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CHARITIES & NOT-FOR-PROFIT NEWSLETTER

July 2003

The Miller Thomson Charities and Not-for-Profit Newsletter is published periodically by the Charities & Not-for-Profit Practice Group as a service to our clients and the broader voluntary sector. We encourage you to forward the email delivering this newsletter to anyone (internal or external to your organization) who might be interested. Complimentary email subscriptions are available by contacting charitieseditor@millerthomson.ca.

Inside

MILLER THOMSON FOUNDATION SCHOLARSHIP AWARDS

Judson D. Whiteside, Chairman & CEO
Markham
905.415.6701
jwhiteside@millerthomson.ca

We would like to update you on the Miller Thomson Foundation and its annual awards. The Miller Thomson Foundation was created in 1995 for the purpose of funding the Miller Thomson Foundation Scholarship and in 2001 the Foundation launched the scholarship as a National Programme. The purpose of the Scholarship is to encourage and promote the attainment of higher education goals by top students in Canada who have demonstrated a high level of academic achievement and made a positive contribution to their school and community.

This year over 2,600 high school students across Canada in their graduating year applied for the 200 National Scholarships available. Each winner receives $1,000 towards their post-secondary education. Since the Foundation was formed, $1,150,000 has been awarded to 1,150 deserving students in Canada.

The Board of Governors of the Miller Thomson Foundation, comprising 29 prominent members of the business and education communities from across Canada, were pleased to confirm this year's winners (listed on the Miller Thomson website at http://www.millerthomson.com/foundation.asp).

The 2004 Scholarship Programme will be launched in December. For further information, contact Lesley Lawson, Executive Director at llawson@millerthomson.ca.

PRIVACY LAW: NEW PROVINCIAL RULES EFFECTIVE JANUARY 1, 2004

Eve C. Munro
Vancouver
604.643.1262
emunro@millerthomson.ca

As discussed in our April 2002 and Spring 2001 issues, new rules protecting privacy of personal information will apply to most organizations in Canada effective January 1, 2004. The application of the new rules to charities and not-for-profit organizations will, at least for the time being, be more restricted

than the application to for-profit organizations in most provinces and territories. Nonetheless, the extent to which these rules apply to an organization's activities and the extent to which an organization may wish to adopt privacy principles in response to public expectation is still important as good practice rather than compliance.

Federal Legislation
As discussed in detail in earlier issues of this newsletter, in 2000, the Federal Government passed the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*").

On January 1, 2004, *PIPEDA* will apply to all organizations in every province, unless the relevant province has enacted comparable legislation by that date. Where a province has passed privacy legislation that is "substantially similar" to *PIPEDA*, the federal government may exempt all or part of the provincially regulated private sector from the application of *PIPEDA* within the province's boundaries and the provincial law will apply.

Provincial Legislation
Since 1994, Quebec has been the only province with legislation governing the protection of personal information. B.C. has introduced its own legislation in the form of Bill 38 - *Personal Information Protection Act*. This Bill has received Second Reading and has been carried over to the Fall 2003 Sitting. We understand that the intent of the government is to pass this legislation prior to the January 1, 2004 deadline. Alberta has also introduced legislation. Alberta's Bill 44 - *Personal Information Protection Act* has passed First Reading and will also be carried over to the Fall Sitting.

The Alberta and B.C. governments worked together in drafting their legislation. The intent in both cases was that the new legislation would be "substantially similar" to *PIPEDA* in order that the provincial law and not *PIPEDA* will apply to activities within the province's boundaries. It remains to be seen how these statutes will be viewed by the federal government. The former Privacy Commissioner of Canada has stated that the legislation introduced by these two provinces is not "substantially similar". It is not the Privacy Commissioner who will ultimately make this determination - the determination will be made by the Cabinet based on a recommendation by the federal Minister of Industry.

