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“Charity Law”

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ADVISING THE CHARITABLE CLIENT

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A. THE SIGNIFICANCE OF CHARITIES AND CHARITY LAW

To collectively describe charities in Canada as "big business" may be perceived by some to be an oxymoron, to others it is a self-evident truth. In June 2009, Statistics Canada published *Caring Canadians, Involved Canadians: Highlights from the 2007 Canada Survey of Giving, Volunteering and Participatin*g (the "2007 Survey"). which reported that in the twelve-month period covered by the 2007 Survey, almost 23 million Canadians, or 84% of the population, made a financial donation to a charitable[1] or non-profit organization.[2] The 2007 Survey reported that the total amount donated in

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[1] It is important at the outset to understand the differences between a charitable organization and a nonprofit (not-for-profit) organization. The *Registered Charities Newsletter, No. 19* (June 2004) at 7, available at http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-19/charitiesnews19-e.pdf, sets out the differences between the two types of organizations in the following terms:

> The *Income Tax Act* [*infra* note 5] distinguishes non-profit organizations (NPOs) from registered charities. While both classes of organizations are all or partially tax-exempt, registered charities have the additional privilege of issuing official donation receipts to their donors. On the other hand, registered charities are publicly accountable through the CRA, and have to meet more stringent operational requirements.
>
> Whether an organization is a registered charity or an NPO depends on its purposes and activities. Charities have a particular set of purposes—such as the relief of poverty, the advancement of education or religion, or other purposes that benefit the community—that the courts have recognized as charitable.
>
> Under paragraph 149(1)(l) of the *Income Tax Act*, a non-profit organization is defined as "a club, society or association that … was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada."

Whether the organization is designated as charitable or nonprofit will dictate the filing requirements, the activities in which the organization can engage, and the manner in which the funds are disbursed.

2004 was $8.9 billion, which increased by 12% in 2007 to $10 billion. The 2007 Survey also reported that nearly 12.5 million Canadians, or 46% of the population, volunteered during the twelve-month period covered by the 2007 Survey, with 2.1 billion volunteer hours being volunteered. The major beneficiaries of these volunteers were organizations involved in sports and recreation, social services, education and research, and religion.[3] Canada Revenue Agency ("CRA"), meanwhile, reports that there are currently over 83,000 charitable organizations[4] registered under the *Income Tax Act*,[5] which in 2006 spent $111.8 billion in carrying out their charitable programs.[6]

However, with the exception of a limited number of lawyers who regularly provide specialized advice involving charities and donations, the vast majority of lawyers who are called upon to advise charitable clients do so on an infrequent basis and either treat charitable clients as step-children compared to their "real" clients, or perceive the professional service that they render to be akin to an act of charity itself, either because the service is given *pro bono* or because acting on behalf of a charity provides a sense of satisfaction in the hope that the advice provided has furthered charitable purposes that are of general benefit to the community. While such motivation is laudable, lawyers should not lose sight of the fact that the services they provide, whether it be done on a *pro bono* basis or at a reduced rate, must be done in a competent and professional manner.

Meeting this requirement, though, is becoming increasingly difficult to achieve. Lawyers called upon to advise charities are expected to have an understanding of numerous and diverse areas of the law, including corporations, charitable trusts, associations, taxation, contracts, real estate, leasing, employment, insurance, risk management, intellectual property and trust accounting, to name only some of the major areas. Coupled with increasing complexities involved in running charities is a heightened level of expectation placed upon leaders of charitable organizations by the courts, the government and the public at large. When individuals who are faced with the responsibility of establishing and operating a charity seek legal advice, it is incumbent upon the lawyer to not only

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[2] Michael Hall et al., *Caring Canadians, Involved Canadians: Highlights from the 2007 Canada Survey of Giving, Volunteering and Participating* (Ottawa: Statistics Canada, 2009). Available online at http://www.givingandvolunteering.ca/files/giving/en/csgvp_highlights_2007.pdf.

[3] See also Terrance S. Carter, "Report On the 2007 Canada Survey On Giving, Volunteering And Participating" in *Charity Law Bulletin* No. 173 (September 28, 2009) online: http://www.carters.ca/pub/bulletin/charity/2009/chylb173.pdf.

[4] Canada Revenue Agency, *Small and Rural Charities: Making a Difference for Canadians* (November, 2008) Available online at: http://www.cra-arc.gc.ca/E/pub/tg/rc4457/rc4457-e.html.

[5] R.S.C. 1985, c. 1 (5th Supp.)[ITA].

[6] For more information, see Terrance S. Carter, "Highlights of CRA's Report on Small and Rural Charities" in *Charity Law Bulletin* No. 149 (November 27, 2008) online: http://www.carters.ca/pub/bulletin/charity/2008/chylb149.pdf.

provide answers to the specific question asked, but to also take the initiative to ensure that the charitable client is aware of the duties and responsibilities that charities are now facing, as well as knowing what steps can be taken to avoid liability exposure before problems occur.

With the increasing specialization of the practice of law dealing with charities, the provision of legal services in a lack lustre manner based upon the assumption that charitable clients require less effort than full paying clients is no longer an option. Charitable clients not only require competent and complete advice, they also require legal counsel that will take the initiative in guiding them through the intricacies and complexities of the law now inherent in operating a charity in Canada.

Advising the charitable client therefore extends beyond simply "doing good" by assisting individuals who wish to benefit the community. Instead, it requires the provision of professional advice on complicated areas of the law, rendered in a manner that reflects an increasing reliance by clients on counsel to identify legal risks and provide recommendations on how those risks can be avoided. To that end, this paper suggests a more active professional mindset is required to deal with charities, and lawyers should assist charities in identifying areas of risk by utilizing tools such as a charity legal risk management checklist, a sample of which is attached to this paper as an appendix. The paper also explains a number of problems that lawyers may encounter from time to time in advising charities. The paper concludes by emphasizing the importance of communicating with the charitable client and providing informational reports to both assist the client and establish clear evidence of the advice rendered by the lawyer. Accordingly, this paper is not a technical discussion of legal issues, but instead attempts to provide a practical guide for practitioners who wish to develop a proactive approach in advising charitable clients.

With the escalating cutback in social program funding by all levels of government, and the corresponding pressure upon charities to fill the void, the number of charities and the services that they provide will continue to increase, creating a greater demand for competent legal advice. The charitable sector is clearly going through fundamental changes in its evolution into a major presence in the Canadian economy. At the same time, the legal services that lawyers are now called upon to provide to charitable clients is also going through fundamental changes, from that of benign passivity to proactive legal risk management advice.

