

UPDATE ON USE OF RELATIONAL PROVISIONS BY ONTARIO NON-SHARE CAPITAL CORPORATIONS

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A. INTRODUCTION

For charitable corporations that are closely related to each other, there is frequently a need to include some form of relational provisions in the corporate documents of one or more of these corporations. However, the ability of non-share capital corporations under the *Corporations Act* (Ontario) - the “Act” - to establish and/or utilize relational provisions may now be in jeopardy as a result of a recent position taken by the Ontario Ministry of Consumer and Business Services, Companies and Personal Property Security Branch - “Companies Branch”. Specifically, Companies Branch has advised that Ontario non-share capital corporations wanting to implement certain relational provisions in their Letters Patent are not able to do so under the Act. As a result, the ability of both existing and future Ontario non-share capital corporations to either establish and/or rely upon relational provisions in their constating documents is now in question. This Charity Law Bulletin provides a brief explanation of the types and purpose of the relational provisions that are often utilized by charitable corporations, a summary of the recent position taken by Companies Branch, and a commentary in response.

B. USE AND TYPES OF RELATIONAL PROVISIONS

There are many instances of charitable corporations - i.e. international and national religious denominations, charities that establish parallel foundations, charities that establish associated charities that engage in high risk activities, as well as umbrella charitable associations (collectively referred to as a “Lead Charity”) that

require relational provisions to be included in the corporate documents of their associated charitable corporations, such as local religious organizations, parallel foundations, separately incorporated high-risk charities, or local chapters of charities (collectively referred to as an “Associated Charity”). While there are other creative options that are available for a Lead Charity that needs to exercise a degree of supervision over an Associated Charity – i.e. via contract and licensing pursuant to a franchise model (see an article entitled “Pro-active Protection of Charitable Assets” dated November, 2001, available at www.charitylaw.ca), some common forms of relational provisions used by a Lead Charity with regard to an Associated Charity include the following:

- a) A requirement that the directors, officers and members of the Associated Charity subscribe in writing to a key document of the Lead Charity; for example, the Mission Statement, Objects or the Statement of Faith of either the Lead Charity or other supervisory organization by incorporating by reference an outside document into the corporate documents of the Associated Charity.
- b) The use of qualification requirements for a specified number of corporate members, directors and/or officers of the Associated Charity requiring that those members, directors, or officers obtain and maintain the consent of the board of directors of either the Lead Charity, another organization, or a specified person, with the result that if such consent is withdrawn, then the individual in question would no longer satisfy the qualification requirements for that office and would consequently become ineligible to hold that office in the Associated Charity.
- c) A requirement that the Lead Charity approve in writing some or all amendments to the corporate documents (either or both the Letters Patent and the General Operating By-law) of the Associated Charity prior to their adoption and/or enactment by the directors and members of the Associated Charity.

The purpose of judiciously using these types of relational provisions is to enable the Lead Charity to maintain some degree of supervision over and consistency concerning the charitable purposes and activities of the Associated Charity and/or the composition of its board of directors responsible for carrying out its charitable operations, but not going so far as to exercise effective control over the day to day operations of the Associated Charity that would otherwise prejudice the ability of the Associated Charity to operate independently and free from domination by the Lead Charity, as might, for example occur through cross-over majority membership of the directors and/or the corporate members of the Lead Charity on the board of directors of the Associated Charity. Whether or not a particular relational provision might impact ascending, descending or crossover liability between the Lead Charity and the Associated Charity is a

separate and important issue that must be carefully looked at by legal counsel for the charities in question, but is beyond the scope this Bulletin. For more information on recent case law dealing with crossover liability between separately incorporated associated entities, see Charity Law Bulletin No. 19, dated January 31, 2003, available at www.charitylaw.ca.

