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# CHARITIES & NOT-FOR-PROFIT NEWSLETTER

*September 2007*

*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.*

## Inside



## REFORM OF B.C. *SOCIETY ACT*

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### 1. Introduction

As reported in the October 2006 issue, the British Columbia Law Institute is working through a major two-year project to consider reform of British Columbia's *Society Act* (the statute under which most B.C. charities and non-profit organisations are established). The first phase of this project has finished, resulting in the publication of a consultation paper, which seeks the views of the public on the tentative Institute recommendations for a new *Society Act* (see http://www.bcli.org/pages/projects/society/SARP.html ). The second phase will build on these tentative recommendations and on public responses and will conclude with the publication of the final report for the project, in July 2008.

### 2. The Society Act Reform Project Committee

A volunteer project committee is carrying out this project. The members of the committee consist of a number of B.C. lawyers (including this author) and sector representatives.

### 3. The Consultation Paper

This consultation paper which was released in August of 2007 has two parts. Part One contains background material including describing the scope of this project, the society as a legal form, a brief history of the *Society Act*, and explains the reasons why the time is ripe for reform of the law. Part Two contains the project committee's tentative recommendations for reform.

### 4. Background to Project

There are at present a number of challenges facing the not-for-profit sector such as internal governance practices; measurement of program outcomes; fundraising; the definition of "charity" under the *Income Tax Act*; financial reporting and management; and outdated organizational laws. The project focuses only on the last topic because a modern organizational law can provide a firm foundation that will allow for progress to be made on the other fronts.

### 5. Benefits of Forming a Society

A society confers a number of benefits, the most important of which is status as person at law. As a result of this status, the members of a society enjoy limited liability. In this respect, societies resemble for-profit companies except that societies are incorporated primarily to pursue public, not-for-profit purposes; are restricted from distributing their assets to their members during their existence; and do not have share capital.

## 6. Why Reform of the Society Act is Needed Now

There are three main reasons why a new *Society Act* is needed now:

(a) as a result of the new *Business Corporations Act* ("BCBCA") being enacted in 2004, there is a streamlined and modern legal framework for companies in B.C. As a result, not-for-profit societies are now saddled with some rather onerous provisions of the now repealed *Company Act* that no longer applies to the for-profit companies.

(b) the not-for-profit sector has grown and developed in ways that could not have been foreseen in 1977 and new legislation is needed to establish an adequate legal framework for this sector.

(c) reform initiatives are underway or have recently been completed in other jurisdictions which gives B.C. an opportunity to enact both modern and harmonized legislation.

## 7. Tentative Recommendations

The consultation paper contains 106 tentative recommendations which are grouped into 15 categories:

(a) General Principles

The first group of tentative recommendations set out the broad themes that are implicit in the more detailed tentative recommendations that follow and emphasize the need to enact a new Act, to continue to have a separate statute for societies, to fine-tune rather than overhaul the core principles of not-for-profit law, to harmonize the new statute, wherever appropriate, with the procedural and administrative rules in the *BCBCA*, and to focus the new statute on organizational rather than regulatory issues.

(b) Incorporation and Naming

A streamlined incorporation procedure is needed for Societies as in the *BCBCA*. Some distinct aspects of the current *Society Act* should be preserved, such as specifying a not-for-profit purpose or purposes on incorporation and filing bylaws with the Registrar of Companies.

(c) Constitution and Bylaws

Much of the substance of the current law relating to a Society's constitution and bylaws should be maintained but in terms of form, societies should adopt a modified version of the notice of articles used by companies as a model for the society constitution.

(d) Capacity and Powers

The committee recommended that any existing remnants of the old doctrine of *ultra vires* should be abrogated. A new *Society Act* should embrace the principle that societies are legal persons with the same capacity as an individual of full capacity.

(e) Offices and Records

The existing provisions relating to offices and records currently in the *Society Act* should be revamped along the lines of the *BCBCA*.

(f) Directors and Officers

The rules relating to directors in the *Society Act* such as election or appointment of directors, minimum number required, residency, qualifications, vacancies, and removal. should be harmonized with similar rules in the *BCBCA* and provide more clarity on the status of officers.