B. THE FUNDAMENTALS OF A CHARITY

At law, a charity has a specific meaning that often eludes the popular conception. For an organization to be considered charitable at law, its objects or purposes must be undertaken to achieve a charitable purpose. Presently, only four categories or heads of charity are recognized by the courts. In his decision in the case *Special Commissioners of Income Tax v. Pemsel*,[7] Lord MacNaghten identified four heads of charity: relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community not falling under any of the preceding heads. This definition is mirrored in Ontario's *Charities Accounting Act*,[8] and although the ITA does not make specific reference to these categories, both the Charities Directorate of CRA and the courts rely on the same categories in regulating the sector. The Supreme Court of Canada, in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*,[9] clarified the Canadian approach to recognizing charities, noting that while the ITA focuses on the character of the activity undertaken by the organization, linking them to the categories established in *Pemsel*, the focus should be on the purpose in furtherance of which an activity is carried out in order to determine whether charitable status should be granted.

Whether an organization operates as a charitable trust, an unincorporated association or a non-share capital corporation, there are clear tax advantages to obtaining charitable status, the primary one being that a charity does not pay tax on income or capital gain. The ability to issue charitable receipts to donors as tax credits for income tax purposes is a significant benefit for those organizations that must rely on individual donations for funding purposes. Recent proposals to amend the ITA include provision to enable a gift for income tax purposes to include consideration to the donor.[10]

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[7] [1891] A.C. 531 (H.L.) [*Pemsel*].
[8] R.S.O. 1990, c. C-10 [CAA].
[9] [1999] 1 S.C.R. 10 [*Vancouver Society*].
[10] These amendments were first introduced as part of Draft Technical Amendments to the ITA released on December 20, 2002. After a series of changes and revisions, the proposed amendments were reintroduced in Bill C-10 which was under review until it died on the Order Paper on September 7, 2008, as a result of the dissolution of the Parliament. These amendments have not been re-introduced in Parliament for enactment. CRA has indicated that they are applying these provisions as if enacted. For details, please refer to the following *Charity Law Bulletins* available on our website at www.charitylaw.ca: Theresa L.M. Man, "July 18, 2005 Draft Amendments to the *Income Tax Act* Affecting Charities: Part I – Definition of Gift & Split-Receipting" in *Charity Law Bulletin No. 76* (8 September 2005); and M.E. Hoffstein, Theresa L.M. Man and Laura E. West "When Is An Advantage Not An Advantage--Issues Arising From The Proposed Split Receipting Regime" presented at the 4th National Symposium on Charity Law held in Toronto by the Canadian Bar Association (CBA) and the Ontario Bar Association (OBA).

C. THE FUNDAMENTALS OF A NONPROFIT ORGANIZATION

Under subsection 149(1)(l) of the ITA, a nonprofit organization is defined as a

> … club, society or association that … was not a charity … and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder … .[11]

Although a nonprofit organization, which can only take the form of an unincorporated association and a non-share capital corporation, is tax exempt and therefore does not pay tax on income or capital gains (except income from property of an organization whose main purpose is to provide dining, recreation or sporting facilities), it is not able to issue charitable receipts for income tax purposes. On the other hand, however, a nonprofit organization is not subject to the same considerable restrictions and reporting requirements as are registered charities.

It is up to CRA, though, to determine whether or not a non-share capital corporation or an unincorporated association qualifies as a nonprofit organization under subsection 149(1)(l) of the ITA. This determination can be based on the objects of the organization, or the CRA may draw an inference based upon the nonprofit organization's activities. CRA has confirmed that they do not maintain a list of nonprofit organizations as they do with registered charities, since nonprofit organizations are not required to register with the CRA.[12]

In addition, no part of the nonprofit organizations income can be available for the personal benefit of its members[13]. While a nonprofit organization can pay reasonable salaries to its employees or for services rendered, the CRA will question those payments if they are unreasonable.[14] A nonprofit organization, however, is not permitted to intentionally earn a profit from business activities, regardless of what the profit is used for. CRA has recently released a Technical Interpretation which states that a nonprofit organization can earn a profit so long as it is unanticipated and incidental to carrying out the nonprofit organization's exclusively not-for-profit purposes.[15] Such unanticipated income may arise when the expenses of the nonprofit organization are less than budgeted. Where a

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[11] ITA, *supra* note 7, s. 149(1)(l).
[12] Technical Interpretation, 2009-0337311E5
[13] CRA, Technical Interpretation 982115
[14] CRA document no. 2002-0157525, October 25, 2002
[15] *Supra*, note 12.

nonprofit organization accumulates surplus assets that are more than what is required to carry out the purposes of the nonprofit organization, the CRA has indicated that the organization cannot maintain its status as a nonprofit organization.[16]

While the regulatory requirements placed on a nonprofit organization are fewer than those placed on charities, there are still compliance and record keeping requirements, such as the need to file a T1044 Non-Profit Organization Information Return if: the nonprofit organization received or was entitled to receive taxable dividends, interest, rentals, or royalties totalling more than $10,000 in the fiscal period; the total assets of the nonprofit organization were more than $200,000 at the end of the immediately preceding fiscal period (the amount of the organization's total assets is the book value of these assets calculated using generally accepted accounting principles); or an NPO information return had to be filed for a previous fiscal period.

D. THE CHALLENGE IN ADVISING THE CHARITABLE CLIENT

1. The Nature of the Charitable Client

The challenge in advising the charitable client is a direct result of the unusual nature of a charity that makes it different from advising any other type of client. For instance:

(a) Whereas most clients are motivated by self-interest, those involved in directing a charity are generally motivated by the sense of a greater good that extends beyond themselves. However, due to this increased expectation of good will, the sensitivities of those involved with charities are heightened and are often subject to greater disappointment and misunderstandings than is the case in a business context.

(b) Whereas there is usually continuity in acting as legal counsel for a business or for an individual, due to the frequent changeover in board members involved with charities, there is often an inherent lack of continuity when acting for a charity. As a result, individuals on the board for whom the lawyer provided advice in one year may be different the next year.

(c) Whereas a business client will generally evidence a reasonable level of commitment to complete a required task, the extent of a volunteer's commitment can range from a superhuman

[16] CRA, IT-496R

effort that far surpasses anything found in a profit-making business, to those who perceive their involvement as only a position of honour with a corresponding limited sense of commitment to the task at hand.

