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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

THE MILLER THOMSON FOUNDATION 2009 NATIONAL SCHOLARSHIP: FIFTEEN YEARS AS A PROUD SUPPORTER OF POST-SECONDARY EDUCATION IN CANADA

Since its formation in 1995, The Miller Thomson Foundation has awarded scholarships totalling $2,350,000 to 2,350 promising students pursuing post-secondary education in Canada.

The Miller Thomson Foundation is pleased to announce the 200 recipients of the 2009 National Scholarships. Each of the students receives a $1,000.00 entrance scholarship from the Foundation to continue their studies this fall at the Canadian university or community college of their choice.

The National Scholarship Programme is a long term, ongoing initiative funded by The Miller Thomson Foundation. The purpose of the National Scholarship is to encourage and promote the attainment of higher education goals for individuals in Canada who have demonstrated a high level of academic achievement and made a positive contribution to their school and their community through extracurricular and community activities.

The 2010 National Scholarship Programme will be launched on December 1, 2009. Persons interested in further information about the National Scholarship are invited to visit our website at www.millerthomson.com and link to MT Foundation.

CANADA NOT-FOR-PROFIT CORPORATIONS ACT – ENACTED BUT NOT YET IN FORCE

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Canada has enacted new legislation to replace the *Canada Corporations Act* (CCA). This is the first substantial change to the existing federal non-share corporation legislation since 1917. This legislation was introduced into parliament several times since 2005 (Bill C-21, Bill C-62 and finally Bill C-4). Bill C-4 *An Act respecting Not-For-Profit Corporations and Certain Other Corporations* received royal assent on June 23, 2009. However, the new *Canada Not-For-Profit Corporations Act* (CNCA) is not in force yet. The statute will come into force on a day to be fixed by order of the Governor in Council. Industry Canada has indicated to us that it will likely be 12 months to 24 months before the CNCA is in force.

When the CNCA is in force all corporations incorporated under the CCA will have three years from that date to continue the corporation under the CNCA. If a corporation does not continue under the CNCA within the three year period it can be dissolved. Corporations incorporated by Special Act of Parliament can also elect to be continued under the CNCA, but there is no requirement to do so. Continuing corporations will have the ability to make some amendments to their structure on the continuance.

The government has stated it will not charge any fees to continuing corporations. We are also currently taking steps to help minimize the costs of preparing the necessary documents to complete this continuation. First, we recommend that most corporations take no action at this time. Given that the legislation is not expected to be in force for at least a year, there is a possibility that the legislation could be amended before it comes into force. Preparation of legal documents at this time is premature and may lead to additional legal fees if the legislation changes. Second, we will be preparing template documents to help clients reduce the costs of continuing under the new statute.

The CNCA differs greatly from the CCA. Under the CNCA a corporation will have the capacity, rights, powers and privileges of a natural person, subject to any restrictions included in the corporation's articles of incorporation or continuance. The CNCA also removes the need for a corporate seal, specifically allows electronic meetings, written resolutions in lieu of meetings, and absentee voting and provides a standard of care for directors. The CNCA significantly increases members' rights and gives non-voting members the right to vote on some changes to the corporation. Granting voting rights to non-voting members will be problematic for some charities and we will address this issue in-depth in a future article.

The lawyers in the Charity and Not-For Profit Group at Miller Thomson LLP will be monitoring this legislation closely and will keep our readers and clients informed once it is time to take action. In the meantime, please contact us if you have specific concerns or questions.

GUIDANCE RELEASED BY THE CANADA REVENUE AGENCY CHARITIES DIRECTORATE ON FUNDRAISING BY REGISTERED CHARITIES

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The Charities Directorate Canada Revenue Agency (CRA) released draft guidelines concerning the fundraising activities of registered charities in April and June 2008.

In articles written about the draft guidelines at that time, we identified a number of issues and concerns which we felt were raised by the policy document released by the CRA. In particular, we raised concerns about:

1. the presumption that no fundraising expenses could be considered as charitable expenditures;
2. the one-size-fits-all approach to expenditures incurred in the context of fundraising;
3. the negative inferences that seemed to apply to charities that hire third party fundraisers;
4. the fact that it appeared to be directed more at preventing tax shelter abuses and the small percentage of truly offensive behaviours relating to fundraising rather than working with the sector to enhance clarity around these issues and improve transparency and accountability of the sector to the Canadian public in this regard; and
5. the fact that the proposed "categories" of acceptable and unacceptable fundraising ratios were judgmental and ignored the realities faced by organizations that rely on charitable donations to pursue their charitable missions.