In any event, most Canadian organizations operating outside the province of Quebec, to which the federal legislation does not currently apply, will be subject to some new privacy law regime on January 1, 2004. In provinces that do not enact their own legislation which is determined to be "substantially similar", *PIPEDA* will apply, subject to the limitations on application described in earlier articles.

Although there is some legal debate about the constitutionality of the application of *PIPEDA* to commercial activities of charities, most charities should proceed on the basis that it does apply rather than risking non compliance. Another consideration for not-for-profits is that in our increasingly privacy conscious culture, donors and members may expect organizations to comply with federal or provincial requirements as a matter of course, perhaps even where not strictly required by law.

Application of B.C. and Alberta Legislation
PIPEDA is confined to commercial activities and to information about employees of federal undertakings because of Canada's constitutional structure. Provincial legislation is not subject to this limitation, and B.C.'s Bill 38 applies to the non-commercial sector as well as employees of provincial organizations. Accordingly, under the new B.C. legislation, charities and not-for-profits operating in B.C. will be in the same position as for-profit organizations and will be subject to privacy laws in respect of all activities (not simply the commercial activities), and to all personal information about their employees.

Alberta's Bill 44 provides that it does not apply to a "non-profit organization" or any personal information that is in the custody of or under the control of a non-profit organization, except in the case of personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization. "Commercial activity" is defined to specifically include the selling, bartering or leasing of membership lists or of donor or other fundraising lists.

It is not yet clear to what organizations this exception for "non-profit organizations" in Alberta's Bill 44 will apply. "Non-profit organization" is defined in the Bill as meaning an organization that is incorporated or registered under specified Alberta legislation or that meets the criteria to be established under regulations.

Bill 44 further provides that the Lieutenant Governor in Council may make regulations exempting certain non-profit organizations that are restricted or otherwise limited in their operations and delaying application of the *Act* to a non-profit organization. Unlike the proposed B.C. legislation, the Alberta Bill does not extend the application of the privacy rules to the activities of charities and other not-for-profits beyond the application of those rules under *PIPEDA*.

On the basis of the new legislation currently tabled it appears that, at least initially, only in B.C. will charities and other not-for-profits be required to comply with new privacy rules in respect to all of their operations (although it should be noted that there are existing obligations in the Province of Quebec for charities and not-for-profits). However, other not-for-profits may choose to comply more broadly than simply with respect to their activities which are "commercial" in character, in order to meet the expectations of donors and members.

General Privacy Principles

Beyond these issues of application, existing and proposed privacy legislation impose obligations regarding appointment of compliance officers; notice and consent required for the collection, use and disclosure of personal information; implementation of policies and practices and information to be available regarding the same; security of storage, length of retention, accuracy of personal information; access to personal information held; and complaint procedures. The rules apply to "personal information", which is information about an identifiable individual, but does not include the name, title and certain business contact information of an employee of an organization.

At their core, the principles underlying the privacy legislation can be summarized as follows:

1. Individuals must be given notice of the proposed collection, use and disclosure of their personal information (including purposes).
2. Informed consent for the collection, use or disclosure of an individual's personal information must be obtained.
3. Personal information data must be protected by appropriate security.
4. Individuals must have access to data collected and details regarding its use and disclosure.

The rules and exceptions in each case must be reviewed to ensure compliance. In particular, the treatment of employee personal information in the B.C. and Alberta Bills contains significant exceptions to the consent principle.

Recommendations

In preparation for the coming changes in the privacy law in relation to privacy, organizations' information collection, use, storage and disclosure, practices and procedures should be reviewed. Preliminary questions will include:

- Does the organization carry on a federally regulated undertaking?
- In which Canadian jurisdictions is the organization operating?
- What activities does the organization carry on that might be considered commercial in character?
- Does the organization want to adopt privacy principles on the basis of good practice even where not strictly required by law?

With these issues in mind, organizations can assess their positive obligations in terms of compliance and, beyond that, the approach that they wish to take to privacy issues. Organizations which will be subject to more than one legal regime should consider adopting "best practices" that will provide uniformity to the organization's policies and practices. As the regulatory regime becomes clearer, Miller Thomson LLP lawyers will be developing compliance tools designed to ensure our clients can meet all applicable privacy rules.