(d) Whereas a business client by necessity will normally have a well established structure on which the business is based, the nature of voluntarism for those involved with the board of a charity will often mean that there will be a significant difference of opinions concerning how to formally structure the charitable organization or how to implement the structure on a day-to-day basis.

(e) Whereas a business client understands the importance of process to achieve an end result, individuals on the board of a charity will often focus on the charitable purpose that they wish to achieve and feel thwarted by the process required to achieve that goal, particularly when the process involves what is assumed to be bureaucratic and legalistic exigencies.

(f) Whereas the business client is generally not surprised to find there are legal niceties that must be complied with in running a business, the charitable client is often surprised and frustrated to find they must comply not only with normal legal hurdles associated with regular operations, such as compliance with employment standards legislation, but are also subject to often onerous and complicated legal expectations imposed upon charities and their boards under the ITA, as well as trust law that applies to charitable property. The lack of understanding of legal requirements is generally so pervasive with charitable organizations that it is often necessary to assume that the charitable client knows little, if anything, about the legalities that are involved in operating a charitable organization.

(g) With increased cutbacks in government funding to community charities, board members and officers of charities are, by necessity, having to concentrate more on the means of raising the necessary monies to maintain the charitable programs, often at the expense of ensuring the quality of the program or even compliance with basic legal requirements. In addition, there may be a corresponding proliferation of charitable organizations to fill the vacuum once occupied by government funded charitable organizations. Those involved in starting newly created charities, though, will frequently focus almost exclusively on the current needs that must be met at the

expense of putting the necessary charitable structure in place and ensuring applicable rules and laws are complied with.

(h) Of all of the tens of thousands of the individuals who serve as unpaid directors and officers of charitable organizations, it has been correctly stated that "it is unlikely that more than a small fraction of these individuals have any clear ideas of the risks that they are incurring by accepting such positions."[17]

2. Unrealistic Expectations of the Lawyer by the Charitable Client

In addition to having to deal with the unique character of the charitable client, the lawyer who is called upon to advise charities will generally encounter at least a few of the following unrealistic expectations of the charitable client:

(a) Unless the lawyer is dealing with a large institution with a secure source of government funding, the charitable client will often expect, although not necessarily state, that the lawyer will provide the required legal services either on a *pro bono* basis or subject to a significant reduction. While there is a place for *pro bono* services for a charity, before doing so, the lawyer must first determine the nature of the problem, the solutions required, and whether or not he or she is prepared to devote the time and attention required in order to provide the necessary legal services on a *pro bono* basis, or with a significant reduction. If not, it is incumbent upon the lawyer to clearly identify to the client at the outset that the legal services in question are being done on a fee for service basis at whatever rate the lawyer feels is appropriate in the circumstances.

If the lawyer does undertake a task for a charitable client on a *pro bono* or reduced fee basis, the lawyer must understand that the lack of payment does not justify incomplete or tardy service. If anything, the charitable client may require legal advice and/or services that are much more sophisticated than those which are associated with a medium sized business and, in some instances, such services may be needed immediately.

[17] William I. Innes, "Liabilities of Directors and Officers of Charitable and Non-Profit Corporations" (1993), 13 E. & T.J. 1 at 2.

(b) When a charity retains a lawyer, no matter how small the task and whether or not the lawyer is paid for his or her services, a frequent presumption is that the lawyer's involvement in even a small matter provides the equivalent of a legal "Good Housekeeping Seal of Approval" on everything the charity does. The presumption often expressed, after the fact, is that since the charity was not advised by legal counsel that a particular situation or course of action might be a problem, it could assume that the current practices of the charity complied with all applicable laws.

(c) Unrealistic expectations of what the lawyer is to do often flows out of the general confusion and lack of knowledge by volunteer board members concerning the operations of a charity. Board members are generally so involved in pursuing programs to achieve charitable purposes that they do not question whether they have either the time or expertise to ensure they are complying with legal requirements. It is generally perceived this is the responsibility of the lawyer, although this assumption may not have been communicated to the lawyer. This presumption is so prevalent that charities who become embroiled in legal problems will often state that they assumed since they had not heard any warnings from the lawyer that "no news was good news." When a problem does develop, particularly if it involves potential personal liability of volunteer directors, it is often the lawyer who is the first person singled out for blame in not having warned the director of the risks that could have been avoided.

In summary, the expectation of the charitable client toward a lawyer retained to provide legal advice is that it should be provided, as much as possible, on a *pro bono* basis, or at least with a significant discount; it should be accurate and professional; and, it should include appropriate warnings concerning existing or proposed courses of action that may expose the charity and its board to unnecessary legal risks.

3. <u>Why the Charitable Client Often Experiences Difficulties</u>

The public's perception of charities is that they are generally benign organizations of individuals who are committed to higher ideals for the good of the community, and as such are somehow immune from the complexities and legal niceties that apply to business organizations. This is particularly so with religious organizations that often function on the mistaken assumption that

their dedication to spiritual values elevates them above the need to deal with mundane matters of complying with the laws of the land.

As a result, it often comes as a surprise to many individuals, both in the community and those involved in charitable organizations, that charities are not the simple organizations they are generally perceived to be, but in fact are often sophisticated corporate entities having serious legal issues and complexities in operations that far outweigh those faced by many businesses. For instance, most charities will be faced with having to deal with some or all of the following issues:

- compliance with complicated statutory requirements for charities under the ITA;
- increased directors and officers liability at common law and in accordance with a growing multitude of provincial and federal statutes;
- raising and managing large sums of money each year;
- overseeing the supervision of employees;
- facing the possibility of termination of employees and the corresponding potential for wrongful dismissal;
- maintaining the goodwill of volunteers while at the same time reducing the risk of exposure to legal liability for volunteers;
- establishing and maintaining an appropriate organizational structure;
- dealing with a diffuse decision making process reflecting input from both the board of directors and from executive staff members;
- ensuring the correct treatment of charitable gifts, including compliance with donor restrictions;
- minimizing the potential for sexual abuse and molestation of children and other vulnerable individuals who come in contact with the charity;
- compliance with human rights legislation;
- compliance with employment legislation;
- compliance with requirements of the provincial and federal government concerning operations of charities through both the Canada Revenue Agency and the Public Guardian and Trustee of Ontario;
- establishing and maintaining the involvement of the charity in both a national and/or international structure, if applicable;

- ensuring appropriate protection of intellectual property;
- ensuring applicable investment restrictions are complied with; and
- ensuring the charitable activities of the organization constitutes an appropriate means of fulfilling the charitable purposes as set out in the constitution and/or letters patent of the charity.