CRA embarked on a lengthy consultation process on this draft policy and it should be commended for doing so. Officials confirmed that they had received more input on this document than any other draft policy previously posted for comment. The final document, a Guidance on Fundraising by Registered Charities (CPS – 028) was released in June 11, 2009. As finalized, it reflects comments provided by the sector and responds in some part to the concerns and issues raised. The final Guidance on this topic can be found at: http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-eng.html

As released, the document is in the form of a Guidance rather than a policy. It is a much improved document which recognizes that expenditures on fundraising to support charitable work are necessary and required.

The Guidance states that its purpose is to provide information to charities and to explain how the CRA looks at expenditures relevant to fundraising on audits. It is not intended to be a new 'policy', but rather it confirms existing practices currently followed by the Directorate. The document clarifies that this is a guidance tool for charities to use and consider when completing the Form T3010 Annual Return and when considering the treatment of fundraising expenditures.

One area of significant improvement is in the discussion of how the CRA evaluates fundraising activities of individual charities. In the first draft, the CRA had included what the sector began to call a 'grid', which relied on the ratio of fundraising costs to fundraising revenues in a fiscal period and went on to categorize the ratios as acceptable or unacceptable. The 'grid' has been substantively revised. The Guidance acknowledges that the sector is diverse and that fundraising effectiveness will vary between organizations. It clarifies how the CRA would approach these ratios at different levels and that the ratios are not by themselves generally evidence of acceptable or unacceptable behaviour. The Guidance also contains best practices and identifies areas of concern that could lead to further review.

The background paper which supports the Guidance on fundraising by registered charities is twenty-two pages long. It contains examples, questions and answers about specific issues that may arise. As drafted, we remain somewhat concerned that auditors will be required to use discretion in their review of whether a charity is incurring appropriate expenditures and using their assets effectively. One can imagine that some organizations may face difficult auditors who have less experience with fundraising. Auditors need to remember that one has to consider the overall circumstances of an organization to properly assess whether the expenditures are reasonable.

However, one has to balance that concern with the fact that historically, charities have had great difficulty grappling with how to deal with expenditures related to fundraising. It is hoped that this Guidance will provide some explanation and certainty for organizations when looking at fundraising activities and the expenditures to be incurred. It is also hoped that it will contribute to a greater understanding and more realistic expectations among the Canadian public about the costs of fundraising, particularly for organizations that rely solely on donor dollars to operate.

Finally, one could argue that the underlying message being delivered by the CRA to registered charities is that transparency and accountability to your donor public is critical. To the extent that organizations may be concerned that the information provided on their Form T3010 Annual Return does not explain the whole story about their fundraising activities, CRA has a response: ensure the full story is told on your organization's website so your donors understand the nature of your organization's activities. We recommend that in appropriate circumstances, consideration be given to posting an upfront disclosure about fundraising and the necessary expenditures on your website, or in the documentation produced for donors to avoid any misunderstanding about the narrow information provided by the Form T3010.

Miller Thomson LLP recommends that charities review the Guidance and Background Paper released. Take the time to consider how the CRA's views impact your particular organization. We would be pleased to assist you in applying the Guidance to your particular circumstances.

CRA PUBLISHES "CONSULTATION ON THE PROPOSED GUIDANCE IN ACTIVITIES OUTSIDE OF CANADA FOR CANADIAN REGISTERED CHARITIES"

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The CRA has now published for comment its draft Guidance on foreign charitable activities (see www.cra-arc.gc.ca/tx/chrts/cnslttns/ccrc-eng.html). This draft Guidance, which is designed to replace current Guide RC4106 and the discussion in Registered Charities Newsletter No. 20, gives more details than its predecessors and is intended to be easier to understand.

The draft Guidance confirms that a Canadian charity must operate (inside and outside Canada) either by carrying out its own activities or by making grants to qualified donees. Most of the draft Guidance deals with ways in which a Canadian charity can work through an intermediary yet still be carrying out its own activities.

