SUBMISSION TO THE CITY OF WINNIPEG

Executive Policy Committee

July 16, 2003

"LICENCING REQUIREMENTS IMPOSED TO DIRECT SELLERS IN THE CITY OF WINNIPEG"

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1. EXECUTIVE SUMMARY

While the DSA applauds the City's efforts in reformulating By-Law No. 201/72, the DSA has some continuing policy concerns with respect to the current draft proposed by-law (the "Draft By-Law"), and recommends, in light of the points brought forward by the City's recent report, as follows:

(1) **The Draft By-Law be delayed until such a time as detailed administrative guidelines can be prepared by the City to assist the Licensing Branch in determining when someone is in business for the preponderant purpose of making a profit;**

(The DSA welcomes the opportunity to work with City officials in establishing the appropriate Administrative Guidelines).

(2) **The Draft By-Law, or the appropriate legislation, be amended to include a remedy by which an individual or other entity that has been assessed on the basis that it is a "businesses", be afforded the right to appeal that decision to an objective decision-maker, and if still dissatisfied with that decision, to appeal the ultimate decision to a court of competent jurisdiction.**

(3) **The Draft By-Law's current proposed $2,500 exemption for businesses with $2,500 or less in gross revenues be adjusted to reflect at least $5,000 in gross revenues (or potentially, some even higher amount), to foster the growth of small business for the benefit of the local economy and in respect to recognized thresholds of income tax policy.**

(4) **The Draft By-law delete all references to forced consents respecting verification of the said exemption, which entail intrusions into the privacy of taxpayers at the CCRA level – in recognition that forcing such involuntary consents would be tantamount to an invasion of privacy, and potentially contrary to the Manitoba *Freedom of Information and Protection of Privacy Act,* and would in fact lead to no fruitful information being obtained (given that individuals with gross revenues of even $5,000 are not generally required to file income tax returns).**

(5) The Executive Policy Committee endorse the creation of a separate category of License in Lieu of Business Tax, specific to direct sellers, with the fee being set at $65 – in recognition of the fact that at such a level, the fee would be more appropriate to the actual scale of the business, and have less of a devastating effect on the direct selling industry in Winnipeg.

While these recommendations address the DSA's policy concerns with respect to the Draft by-Law, the DSA remains concerned, in the main, with the substantive application of the fees being proposed. To that end, a copy of the DSA's December 3, 2002 submission to the Mayor's office is attached, and continues to address the DSA's broader concerns with regard to the possible application of these fees, concurrently, and the potentially negative effects on direct selling in Winnipeg, and in Manitoba.

2. THE DIRECT SELLERS ASSOCIATION OF CANADA

The Direct Sellers Association of Canada (DSA), founded in 1954, is the national Association of Canadian direct selling companies and their ISCs. The mission of the DSA is to further enhance trust, confidence, and growth in the Canadian direct selling industry through self-regulation and ethical conduct.

The DSA and its 50 member companies are committed to the high industry standards set out in its Codes of Ethics and Business Practices. The purpose of the Codes is to emphasize the sense of responsibility all DSA members should express and exhibit towards Canadian consumers and the general public. The Codes applies to direct sales practices used in the marketing of products and services and refers to the relationship DSA members and their ISCs should strive to have with the consumer and the community.

The direct selling companies and their ISCs market and distribute a wide variety of products and services such as cosmetics and personal care items, home appliances, house ware specialties, household cleaning products, candles, natural health food products, toys, educational products, and telecommunication services, just to mention a few.

The DSA shares its expertise and knowledge with all levels of government. Papers and comments have been submitted on draft legislation, proposed regulations or public policy pertaining to Finance, CCRA, Health Canada, International Trade, provincial consumer protection legislation and municipal by-laws, to name a few. It also promotes the principles set out in the Competition Act through its close ties with the Competition Bureau.

3. THE DIRECT SELLING INDUSTRY

By definition, a direct sale is the sale of a consumer product or service by an ISC in a face-to-face manner, away from a fixed retail or business location.

Surveys indicate that less than 10% of ISCs are involved in direct selling on a full time basis, meaning more than 30 to 40 hours a week.

The DSA also represents close to 1 million ISCs, 75% of whom are women, and of which, 50% have a full or part time job in additional to their direct selling activities.

Through their involvement in the direct selling industry, many ISCs can involve themselves in a manageable economic opportunity, which can further family income with minimal disruption and minimal investment. Furthermore, the opportunity is available to all members of Canadian society, everywhere in Canada, whether living in urban or rural communities.