C. POSITION OF COMPANIES BRANCH AND COMMENTARY

1. Overview of Position of Companies Branch

Currently, Companies Branch takes the position that the three types of relational provisions outlined above do not comply with the Act, because they suggest some degree of unacceptable outside control by the Lead Charity over the Associated Charity. Accordingly, these types of relational provisions are not presently being approved by Companies Branch where they are included in either an Application for Letters Patent of a new charity or in an Application for Supplementary Letters Patent of an existing charity that wishes to amend its Letters Patent. It is immaterial to Companies Branch's position whether the Application for Letters Patent or Supplementary Letters Patent have already been approved and authorized by both the directors and members of the charity in accordance with the requirements of both the Act, as well as the constating documents of the charity itself.

2. Reference to Outside Documents

One of the relational provisions that is currently considered unacceptable by Companies Branch is where reference is made in the Letters Patent or Supplementary Letters Patent of an Ontario corporation to an outside document to which the members, directors and officers must subscribe and adhere to in carrying out their duties and responsibilities. For a religious charity, such an outside document could include the articles of religion of an umbrella religious denomination - for example, the canon law of the Roman Catholic Church, or the statement of faith of another religious body - or, for a parallel foundation, the mission statement or general objects of the charity for which it has been established to fund. It is unclear what

statutory authority Companies Branch is relying upon in taking its position on this issue, as there is no section in the Act on point in this regard.

The position of Companies Branch is concerning, since it is a general principle of statutory interpretation that where a statute is silent on a particular matter, then such matter will not be prohibited by the legislation in question. In this regard, since the Act itself does not address the issue of the incorporation by reference to outside documents in the governing documents of an Ontario non-share capital corporation, then such provisions should be permissible in the Letters Patent and Supplementary Letters Patent of Ontario charitable corporations, particularly since Sec. 119(2) of the Act permits anything which can be included in the by-laws of a non-share capital corporation to be included in the Letters Patent, as outlined in more detail below.

On this issue, the decision of the British Columbia Superior Court in *Colettis v. Orthodox*, [1993] B.C.J. No. 2081 (the “Colettis Case”) supports the position that incorporation by reference to outside documents in the Letters Patent of a charitable corporation is in fact permissible. In the Colettis case, the Court took the position that the constitution of a local Greek Orthodox Church corporation requiring its bylaws to be consistent with an outside document - that is the Uniform Parish Regulations (“UPR”) intended to govern each parish of the Greek Orthodox Church - was acceptable. This is because the Court was of the opinion that the UPR were intended to work together with the other provisions of the constitution and that it was acceptable for either set of provisions to impose greater restrictions on certain matters than the other. The Court stated that the UPR provisions did not contradict any general principle of self-government or local control. Further, the Court in the Colettis case found that the requirement that the directors of the local Greek Orthodox church corporation were expected to act in accordance with the teachings of the Greek Orthodox Church was not objectionable, given that the furtherance of those teachings was among the corporate objects of the local church corporation.

In applying the Colettis decision to the issue at hand – i.e. where the objects of a charitable corporation specifically incorporate by reference outside documents into its constating documents, then the written subscription by the members, directors and officers to these outside documents would be reasonable and,

therefore, should be permitted. One example of where such a provision is commonly used is where a parallel foundation that is established with corporate objects that require it to receive and maintain a fund and to apply the income from such fund for the benefit of the general charitable purposes of the Lead Charity, requires the written subscription of the directors and members to the mission statement or objects of the Lead Charity. Another example is in relation to religious charities where it is often a requirement that its members, directors and officers must be in agreement with and adhere to the particular religious code of that religious body.

3. Written Approval of the Members, Directors and Officers of One Charity by Another

Companies Branch has also expressed concern about the use of relational provisions in Letters Patent and Supplementary Letters Patent that require members, directors and officers of the Associated Charity to obtain and maintain the consent of the board of directors of the Lead Charity in order to serve as a member, director, or officer. In this regard, of particular concern to Companies Branch is the requirement that such consent from the Lead Charity must be maintained on an ongoing basis, since Companies Branch is of the opinion that this may provide the Lead Charity with outside control and is, therefore, not permitted under the Act. However, Companies Branch also takes the position that there are some types of limited outside control provisions by one corporation over another that are permissible, including, for example, a provision which states that no person may be nominated for the position of director of an Associated Charity without first obtaining the approval of the Lead Charity. In this regard, it would seem that if this type of outside control by the Lead Charity over an Associated Charity is permitted by Companies Branch, albeit only at the initial stage of nominating the directors, then relational provisions should also be permitted to be exercised in other similar ways, including a qualification requirement that a director must obtain and maintain the consent of the Lead Charity to be a director, officer, or member of the Associated Charity.