(g) Duties, Liabilities, and Conflicts of Interest

Modernization of the outdated and skeletal rules covering the duties and liabilities of directors and officers and conflicts of interest involving directors and officers in the current *Society Act* should take place such as:

(i) obsolete rules, such as assigning personal liability to directors if a society carries on with fewer than three members for a period of time, should be repealed;

(ii) new provisions, recognizing the complex environment directors and officers must operate in, should be enacted;

(iii) the provisions allowing a society to indemnify a director or an officer should be overhauled and streamlined;

(iv) the court should be empowered to relieve individual directors and officers from personal liability on a case-by-case basis; and

(v) there are a number of tentative recommendations relating to the modernization of rules governing conflicts of interest, including restricting paid staff members from serving on a society's board of directors.

(h) Members

The committee's tentative recommendations with respect to members are aimed at modernizing the law and such topics as the definition of "member," classes of members, and dues and subscriptions should be clarified and few changes, notably with respect to the minimum number of members (which should be one).

(i) Meetings of Members

The committee tentatively recommends harmonization with the *BCBCA* for meetings of members which has a more fully developed set of default rules.

(j) Financial

The financial rules relating to the not-for-profit character of societies, such as the prohibitions on share capital and on distributions to members during the life of the society will be retained but the other financial rules should be harmonized with procedures in the *BCBCA*.

(k) Audits

The current position with respect to audits is to be maintained but the committee recommended harmonizing the procedural rules governing audits of societies with the procedural rules governing audits of companies and societies that choose to have an auditor should be required to have an audit committee of the board of directors.

(l) Members' Remedies

The committee tentatively recommended filling in the gaps in the *Society Act*'s current repertoire of members' remedies. The two major current remedies - investigation and oppression - should be clarified and updated and to these remedies should be added the right to derivative action and compliance or restraining orders.

(m) Society Alterations

The committee recommended the enactment of modern provisions relating to amalgamations, conversions to cooperative associations, continuation into and out of British Columbia, arrangements, and extraordinary disposals of a society's undertaking.

(n) Liquidation, Dissolution, and Restoration

The committee tentatively recommends harmonizing the procedural rules liquidation, dissolution, and restoration with the *BCBCA*.

(o) Miscellaneous

There are a few miscellaneous rules in the *Society Act* that should be clarified and modernized, such as the rules relating to subsidiaries and branch societies and updating the extra provincial registration system for societies by harmonizing it with the *BCBCA*.

## REFORM OF ONTARIO NOT-FOR-PROFIT CORPORATION LAW CONSULTATION PAPER #2

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Consultation Paper #2 - Modernization of the Legal Framework Governing Ontario Not for Profit Corporations (the "Paper"), released by the Ontario Ministry of Government Services on 22 August 2007, seeks views of Respondents by the end of 2007 with respect to what provisions as to the rights and responsibilities of directors and officers should be contained in a new Not-For-Profit Ontario Statute. In the introduction, the Paper notes that the existing statute, the *Corporations Act*, is an organizational statute (establishing structure under which enforcement of rights and responsibilities rests generally within the corporation, its directors and members), not a regulatory statute (under which it is the state which enforces the provisions). The Paper seems to be based upon the premise that a new statute will likewise be organizational.

Structurally, the Paper is divided into seven sections, addressing Board Composition, Term of Office, Directors' Meetings, Resignation and Removal, Officers, Directors' and Officers' Liability and Conflict of Interest. In each case, the section is given a sub-title in the form of a general and more or less neutral question. This is followed by a background statement that is not always quite so neutral. The Paper then paraphrases how other legislated models have responded to the particular issue. And finally, the Paper poses one or more questions, in some cases based upon unarticulated assumptions.

The Paper is likely to yield representations presenting views on the issues that it has articulated, and for this, the public should be thankful. On the other hand, some of the issues are addressed in an almost "motherhood" way, and may produce little, if any, creative thinking on how future legislation should address the topics.

On the face of the wording of the questions, the Paper may be viewed as an attempt to present a neutral stance on each of the particular issues, but deeper analysis may not support that neutrality, leaving the sense that there are sometimes preconceived notions underlying even the questions themselves. For example, Section 2 asks if a maximum term of office for a director should be included, but without articulating that the Paper's preconceived notion is that there is a good rationale for imposing a requirement of any length.

Directors have five fundamental rights with respect to meetings of directors:

the right to reasonable advance notice;

the right to attend;

the right to sufficient information to make reasoned judgments;

the right to speak; and

the right to vote unless disqualified.

It is curious that Section 3 of the Paper raises as an issue only the possible quantification of the first of these, despite the probability that, as experience strongly suggests, the other aspects are certainly of equal importance.