4. BACKGROUND

4.1. History of Representations

On December 3, 2002, the DSA tabled a document entitled "*Submission To The City Of Winnipeg Mayor's Office*", setting out the DSA's position to the City's treatment of certain home-based businesses under its License in Lieu of Business Tax by-laws. A copy of this submission is appended hereto.

Since then, the DSA has been awaiting a report that the City's Administration had committed to generating, at a meeting of the Standing Policy Committee on Fiscal Issues on February 4, 2002.

The City's response to the issues raised became available to the DSA on July 11, 2003, when it was presented to the Standing Committee on Fiscal issues.

This document has thus been prepared on short notice, for representations to the Executive Policy Committee, at a meeting scheduled for July 16, 2003, with final approval by City Council on July 23, 2003.

4.2. Summary of Relevant Points to Date

The City of Winnipeg's Licensing Services Branch (the "Branch") has just now begun relying on it to impose an annual $135 "business licence in lieu of business tax" (the "Business Licence") to all direct selling independent contractors, representatives and agents ("ISCs") residing in Winnipeg. In addition, the Branch has also demanded that these same ISCs obtain one-time Home Occupation Permits, at an additional cost of $111.87, and their annual Canvasser's Licences, at an annual cost of $65.

The DSA understands the Branch currently makes no inquiries as to the nature of the ISC's motives in joining the direct selling industry (i.e., whether "business" or "profit" related, or of a more "personal" nature), or the precise use of their home premises, if any. From the DSA's perspective, the Branch appears to be taking the position that once an ISC has signed an independent contractor agreement, the ISC is automatically liable for all of these fees.

These fees act as a barrier to entry for individual ISCs attempting to engage in direct selling in Winnipeg, and the experience is showing a chilling-effect on the direct selling industry in Winnipeg – all of which is described in much greater detail in the attached, December 3, 2002 Submission to the Mayor's Office.

5. POLICY ANALYSIS & RECOMMENDATIONS

5.1. Draft By-Law Unworkable Without Administrative Guidance & Appeal Remedy

In the DSA's view the Draft By-Law has failed to effectively recognize the difference between individuals and entities that may operate with a non-business motive, and who are not subject to a business tax under current constitutional principles, and those other individuals and entities that operate with a business motive, and are subject to business taxes.

A classic example, already cited with concern by the City's Standing Committee of Fiscal Issues, is the hypothetical grandmother, selling knitted trinkets at local variety sales, more for social interaction than for profit.

Numerous other examples of such non-business motives exist in the direct selling industry, where ISC's often join direct selling companies for social or personal reasons, without any real attempt to profit from their activities. For example, many ISCs sell products mainly for social reasons, as a hobby, and to receive personal discount on merchandise, or otherwise where the realization of a real "profit" is not attainable given the part-time efforts that are put into these sales.

The City's own report confirms, based on the 1983 Supreme Court of Canada case that it cited – the reference was to *Ontario (Regional Assessment Commissioner) v. Caisse populaire de Hearst Ltée*, [1983] 1 S.C.R. 57 – that such non-business motives will not amount to a "business", and cannot be taxed by a municipality.[1]

While subsection 2(1) of the Draft By-Law does refer to persons who, "in carrying on a business for the preponderant purpose of earning a profit", the DSA believes that this phraseology needs further clarification before the Draft By-Law can be enacted.

As the DSA observed in its December 3, 2002 submission to the Mayor's Office, the recent legislative changes to the City of Winnipeg's Charter (see below) now require a change to the current practices of the Licensing Branch, which do not currently distinguish between the

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[1] It is important to realize at this juncture, that the proposed $2,500 exemption from business tax has no application to this discussion, as the question goes to whether or not the City would have the proper jurisdiction to levy a business tax on these individuals or entities in the first place. For example, if the grandmother above happened to earn $3,000 per year in her variety sales, she still would not be subject to the City's business tax, since the City would lack any legal jurisdiction to tax her.

motivations and expectations of ISCs. A level of discretion will have to be exercised by the Licensing Branch and appropriate policies established for the purpose of making a distinction between ISCs whose primary motivations are not profit-oriented and those who clearly operate a "business" in the conventional sense.

Accordingly, the DSA feels that it is incumbent on the City's Executive Policy Committee to ensure that the Draft By-Law be delayed until such a time as detailed administrative guidelines can be prepared by the City to assist the Licensing Branch in determining when someone is in business for the preponderant purpose of making a profit.