4. Consequences of Legal Deficiencies in Charitable Structure and Operations

Few individuals who are themselves involved in charities give much consideration, if any, to the consequences that could flow from legal deficiencies in charitable operations. Some of the problems, though, that a charity and its board of directors may face at different times include the following:

- legal action by aggrieved parties based on negligent supervision of staff and volunteers;
- legal action many years after the fact by individuals who allege that they had been sexually or physically abused;
- personal liability of board members as a result of breach of trust involving charitable funds;
- violations of human rights legislation;
- actions for wrongful dismissal;
- revocation of charitable status;
- loss of corporate status with the corresponding escheat of assets to the Crown;
- control by special interest groups intent upon pursuing a specific agenda;
- splits in membership of community groups or religious organizations;
- court supervised audit of accounts conducted under the CAA; and
- possibility of a public inquiry under the CAA.

For charities that assume exposure to legal liability is more theoretical than real, reference should be made to the provisions of section 6 of the CAA. The reported and unreported decisions under that section illustrate how disgruntled members of a charity or members of the public can cause upset and significant legal costs for the charity and its directors by requesting a public inquiry. The relevant portions of section 6 of the CAA states as follows:

> 6. (1) *Any person may complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which any such funds have been dealt with or disposed of.*
>
> (2) Every such complaint shall be in writing and delivered by the complainant *to a judge of the Superior Court of Justice*.
>
> (3) Wherever the judge is of opinion that the public interest can be served by an investigation of the matter complained of, he or she *may make an order directing the Public Guardian and Trustee to make such investigation as the Public Guardian and Trustee considers proper in the circumstances*.
>
> (4) In making an investigation directed under subsection (3), *the Public Guardian and Trustee has and may exercise any of the powers conferred on him or her by this Act and any of the powers of a commission under Part II of the Public Inquiries Act, which Part applies to the investigation as if it were an inquiry under that Act*.
>
> …
>
> (6) As soon as the Public Guardian and Trustee has completed the investigation, he or she shall report in writing thereon to the Attorney General and to the judge who ordered the investigation.
>
> (7) Upon receipt of the report, *the judge may order a passing of the accounts in question, in which case section 23 of the Trustee Act applies, and the judge may make such order as to the costs of the Public Guardian and Trustee thereon as he or she considers proper.* … [Emphasis added.]

In the 1988 decision of *Stahl v. Ontario Society for the Prevention of Cruelty to Animals*,[18] the court held that a complainant under Section 6 of the *Charities Accounting Act* is in the same position as an informant who complains of a breach of the Queen's peace before a Justice of the Peace. As such, it is assumed that a complainant is acting for the public good and is not liable to costs, although the complainant might be liable for damages for a malicious prosecution, although an unlikely event.

The court in *Stahl* stated that a complainant under the CAA need not give notice of his or her complaint to the charity involved. Instead, the matter may be laid before a Judge of the court on an *ex parte* basis. The Judge considering the complaint is to act in the same manner as a Justice of the Peace in considering criminal information that is presented before him. As such, the Judge need consider only whether the public interest can be served by the investigation of the matter complained of and is not called upon to determine the merits of the complaint itself.

[18] (1989), 70 O.R. (2d) 355, 35 E.T.R. 234 (Dist. Ct.) [*Stahl*].

The case of *Boldrini v. Hamilton Naturalists' Club*[19] provides clear evidence of how effectively Section 6 of the CAA can be used to attack a charity. In *Boldrini*, the Club turned down the complainant's request that the Club contribute towards the publication of his book about a creek in the Hamilton area. The complainant then sent a series of letters to the Club requesting information about its organization and operations. Although the Club provided a response, the response did not satisfy the complainant. The complainant then commenced an application under Section 6 of the CAA, raising questions about the manner in which monies were raised from the public, and expenses related thereto, which included money raised by a local walk-a-thon and its associated expenses. The complainant also raised an issue concerning monies transferred by the Club to "others." The court stated that this raised a question as to whether donations were made by the Club to other organizations controlled or directed by Club members and whether or not the transfers were appropriate donations for the Club to make as a charity. In granting the application, the court held that the public interest could be served by an investigation by the Office of the Public Guardian and Trustee.

5. How the Lawyer can Encounter Difficulties in Advising the Charitable Client

The general nature of the problems encountered by lawyers when providing legal advice to a charitable client was succinctly described by Donald J. Bourgeois:

> The confusion and underdevelopment of the law … make[s] it difficult for lawyers to provide legal advice to clients. There are few texts on the subject. The cases often comment on the lack of legal developments in this area and the need to make analogies to other forms of law, including trust and business law. The policies and practices may not be readily available or explicable. The law is not "transparent."[20]

In addition to the general lack of law and commentaries available to help lawyers advise charities, there are increasing expectations expressed by the courts concerning the professional duties of lawyers in dealing with clients in general that have equal application to advising charitable clients. These legal expectations can be summarized as follows:

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[19] [1995] O.J. No. 3321 (Gen. Div.) [*Boldrini*].

[20] Donald J. Bourgeois, *The Law of Charitable and Not-for-Profit Organizations, Third Edition* (Markham: Butterworths, 2002) at 5.

(a) A lawyer dealing with a charity must ensure any transaction with which the charity is involved has been fully explained to the client, particularly unsophisticated members of the board;

(b) A lawyer advising a charity has a duty to warn the charity of any risks involved in the course of action contemplated by the client. In this regard, the court in *Major v. Buchanan* stated:

> A solicitor has the duty of warning a client of the risks involved in a course of action contemplated by the client or by his solicitor ... and of exercising reasonable care and skill in advising him. If he fails to warn the client of the risks involved in the course of action and it appears probable that the client would not have taken the risk if he had been so warned, the solicitor will be liable. If he warns the client of the risks ... then he can only proceed to follow such course if the client instructs him to do so.[21]

(c) It is also incumbent upon a lawyer dealing with a charity to not only inform the charity of the inherent risks associated with the contemplated course of action, but also to identify if there are better alternatives. "The solicitor has a duty to advise the client whether or not his instructions are unreasonable, or unworkable, or involve certain risks and better alternatives."[22]