In this same vein, there can surely be no valid reason for not permitting resolutions in writing signed by all directors to have the same effect as a resolution validly enacted at a meeting. And in this case, it is to be wondered why the Paper even asks the question of whether written resolutions should be permitted.

It is clear enough from the description of background and how other legislated models have responded to the issue, that Section 4 of the Paper favours a reduction in the size of the vote required to remove a director, from the present two-thirds to a majority. This would be consistent with the requirements of the Ontario *Interpretation Act* that, in the case of bodies corporate, the will of the majority should prevail.

Section 5 poses two specific questions respecting officers: whether a new statute should provide for appointment of specific officers, and whether any officers should be required to be directors. No questions are directed to the rather obvious corollary questions: whether there should be a delineation of the duties and responsibilities of specific officers; and whether any officers should be prohibited from being directors. Perhaps it is anticipated that those responding to the Paper will address these questions as well.

Directors (and frequently officers also) of Not-For-Profit corporations serve as volunteers, giving of their time, knowledge and effort without remuneration. Quite justifiably, many, perhaps most, consider that they are entitled to a reasonable, even generous, measure of protection as a matter of fairness and justice. On this issue of the liability and protection of directors and officers, the Paper devotes its greatest space (over seven pages, in Section 6). There is no acknowledgement in the Paper, however, of the fact that there exists a significant body of jurisprudence (so called judge-made law) from which many of the principles set out in the background and questions are taken. That being said, however, there are valid reasons to incorporate the jurisprudence into legislation, while at the same time, adding provisions to clarify areas that are now not as clear as one might wish, and other provisions adding to the protection of volunteer directors. It is curious in this day and age that the question of whether there should be authority for indemnity and insurance provisions is even raised.

Whenever the obligation of a person to protect the interest of a corporation, whether as a director or officer, is at odds with that person's personal interest, a conflict of interest arises. Historically, legislation and jurisprudence have usually imposed restrictions upon participation in decisions on matters where this situation exists, based upon pecuniary or "money's worth" interests, or as the background to Section 7 of the Paper suggests, "contracts" or "transactions". Popular contemporary commentary seems intent upon broadening interests to include what are often described as "business interests", generally non-pecuniary interests. Thus, the Paper seeks views as to whether any of the legislative provisions in other jurisdictions should be included in a new statute, whether the interest concept should be broadened beyond pecuniary, and what persons should be covered by any new provisions.

Overall, the Paper is a further step to generate thinking before legislation is drafted. As our teachers always told us, thinking comes before writing - and never was this more essential than in this area of law that has lacked legislative attention for far too long.

## ACCOUNTING PROPOSALS RE EXPENSE ALLOCATIONS

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As most readers are only too aware, there have been substantial problems of late where the CRA has taken the position that fundraising costs cannot be apportioned between administrative expenses and charitable expenses. The issue arises most often when either on the telephone or in written fundraising messages, the charity tries to "educate" the public about the objectives of the charity.

The CRA has rejected this sort of apportionment raising some real barriers to many charities meeting their disbursement quotas. The fact of the matter is that the statutory allowance (on the CRA's interpretation of the disbursement quota's ambit) of just 20% of receipted income for all administrative costs including fundraising is just too low given the rising cost of telephone and direct mail solicitation. As a result, this is an area which is under active study by the CRA.

We don't know whether a recent "exposure draft" issued by the Accounting Standards Board (ASB) was triggered in part by this situation. But the ASB has an ongoing project to "improve" the accounting standards for non-profits (with improvement being in the eye of the beholder, of course.)

Earlier this year the ASB posted a far-reaching set of revised accounting proposals which will, if adopted, have an impact on charity and non-profit accounting (http://www.acsbcanada.org/1/1/2/5/2/index1.shtml ). These changes of course are of primary interest to accountants but any changes will have at least a secondary impact on charity financial statements and how they are presented.

It is important to note that there is little congruity between the accounting rules and what the CRA requires for T-3010 reporting. This lack of harmonization often leads to clashes with CRA charity auditors who seem to ignore generally accepted accounting principles (GAAP) when looking at the filed T-3010s. Thus, even if these proposals are adopted, it is far from certain that they would have any substantive role in ameliorating the disbursement quota problems that so many charities are having trouble with.

