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This is the inaugural Newsletter of the Miller Thomson Charities and Not-for-Profit Group. We provide a wide range of services to charitable organizations, public and private foundations, associations and other not-for-profit organizations across the voluntary sector from our offices in Toronto, Markham, Calgary, Edmonton, Vancouver, Whitehorse and Washington D.C. Please visit our website –

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for more information.

If you are interested in receiving subsequent issues of our group's newsletter, please complete and return the enclosed form.

If you have any comments on our newsletter or its content, we would appreciate receiving them. Please e-mail us directly at –

charitieseditor@millerthomson.ca.

Seizure of Trust Assets

In a surprising move, the Supreme Court of Canada has refused leave to appeal from the decision of the Ontario Court of Appeal in *Christian Brothers of Ireland in Canada* ("CBIC"). We also understand that, in a rare step, the Supreme Court will be asked to reconsider its decision to refuse leave.

In this case at first instance, Justice Blair had been asked to decide whether the assets of a charity are available to compensate tort claimants, and, if so, whether any particular assets of the CBIC were protected and could not therefore be used to pay compensation to the Mount Cashel victims. Two schools operated by the CBIC in British Columbia constituted the most valuable assets potentially available to pay these claims.

The Ontario Court of Appeal in two concurring opinions agreed that charities are not immune from liability to tort victims and did not accept that there was any exception for assets held on a "special purpose trust".

In upholding Justice Blair on the first issue, the Court of Appeal confirmed that the law in Canada is that a charity, whether it takes the form of a trust or a charitable corporation, is not immune from liability for the negligent acts of those who administer the charity. It confirmed that the "charitable immunity theory" has never been adopted in Canada.

With respect to the second issue, the Court of Appeal held that the assets of the charity, be they beneficially owned or "trust funds", were available to respond to its liabilities. The Court found that it was "neither necessary, nor logically probative, to examine each asset of the charity on an individual basis to determine the availability to be answerable to the debts of the charity on a wind-up, based on whether that asset is held in trust for one or more charitable purposes".

It could be argued that this decision is and will be limited to the facts of the case – a case that involves claims by tort victims, where general assets are insufficient, and the charity is being wound-up and no longer operable. However, it could also be argued that this case "opens the door" to other claims such as claims in contract and raises the potential of seizing other "in trust" arrangements such as endowed funds. Only time will tell, but in the meanwhile, donors and charities beware.

Charitable and Non-Profit Organizations: What is the difference?

Charitable and non-profit organizations share many characteristics. They are non-profit and direct their resources to furthering their objects. There are however critical differences between a non-profit organization (NPO) and a charitable organization. NPOs do not have the right to be registered under the *Income Tax Act* (Canada) (the "ITA") with CCRA as registered charities. The ITA recognizes two categories of charities eligible for exemption from income taxation and issuance of charitable receipts, a charitable organization and a charitable foundation.

NPOs are not entitled to issue receipts for donations received by them, whereas charities, if registered, are permitted to issue receipts for income tax purposes. A tax credit, up to a maximum allowable credit, may be claimed by individuals in respect of their charitable donations. A tax deduction, also subject to a limit, may be deducted by a corporation in respect of its charitable donations. The ITA treats donations from individuals differently than donations from corporations.

A charity is not required to register with Revenue Canada as a "registered charity". There are however a number of advantages to registration. These advantages are as follows:

(a) the organization may issue tax receipts;
(b) the organization is exempt from taxation;
(c) the organization may more readily qualify for other benefits.

Some of the disadvantages of registration include the following:

(a) the organization must devote all of its resources to its charitable activities;
(b) the organization must make annual filings with CCRA;
(c) none of the property of the organization may be distributed to the members on dissolution or winding up of the organization.

Registered charities are automatically exempt from tax on their income.

An NPO may be exempt from the payment of tax on its income if the following conditions are met:

(a) it must not in the opinion of the Minister, be a charity;
(b) it must be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit;
(c) it must in fact be operated exclusively for one of the purposes mentioned in (b); and
(d) no part of its income may be paid, payable or otherwise made available for the personal benefit of any proprietor, member or shareholder.

NPOs may, however, be subject to tax on their property income and on certain taxable capital gains.

An NPO is not required to file an information return under the ITA, unless it has certain types of income, such as:

(a) if it receives more than $10,000.00 in interest, rentals or royalties;
(b) if it has more than $200,000.00 in assets at the end of the preceding fiscal year; or
(c) if it has filed an information return in a preceding fiscal year.