(d) Even where the charity specifically instructs the lawyer to only undertake a certain task and no more, if the lawyer in completing that task becomes aware of a risk that the charity is taking, then the lawyer is obliged to advise the client of the risk notwithstanding the limited nature of the retainer. In *Marbel Developments Ltd. v. Pirangi*,[23] the British Columbia Supreme Court held that the existence and extent of a solicitor's duty to advise a client must, in part, depend on the nature and extent of his or her retainer. In finding that the solicitor in question, using reasonable professional judgment, failed to advise the client of certain inherent risks, the court stated, "the solicitor must not allow his client to define the retainer unilaterally, in ignorance of material risks of which the solicitor is or should be aware."[24]

If a lawyer involved with a charity on a specific matter becomes aware of a potential problem on another matter, such as a breach of trust involving donor restricted trust funds, it is incumbent

[21] *Major v. Buchanan* (1975), 9 O.R. (2d) 491 at 514 (H.C.) [*Major*].
[22] *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1985), 31 C.C.L.T. 201 at 219 (Ont. H.C.), rev'd on other grounds (1986), 55 O.R. (2d) 56 (C.A.) [*Elcano]*.
[23] (1994), 18 C.C.L.T. (2d) 229 (B.C. S.C.) [*Marbel*].
[24] *Ibid*. at 239.

upon the lawyer to advise the charitable client of the risks associated with the activity that the lawyer has observed.

These expectations are echoed in the *Rules of Professional Conduct* of the Law Society of Upper Canada. Rule 2.01 defines a competent lawyer as one "who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including … recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served."[25] The rule also requires a lawyer to investigate facts, identify issues, ascertain client objectives, considering possible options, and develop and advise the client on appropriate courses of action. In so communicating, the lawyer must do so in a manner that is appropriate to the client's abilities.[26]

6. Conflicts of Interest in Advising the Charitable Client

In addition to the obligation to actively warn the charitable client of risks, a lawyer involved in acting for a charity can on occasion find himself or herself in difficulties as a result of real or perceived conflicts of interest. Some examples of these conflicts include:

(a) A lawyer as a member of the board of directors of a charity may be asked to provide legal services in return for a fee, whether the fee be at full rate or at a reduced rate. In such a situation, the lawyer would be in breach of his or her fiduciary duty as a director of the charity, no matter how small the amount of remuneration is.[27]

(b) Even if the lawyer, in providing legal advice or services while a member of the board of directors, does not receive any remuneration from the charity, there may still be a conflict of interest inherent in the lawyer assuming fiduciary responsibilities as a board member while at the same time acting as the professional legal advisor for the charity. The dichotomy in roles may put the lawyer in an untenable situation, where for instance, the board is reluctant to adopt recommendations contained in the legal opinion from the lawyer. In such a situation, it may

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[25] Law Society of Upper Canada, *Rules of Professional Conduct*, r. 2.01 (updated to June 25, 2009) [Rules].
[26] *Ibid*., r. 2.01(b),(d).
[27] *Re Public Trustee and Toronto Humane Society* (1987), 60 O.R. (2d) 236 (H.C.) [*Toronto Humane Society*]. See also *Harold G. Fox Education Fund v. Public Trustee* (1989), 69 O.R. (2d) 742 (H.C.) [*Harold G. Fox*], and *Re French Protestant Hospital*, [1951] 1 Ch. 568 [*French Protestant Hospital*].

become difficult if not impossible for the lawyer to fulfill his or her fiduciary obligation to put the best interests of the charity foremost while at the same time having to deal with the professional consequences of whether or not the advice rendered is acted upon by the client.

This is not to suggest that providing free legal services to a charity by a lawyer who is a member of its board of directors necessarily constitutes a breach of fiduciary duty; rather it indicates that there may, in certain circumstances, be a conflict of interest which can only be resolved by the lawyer either ceasing to act as the solicitor for the charity or removing himself or herself from the board of directors to permit the lawyer to provide totally impartial legal advice. The lawyer is already faced with significant liability simply being a member of the board of directors of a charity without also unnecessarily exposing himself or herself to the increased risk of having detrimental reliance placed upon his or her professional advice given free of charge.

(c) A similar type of conflict could arise when the lawyer is acting as solicitor for two related charities, such as an operating charity and a parallel foundation, where the interests of the two charities are at odds. For instance, when the board of directors of one related charity is in disagreement with the direction taken by board of directors of the other charity, the solicitor may need to declare his or her conflict of interest and recommend that one or both of the associated charities obtain independent legal advice.

(d) Conflicts of interest can also arise where the lawyer is called upon to advise the board of directors of a charity and the advice rendered indicates that the directors could be found personally liable. When this occurs, the lawyer should advise each member of the board of directors that the advice being rendered is directed to the board members in their capacity as directors of the charity and is not being given as legal advice to them in their personal capacity. As a result, the lawyer should advise the board of directors that each member should obtain their own independent legal advice to review the consequences of their actions.

(e) A conflict of interest can also arise where the legal opinion sought by the executive director of a charity results in an opinion which the executive director is reluctant to pass along to the board. In such a situation, the lawyer should expressly request that the legal opinion be communicated to the board of directors. If it is not, then depending upon how serious the matter is, the lawyer may

want to send a copy of the opinion letter to the home addresses of the directors, particularly if the lawyer has become aware that the executive director is trying to "stone wall" the board from receiving the legal opinion in question.

Once again, the *Rules of Professional Conduct* clearly warns lawyers against proceeding in the circumstances of a conflict of interest. The commentary to Rule 2.04 cautions that a "client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest."[28]

E. MINIMIZING THE LAWYERS EXPOSURE TO RISK

From the case law referred to above, it is clear that it is no longer sufficient for a lawyer in advising a charity to provide the services of a legal technician only without considering and advising the charitable client on the consequences of its action. Since lawyers may now be held liable as much for what they don't say as for what they do say, lawyers by necessity need to become proactive in advising the charitable client.

Most firms that regularly deal with charities have law clerks who are generally capable in technically creating a charitable corporation, preparing the application for charitable registration with CRA, and completing the necessary government filings. What a lawyer is called upon to do in advising the charitable client is to go a step beyond what the law clerk does and provide active legal counsel to identify and avoid legal problems before they occur. An analogy can be made to the accounting profession, between a bookkeeper who provides only financial statements for his clients at the end of the year and a chartered accountant who is expected to go the extra step and identify problem areas in the business operations and provide recommendations on how to better structure the business in order to improve the net earnings and reduce taxes where possible. In the context of charities, a lawyer must change from providing passive, reactive advice to providing legal counsel in a proactive and preventative context that anticipates problems and reduces legal risks in charitable operations.