Although the draft Guidance was not designed to convey a substantially different approach, it does contain some helpful clarifications. For example, the CRA seems to be backing off its suggestion that a Canadian charity must always obey non-Canadian laws in order to be a Canadian charity.

In the past, some charities felt that the CRA was overly prescriptive in pushing charities into particular arrangements with foreign intermediaries. The draft Guidance goes to great lengths to present all of the general approaches (agency, joint venture, co-operative partnership and contract for services). Instead, the CRA stresses that the choice of arrangement may be less important than the reality of Canadian direction and control over the charitable activity carried out through the intermediary. The draft Guidance also confirms that the CRA continues to apply what has been referred to as the "charitable goods policy" – the CRA will permit goods which can reasonably only be used in charitable activities to be transferred to a suitable trustworthy intermediary without the usual indicia of direction and control on the part of the Canadian charity. We still recommend charities distributing such goods enter into a contract requiring the recipient to use the goods for charitable activities and to provide reporting.

All charities that carry out activities outside of Canada should review the draft Guidance carefully. The CRA Charities Directorate invites comments on it by September 30, 2009. We would be pleased to assist in preparing and submitting comments on behalf of Canadian charities with special situations that do not seem to fit into the draft Guidance. We also recommend that Canadian charities funding activities through intermediaries obtain periodic legal advice on the structures that they are using. The CRA's approach on this issue continues to evolve. We see a constant trickle of new clients seeking advice on how to respond to CRA proposals to revoke charitable registration for not taking sufficient care in documenting and supervising activities carried out through intermediaries.

NOT ALL VOLUNTEERS WELCOME: BUT ORGANIZATIONS MUST BE AWARE OF HUMAN RIGHTS RESTRICTIONS

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Not all offers of free voluntary work need be accepted according to the Ontario Superior Court of Justice's recent ruling in *Foschia v. Conseil des Écoles Catholiques de Langue Française du Centre-Est*.

The facts in *Foschia* were straightforward. The plaintiff, Mr. Foschia, was a father of two children who attended the La Vérendrye School. He worked as a volunteer at the school and was involved in various school activities. Part of Mr. Foschia's volunteer duties included the supervision of children in a classroom during midday meals.

In April, 2005, the principal of the school received complaints from two parents of second-grade daughters. They complained that the plaintiff was giving their daughters "special attention" and they were concerned about their daughters' safety and that of the other students. The parents asked that Mr. Foschia have less access to their daughters.

In light of these complaints, the school's principal made the decision to limit the plaintiff's volunteer activities and placed greater restrictions on his "comings and goings in the school."

Unhappy with the forced reduction of his duties - and the principal generally - the plaintiff complained to various school board officials, including the superintendent and deputy superintendent. He was ultimately barred from accessing the school premises in February, 2006.

Following his expulsion, the plaintiff brought a civil action against 20 defendants including the school board seeking, amongst other things, to continue his volunteer duties with the school without restriction.

The defendants jointly brought a motion to have the plaintiff's action dismissed.

In dismissing the plaintiff's actions, the Court noted that the *Education Act* cloaked the principal with the duty to "refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils…". The Court found that in prohibiting the plaintiff from the school's premises, the principal acted in the course of her duties and in accordance with the legislation.

As the court noted: "There is nothing in the law to require a school principal to accept all offers of voluntary help or to continue to accept them. His or her decision must be accepted."

Organizations that regularly recruit and rely on the assistance of volunteers should read the court's decision with some caution. The protections against discrimination and harassment in "employment" set out in the Code have been interpreted broadly to include any "employment-like" relationship. As a result, it is likely that the Human Rights Code will apply to a volunteer in the event that his or her duties are terminated in contravention of the Code. Further, human rights legislation is quasi-constitutional. That means that provincial legislation, including the *Education Act*, must ultimately be read in compliance with the Code subject to any express statutory exemptions.

In *Foschia*, the plaintiff did not allege that in the process of terminating his volunteer duties, his rights pursuant to the Ontario Human Rights Code were violated nor were there any facts which suggested such a claim could be substantiated.

SIGNING AUTHORITIES

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Shortly after a Not-for-Profit Corporation is first incorporated, an organizational meeting of Directors is held for the purpose of what might be called "internal housekeeping". Quite commonly, after each annual meeting has selected the Directors for the coming year, a further "internal housekeeping" organizational meeting is held by the Directors to name signing officers for the coming year (among other things). Particularly when one or more new Directors come onto the Board, there may be pressure to change the signing authorities for the corporation.