To this effect, the City's own Report, entitled the *License in Lieu of Business Tax and Home-Based Businesses*, and dated June 26, 2003 (the "City's Report") emphasized that "[n]ew administrative guidelines will be developed with the advice of the City of Winnipeg Legal Services" (i.e., to assist staff in better determining when someone is in business for the preponderant purpose of making a profit").

The DSA submits that such administrative guidelines need, for the purposes of clarity, to be in place prior to the Draft By-law being enacted.

Finally, and in light of the "subjective" review that the City's Report indicates will have to be undertaken in order to determine whether a person is in "business", the DSA submits that an administrative procedure be put in place to afford individuals and other entities that have been assessed on the basis that they are "businesses", to appeal that decision to an objective decision-maker, and if still dissatisfied with that decision, to appeal the ultimate decision to a court of competent jurisdiction.

RECOMMENDATIONS:

The DSA recommends that

(1) The Draft By-Law be delayed until such a time as detailed administrative guidelines can be prepared by the City to assist the Licensing Branch in determining when someone is in business for the preponderant purpose of making a profit;

(2) The Draft By-Law, or the appropriate legislation, be amended to include a remedy by which an individual or other entity that has been assessed on the basis that it is a "businesses", be afforded the right to appeal that decision to an objective decision-maker, and if still dissatisfied with that decision, to appeal the ultimate decision to a court of competent jurisdiction.

The DSA submits that such clarifications are in fact mandated by the January 1, 2003 changes to the City of Winnipeg Charter, and more particularly, the recent changes that clarify, in subsection 316(3), that a business assessment, and the requirement to assess, do not apply to premises "the use of which is not for the preponderant purpose of earning a profit", and in subsection 320 (1), which limits the application of the Draft By-Law to persons who carry on a business "for the preponderant purpose of earning a profit".

The DSA submits that such legislative requirements call out for administrative guidance, and that it would be imprudent for the City to enact the Draft By-Law without such guidance in place.

The DSA would also welcome the opportunity to work with the appropriate City officials to properly address the administrative guidelines necessary.

5.2. The $2,500 Exemption Is Simply Too Low a Threshold

5.2.1. Exemption Likely to Have No Meaningful Effect

The DSA applauds the City's efforts in trying to exempt a portion of home-based businesses with small revenues from the requirement to obtain a License in Lieu of Business Tax.

The DSA observes, however, that the revenue threshold set by the City (i.e., $2,500 in gross revenues) appears too low to have any material impact in the practical application of By-Law No. 201/72.

This is because of the following practical reality: at $2,500 in gross revenues, a typical business would not likely have positive profits.

In the case of the direct selling industry, this is certainly the case, as even typical direct sellers, earning $5,000 in gross revenues, would generally be expected to not yet have reached their "break-even point", and would be expected – therefore – to have "nil" in terms of net profits.

The December 3, 2002 DSA Submission provided the following example of typical earnings, which considered that although there are obviously variances amongst ISCs in terms of the level of investment in their business, and the allocation of their resources, is still a good example of a typical ISC's purchasing pattern, and his/her related business expenses:

	$5,000	Purchases at ISC's price
minus	$2,000	Goods purchased for self-consumption
	$3,000	Net Sales
x	30%	Discount Level
	$900	Gross Profit
minus	$200	Brochures Purchase
minus	$600	Demonstration Products/Kit
	$100	
minus	$*	Travel Expenses (gas, use of automobile)
	$*	Delivery Expenses (paper bags, etc.)
	$*	Other Expenses (Stationery, etc.)
=	**$0**	Realistic Net Profit

The DSA believes that by setting such as low threshold for taxation, and by instituting that threshold on a *gross* revenues basis, the City has failed to recognize that typical small businesses, and typical ISCs, would also be incurring significant expenses in the pursuit of their business activities, and would in reality, have no money left, at the end of the day, to meet its licensing obligations.

The DSA believes that when the combined $300-plus charge for the Business Licence, Home Occupation Permit, and Canvasser's Licence are all taken into account, these municipal charges will act (and are currently acting) as a complete barrier to entry for these small start-up businesses – and if not an immediate barrier to entry, then a barrier to entry commencing with the second full year of operation, which is the point in time that the City would see the $135 Business Licence first payable.

And in this light, the $2,500 exemption provided by the City can be seen to have the potential to be both immaterial and insignificant to these small start-up businesses, and therefore incapable of operating as it was intended by Council.