While the entire exposure draft will be of some significant interest to charity and non-profit financial officers, we thought that it would be useful to set out the material in Topic 9 - Disclosure of allocated fundraising and general support costs

> "40 The proposed new Section 4470 results from input received from a number of sources that have suggested the need for guidance and disclosure with respect to allocations of expenses made by NFPOs. The AcSB understands that financial statement users pay a significant amount of attention to the aggregate reported costs of both general support and fundraising, with an attendant concern about these numbers being "managed" by NFPOs.
>
> 41 Both the US and UK have some requirements on this issue. A Canadian standard addressing expense allocation generally, and the disclosure of amounts allocated from general support and fundraising expenses specifically, would be a substantial improvement in information generally available. The disclosure would permit users to understand NFPOs' general support costs and fundraising costs, and the portions that are allocations, together with the costs of performing the services provided by an NFPO. This, in turn, permits users to better compare the reported results of operations among NFPOs.
>
> 42 The proposals respond to the need for additional user information but do not require NFPOs to change their reporting methods. Prescribing reporting methodologies is beyond the scope of this standards improvement project. Thus the proposals do not require NFPOs to change their current practice with respect to reporting either by object or by function, or to make allocations of costs if they are not already doing so.
>
> 43 The proposals require NFPOs that are making allocations of general support and fundraising costs to other functions to disclose the policies adopted for the allocation of expenses among functions, the nature of the expenses being allocated, the basis on which such allocations have been made, and the functions to which they have been allocated. For purposes of the proposed standard, allocations that are to be disclosed are those made after individual expenses have been attributed among the functions to which they relate and all of the expenses of a function have been accumulated within that function."

This set of proposals would begin to apply to financial statements relating to fiscal years beginning on or after January 1, 2009. The ASB has requested public comments relating to the Draft (with a deadline of November 15, 2007). Additional information relating to the Draft and the background for the proposed amendments can be found on the ASB website.

## CANADIAN ASSET-BACKED COMMERCIAL PAPER CRISIS

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An asset-backed commercial paper trust is a limited-purpose entity that issues secured short term debt obligations called commercial paper to fund purchases of assets that back-up the commercial paper and generate cash flow. Traditionally, those underlying assets were principally made-up of mortgages and various types of consumer loans and receivables, but many of the trusts currently hold a significant portion of their assets in the form of credit default swaps, collateralized debt obligations and other leveraged derivatives instruments. Typically, repayment of maturing asset-backed commercial paper ("ABCP") is dependent on the cash generated by an issuer trust's underlying asset portfolio and the issuance of new ABCP. In addition, to provide ABCP trusts with a back-up source of liquidity, the trust generally arranges for liquidity facilities that, subject to satisfying certain conditions, may be drawn by the issuer trust on the occurrence of a "market disruption" that results in the trust being unable to issue ABCP. ABCP is rated by Dominion Bond Rating Service ("DBRS") asset of the trust is separately rated by, in most instances, two rating agencies. Most Canadian ABCP was rated R-1 (high), the highest rating awarded by DBRS.

The Canadian market for ABCP can be divided into ABCP issued by trusts sponsored and managed by Schedule I chartered banks and ABCP issued by trusts sponsored and managed by non-bank sponsors. It is estimated that the non-bank sponsored portion of the Canadian market currently has about $35 billion of ABCP outstanding.

In mid-August 2007, a number of sponsors of non-bank managed ABCP announced that it was not possible to place new ABCP due to unfavourable conditions in the Canadian markets. In response, many sponsors of ABCP requested funding under their liquidity facilities. However, most of these requests were denied by the so-called liquidity providers who took the position that either a "market disruption" did not occur or other conditions to funding had not been satisfied. This situation resulted in most trusts being unable to pay holders of maturing ABCP, creating a liquidity crisis for many holders.

In the brief period following the start of this liquidity crisis, questions have arisen around (i) the adequacy of disclosure to investors about the nature of the underlying assets and liquidity lines as well as apparent conflicts of interest regarding the role played by various participants in the creation and sale of ABCP, (ii) the failure of most liquidity lines to serve their stated purpose, and (iii) the high ratings assigned to ABCP by DBRS.

