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# Legal Risk Management Checklist for Charities & Not-for-Profits (condensed version)

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## **A. INTRODUCTION**

The operation of charities today is much more complex and litigation against charities much more rampant. The exposure of charitable assets to liability goes further than just the loss of charitable assets and/or the insolvency or winding up of a charity. Directors of these charities may now also be faced with possible legal action being brought against them personally by donors, members, third parties and governmental authorities for breach of their fiduciary duties or even breach of trust in failing to protect the assets of a charity and in not applying those assets for their intended charitable purposes. Given the threats to both charities and their directors, there is developing an urgent need to protect charitable assets from future lawsuits and creditors and to do so on a pro-active basis.

The purpose of this checklist is to briefly outline the responsibility of directors of charities, whether incorporated or not, to protect charitable assets, and then to provide an overview of some new and existing areas of liability exposure currently being faced by charities in Canada as well as the means available to protect charities against such risks. As it is impossible to adequately address all aspects of the liability exposure being faced by charities today and the pro-active steps which need to be taken, this checklist will instead provide a general overview of the recommended procedures that charities and their board of directors need to be aware of to both identify and manage legal liabilities. Please note that many of these procedures will also be applicable to not-for-profit organizations which are not charities.

## **B. IDENTIFICATION AND MANAGEMENT OF LEGAL RISKS**

1. Is charitable status even necessary?
2. General Overview Of Organizational & Legal Documentation:
  - a) Identifying existence and location of key organizational documents

- b) Key organizational documents for an unincorporated charity
    - o Constitution and amendments to Constitution, if applicable
  - c) Key organizational documents for a corporate charity
    - o Letters Patent and Supplementary Letters Patent, if applicable
    - o Membership Covenant or Mission Statement, if applicable
    - o By-laws and Resolutions
    - o Directors, Members and debt registers
    - o Copies of government filings
  - d) Determining other key legal documents:
    - o Leases, Deeds and Mortgages
    - o Agency, Association and Joint Venture Agreements
    - o License Agreements
    - o Business name, trade-mark and Section 9 Official Mark Registrations
    - o Charitable Registration Number
3. Review Of Documents For Unincorporated Charity:
- Are there objects stated in the Constitution and are they exclusively charitable?
  - Do constitutional documents correctly reflect how the organization is actually structured and operated?
  - Is a copy of the Constitution filed with the appropriate government agencies?
4. Review Of Corporate Structure
- a) Review of Letters Patent:
    - Is the name in Letters Patent the correct name and descriptive of objects?
    - Are there exclusively charitable objects?
    - Are activities of the charity authorized by its charitable objects?
  - b) Review of Supplementary Letters Patent:
    - Change of corporate name and/or objects
    - Effect of change of objects upon existing charitable property
  - c) Letters Patent of Amalgamation (only for Ontario corporations):
    - Requires the same or similar charitable objects
    - Existing charitable property must be held in trust for previous charitable objects
  - d) Need to review of corporate by-Law for basic terms.
  - e) Was initial corporate organization of the charity properly done?
  - f) Are the records of Board decisions and Membership Meetings complete?
  - g) Need to ensure that there is not inadequate Board and/or Members authorization for indebtedness.
  - h) Have corporate records been properly maintained?
  - i) Need to maintain corporate filings and registration
    - Ontario corporations:
      - o Initial Notice and Notice of Change - Form 1
      - o *Business Name Act* Registration
      - o Report to Public Guardian and Trustee
    - Canada corporations:

- Annual Summary (Form 3) – Canada
  - Extra-Provincial Initial Notice (Form 2) – Ontario
  - *Business Name Act*- Ontario registration
  - Report to Public Guardian and Trustee – Ontario
  - Does the charity operate and/or fundraise in any other provinces? May need to register as extra-provincial corporation and/or as a fundraiser.
  - Does the charity operate and/or fundraise in Quebec? Separate charitable number in Quebec may need to be obtained.
- j) Developing, adopting and implementing Policy Statements on child abuse, sexual abuse and sexual harassment.
- k) Loss of corporate status and dissolution for failure to maintain government filings.
- l) Proper use of corporate name and business names other than corporate name.

### **C. UTILIZING MULTIPLE CHARITABLE CORPORATIONS**

- Can the charity use multiple charitable corporations for its various activities to reduce liability exposure activities?
- Can the charity establish and utilize a parallel foundation for both fundraising and protection of charitable assets?

### **D. BOARD MANAGEMENT ISSUES**

1. Identifying what group is in charge of the charity:
  - Where does de facto control lie?
  - Is Board authority recognized by Membership?
2. Determining lines of control between Board and the Executive Director.
3. Are Board meetings held frequently enough and do Directors regularly attend?
4. Do audit committees need to be established?
5. Communicating Board responsibilities to existing and future Board Members:
  - Need to create a Board Binder consisting of all corporate documents, as well as legal explanation of the general operations of the corporation, operating a corporation as a charity and Board legal duties and liabilities, to provide to all Board Members.

### **E. REDUCING BOARD LIABILITY**

1. Do any Directors receive direct or indirect remuneration or benefit from the charity?
2. Does the charity indemnify its Directors and Officers?
3. Has the Board delegated too much responsibility to others?
4. Should the charity consider reducing the size of the Board?
5. Is the charity effectively making use of committees?
6. Should the charity consider implementing an Advisory Board?
7. Has the charity reviewed all the ways of protecting the personal assets of Directors?
8. Charity needs to establish appropriate and comprehensive due diligence procedures for Board Members.