And in short, it must be concluded that the $2,500 exemption, based on *gross* revenues, is simply likely too low a threshold to have any meaningful effect.

5.2.2. Exemption Does not Meet its Intended Objective

Given these practical realities, the DSA believes that the establishment of a $2,500 threshold will not address the key issue identified by the City with respect to the current By-Law No. 201/72 which, at it is referred to at page 4 of the City's Report, is as follows:

> Concern centers on the fact that it may not be the intent of Council to charge license in lieu of business tax to those who are making limited revenues when pursuing their business interest.
>
> …
>
> It is important that City Policy recognize the legitimacy of home-based businesses and create a business-friendly environment where viable business operating from home can incubate and grow. Generally, where local communities have continued to enhance their entrepreneurial climate, innovation and economic development have occurred

By imposing several business taxes and regulatory licenses on individuals who are making very minimal or no revenues,[2] the City is forcing individuals that are making revenues far below the poverty level, to take a loss on their commercial activities, yet indirectly forcing them to quit such activities, before they can even hope to enhance their lives and grow their revenue base.[3]

In the DSA's view, the City will also lose the opportunity to use the "exemption" threshold to screen out both "low income businesses", as well as individuals and entities engaged in non-businesses pursuits – thus assisting the Licensing Branch in weeding out individuals and entities that are clearly not meant to be paying such licensing fees (i.e., the grandmothers too).

To this end, the DSA believes that the City's own figures suggest that the current exemption will extend to just over 350 home-based businesses (i.e., the Report indicates an expected $50,000 reduction in licensing fees because of implementation of the $2,500 exemption, equating to an exemption for some 370 businesses: $50,000 ÷ $135).

Accordingly, the DSA believes that a blanket exemption be used, with an upper threshold of at least $5,000 in gross revenues – and potentially some even *higher* threshold, as only a threshold significantly higher than $2,500 will create a meaningful impact, and foster the growth of small business that it is intended to.

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[2] Which would be the case, as demonstrated above, for ISCs making less than $5,000, or even more.

[3] In support of our argument, we refer you to the Economic Freedom of the World: 2003 Annual Report published in July 2003 by The Fraser Institute, stating, on page 2 " Economic freedom is reduced when taxes, government expenditures, and regulations are substituted for personal choice, voluntary exchange, and market coordination. Restrictions that limit entry into occupations and business activities also retard economic freedom."

RECOMMENDATION:

The DSA recommends that:

(3) The Draft By-Law's current proposed $2,500 exemption for businesses with $2,500 or less in gross revenues be adjusted to reflect at least $5,000 in gross revenues (or potentially, some even higher amount), to foster the growth of small business for the benefit of the local economy and in respect to recognized thresholds of income tax policy.

5.3. CCRA Linkage is Fundamentally Flawed

The DSA is very concerned with the linkage between the blanket exemption for low-income direct selling businesses (discussed in the section above), and disclosure of information to the CCRA. Its concerns are based both on "privacy concerns", and on a fundamental flaw in the City's apparent enforcement methodology.

5.3.1. Privacy Concerns

The DSA is gravely concerned, from a privacy perspective, about the manner in which the City officials intend to verify compliance with the Draft By-Law, as the compliance initiative will effectively force the ISCs to consent to the release of personal information to the City by the CCRA.

In this respect, the DSA notes that subsection 36(1) of *The Freedom of Information and Protection of Privacy Act, C.C.S.M., c. F 175*, provides a general prohibition against the collection of "personal information" by a public body including the City of Winnipeg unless such collection meets the following criteria:

(a) collection of the information is authorized by or under an enactment of Manitoba or of Canada;

(b) the information relates directly to and is necessary for an existing program or activity of the public body; or

(c) the information is collected for law enforcement purposes or crime prevention.

The DSA questions whether these criteria would be met under the circumstances.

Furthermore, and of equal concern, the DSA notes that subsection 36(2) of *The Freedom of Information and Protection of Privacy Act* restricts public bodies from collecting personal information that "is reasonably necessary to accomplish the purpose for which it is collected".

Given these over-arching requirements, the DSA respectfully submits that the City's plan to effectively force ISCs to consent to the CCRA's release of their income tax returns (to the extent the ISCs have a sufficient level of taxable income so as to be required to file return), and then collect this "personal information" is in violation of *The Freedom of Information and Protection of Privacy Act*.

The DSA submits that the information disclosed in an ISCs' income tax return is not in fact "reasonably necessary to accomplish the purpose for which it is collected" since – as set out in detail below – the information sought to be collected will, in all likelihood, not enable the City to verify the information it is seeking.