Lawyers and consultants who regularly deal in risk management issues have identified the need to practice preventative law. Brian D. Wynn states:

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[28] *Ibid*., r. 2.04(3), commentary.

> Like wellness in medicine, preventative law is a philosophy or regimen which applies to the planning process. It is designed to reduce conflicts so that only the toughest of issues demand expensive dispute resolution mechanism. … Contrast it to the other, reactive mode of client/lawyer relations where the embattled client habitually calls on the lawyer "when there is a problem" and requests a remedy or solution. It isn't hard to see which style promises greater efficiency in the long run.[29]

F. STRATEGIES TO ADDRESS THOSE RISKS

In the context of advising charities, proactive legal risk management advice is difficult to define with any exactitude, but generally can be said to include the following:

(a) The lawyer must become familiar with the law before he or she can effectively advise the charitable client on how to avoid potential legal risks. This requires that the lawyer have a grasp of different forms of organizational structures for charities, i.e. corporate, unincorporated associations, charitable trusts, and charitable non-share corporations, under both the *Ontario Corporations Act*,[30] and the *Canada Corporations Act*,[31] as well as their respective impending successor legislation, the *Canada Not-for-Profit Corporations Act* (CNCA) which received royal assent in June, 2009[32] and *Ontario Not-for-Profit Corporations Act* (ONCA) which was introduced in May, 2010.[33]

The lawyer should also have an understanding of the history of charities based upon trust law; a working knowledge of the applicable provisions of the ITA as it applies to charities; familiarity with the various reporting requirements of both the federal and the provincial governments, particularly Ontario's Public Guardian and Trustee under the CAA; a general understanding of inclusions and exclusions of general liability insurance policies; familiarity with third party liability exposure and the

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[29] Brian D. Wynn, "Happenings, A Word on Recreational Accidents, Risk Management and Preventative Law" in *Fairs, Festivals and Fund Raisers: Legal and Risk Management Issues for Special Event Organizers* (Toronto: Canadian Bar Association, 1995) Tab 11 at 15.

[30] R.S.O. 1990, c. C.38.

[31] R.S.C. 1970, c. C-32.

[32] Bill C-4, *An Act respecting not-for-profit corporations and other corporations without share capital*, 1st Sess., 40th Parl., 2009, received third reading in the Senate on June 23, 2009 and received Royal Assent on the same day. The new act, which is intended to simplify and streamline the regulatory burden on not-for-profit corporations and other non-share capital corporations, will replace Parts II and III of the *Canada Corporations Act*. For more information, please see Jane Burke-Robertson "Bill C-62: Changes Afoot for Non-Profit Corporations" in Charity Law Bulletin No. 139 (June 25, 2008) online: http://www.carters.ca/pub/bulletin/charity/2008/chylb139.pdf, and "Draft Regulations Under the Canada Not-For-Profit Corporations Act" in *Charity Law Update* (October 2009) online: http://www.carters.ca/pub/update/charity/09/oct09.pdf.

[33] For more information, see Jane Burke-Robertson and Terrance S. Carter "Introduction Of Bill 65, The Ontario Not-for-profit Corporations Act" in *Charity Law Update* (May 2010) online: http://www.carters.ca/pub/bulletin/charity/2010/chylb210.htm. The *Ontario Not-for-profit Corporations Act* will replace the *Corporations Act*, which currently regulates Ontario's not-for-profit corporations.

Occupiers Liability Act;[34] a grasp of title issues related to charities owning real property; an understanding of employment law and contracts; familiarity with the *Trade-Marks Act*,[35] and the registrations available there under; an understanding of the exposure of directors and officers to personal liability under both the common law and numerous provincial and federal statutes; a grasp of board management issues; familiarity with basic accounting principles involving charitable funds, particularly as it relates to donor restricted trust funds; as well as a general understanding of national and international charitable structures, if applicable.

Many changes can occur in a very short period of time that can significantly change the legal landscape in which charities operate. For example, in the past year alone (i.e., from June 2009 to May 2010), extensive changes have occurred in the legislative framework at the federal, as well as the provincial level in Ontario. At the federal level, the above noted CNCA will come into force pending the final approval of the regulations to give the legislation effect within the next year. As well, the March 2010 Federal Budget contained significant reform of the disbursement quota for charities by repealing the charitable expenditure rule (the requirement that a charity disburse 80% of its receipted income from a previous year) for fiscal years that end on or after March 4, 2010.[36] At the provincial, level, in addition to the recent introduction of the ONCA in May, 2010, Bill 212, which received royal assent on December 15, 2009, brought about significant reform to the regulation of charities in Ontario by overcoming limitations that have for decade's plagued charities operating in Ontario.[37] One of the reforms brought about by Bill 212 has been the complete repeal of the *Charitable Gifts Act*, which had limited the ability of charities in Ontario wishing to acquire more than a 10% interest in a business as an investment.

In addition to changes made by federal and provincial legislatures, a lawyer advising the charitable client must also keep abreast of the various guidances and policies released by CRA. Although CRA guidances and policies do not have the force of law, they do lay out CRA's interpretation of, and position on, certain provisions of the ITA and the common law. The CRA is continually developing

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[34] R.S.O. 1990, c. O.2.

[35] R.S.C. 1985, c. T.10.

[36] See Karen J. Cooper and Terrance S. Carter "Significant Benefit for Charities in 2010 Federal Budget DQ Reform" in *Charity Law Bulletin* No. 197 (March 8, 2010) online: http://www.carters.ca/pub/bulletin/charity/2010/chylb197.htm.

[37] For more information, see Terrance S. Carter "Bill 212 brings Significant Reform the Regulation of Charities in Ontario" in *Charity Law Bulletin* No. 181 (November 26, 2009) online at: http://www.carters.ca/pub/bulletin/charity/2009/chylb181.htm

new guidance, and revising older documents to reflect changes in the ITA, the common law, or the charitable sector. In the past year, CRA has released guidances for charities on fundraising[38], as well as human rights[39], and plans to release in the near future guidance on the advancement of religion, animal welfare, protection of the environment, and complementary and alternative medicine, all of which will provide both clarity, but additional compliance requirements for charities.[40]

Without some knowledge in these areas of the law, a lawyer in attempting to advise a charitable client may have a difficult, if not an impossible time, in trying to effectively guide the client in avoiding problems before they occur, let alone simply trying to ensure that the charity complies with all of the basic requisite statutes that have general application to the day-to-day operations of a charity.

