
CHARITY AND NFP LEGAL CHECK-UP: 10 TIPS FOR EFFECTIVE LEGAL RISK MANAGEMENT

*By Terrance S. Carter and Jacqueline M. Demczur**

A. INTRODUCTION

Charities and not-for-profits (“NFPs”) face increasing challenges in delivering their services to the public, in part because of a more litigious society, as well as an increasingly complicated regulatory environment in which to operate. In facing these challenges, charities and NFPs need to be familiar with an array of legal requirements. However, charities and NFPs frequently experience difficulties in complying with requirements in this regard. This may be due to inadequate corporate records, governance policies and books and records, improper charitable receipts, failure to comply with fundraising requirements, lack of direction or control over foreign activities, as well as possible violations of privacy rights involving donors, employees and volunteers, amongst other examples of potential non-compliance.

For charities and NFPs to comply with and avoid exposure to corresponding legal liability from such requirements, it is important that their boards and senior management undertake regular legal check-ups in order to ensure appropriate due diligence. In this regard, a good starting point for establishing the necessary due diligence is to ask: what is the legal status of the charity or NFP; what are the applicable legal requirements; and how can one best comply with those legal requirements? The “Top Ten Tips” that follow identify key issues that charities and NFPs may want to address in order to implement effective legal risk management.

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B. TOP 10 TIPS TO EFFECTIVE LEGAL RISK MANAGEMENT

1. GET TO KNOW YOUR ORGANIZATIONAL AND LEGAL DOCUMENTATION

Charities and NFPs need to develop and maintain an inventory of key organizational and legal documents and keep those documents in a central location. Examples of key documents include: letters patent/articles of continuance, charitable registration number, correspondence from Canada Revenue Agency (“CRA”), deeds, mortgages, leases, etc. Questions to consider concerning letters patent/articles of continuance include: are the corporate objects reflective of what the organization does; has there been a “mission drift” from the current corporate objects; are the present activities of the charity or NFP authorized by its corporate objects; and has a copy of the letters patent/articles of continuance for a charity been filed with CRA and the Public Guardian and Trustee (“PGT”) in Ontario?

In relation to the general operating by-law of a charity or NFP, the key questions to consider include: Do the by-laws conflict with the objects or dissolution clause in the letters patent/articles of incorporation? Does the by-law reflect the actual organizational structure of the charity or NFP? Does the by-law reflect changes to applicable corporate legislation? Does the by-law include an indemnification provision that has been authorized in accordance with the regulations under the *Charities Accounting Act* (Ontario)?

2. KNOW WHO IS IN CHARGE?

Knowing who is in charge of a charity or NFP is essential for ensuring good governance. In this regard, it is important to determine where the actual *de facto* control of the charity or NFP lies (e.g. with a board of directors or senior management). Are there clearly defined lines of authority between the board and senior management? Has the board delegated excessive responsibility to senior management without ensuring adequate supervision and monitoring? Are there conflicting qualification requirements in becoming a director in the governing documents? Has a register of directors been maintained? Are changes in director information being sent to the relevant government authority? Has an audit committee been established? Is there adequate communication of board responsibilities? Is the board aware of its legal duties and liabilities? Is the board provided with regular updates on changes to the law? Are policies in place to address board succession planning, recruitment and orientation?

3. MONITOR THIRD PARTY USE OF PROPERTY

In relation to monitoring third party use of its property, some questions to ask are: Is the charity or NFP aware of potential liability in allowing third parties to use their property? Has the organization developed a facility use policy and license agreement with appropriate releases and indemnification provisions? Does the organization require evidence of liability insurance from third party users of its facilities? Has the organization provided notice to its insurer concerning the use of its property by third parties? If applicable, does the charity charge appropriate fair market rent to non-charity users of its property, and does the rental of the property meet CRA's requirements for a "related business"?

4. CHECK INSURANCE AND RISK TRANSFER DOCUMENTATION

Obtaining necessary insurance and implementing appropriate risk transfer documentation are both extremely important steps for a charity or NFP to take to ensure adequate protection of the organization, its directors and officers and its assets. Accordingly, some questions to ask in this area include: Has a historical record of the charity or NFPs insurance coverage been maintained? Has full disclosure of all risks been provided to the insurer to avoid denial of coverage? Does the charity or NFP request regular written reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage? Is there a regular review of the adequacy of general liability and property insurance, as well as employment benefits and practice coverage? Is there directors' and officers' liability coverage in place? Is there need for special endorsements to extend insurance coverage to "out of the ordinary" activities? Is there a child protection policy in place and has it been reviewed by the insurer as well as by legal counsel? Has an independent insurance consultant conducted an assessment of insurance coverage? Has the charity or NFP implemented effective risk transfer documentation, such as informed consents, disclaimers, waivers and indemnities?

5. WATCH OUT FOR WASTING IP ASSETS

Intellectual property is an essential asset of a charity or NFP, and normally consists of both trade-marks (i.e. branding) and copyright. Trade-mark rights exist at common law but are limited and should therefore be supplemented by trade-mark registrations under the *Trade-marks Act* to ensure proper protection of the brand of the charity or NFP. A corporate or business name registration does not itself give trade-mark protection, and CRA does not monitor for confusingly similar charity names. In this regard, a trade-mark may be vulnerable to attack and can unintentionally become a wasting asset if not properly protected. In

response, charities and NFPs should develop a portfolio management approach for identifying, registering, using and enforcing trade-marks.