Registered charities must, within six months after the charity's fiscal period, file a Registered Charity Information Return and Public Information Return with applicable schedules.

Toronto Stock Exchange Warrants

Certain charitable organizations and public foundations have expressed interest in seeking donations of options or warrants (collectively, "charitable options") from non-public issuers that are about to go public and be listed on the Toronto Stock Exchange (the "TSE"). In order to accommodate this interest, the TSE has established requirements for the granting of charitable options.

The requirements permit the grant of charitable options only by those non-public issuers that have: (i) filed a preliminary prospectus for the initial public offering ("IPO") of their securities, and (ii) received conditional approval for the listing of the IPO securities on the TSE. The TSE has not authorized the grant of charitable options by issuers that have securities already listed and trading on the TSE.

An eligible issuer must apply to the TSE for approval to grant any charitable option and to list the securities issuable upon its exercise. Approval will generally be provided if the requirements are met. For example, one requirement is that the aggregate number of securities of the class or series that is issuable upon exercise of all charitable options granted by an eligible issuer must not at any time exceed 2% of the total number of securities of that class or series (calculated on a non-diluted basis and adjusted for any stock splits and stock consolidations) outstanding immediately after the IPO closing. Other requirements are that the charitable option may not be assigned or transferred in whole or in part, nor exercised at a price that is less than the IPO price, and the details of any exercise of a charitable option (including the date of exercise and the number of securities issued on exercise) must be promptly reported in writing to the TSE by the listed issuer.

Note that a company is not entitled to a tax deduction for granting charitable options. In some circumstances, a company may be able to structure a gift which will have similar results for the charity and provide the company a tax deduction.

What's New with the Public Guardian and Trustee (Ontario)

Responding to concerns raised by the Charities and Not-for-Profit section of the Canadian Bar Association – Ontario, the Public Guardian and Trustee of Ontario (PGT) has recently addressed two issues relating to investment powers of trustees.

With respect to the concern that the new amendments to the *Trustee Act* did not specifically include any power to trustees to delegate their investment authority, the PGT responded that (1) each charity should have an investment plan, which may be developed in consultation with an investment advisor, that takes into account a reasonable assessment of risk and return and must ensure that the overall investment plan is followed and revised as necessary; (2) a charity may choose, if appropriate, to have day to day investment decisions made by an investment advisor and (3) the way in which the advisor is chosen and the plan created, carried out and monitored should be recorded as this evidence would be important to address any concerns which may be raised.

The second concern related to the reference in subsection 27(3) of the *Trustee Act* to "mutual funds" and specifically that it is not a defined term and consequently it is not clear if it is intended to refer only to mutual funds as the term is used in the *Securities Act* or if it is intended to cover a broader range of joint investments, such as pooled funds. The PGT responded by stating that although the legislature did not choose to define the term or to refer to the definition in the *Securities Act,* her office "will not take the position that the narrow "technical" definition used in the *Securities Act* applies." We have been advised that amendments have been suggested and it is hoped that the legislature will address this issue shortly.

Case Comment

Game and Bird Sanctuary: a charitable purpose: *Granfield Estate v. Jackson*

Cynthia Granfield died on June 25, 1997. She provided in her 1990 will that her farm property be managed for the purpose of providing a game and bird sanctuary with certain life interests in the net income. The will also contained a wish that the deceased's brother, Derryck Jackson, not obtain any portion of her estate.

The brother challenged the will on the basis that a game and bird sanctuary was not a charitable purpose. If the Court accepted this argument, a partial intestacy would result, leaving the brother with the portion of the estate set aside for this purpose. Of course, this result contravened the express desire of the testator.

The executor applied for a declaration as to the validity of the trust. In considering the validity of the trust the Court reviewed the four charitable "purposes" namely, the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community.

The Court found that there was a clear charitable intention expressed in the will, despite the old English decision in *Re Grove-Grady,* where money left to set up a reserve for animals and birds was found not to be a charitable purpose. The Court stated that such "reasoning . . . is not appropriate now," and declared that it maintained jurisdiction by way of the cy-près doctrine. With reference to the fourth category of charitable purposes, the Court recognized that "the law of charity is indeed a moving subject and must be viewed in terms of present day exigencies". A game and bird sanctuary in a developing suburban area would be beneficial for the public. The gift was upheld.

Mandatory Mediation

Charities who regularly accept testamentary gifts should know that mandatory mediation is alive and well in Toronto and Ottawa for matters involving estates. The requirement that most litigious estate matters partake in alternative dispute resolution techniques attempts to recognize some of the unique aspects of substantive estates law and the separate procedures governing estate litigation while trying to achieve an efficient and effective rule to deal with estate disputes.