In addition, Subsection 119(2) of the Act permits the inclusion of this type of relational provision in the Letters Patent or Supplementary Letters Patent of a charity. Subsection 119(2) states that the applicants for incorporation of a corporation without share capital, “*may ask to have embodied in the letters patent any provision that may be made the subject of a by-law of the corporation*”. As well, Section 129 of the Act

states that the directors may pass by-laws not contrary to the Act or to the Letters Patent or Supplementary Letters Patent. Among the matters that can be regulated by by-law in accordance with Subsection 129(f) are, “*the qualification of and the remuneration of the directors*”. As the type of relational provision that is contemplated above specifically authorizes qualification requirements for directors, and as the Act permits corporations to establish their own qualification requirements for directors as outlined in Subsections 119(2) and 129(f), it would appear that reasonable qualification requirements for directors set out in either an Application for Letters Patent or Supplementary Letters Patent, including those requiring approval to be obtained from the directors of another corporation, should be permissible.

4. Approval of Amendments to Corporate Documents by Another Corporation

It is also the position of Companies Branch that any provision in the Letters Patent or Supplementary Letters Patent of a charitable corporation which require another corporation to consent to amendments of either its Letters Patent or General Operating By-law is not permitted, since such provision apparently suggests the existence of inappropriate outside control and is not authorized under the Act. However, it is unclear what the authority for this position is, whether under the Act or other legislation. The basis for the position of the Companies Branch may be that because the Act does not specifically authorize this type of outside control, it is not permitted under the legislation. However, as explained above, since the Act does not directly or indirectly address the issue of outside control provisions specifically, then the utilization of such outside control provisions should not be considered to be prohibited under the Act.

In this regard, the 2001 decision of the Ontario Superior Court of Justice in the case of *The Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc. v. Protection of the Holy Virgin Russian Orthodox Church (Outside of Russia) in Ottawa, Inc. and St. Vladimir’s Russian Residence of Ottawa Inc.*, [2001] O.J. No. 438 (the “Russian Orthodox case”) is instructive on this issue. The facts of this case involve a dispute between the defendant churches and the national denomination. The directors of one of the defendant churches, the Holy Virgin Church, voted to leave the religious denomination of the plaintiff to join another denomination. The plaintiff denomination took the position that to be a director of the defendant church required the observance of the teaching and tenets of the national denomination and

that the motion by the members of the defendant church to amend its Letters Patent and By-laws was invalid because such amendments required the consent of the Bishop of the national denomination and such consent was not obtained.

In reviewing the facts and the governing documents of the defendant church, the Ontario Superior Court of Justice took the position that the governing documents were intended to establish the Holy Virgin Church as a parish of the national denomination. Specifically, in relation to the requirement that any amendments to the By-laws of the Holy Virgin Church required the approval of the Bishop of the national denomination, the Court indicated that, “there is no interference with any principle of self-government or local control with respect to the members as submitted by the Defendants.” On page 21, the Court stated that, while the *Canada Corporations Act* required membership approval of proposed by-law amendments by a two-thirds vote, “...nowhere in the Act is there any provision to the effect that members may not establish additional provisions or requirements in this regard. Indeed, to accede to the submission of the Defendants in this regard would place a restriction on the freedom of members to arrange their affairs as they see fit.”

In the Russian Orthodox case, the Ontario Superior Court of Justice held that the powers with respect to the enactment of By-laws under the *Canada Corporations Act* set minimum standards and a corporation could impose stricter rules, including a requirement that all by-laws must be approved by an outside Bishop. The Ontario Superior Court of Justice’s interpretation of the by-laws in question in the Russian Orthodox Case was subsequently upheld by the Ontario Court of Appeal in its judgement dated December 10, 2002, [2002] O.J. No. 4698.