Accordingly, the present Draft By-Law is, in this manner, both abusive, and subject to attack under Manitoba's privacy legislation.

In the DSA's view, there is already a penalty provided for a "false declaration", and therefore a sworn declaration by the Applicant may be a more reasonable way to address the issue of ensuring that the right person gets the exemption.

5.3.2. The Proposed Exemption Far Below Threshold For Filing Returns

As alluded to above, and relevant to the privacy concerns addressed just above, there is a fundamental flaw in enforcement methodology that the City appears to want to use.

That flaw can be seen in the realization that even at a *net income* of $5,000, individuals with such earning would not generally be required to file income tax returns with the CCRA.

The requirement to file income tax returns is provided for in section 150 of the *Income Tax Act* (the "ITA"), and under these requirements, individuals – including those who earn business income from operating a business – would only be required to file an income tax return (called a Form T1 General) if, among other things, having **tax payable** for the particular year.

Since both the federal and provincial tax credits include credits / personal exemptions for almost $8,000, it is clear that most individuals qualifying for the blanket exemption now provided for the in Draft By-Law would have no tax payable, and would not be required to file personal income tax returns – leaving nothing for the City to verify, even having intruded into the person's privacy.

RECOMMENDATION:

The DSA recommends that:

(4) The Draft By-law delete all references to forced consents respecting verification of the said exemption, which entail intrusions into the privacy of taxpayers at the CCRA level – in recognition that forcing such involuntary consents would be tantamount to an invasion of privacy, and potentially contrary to the Manitoba *Freedom of Information and Protection of Privacy Act,* and would in fact lead to no fruitful information being obtained (given that individuals with gross revenues of even $5,000 are not generally required to file income tax returns).

5.4. Fee Applicable to Direct Sellers

As noted in the DSA's December 3, 2002 Submission to the Mayor's Office, subsection 320 (1) will also now allow differential license fees to be established on the basis of:

- Classes of persons;
- Classes of premises; and
- Classes of businesses.

The DSA continues to believe that the granting of this power to Council creates the opportunity to deal directly with the establishment of more appropriate levels of License Fee in Lieu of Business Tax for those direct sellers who are carrying on their businesses for the predominant purpose of earning a profit.

The DSA continues to believe that a separate category specific to direct sellers should be established, and that the License Fee in Lieu of Business Tax be set at $65 (which was charged in the past as a Canvasser's License alone – and which was not perceived as a major impediment

to ISCs who were actively engaged in a direct selling business.)[4]

The DSA submits that if such a fee was established, the compliance rate amongst ISC's would improve, given that (1) it would likely not have the effect of causing ISCs to quit direct selling to avoid having to pay exorbitant fees (which is currently the case) (2) the DSA and its member companies would support a fee in the amount of $65 and would be willing to take positive steps to encourage compliance.

RECOMMENDATION:

The DSA recommends that:

(5) The Executive Policy Committee endorse the creation of a separate category of License in Lieu of Business Tax, specific to direct sellers, with the fee being set at $65 – in recognition of the fact that at such a level, the fee would be more appropriate to the actual scale of the business, and have less of a devastating effect on the direct selling industry in Winnipeg.

[4] As set out in the DSA's December 3, 2002 submission, the DSA makes this submission in connection with greater recommendations regarding the evolution of both the Canvasser's License, and the Home Occupation Permit.

6. MOVING FORWARD

Since its inception, the DSA has had many successes working in conjunction with various federal and provincial governmental organizations, to achieve results beneficial to all stakeholders, including the government, the industry, the ISCs and the consumers.

Clearly, government and businesses are forming more and more partnerships and alliances to promote business rather than to stunt it. This should be kept in mind, moving forward.

In that spirit, the DSA has provided concrete recommendations and is committed to work constructively with the City of Winnipeg in encouraging compliance by the ICSs to pay the charges, should the above recommendations be accepted and implemented.

We believe that the DSA recommendations will open the doors for more people approaching the direct selling channel. This in turn will provide people of Winnipeg with access to business training skills conducive to creating personal and collective wealth.

If the above recommendations are not satisfactory or cannot be reasonably modified however, for the reasons stated in this submission, the DSA cannot agree to the ongoing imposition of the three charges and will advise all its member companies that it does not support the City's position and that each member and their ISCs should consider contesting these fees, wherever appropriate, whenever they are levied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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