FEDERAL REPORT ISSUED RECOMMENDING BETTER CHARITY REGULATION*

Robert B. Hayhoe
Toronto
416.595.8174
rhayhoe@millerthomson.ca

The Joint Regulatory Table ("JRT") of the Voluntary Sector Initiative ("VSI") has now issued its final report recommending changes to the federal regulatory environment for charities.

The VSI is a joint federal government and voluntary sector project designed to examine how the federal government could better assist the voluntary sector's work in the public interest. The VSI is divided into Tables (working groups) by subject area. The Table which is of most interest to lawyers is the JRT. This Table was convened in November, 2002 and has equal representation from the sector (both voluntary sector organizations and professionals) and from the federal government.

The JRT was asked to look at four areas, being the accessibility and transparency of the federal charities regulator (currently the Canada Customs and Revenue Agency or CCRA), appeals from regulatory decisions, compliance reforms (intermediate sanctions) and institutional models. The JRT issued an interim report in the Fall of 2002 (as discussed in our September 2002 newsletter) which made recommendations in each of the four subject areas. The interim report was then the subject of an extensive consultation process which (with some notable objections to the scope of the JRT's terms of reference) supported most of the recommendations.

In March 2003, the JRT delivered its final report to John Manley (Minister of Finance), Elinor Caplan (Minister of National Revenue) and Sheila Copps (Minister Responsible for the Voluntary Sector). Because of the positive responses received during the consultation process, the final report is very close to the interim report.

Accessibility
The JRT report identifies a need for greater transparency in the CCRA's registration decision-making process. The recommendation is that the CCRA publish reasons for its positive and negative registration decisions (backed up by making the completed application package public for failed applications as it now is for successful ones). The report also recommends that the financial statements which registered charities must file with their T3010 annual returns be made available to the public.

The JRT report discusses in detail the proposal that the existence of a CCRA charities audit and the results of such an audit be made public. However, in recognition that the very existence of an audit could suggest wrongdoing to some, the report only recommends that audits be disclosed if serious penalties are imposed.

Finally, the JRT report recommends that the CCRA's internal policy database should be made available to the public (as is now beginning to be done on the CCRA's website).

Appeals
The current appeal system available to a charity against a registration or de-registration decision is a judicial review in the Federal Court of Appeal. This system is universally recognized as unsatisfactory.

The JRT report recommends that the CCRA introduce an independent internal administrative review system to consider registration and compliance decisions. Following a negative administrative review, a charity should have recourse to a trial *de novo* (the suggested venue being the Tax Court of Canada).

As well, the JRT recognizes that a combination of the inappropriateness of the current appeal structure and the financial realities facing charities has resulted in an almost total lack of jurisprudence on most of the tax issues facing registered charities. The report recommends a litigation fund, perhaps modeled on the Court Challenges Program, be considered as a way of obtaining more jurisprudence.

Intermediate Sanctions

The JRT recognizes that the current sanction system (essentially de-registration for all tax law violations) is both too severe and too blunt. Provided that a working appeal procedure is implemented, the JRT recommends that charities also be susceptible to suspension of qualified donee status (requiring that the CCRA obtain control of the receipting process) and/or to suspension of a charity's tax exempt status (with a tax based on revenue). While the interim report had recommended monetary penalties on directors and officers of charities, the consultation process indicated strong opposition to this proposal, so further study is recommended.

The report also deals with sanctions on charities established by deceptive fundraisers. The JRT is concerned that the current rules permit a registered charity to collect money from the public with fraudulent underlying purposes without any ability for the CCRA to revoke registration until a few years later when the disbursement quota is not met. The JRT recommends the addition of a specific revocation ground, being that the registration was obtained on the basis of false information.

