Not for Profit Law

Peter Broder

Sponsorships: Private Interests, Public Benefit

The recent controversy over exclusion of the group Right to Play from the Vancouver Winter Olympics sheds light on a little discussed – or understood – corner of charity law. The controversy stemmed from efforts to ban Right to Play from the 2010 Games because it has a sponsorship deal with Mitsubishi Motor Sales, which ostensibly conflicted with the exclusive sponsorship rights for the event negotiated by General Motors with the Vancouver Organizing Committee.

Right to Play is a registered charity that uses sport and play to promote health, building of life skills and peaceful resolution of conflict among youth in developing countries. Attending the Games provides an opportunity for Right to Play to profile its humanitarian work and introduce itself to Olympic athletes – a number of whom have, in the past, become key supporters of the group.

The Right to Play sponsorship is reportedly worth $480,000, and the General Motors deal worth some $67 million, so there are significant commercial interests at stake. But what is interesting from a charity perspective here is the question of valuing sponsorship arrangements and the risks of not valuing them properly.

When a charity has an opportunity to align itself with a business, the revenue that the charity is able to generate through the arrangement is often viewed as "found money." Sometimes, for relatively little effort, the charity can receive a significant contribution either to a particular program or for its general operations. What's more, it is a contribution that is not a receipted donation for purposes of calculating the charity's disbursement quota, thus offering a group a lot of leeway in how it may be used.

In a time when many groups struggle to find adequate resources, it is not surprising that these kinds of arrangements are greeted enthusiastically by charities and their boards. But in the rush to embrace this novel source of revenue, charities can overlook the importance of getting adequate consideration for the use of their names or other benefits that they provide to their corporate partner. Registered charities that confer an improper private benefit are subject to sanctions under the *Income Tax Act* (*ITA*), and may have their registrations revoked.

Under the *ITA*, registered charities are required to devote all their resources to charitable work. When a business makes use of a charity's name, logo or other assets, it is promoting its own commercial interests. Serving that commercial interest is permitted, but only in as much as it advances the charity's goals as well. The charity may benefit in a number of ways – sometimes by having its profile raised, sometimes by getting in-kind or other tangible support for its work from the arrangement and, most frequently, by receiving monetary compensation.

A charity is not permitted to use its resources to benefit a private corporation where it does not receive an appropriate return – so it can't lend or give access to its name, logo or other assets without getting something back. By doing so, it would no longer be devoting all its resources to charity.

As well as the *ITA* restriction, the common law requires that a charity's purposes be exclusively charitable. While not every action it takes must be charitable in and of itself, it can't have endeavours that are not charitable as a significant element of its activity. This means conveying a benefit to a non-charitable third party is only acceptable as a byproduct of its main work.

What this means in practice is far from clear. Most of the case law dealing with this issue relates to groups seeking charitable status where they have a relationship with, or their work benefits, a for-profit business. In this context, the issue disappears if charitable registration is denied. However, situations also arise where groups that are already registered charities enter into collaboration with commercial enterprises. There is little guidance from the courts on what is permissible in these circumstances.

In an environment where charities are often desperate for resources, it is hard to be confident they are always getting the best deal possible from such partnerships. As shown in the Vancouver situation, exclusivity may be a key part of the arrangement, and is clearly valued by businesses. But exclusivity does little to serve the interest of the charity.

In addition, determining whether a charity is receiving fair market value for its contribution to the relationship can be difficult to gauge since intellectual property and other intangible assets are often exchanged in the arrangement. For example, a charity may negotiate to allow its logo to be used on a product. The value in increased sales of using the charity's logo may be impossible to assess.

A further complication is that sponsorship deals between charities and their partners are usually struck in private rather than in an open market. Charities often zealously guard the details of their arrangements, presumably to prevent their partners from being poached by other charities prepared to offer a better deal. So, there is frequently no good external measure of the true worth of the contribution by each party to the collaboration.

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One approach to this problem would be for government to regulate the terms of arrangements charities can make with business by providing guidelines on what constitutes an acceptable partnership. Likely, however, neither charities nor business would be happy with this type of micro-management of their relationships.

A better approach would be for charities to be fully transparent about such arrangements. That would mean (either as required by government regulation or on the charity's own initiative) disclosing fairly, accurately and accessibly the key terms and conditions – including provisions like exclusivity – of a sponsorship.

Telling the public exactly what charities are giving and exactly what they are getting from such partnerships gives consumers the opportunity to support situations where they believe that the charity is being properly benefited under the arrangement. Where the charity is allowing its name, logo or other assets to be used by the business and is not being fairly compensated by the business, consumers can withhold their support.

Without further guidance from the courts, public attitudes are probably as good a measure as any of when the balance of benefits in a sponsorship arrangement has tipped too far in the direction of the business partner. At a minimum, showing that the public is aware of the private benefit in a sponsorship and still chooses to support it would be useful in replying to an allegation of improper private benefit by Income Tax authorities.

More transparency would also level the playing field in negotiation of these arrangements by charities and businesses. No corporation would want to be seen as giving short shrift to its charity partner. In addition, small charities or those entering into such arrangements for the first time would better be able to judge when the terms of the deal they are considering is reasonable or not.

As this is being written, a compromise that would allow for Right to Play's participation in the 2010 Winter Games is being sought. That search for compromise has been spurred, at least in part, because of public perception that this situation is unfair. By disclosing their sponsorship arrangements, charities could enlist public support in making sure they get the best deal and that private interests don't trump public benefit when they partner with business.

Peter Broder is Policy Analyst and General Counsel at The Muttart Foundation in Edmonton, Alberta. The views expressed do not necessarily reflect those of the Foundation.