As well, it is important to know who owns the copyright in publications and website content of the charity or NFP and to ensure that the content is properly identified with notice of copyright protection ©. Generally speaking, unless there is an agreement to the contrary with an employee, copyright vests in the charity or NFP as the employer. However, an employee would still need to provide a written waiver of moral rights. Further, with a volunteer, website designer or independent contractor providing program content, it is important that the charity or NFP obtain both an assignment of copyright and a waiver of moral rights as may be necessary.

6. ENSURE COMPLIANCE WITH PRIVACY AND ANTI-SPAM LAW

Compliance with privacy and anti-spam laws is a growing area of concern for charities and NFPs. In this regard, has the charity or NFP implemented a privacy policy to protect members, donors, employees and volunteers? Under Canadian privacy legislation including, the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), organizations must obtain “knowledge and consent of the individual [...] for the collection, use, or disclosure of personal information, except where appropriate.” PIPEDA applies to commercial activities, including “the selling, bartering or leasing of donor, membership or other fundraising lists.” Charities and NFPs that engage in limited commercial activities ancillary to their primary functions will be subject to PIPEDA, so it is best to assume that PIPEDA applies.

Canada’s Anti-Spam Legislation (“CASL”) impacts how charities and NFPs communicate with donors, volunteers, members, as well as the public. CASL prohibits the sending of commercial electronic messages (“CEM”) without consent. Regulations include a specific exemption for select messages sent by or on behalf of registered charities that are primarily for fundraising purposes. However, this is not a full exemption from all CEMs sent by charities and also does not apply to NFPs. As such, both charities and NFPs should ensure that they are obtaining appropriate consents before sending CEMs.

7. MONITOR EMPLOYEE AND VOLUNTEER LIABILITY RISKS

In relation to potential risks associated with its employees and volunteers, it is important for charities and NFPs to consider the following: Has the charity or NFP implemented policies for hiring, disciplining and

terminating employees and volunteers? Is an accommodation policy in place for members of disadvantaged groups? Is there a workplace violence and harassment policy in place? Are employees and volunteers who deal with children adequately screened and supervised in accordance with an appropriate sexual abuse policy statement? Is the charity or NFP in compliance with applicable statutory requirements for employees (e.g. occupational health and safety legislation)? Is the charity or NFP exposed to potential criminal liability by directing how tasks are performed but neglecting to take reasonable steps to prevent bodily harm?

8. BE PREPARED FOR A CRA AUDIT

Being ready in advance for a CRA audit is an important strategy for both charities and NFPs. For NFPs, it is important to determine whether the organisation continues to meet the requirements to be a non-profit organisation under par. 149(1)(l) of the ITA with regards to both income generation and reserves. For charities, it is important to consider the following amongst other issues: does the charity know what charitable objects are on file with the CRA? Are its activities carried out in accordance with its objects? Has the charity filed its governance documents with CRA? Do all of the charity's receipts include the name and website address of the CRA? Does the charity submit its annual information return (Form T3010) within six months of the financial year end? Does the charity comply with split receipting and anti-tax shelter provisions of the *Income Tax Act* ("ITA")? Is the charity aware of the CRA Guidance on Fundraising and the need to track its annual fundraising ratio? Does the charity comply with CRA's requirements for "related business"? Is the charity aware of the requirements to engage in political activities and comply with the 10% of resources restriction? Are agency relationships, joint venture relationships, or contractual transfer arrangements with non-qualified donees implemented with appropriate "direction and control"? Is the board of directors, trustees, officers or equivalent official, screened to see if any are "ineligible individuals" under the ITA?

9. ENSURE COMPLIANCE WITH DONOR RESTRICTIONS

Another area where charities sometimes run into challenges is in relation to complying with donor restricted funds. To avoid such challenges, a charity should consider the following: Are there donor restricted funds held by the charity (e.g. an endowment, scholarship funds)? Are restricted funds used in accordance with applicable restrictions and is the board of directors aware of the consequences (breach of trust) for failing to comply with such restrictions? Are restricted funds kept segregated from the general

funds of the charity? Are restricted funds pooled for investment purposes and if so, has there been compliance with the regulations under the *Charities Accounting Act* (Ontario) in commingling restricted funds for investment purposes, where applicable?

10. KNOW THE LEGAL BASIS FOR INVESTING SURPLUS FUNDS

Finally, charities and NFPs should carefully determine what investment powers apply to the investment of surplus funds. Investment power may be found in the letters patent/articles of incorporation, incorporating legislation, or by default in applicable provisions of the *Trustee Act* in each province for charities. It is also important to determine whether there an investment policy in place, is the charity in compliance with the prudent investor standard under the *Trustee Act*, as well whether there has been proper delegation of investment decisions by a charity? In this regard, charities and NFPs should not blindly rely upon documentation from an investment manager since such documents may not reflect the applicable legal requirements that apply to the investment of funds of either a charity or a NFP.

For more details see our [Legal Risk Management Checklist for Charities and NFPs](#).