This new revocation ground is very troubling. Common practice on registration applications is to give accurate but limited information about the applicant's proposed activities. Furthermore, the application requires a very detailed pro forma budget, which must often be based on very tenuous assumptions. It is not difficult to imagine situations in which the CCRA might seek to apply this ground but which do not involve deceptive fundraisers. Why not address the issue of deceptive fundraisers directly?

Institutional Reform

The JRT was asked to identify possible new models for the federal regulator (but not to express a preference). The first model suggested is an improved CCRA Charities Directorate (as seems to be developing now). The second is an improved Charities Directorate assisted by a new voluntary sector agency which would be largely advisory.

The third model considered would involve a total replacement of the CCRA with a new Charities Commission. The thought is that this would avoid some of the perceived role conflicts which currently exist and allow the Commission to focus clearly on its mandate. The final proposal is that the responsibilities of the Charities Directorate be divided between it and a new Charities Commission, with the Commission being given responsibility for registration and revocation decisions and the CCRA keeping audit responsibility.

Conclusion

The JRT report is a useful and detailed look at the administrative aspects of federal charity tax regulation. While the substantive charity tax rules are also ready to be re-examined, most of the changes proposed to the regulatory model would be improvements on the current system.

* Based upon a similar article published in *Lawyers Weekly*

GIFT PLANNING -CHANGE WILL DO YOU GOOD*

Rachel L. Blumenfeld
Toronto
416.596.2105
rblumenfeld@millerthomson.ca

Miller Thomson LLP was pleased to sponsor the keynote address of Frank Minton and Lorna Somers at the Canadian Association of Gift Planners ("CAGP") 10th Annual Conference in Vancouver in May.

In their entertaining presentation, Frank and Lorna reviewed the many trends that have arisen in the taxation of planned gifts over the last decade and made suggestion for the future. We will summarize their comments below.

Frank identified six intermediate goals that would move the gift planning community towards the "pinnacle" of gift planning. These are:

1. Legislation that would make charitable remainder trusts more viable. This has the potential of unlocking millions and millions of dollars. Specifically, charitable remainder trusts should be tax exempt like charities, and the payment to beneficiaries should be a percentage of trust assets rather than net income. He suggests implementing a definite way of calculating the donation receipts so no one is in doubt.
2. Legislation enabling foundations to arrange gift annuities. At the present time, many hospitals offer gift annuities, but the foundations that support them cannot - the reason being that foundations cannot incur debt and a gift annuity is construed as a debt obligation.
3. A definite methodology for calculating the value of annuity payments. Frank cited the recent CCRA technical bulletin that was correct in concept, but misapplied in implementation. As a result of that bulletin, two people of the same age who give the same amount on the same day can get two different donation receipts because the two charities can get different premium quotations from different insurance companies. It ought to be the same for everyone and that can be done with a clear methodology.
4. A revision of the disbursement quota rules. The objective of requiring charities to use donated dollars for philanthropic purposes is laudable. Unfortunately, it has inadvertent consequences that can make it difficult to build endowments. The current rules that force investments primarily into fixed income securities fly in the face of modern portfolio theory and limit growth.
5. Private foundations should be on par with public charities with respect to gifts of listed securities Current rules inhibit entrepreneurs from creating private foundations and thus shrink the funding that would otherwise be available to charities.
6. Total exemption of capital gains from taxation for donations of appreciated property.

Frank suggested that if some of these intermediate goals can be achieved, then the gift planning community will be much further ahead.

Lorna's message to the gift planning community is that planned giving professionals must learn to adapt to changing times. Gift planners, according to Lorna, need to be like the green plastic doll Gumby - flexible, intrepid and tenacious.

Examples of changes to come include:

1. It is only a matter of time until more financial institutions become involved in the charitable sector in Canada (as in the U.S.), in order, in part, to ensure that they retain assets under management that would otherwise go to a charity. To counterbalance this, charities are entering into asset retention plans whereby the charity will agree to invest the assets through the broker or advisor who brings

the gift. It is also likely that there will be an increase in the number of financial advisors wanting to partner with charities in these asset retention plans.