## **F. INSURANCE CONSIDERATIONS**

1. Need to maintain historical record of insurance coverage.
2. Need to obtain annual report on existing coverage and recommendations from insurance broker.
3. Regularly review and upgrade general liability coverage and property insurance.
4. Need to secure directors' and officers' liability coverage.

## **G. THIRD PARTY USE OF CHARITABLE PROPERTY**

1. Potential liability exposure whenever charity permits third party use of property.
2. Need to develop a property uses policy.
3. Need to develop a sample licence agreement with indemnification.
4. Need to obtain evidence of liability insurance from third party.
5. Need to charge appropriate rental fees.
6. Need to effectively implementing a property use policy.

## **H. REAL PROPERTY ISSUES**

1. Re-register deeds within forty (40) years to maintain priority under the *Registry Act*.
2. Are there any *Planning Act* (Ontario) pitfalls?
3. Need to be aware of any encroachments with neighbouring land.
4. Are municipal zoning and legal non-conforming uses be complied with?
5. Is charity subject to forced sale of land under *Charities Accounting Act*?
6. Need to identify if any liability for toxic property.

## **I. LEASING ISSUES**

1. Are there any pitfalls in the charity's offers to lease?
2. Need to be aware of the effects of personal guarantees in leases.
3. Registering notice of lease on title –when and why should this be done?

## **J. INTELLECTUAL PROPERTY ISSUES**

1. Should the charity register any of its key names and/or logos as trade-marks or Section 9 official marks?
2. Who owns the copyright for publications of the charity? Should copyright be registered, assigned or licensed?

## **K. EMPLOYMENT AND VOLUNTEER MATTERS**

1. Need to develop appropriate hiring policies and practices.
2. Need to establish general policy statements on lifestyle expectations for employees and appropriately document.
3. Need to develop and adopt specific policy statements for employees and volunteers.

4. Charity should establishing suitable employment contracts.
5. Volunteers need to be properly selected and supervised.
6. Need to develop and implement an employee and volunteer manual.
7. Is there an appropriate discipline process in place?
  
8. Has an Occupational Health and Safety program been implemented?
9. Is the charity aware of and complying with collateral statutory compliance matters, including pay equity, employment standards, human rights legislation and privacy legislation?

#### **L. CHARITABLE ACTIVITIES**

1. Charity needs to ensure that operations are done in accordance with charitable objects.
2. Any involvement in related business activities and/or deemed related business activities?
3. Need to determine if charitable monies are used to fund deficits in business operations.
4. Is the charity involved in any political activities?
5. Is charity in compliance with any restrictions on gifting of charitable property?
6. Need to be aware of any prohibitive fundraising activities by charitable staff.

#### **M. FISCAL MANAGEMENT ISSUES**

1. Are all salaries and benefits being paid?
2. Is the charity operating with a deficit and for how long?
3. How is deficit being funded?
4. Has a sinking fund been established to retire debt?
5. Are improper fund raising vehicles in use?
6. Are investments being offered to the public without full disclosure?
7. Are funds being correctly invested and managed?

#### **N. TRUST FUND ISSUES**

1. Are there donor designated trust funds being held by the charity?
2. Are trust funds kept segregated from operating funds?
3. Are trust funds used for operational purposes or borrowed against?
4. Are charitable funds used only in accordance with charitable objects?
5. Is there any misdirection of charitable funds?
6. Need to be aware of any trust funds issues in building projects.
7. Is charity aware of consequences of breach of trust in relation to charitable property?

#### **O. MAINTAINING CHARITABLE REGISTRATION**

1. Co-ordinating correct name of charity with records of CCRA (formerly Revenue Canada)
2. Maintaining current address with CCRA.
3. Obtaining Quebec charitable registration, if necessary.
4. Maintaining Statutory Requirements of CCRA.

5. Monitoring improper issuance of charitable receipts.
6. Properly documenting agency relationship with non-qualified donees.
7. Properly documenting joint venture arrangements.
8. G.S.T. considerations.

#### **P. NATIONAL/INTERNATIONAL RELATIONSHIPS**

1. Need to document relationships with national organizations and/or subsidiary chapters.
2. Need to document relationship of national organization to international structure.
3. Need to establish ownership of trademarks and licensing documentation.

#### **Q. ANTI-TERRORISM LEGISLATION**

1. Is there a need to exercise due diligence to determine compliance and/or risk with the Anti-Terrorism Act?
2. Need to implement due diligence through education.
  - Development of anti-terrorism policy statement.
  - Develop access to general resource materials on anti-terrorism legislation.
  - Provide materials and presentations to all representatives of the organization.
3. Need to implement due diligence at Board, staff and volunteer levels.
  - Conducting CSIS security checks.
  - Completion of yearly disclosure statements.
  - Undertaking to report any material change in disclosure statements.
4. Need to develop due diligence checklist of charitable programs.
  - Checklist should incorporate all aspects of anti-terrorism policy.
  - Evaluate all charitable programs annually in accordance with checklist.
  - Communicate results of evaluation to Board of Directors.
5. Is there a need for due diligence review concerning “affiliated charities”, third party agents and/or donors?
6. How to document due diligence through anti-terrorism policy statements?
7. How to evidence due diligence with CCRA and legal counsel?

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