Consider the following as an example:

An unfortunate past experience (where funds were embezzled) had previously generated the incentive for greater involvement of the members of the Board of Directors in the signing process. As a result, there is a long-standing Board-approved policy on signing authorities for various items, i.e. cheques, contracts, etc., and various appointed officers had authorities at different levels. The levels have varied over the years but in general terms, at the higher dollar levels, there are both greater controls and greater Board involvement. For example, for an expenditure over $200,000, the signing authority requires one internal staff signing person (one of the Chief Executive Officer, Chief Financial Officer, Controller, and Corporate Secretary), and one external Board of Director signing officer (one of the Chair of the Board, the Vice Chair, Past Chair, and the Chair of the Finance Committee). This system is seen as safeguarding the Board of Directors in terms of its fiduciary responsibility.

After a change in the composition of the Board one year and the selection of new officers, the new Chair suggests removing the Board of Director signing officers, leaving all signing authority at the staff level. It is not clear whether there is any appropriate reason in principle for making such a change, other than that the process would then be easier and more convenient for the Board of Director signing officers.

So the question then becomes whether there are legal requirements, or best practice rules or policies, as to what signing authorities should be adopted.

General Principles:

Although it is not an uncommon provision in corporate by-laws to find provision for Directors, as such, holding signing authority (both for documents and for banking), there is no requirement in corporate law that a Director must be a signing officer. In larger commercial corporations it is less likely that a Director is authorized to sign cheques. In smaller organizations, both commercial and non-commercial, because of the lack of resources and perhaps because of the more simple requirements, Directors are more likely to be "hands on" and to perform some of the operational functions required to keep these organizations going. Equally, as non-profit organizations grow in size, more staff persons are needed and employed to undertake the increasingly complex administrative obligations and in the financial sphere, more financially trained personnel are employed. Accompanying such growth is the decreasing need for reliance upon volunteer Directors to undertake the required administrative functions, including financial functions such as signing cheques.

Regardless of the size of the entity, the Board of Directors has the ultimate responsible for the good government and management of the organization. It is the Board of Directors that must set up the necessary checks and balances in order to ensure that the resources of the organization are well-managed. Their fiduciary responsibility demands no less.

But there is a wide variety of mechanisms that the Board of Directors has at its disposal to accomplish this responsibility. Which are appropriate to the needs of the organization will vary considerably, from relatively simple and informal limits, to much more complex and stringent requirements. Within this broad range, the Board of Directors must select the mechanism(s) that provide for efficient and effective operations, but at the same time, include reasonable protection against avoidable loss.

Conclusions

The Board of Directors will have to rely upon a combination of common sense on the one hand, and advice received from both its own Chief Executive Officer and its Auditors on the other hand, as to what controls in the signing authorities should be put in place to ensure adequate protection against loss. One of the most common and least sophisticated requirements is the separation of two or three levels of authority:

- authority to approve expenditures;
- authority to requisition cheques for such expenditures; and
- authority to sign the cheques for such expenditures.

In the end, it is a judgment call by the Board of Directors as to what checks and balances must be put in place to safeguard the resources of the organization, while still providing for efficient operations.

Before an organization makes a change in its cheque signing processes, we strongly suggest that a Board of Directors should obtain the appropriate recommendations from both its own Chief Executive Officer, and from its Auditors, as to what signing authorities will balance efficient operations and safeguarding of resources.

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

Arthur Drache wrote "Australian Conference on Charity Law Offers Canadian Insights", "Consultation on Protection of Human Rights as a Charitable Purpose", "Corporate Bill Passes Commons", "SCC Refuses Leave to Choson Kallah", "CRA Issues Sports, Research Policy Guidance" and "Returning a Gift" in the June 2009 issue of *Canadian Not-For-Profit News*.

Robert Hayhoe's published "CRA Avoids Honouring its Compliance Agreements" in *The Lawyers Weekly* June 26, 2009 edition.

Lawyers from Miller Thomson's Charity and Not-for-Profit Group were profiled as leading charity law practitioners in the 2009 Canadian Lexpert Directory, including **Arthur Drache**, **Robert Hayhoe**, **Susan M. Manwaring** and **Martin J. Rochwerg**.

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