2. Another big change for charities is the use of the Internet. Lorna called on charities to work together to develop a national website for allied professionals which would contain information about gift plans, the latest interpretation bulletins and regulations. This would be a great way to raise awareness and encourage referrals.
3. Gift planners must start to emphasize working with owners of private businesses. Many people do not have the capacity to give listed securities - much of their wealth is in their company. Gift planners should be using creative ways to access that wealth.
4. Charities must include donors in their decision-making process. An innovative US hospital created a fund called Mercy Partners Fund. The premise was that a family could sit down periodically with the hospital's CEO and select physicians and talk about the priorities of that hospital and recommend grants from their fund. It is a great way to keep donors involved and to report to them on their charity.

Lorna suggested three ways to improve the gift planning industry:

1. Reduce the turnover in the profession. Creating long-term relationships with donors is very important to maintaining long-term donors.
2. Holistic, integrated professionals will serve an institution best. Ensure that every development officer, estate planner, financial planner, legal counsel working in these matters has gift planning skills. Everyone who works in development at a charitable organization should consider themselves "Relationship Stewards". There should be one integrated program for non-traditional and traditional charitable and non-charitable resource generation for your institution.
3. Use the boards and the volunteers of an organization effectively. Giving these two groups meaningful work will produce an incredible payback.

Gift planning will remain vital if gift planning professionals think in new entrepreneurial ways about gift planning. It is this novel way of thinking that will serve donors and charities, and will ensure a thriving community of content donors and well-endowed donees.

* This article is based on a presentation by Frank Minton and Lorna Sommers at the 2003 Canadian Association of Gift Planners annual conference.

CARVER POLICY GOVERNANCE® IN CANADA*

Hugh M. Kelly, Q.C.
Toronto
416.595.8176
hkelly@millerthomson.ca

Some lawyers have suggested recently that Policy Governance® as popularized by John Carver is not consistent with the fiduciary duty applicable to directors of charities in Canada. In *Primer for Directors of Not-For-Profit Corporations* (2002) published by Industry Canada, the chapter titled "Risk Management" states (at p.64):

> Some models of board governance - notably originating in the United States - advocate that directors limit themselves to policy matters only and leave responsibility for administration and day-to-day matters with the executive staff of the corporation. This limited role for directors does not reflect the obligations that are legally imposed upon directors, particularly directors of charitable corporations, in Canada.

The author of this chapter has recognized only part of what John Carver requires in Policy Governance®. While a detailed analysis of Policy Governance® is beyond the scope of this comment, some explanation of the system will be helpful. Carver's underlying assertion is that:

- The board is responsible for determining the ends (or the purpose and desired results) of the organization to some board-determined level of detail
- The administration, as the board's delegate, is responsible for determining the means (or everything that is not organizational purpose), provided those means do not violate board proscriptions concerning means

To implement these concepts, Carver requires boards to develop four kinds of policies:

1. Ends Policies define the intended results, for whom and at what cost.
2. Governance Process Policies prescribe the board's own job.
3. Board-Staff Linkage Policies establish the relationship between governance and management.
4. Executive Limitations Policies determine the boundaries of the authority of administration.

Carver describes Policy Governance (John Carver and Miriam Carver, "Policy Governance® Defined", http://www.carvergovernance.com):

> Simply put, the board exists (usually on someone else's behalf) to be accountable that its organization works. The board is where all authority resides until some is given away (delegated) to others. This simple total authority-total accountability (within the law or other external authorities) is true of all boards that truly have governing authority.

That "someone else" (described as the "owners") is the membership of trade or professional associations, or the community in the case of community-based agencies. This concept of "owners" is important to Carver:

> The Policy Governance model conceives of the governing board as being the on-site voice of that ownership. Just as the corporate board exists to speak for the shareholders, the non-profit board exists to represent and to speak for the interests of the owners....Policy Governance boards must learn to distinguish between owners and customers, for the interests of each are different. It is on behalf of owners that the board chooses what groups will be the customers of the future. The responsible board does not make that choice on behalf of staff, today's customers, or even its own special interests.

