000.

Optional Registration:

The following jurisdictions have optional registration requirements under the circumstances set out below:

K. British Columbia

Relevant Statute: *Society Act*, R.S.B.C. 1996, c. 433, Part 8 - Extra-provincial Societies.

The British Columbia Corporate Registry advises that NPOs are not required to register extra-provincially. They may be required to register if they own a vehicle or real property; otherwise they can function without registration.

Extra-provincial society means a society or association, incorporated or otherwise, formed outside British Columbia, and includes a branch of that society or association, but does not include a society or association, incorporated or otherwise, formed to acquire profit or gain or that has capital divided into shares.

Relevant Statutes: *Societies Act*, R.S.Y. 2002, c. 206 and *Business Corporations Act*, R.S.Y. 2002, c. 20.

There is no requirement for an NPO to register extra-territorially in the Yukon, unless the NPO is applying for a grant from the Yukon Government, in which case registration is required under the *Societies Act*.

An NPO can register under the *Business Corporations Act* and be subject to the provisions contained; however it would not be classified as a Society.

No Registration Required

M. Nova Scotia

Relevant Statute: *Corporations Registration Act*, Chapter 101 of the Revised Statutes, 1989, amended 1993, c. 18, 1996, c. 23, s.7; 2002, c. 5, ss. 6, 7; 2004, c. 3, ss. 4, 5.

There is no requirement to extra-provincially register an NPO in Nova Scotia, unless an NPO is required to bring or maintain an action in the Province.

SMALL AND RURAL CHARITIES INITIATIVE

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On June 25, 2008, the Canada Revenue Agency (CRA) released the report *Small and Rural Charities: Making a Difference for Canadians*. The report is aimed at helping small and rural charities meet their legislative and regulatory obligations more simply and easily. For the purposes of the initiative, the CRA defines small charities as registered charities with total revenues under \$100,000, as reported annually on Form T3010A, Registered Charity Information Return. Rural charities are registered charities that have a postal code where the second character is a "0", for example K0A 1A1.

The report includes an action plan that was developed collaboratively by the CRA and a panel of representatives from the Canadian charitable sector and follows a series of consultation sessions and panel discussions that were held across Canada in the fall of 2007. Over 60 action items aimed at improving services and reducing the administrative burden for small and rural charities were identified. For example, the CRA will simplify the annual information return and companion guide.

WHAT'S HAPPENING AROUND MILLER THOMSON

The July *Canadian Not-For-Profit News* included "Rethinking Public Disclosure", "Petroleum Price Surge Hurting Charities", "Abusive Practice?", "CRA Offers Model Objects", "Non-Profit Grace Period Expires", "Always Something New to Cope With" by **Arthur Drache**

Kate Lazier's wrote "Gifts Between Charities" in the July issue of *Canadian Not-For-Profit News* Volume 16, No. 7.

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