(b) In meeting with the charitable client to conduct a legal risk management review, the lawyer should assume nothing. In other words, the lawyer should not assume that the charitable client knows the relevant law, or is aware of problems that may need to be addressed, or is aware of the consequences of the present or proposed course of action. If there are any assumptions of facts which the lawyer makes, it is essential that those assumptions be expressed and confirmed with the charitable client before proceeding; otherwise, confusion or possible negligence could result if the lawyer gives advice based upon either a wrong or an incomplete assumption of the relevant facts.

(c) In meeting with the charitable client, the lawyer needs to be diligent in asking questions of the client to identify either existing or potential problems that the charity may be facing. A good technique to facilitate this process is to use a form of checklist, a sample of which is appended to this paper.

(d) In reviewing the operations of the charity, it is important that the lawyer explain major areas of the law that are particularly relevant to the client, even when there is not necessarily a problem that

[38] For more information see Terrance S. Carter, "The Revised CRA Guidance on Fundraising: Improved but Still Challenging" in *Charity Law Bulletin* No. 169 (June 25, 2009) online: http://www.carters.ca/pub/bulletin/charity/2009/chylb169.htm.
[39] For more information, see Terrance S. Carter, "CRA Releases Final Guidance on Upholding Human Rights and Charitable Registration" in *Charity Law Bulletin* No. 212 (May 26, 2010) online at: http://www.carters.ca/pub/bulletin/charity/2010/chylb212.htm.
[40] Presentation given by Bryan McLean, Director of the Policy, Planning and Legislation Division, of the Charities Directorate entitled Policy Priorities for the Charities Directorate, Canada Revenue Agency, delivered at the International Committee on Fundraising Organizations Annual General Meeting, on May 14, 2010 in Kitchener, Ontario.

has been identified, so that the client will be aware of the need to comply with the applicable law in the future. For instance, even though a particular charitable client may not presently be gifting monies to a foreign charity, the issue may have to be faced by the charity at some time in the future. It is therefore helpful to explain in advance the correct means of gifting monies to non-qualified donees outside of Canada so that the charity will be prepared.

(e) When a problem is identified, either in relation to current activities or a proposed action, it is essential for the lawyer to fully explain the consequences of the course of action in question. In this regard, if the consequences may ultimately expose members of the board of directors to personal liability, it is important that this be identified in unequivocal terms, even if the information being conveyed to the charity is not what the client wishes to hear.

(f) Having identified the problem, it is then incumbent upon the lawyer to provide the charitable client with recommendations that can be implemented to rectify the problem, together with other effective alternatives, if possible, that can be adopted to eliminate the risk.

(g) In the event that numerous problems are identified, then at the end of the meeting, it is helpful for the lawyer to set up a priority list of what problems need be dealt with first and in what time frame they should be addressed. Failure to do this can often leave the charitable client overwhelmed by the problems, and potential liability and may, on occasion, have the unfortunate effect of leaving the board of the charitable client paralysed in fear and unable to do anything other than contemplate mass resignation from the board. As such, it is not sufficient for the lawyer to simply provide a list of problems. The lawyer must also provide constructive solutions and an appropriate time frame in which to achieve the steps required to rectify the problems.

(h) It is important that the lawyer then provide a well organized report to the client confirming the advice given, the problems identified, the solutions suggested, and a realistic time schedule to implement those solutions. The report will then become a reference tool for both the client and for the lawyer in monitoring the progress that needs to be made.

(i) The report should be addressed not only to the executive director, if applicable, but to all of the members of the board of directors of the charity. In some circumstances, it may be appropriate for the lawyer to attend the board of directors meeting to provide a summary of the issues addressed in

the report, utilizing overheads or summary sheets to facilitate simplifying the presentation on what often involves complicated issues and consequences.

(j) After the provision of a comprehensive report to the client, it is then important to explain that it is the responsibility of the charitable client to decide if the board wishes to adopt the recommendations provided in the report, and if so to communicate those instructions to the lawyer. The reason for doing so is to ensure that having identified the problems and provided the recommended procedures to deal with those problems, the onus is put upon the charitable client to provide the instructions to proceed with implementing the recommended remedial steps. Otherwise, the lawyer may find himself or herself at a later time being criticized or possibly being held liable in the event the charity's board does not proceed with the recommended course of action.

(k) Assuming the client does provide instructions to the lawyer to commence work on some or all of the recommended course of action, the lawyer should prepare and provide the client with a checklist of the steps that need to be done and the time frame in which those steps are to be accomplished.

(l) In the event the charitable client does not make an initial decision to proceed with the recommended course of action, the lawyer should send a follow-up letter to the client one or two months after the initial report to remind the client of the need to make a decision and to once again confirm that the onus lies upon the client to provide the instructions to proceed. This is important to clarify with the client, since the charitable client may be reluctant to adopt a particular recommended course of action for various reasons, and as such, the lawyer will want to ensure there is no confusion concerning the reason why the recommended course of action has not been adopted, particularly when it involves potential personal liability to directors and officers of the charity.

(m) After the initial problems identified in the report have been addressed, the client should be advised to periodically review matters with legal counsel concerning its ongoing operation on either an annual or bi-annual basis to determine if further issues may have unnecessarily exposed the charity to legal risks.

G. DEVELOPING A LEGAL RISK MANAGEMENT CHECKLIST

1. Sample Checklist

Attached to this paper as Appendix "A" is a document called a "Legal Risk Management Checklist for Charities." The Checklist was developed for two reasons:

(i) A checklist enables a lawyer to keep track of the many issues that need to be reviewed in meetings with charitable clients.

(ii) A checklist is another tool to assist the charitable client in identifying areas of potential legal risks on their own, as well as to assist the client in understanding the myriad of legal and risk management issues that need to be addressed to some extent by most charities.

The Legal Risk Management Checklist for Charities has been structured so that it both raises legal issues as well suggesting some tentative solutions. Although the Checklist attempts to be as generic and broad as possible, it is clearly neither all-inclusive nor comprehensive in the dealing with the issues that are identified. As a result, the lawyer utilizing the Checklist will need to modify it as necessary to customize the Checklist to reflect the emphasis each lawyer places on the advice given to their respective clients.