On August 16, 2007, a group of financial institutions comprising investors in ABCP, institutions that provided liquidity facilities to the trusts, institutions that provided assets to the trusts and shareholders of certain sponsors agreed to what is known as the Montreal Proposal. Under this arrangement, these institutions (and other holders who later signed on) agreed to a 60-day standstill period during which each party agreed that it would roll-over its non-bank sponsored ABCP on, or following, its maturity date and would not take any action that would precipitate an event of default under the trust indenture governing the ABCP. This agreement includes a pledge by asset providers to refrain from making any collateral calls on assets held by the trusts and a pledge by trust sponsors to refrain from calling on any liquidity provider who signed on to the proposal to fund under liquidity facilities. In addition, the participants in the Montreal Proposal agreed in principal to a proposal that would see ABCP eventually converted to rated floating-rate notes with maturities matching the maturities of the underlying assets. This proposal would be subject to the approval of the requisite number of holders of ABCP in each trust. We now expect the standstill period under the Montreal Proposal to be extended for a considerable period beyond October 15, 2007.

Holders of ABCP, frustrated by the dearth of information available to them, sought information on the nature and quality of the assets held by the issuer trusts in order to assess their credit exposure and liquidity options. The question in many investors' minds is whether this is a "liquidity crisis" only, or whether the underlying assets were either impaired or subject to termination (in the case of derivative contracts) or collateral calls by swap counterparties.

In an effort to provide investors with equal access to this information, Ernst & Young, who had been retained by the group agreeing to the Montreal Proposal, established a data room. However, access to the data room is only available to holders of ABCP who sign a non-disclosure agreement. While some holders of ABCP have signed this agreement, others have serious concerns regarding some of its terms and have refused to sign it. We understand that much of the material information regarding the assets held by the trusts has not yet been made available in the Ernst & Young data room due to confidentiality requirements under agreements between the trust sponsors and many of the asset and liquidity providers to the issuer trusts.

On September 6, 2007, an Investor Committee chaired by Purdy Crawford was formed to oversee the proposed structuring process resulting from the Montreal Proposal. The Investor Committee includes investors who are signatories to the Montreal Proposal plus other investors. The Investor Committee has indicated that holders of over 80% of the outstanding non-bank sponsored ABCP listed in the Montreal Proposal have signed acknowledgments indicating their support for the standstill provisions of the Montreal Proposal. The Investor Committee has retained, in addition to Ernst & Young, a financial advisor and a legal advisor to assist with the proposal.

Miller Thomson represents a significant number of investors in ABCP and has been actively involved, since the commencement of the ABCP liquidity crunch, in advising these clients and assisting them in assessing their liquidity and credit concerns and the various courses of action available to them. Miller Thomson clients with ABCB in their investment portfolios should feel free to contact us to discuss any concerns they have about their holdings. At this point, the overall situation remains very fluid and, as the expression goes, the final chapter has not been written. In this case, there may be several chapters still to be written.

## WHAT'S HAPPENING AROUND MILLER THOMSON

The most recent issue of *Charitable Thoughts*, edited by **Susan Manwaring**, contained "Tromp Leaves, de March "Acting"" by **Arthur Drache**, "When the IRS Steps into Governance, Can CRA be Far Behind?" by **Hugh Kelly** and "Charitable Gaming" by **Kate Lazier**.

The August *Canadian Not-for-Profit News* contained "Filing T3010s on a Timely Basis is Crucial", "Do Not Call List One Step Closer", New Control Test Being Administered", “National Portrait Gallery Won't Move to Calgary", “Charity Giveth but Government Taketh", "Disaster Gifts May Have Had an Impact in US Donations" and "Keep Those Charity Texts" by **Arthur Drache** and "More than Another Annual Meeting" by **Brenda Taylor**.

The September 25 issue of the *Canadian Taxpayer* included **Arthur Drache's** article "Religious Schools Early Issue in Ontario Election".

The September issue of the STEP Journal contained an article entitled "Give and Take" by **Robert Hayhoe**. The article described the Canadian tax treatment of private foundations.

The 2007 Annual Conference of the Canadian Council of Christian Charities included presentations on "Using External Counsel Well" by **Robert Hayhoe** (with Bryan Campbell of the Salvation Army), "Gifts of Residual Interest: Tips and Traps" by **Susan Manwaring** and **Rachel Blumenfeld**, "Receiving Gifts of Securities" by **Susan Manwaring** and "Aggressive Fundraising" by **Robert Hayhoe**.

**Susan Manwaring** was elected as the 2007-2008 Chair of the Canadian Bar Association's National Charities and Not-for-Profit Law Section.

**Martin Rochwerg** chaired a Federated Press seminar "Tax Planning for the Wealthy Family" that included a presentation on Private Foundations by Malcolm Burrows of Scotia.

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