It is a trial project. The new rule is set to end on July 4, 2001, although it is expected that the government will extend the rule not only beyond 2001 but also to the rest of Ontario. It applies to specified proceedings such as:

(a) a contested application to pass accounts;

(b) a challenge to the validity of a Will;

(c) dependent's relief claims;

(d) proceedings;

(e) proceedings under certain statutes relating to estates and trusts;

(f) proceedings where advice or direction is sought from the Court; and

(g) claims for equalization of net family properties under the *Family Law Act.*

The mediation is conducted in confidence and the mediator's notes and records are deemed to be part of "without prejudice" settlement discussions.

Although a judge, either at the request of a party or on his or her own initiative, may exempt an estates matter from mandatory mediation, it is expected that exemptions will be rarely granted.

Clergy Residence

During 1998, Miller Thomson lawyers were involved in a series of precedent setting cases involving the clergy residence deduction in the *Income Tax Act.* In general, our clients were successful and the parameters of who is entitled to the clergy residence deduction were clarified.

The clergy residence deduction provides a deduction equal to the value of housing provided to, owned by or rented by a person who meets the status test of being a member of the clergy or a regular minister of a religious denomination or a member of a religious order and who meets a function test of being involved in

ministry to a parish, diocese or congregation or performing administrative services by appointment of a religious-denomination or order.

In 1999, the Department of Finance announced that monetary limits would be imposed upon the deduction so that qualifying employees who owned their home or who rented would be limited to a deduction of the greater of $10,000 and 1/3 of their income. As well, employers of qualifying employees would have to begin to allocate an allowance to each employee in order for them to qualify for the deduction.

On December 21, 2000, the Department of Finance released draft legislation implementing the proposed changes. In addition to some technical amendments clarifying the deduction, the requirement for an employer allocated allowance was dropped and replaced by a requirement that a certificate be obtained from the employer each year certifying that the employee qualifies for the deduction. Although no form has been released, the changes will be effective for the 2001 taxation year.

While the requirement for a certificate is certainly more convenient than a requirement that employers allocate an allowance to each qualifying employee, it has troubling implications. If an employer completes a certificate certifying that a staff member qualifies, but the Canada Customs and Revenue Agency later disagrees, the employer could be exposed to *Income Tax Act* penalties for advising the staff member that he qualified.

One way to avoid penalties is to rely on the advice of outside professionals. For example, a religious denomination could obtain a legal opinion that a certain class of its pastoral workers qualify for the deduction. Even if the Canada Customs and Revenue Agency later disagreed, the legal opinion could protect the denomination against penalties. Miller Thomson lawyers have substantial experience in providing opinions dealing with the clergy residence deduction.

External Publications and Seminars

Robert Hayhoe of our Toronto office spoke on *Surviving a CCRA Charities Directorate Audit* at the annual conference of the Canadian Council of Christian Charities in Vancouver in September, 2000.

Susan Manwaring and **Jasmine Sweatman** of our Toronto office presented a paper entitled *Charitable Donations* at a seminar sponsored by the Trusts and Estates section of the Canadian Bar Association – Ontario in September, 2000.

Douglas Forer of our Edmonton office spoke on *Duties and Responsibilities of Directors of Non-Profit Organizations* at a meeting of the Charities section of the Canadian Bar Association–Alberta in December, 2000.

Douglas Forer of our Edmonton office, assisted by **Susan Manwaring** and **Hugh Kelly** of our Toronto office, and **Sandra Mah** of our Calgary office, presented a seminar entitled *Duties and Responsibilities of Directors* in Edmonton and Calgary in September, 2000.

Robert Hayhoe published an article entitled *Can U.S. Nonprofits Raise Funds in Canada?* in the January/February 2001 issue of the American magazine Nonprofit World.

Douglas Forer will be presenting a paper on Charity Law as part of a seminar sponsored by the Legal Education Society of Alberta in March, 2001.

Robert Hayhoe will be presenting a paper entitled *The Taxation of Non-Profit Organizations* as part of a continuing legal education seminar co-organized by **Jasmine Sweatman** and sponsored by the Charities Section of the Canadian Bar Association in March, 2001.

Susan Manwaring will be presenting a paper entitled *Gift Planning for Private Company Owners/Managers* at the Canadian Association of Gift Planners Annual Conference in Halifax in May, 2001.

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Note:

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