2. How to Utilize a Checklist

When meeting with a charitable client, whether it be to answer a specific question or to conduct a legal review, a copy of the Legal Risk Management Checklist for Charities could be given to the client with the lawyer retaining a copy. This will then permit both the lawyer and the client to review the matters dealt with in the Checklist, identifying potential problem areas and developing suggested solutions. Alternatively, a copy of the Checklist can be forwarded to the charitable client prior to the meeting so the client will be familiar with the format that will be followed during the interview. However, the danger of forwarding the Checklist in advance of the meeting is that the charitable client can often become overwhelmed by the number of issues that need to be addressed. As such, it is generally better to meet with the client in person to explain the need for the Checklist and its contents.

During the interview, the client should be encouraged to make notations on his or her copy of the Checklist, with the lawyer doing the same. These notations will provide a useful tool for the lawyer in structuring the reporting letter concerning the problems that have been identified and the solutions recommended.

A copy of the Checklist should be dated and put into the file so that it can be referred to at a later time in monitoring the progress by the charity in rectifying the problems that have been highlighted. This is particularly useful in those situations where there has been a change in a board of directors or a change in the executive staff, since the new individuals may not be aware that a Legal Risk Management Checklist for Charities had been used in earlier meetings to identify problems and recommend solutions.

For those situations where clients have received a copy of the Checklist, but for whatever reason do not arrange to meet with the lawyer to review the matters raised in the Checklist, it is recommended that the client be advised the issues raised in the Checklist are complicated, have serious consequences, and as such the client should not attempt to do a review on their own without the assistance of legal counsel. In the event the client decides not to retain the lawyer further, at least there will be correspondence warning the client that a review of the Legal Risk Management Checklist for Charities without legal counsel does not constitute a proper review or determination of the various legal risks a charity may be facing.

3. The Structure of the Legal Risk Management Checklist for Charities

The Checklist begins by explaining in point form why it is important to identify legal risk management issues. This involves reviewing a number of issues and the complexities involved in operating a charity, as well as explaining the types of problems a charity can face, who is exposed, and the need to take corrective steps.

The Checklist then identifies the need to establish a procedure to identify and manage legal risk liabilities, such as the creation of a liability management committee to oversee, identify and reduce legal risks.

The Checklist next deals with some basic issues of deficiencies in legal organization, board management matters, reducing board liability, insurance considerations, third party use of charitable property, real property issues, leasing matters, intellectual property, employment and volunteer matters, charitable activities, fiscal management matters, the dangers of operating with a deficit, compliance with trust fund obligations, maintaining charitable registration, and issues involving national and international structures.

While each lawyer will need to modify the Checklist to prioritize the issues in whatever order the lawyer feels is appropriate, it is important that the Checklist cover as many issues as possible and as a result in reviewing the Checklist, the lawyer and the client should be careful not to rush through the items referred to in it simply because of the volume of issues. It is therefore generally recommended that at least a two hour interview be set up to initially review the Checklist, with possible additional meetings being subsequently scheduled as necessary.

H. EFFECTIVELY COMMUNICATING WITH THE CHARITABLE CLIENT

1. Confirming Retainer

Since the lawyer is often contacted by the charitable client to provide an answer to a question as a "favour," it is important for the lawyer to determine whether or not he or she is being asked to provide a professional opinion that will be relied upon, or whether he or she has been contacted to provide advice without professional consequences and corresponding liability. More often than not, the lawyer will have been asked a question on the assumption that the charity believes that it can rely upon the answer, whether or not the charity is able to or intends to pay for such advice.

As a result, it is prudent for the lawyer who is contacted by a charity to confirm in writing the advice being sought, the advice given, and whether or not there is to be any charge for the service that has been rendered. Failure to do so could result in an unfortunate situation of the charitable client relying upon an opinion that the lawyer never intended to constitute a professionally researched opinion.

2. Educational Reports

By far the most frequent task for which lawyers are called upon to assist charities is to complete the incorporation process and obtain charitable registration. The lawyer will normally consider

the task completed when letters patent have been obtained, the minute book has been organized, and a charitable registration number has been obtained from CRA.

However, it is advisable for the lawyer to explain to the charitable client how the charity is to function as a non-share capital charitable corporation, how to comply with the numerous requirements under the ITA applicable to charities, how to comply with various government reporting requirements, as well as providing an explanation of the basic responsibilities and liabilities members of the board of directors will face in operating the charity. As a result, not only must the lawyer provide a reporting letter on the incorporation and initial organization to the charity, which often is never done, but the reporting letter should be structured as a type of "operating manual" so that the letter can be used for reference purposes by both the current and future members of the board of directors.

3. Documenting Advice Given

When acting on behalf of a charitable client in conducting a legal risk management review, it is important that the lawyer provide a comprehensive report to the charity on the risks that have been identified, the consequences of those risks, and the recommendations made to reduce exposure to legal liability.

Even after a legal risk management review has been completed, there will often be need for subsequent consultations with the client to monitor the progress being made by the charity to implement the recommendations. In addition, an ongoing charitable client will invariably need to contact the lawyer on an "as needs" basis to answer specific questions that may arise out of the legal management review. In all of these situations, it is essential that timely and complete reports be provided to the client concerning the advice sought and the recommendations provided.

In the event that the lawyer is unable to prepare a report shortly after the advice has been given, a practical technique to ensure that timely reports are provided is to do an inventory of all files involving charities at the end of each month to ensure that up-to-date reports as necessary have been prepared and sent to all charitable clients.

I. CONCLUSION

Increasingly, advising charities is becoming a speciality practice of law, especially given the number of charities in Canada, the size of the operations and the complexities of the law involving charitable operations. Accordingly, lawyers who are called upon by charities to provide legal advice must either do so in a thorough and professional manner or not at all, whether or not the work is provided on a *pro bono* basis or at a reduced rate. There is nothing at law which justifies a reduced level of service simply because the work is done as an act of charity itself. What the law does state is that all clients are entitled to assume their legal counsel will take the initiative to warn of pending problems and the consequences associated therewith. This professional expectation has as much application to the charitable client as it does to any other. As a result, lawyers who are called upon to assist charitable clients should approach their task in the context of not only providing technically correct legal services but going further and providing proactive legal counsel to anticipate and advise the client on avoiding unnecessary legal risks before they occur. For those who decide to conduct their practice in this context, they will find that the experience of counselling the charitable client will change from one of frequent frustrations to one of achieving a measure of personal satisfaction in having undertaken a difficult task in what one hopes is a thorough and competent manner.