Carver draws a careful distinction between "board" and individual directors:

> It is the board as a body that speaks for the ownership, not each board member except as he or she contributes to the final board product....[B]oard practices must recognize that it is the board, not board members, who have authority....Statements by board members have no authority. In other words, the board speaks with one voice or not at all...."One voice" does not require unanimous votes. But it does require all board members, even those who lost the vote, to respect the decision that was made. Board decisions can be changed by the board, but never by board members.

Carver sums up the role of the board:

> [While] the board has total authority over the organization and total accountability for the organization...[t]he board is almost always forced to rely on others to carry out the work, that is, to exercise most of the authority and to fulfill most of the accountability. This dependence on others requires the board to give careful attention to the principles of sound delegation....This calls upon the board to be very clear about its expectations, to personalize the assignment of those expectations, and then to check whether the expectations have been met....[I]n the absence of clear instructions or clear assignment, evaluating performance is an exercise in futility....Because monitoring performance is the systematic disclosure of whether board expectations have been met,

> monitoring that is fair and incisive can only occur after clearly stated and clearly assigned board expectations.

Carver includes an important caveat:

> Using parts of a system can result in inadequate or even undesirable performance. It is rather like removing a few components from a watch, yet expecting it still to keep accurate time....[The] Policy Governance model introduces an integrated system of governance.

Carver is insistent that:

- The board has full authority and has full accountability
- The board must be definite about its performance expectations;
- The board must assign these expectations clearly
- The board must check to see that the expectations are being met

To fulfil these obligations, a board, individual directors, and the Chief Executive Officer ("CEO") must devote great time and effort to:

- Defining the purpose (or, in Carver's language, "Ends")
- Determining appropriate limits to what is delegated
- Measuring achievements against the demands of both the Ends and the limits imposed in delegation

"Policies" for Carver are any instruction by the board to the CEO or to the board itself, from the very broad to the very particular -- any level of focus desired by the board. The great strength of Policy Governance® is that it speaks prescriptively to stipulate ends, and proscriptively to exclude means. When a board is prescriptive concerning means, it retains for itself, and does not assign, accountability.

Carver emphasizes that the board has total accountability for the organization. Policy Governance® is designed to encompass that total accountability, both the intended results and the means used to achieve results. It is designed to assure the clear assignment of accountability to the CEO, with the concurrent obligation upon the CEO to formally present that accountability (report) back to the board. Policy Governance® when utilized as intended provides excellence in governance. The board of a Canadian charitable corporation that adopts Policy Governance® has performed "due diligence", and fulfilled all legal obligations imposed upon its directors. On a comparative basis, such boards and directors are far ahead of most corporations, even those in the world of commerce, in observing their legal and moral obligations.

The assertion in the Primer quoted at the beginning is quite inaccurate. Any interpretation or perception that Policy Governance® fails to assign, or incompletely assigns, accountability demonstrates an erroneous understanding of what Carver postulates. By not presenting the full picture, the sponsors of the Primer have done a disservice to those who will be led to the incorrect conclusion that the Carver model is unlawful in Canada. Hopefully, a new edition of the Primer, with appropriate corrections, will be issued without delay.

* Based upon an earlier article by Hugh Kelly and Dr. Richard Biery of the Broadbaker Group entitled "Industry Canada's Unjustified Criticism of Carver Policy Governance©" published in the *CCCC Bulletin* published by the Canadian Council of Christian Charities. Dr. Biery will be presenting (along with other distinguished experts) a special seminar “Board Governance for Christian Organizations” on September 8 and 9 in Colorado springs. For more information see www.broadbaker.com

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

Miller Thomson LLP is pleased to announce that a new release of *O'Brien's Encyclopedia of Forms*, Chapter 45, Powers of Attorney, has been published by Canada Law Book. This chapter was revised and updated by **Jasmine Sweatman** (Toronto) and **Sandra Enticknap** (Vancouver). *O'Brien's Encyclopedia of Forms* is a leading comprehensive set of legal forms used as a primary resource by lawyers throughout Canada.