The reasoning of the Ontario Superior Court of Justice, as upheld by the Ontario Court of Appeal in the Russian Orthodox case, as it relates to outside approval of amendments to governing documents of a Canadian non-share capital corporation, has direct application to the issue in question. Specifically, one would assume that the approach of the Companies Branch in relation to the Act should be consistent with the court decisions in the Russian Orthodox case and the *Canada Corporations Act*, thereby permitting relational provisions that require one charitable corporation to approve the amendments to the corporate documents of another charitable corporation.

There are numerous Ontario charitable corporations that have over the years implemented similar provisions in their governing documents, including providing a Lead Charity with veto rights over certain fundamental documents, as well as incorporating by reference certain outside documents. Such charitable corporations include numerous religious charitable corporations that in their corporate documents provide approval and doctrinal control in favour of religious bodies located outside Canada, such as the Roman Catholic Church. Accordingly, if relational provisions have been recognized for years for existing religious charitable corporations, then similar provisions should be acceptable in the Letters Patent of other charitable corporations.

5. Position of Other Supervisory Bodies

It is not clear what the position of Companies Branch is in relation to the inclusion of these types of relational provisions in the General Operating By-law of Ontario's charitable corporations, as opposed to an Application for Letters Patent or Supplementary Letters Patent. This is because the by-laws of an Ontario charitable corporation are not required to be submitted to or reviewed by Companies Branch under the Act. It is also not clear what the position of the Office of the Public Guardian and Trustee ("PGT") is on the inclusion of relational provisions in the Letters Patent or Supplementary Letter Patent. The PGT is the body that is vested with supervisory jurisdiction over charities in Ontario pursuant to the *Charities Accounting Act*. One of its major responsibilities is to review the Applications for Letters Patent and Supplementary Letters Patent of Ontario charitable corporations prior to being sent to Companies Branch for review and issuance. To date, the PGT does not appear to be concerned with relational provisions in general. It would follow, therefore, that if the PGT does not have concerns with the relational provisions, then, presumably, neither should the Companies Branch, particularly given the fact that the Act is itself silent on the issue.

Similarly, in relation to federal non-share capital corporations incorporated under the *Canada Corporations Act*, Industry Canada has not expressed concerns regarding utilization of relational provisions in general. As well, where a charitable corporation that utilizes relational provisions then applies for charitable status with the Charities Directorate of Canada Customs and Revenue Agency ("CCRA"), generally CCRA does not find such provisions to be problematic, provided that the Lead Charity and Associated Charity are both

registered Canadian charities. The only exception to CCRA's position on this issue is where the relational provisions are utilized by a charity located outside of Canada, i.e. a U.S. Lead Charity. In such situation, CCRA generally takes the position that such relational provisions in favour of a foreign organization over a Canadian registered charity is not acceptable. While it is debatable whether CCRA's position on this point is correct, given the case law and practice of many existing religious charities, even CCRA does not have concerns about relational provisions between a Lead Charity and an Associated Charity, provided that the Lead Charity is not a foreign based organization. In this regard, it would appear that the position of Companies Branch on certain relational provisions is probably not supported by other counterpart supervisory agencies, including the PGT, Industry Canada and CCRA.

D. CONCLUDING COMMENTS

As a result of the position taken by Companies Branch, the option of Ontario charitable corporations utilizing relational provisions is no longer available. As a result, the ability of both existing and future Ontario non-share capital corporations to utilize relational provisions in their constating documents is questionable. At least for new charitable corporations wishing to implement relational provisions, consideration should be given to incorporating as a federal non-share capital corporation under the *Canada Corporations Act* instead of in Ontario, since both Industry Canada and the CCRA do not appear to share the same concerns about relational provisions as Companies Branch does, with the exception of relational provisions in the CCRA on foreign charitable organizations. It is hoped that Companies Branch, after reviewing matters further, may decide to reconsider their position on this issue to reflect the current reality of what is a frequent practice of non-share capital corporations and which will likely continue to be in the future.