In May, **Robert Hayhoe** (Toronto) spoke (with Stuart Lark of Holme, Roberts & Owen LLP in Colorado) on "Canadian and US Ministry Relationships" at the IFMA Administration Conference in Orlando, Florida.

Robert Hayhoe published "Federal Report Recommends Changes to the Regulation of Charities" in the *Lawyers Weekly* in June.

Rachel Blumenfeld (Toronto) published a case comment on the decision of the Federal Court of Appeal in *Earth Fund v. Minister of National Revenue* in the May 2003 *International Journal of Civil Society Law*.

Robert Hayhoe published an article "Current CCRA Issues" in the January 2003 *Charitable Thoughts.*

Robert Hayhoe has just been elected for a three year term as a member of the Advisory Council of the International Center for Not-for-Profit Law.

Robert Hayhoe and **Jasmine Sweatman** have both been re-elected to the executive of the Ontario Bar Association Charities and Not-for-Profit Section.

In June, **Susan Manwaring** and **Malcolm Burrows** (The Hospital for Sick Children Foundation), on behalf of the CAGP Government Relations Committee, attended a meeting with representatives from the Department of Finance and CCRA to discuss changes to the *Income Tax Act* (Canada) which could enhance the use of charitable remainder trusts in Canada.

In July, **Jasmine Sweatman's** book, *Bequest Management for Charitable Organizations* was published by Butterworths. **Dragana Sanchez Glowicki** (Edmonton) and **Sandra Enticknap** both contributed to the book.

MILLER THOMSON LLP CHARITIES & NOT-FOR-PROFIT GROUP

Toronto

Jennifer E. Babe	416.595.8555
Alan Belaiche	416.595.8511
Rachel L. Blumenfeld	416.596.2105
Mark R. Frederick	416.595.8175
Kathryn M. Frelick	416.595.2979
Robert J. Fuller	416.595.8514
Robert B.Hayhoe	416.595.8174
Hugh M. Kelly	416.595.8176
Jacqueline L. King	416.595.2966
Susan M. Manwaring	416.595.8583
Rosanne T. Rocchi	416.595.8532
M. Jasmine Sweatman	416.595.8623
Michael J. Wren	416.595.8184

Vancouver

Sandra L. Enticknap	604.643.1292
Martin N. Gifford	604.643.1264
Alan A. Hobkirk	604.643.1218
Donald H. Risk	604.643.1207
Michael Walker	604.643.1288

Calgary

William J. Fowlis	403.298.2413
Sandra M. Mah	403.298.2466
Gregory P. Shannon	403.298.2482

Edmonton

Bruce N. Geiger	780.429.9774
Dragana Sanchez-Glowicki	780.429.9703

Markham

Peter D. Lauwers	905.415.6470
Brenda Taylor (Corporate Services)	905.415.6739

Waterloo-Wellington

Frank O. Brewster	519.822.4680
Stephen R. Cameron	519.579.3660
Teresa de Haan	519.579.3660
William R. Greenwood	519.579.3660
John J. Griggs	519.579.3660
Thomas Jutzi	519.579.3660
J. Jamieson K. Martin	519.579.3660
Richard G. Meunier, Q.C.	519.579.3660
Robin-Lee A. Norris	519.822.4680

Note:

Miller Thomson LLP's Charities & Not-for-Profit newsletter is provided as an information service to the voluntary sector and is a summary of current legal issues of concern to charities and not-for-profit organizations and their advisors. These articles are not meant as legal opinions and readers are cautioned not to act on the information provided without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome and should be directed to charitieseditor@millerthomson.ca.

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