

# Charity Legal Risk Management Checklist

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By *Terrance S. Carter. B.A. LL.B.*  
*Carter & Associates*  
*Barristers, Solicitors & Trademark Agent*  
*211 Broadway, Box 440*  
*Orangeville, Ontario L9W 5G2*  
*Tel: (519) 942-2001 Fax: (519) 942-0300*  
*e-mail: [tcarter@carterslawfirm.com](mailto:tcarter@carterslawfirm.com)*

## **A. WHY IT IS IMPORTANT TO IDENTIFY AND MANAGE LEGAL RISKS**

### **1. Increasing complexities and liabilities involved in operating charities**

- |  |   |
|--|---|
| (a) Large budgets  | (l) Directors and Officers liabilities                  |
| (b) Employee relationships                                   | (m) Lifestyle expectations for employees and/or Members |
| (c) Statutory employee deductions                            | (n) Discipline of employees and/or Members              |
| (d) Wrongful dismissal                                       | (o) Fundraising issues                                  |
| (e) Volunteer liability                                      | (p) Corporate compliance requirements                   |
| (f) Charity rules under <i>Income Tax Act</i> and common law | (q) National/international relationships                |
| (g) relationships with the community                         | (r) Insurance issues                                    |
| (h) Counseling practices                                     | (s) Trust funds   |
| (i) Human rights legislation                                 | (t) Donor expectations                                  |
| (j) Public use of facilities                                 | (u) Creditor relations                                  |
| (k) Potential for child abuse and sexual harassment          | (v) Government regulatory bodies                        |
|  | (w) Diffuse decision making structure                   |
|  | (x) Investment restrictions                             |
|  | (y) Maintaining the goodwill of volunteers              |
|  | (z) Challenges to institutional authority               |

### **2. Consequences of deficient legal organization and charitable operations**

- (a) Legal actions by aggrieved parties

- |   |  |
|---|--|
| (b) Increased damage awards                         | (f) Violation of Human Rights Legislation                      |
| (c) Changing limitation period                      | (g) Revocation of charitable status                            |
| (d) Legal costs in remedying problems               | (h) Loss of Corporate status                                   |
| (e) Personal liability exposure for breach of trust | (i) Control by special interest groups                         |
|   | (j) Public inquiries under the <i>Charities Accounting Act</i> |
|   | (k) Potential for splits in churches and/or community groups   |

**3. Who is affected by deficient legal risk management**

- |                                |                |
|--------------------------------|----------------|
| (a) The charity and its assets | (c) Officers   |
| (b) The Board of Directors     | (d) Staff      |
|                                | (e) Volunteers |

**4. Need to be proactive in reducing liability exposure**

- (a) Waiting to react to problems is too late
- (b) Need to be proactive to avoid problems before they occur
- (c) Less expense in avoiding problems than repairing damage after the fact

**5. Recommended procedures to identify and manage legal liabilities**

- (a) Establish small committee as a Liability Management Committee to oversee reducing liability exposure
- (b) Identify areas of liability exposure
- (c) Obtain input from Board and Membership
- (d) Obtain input from lawyer and accountant as required
- (e) Upgrade insurance in consultation with insurance broker
- (f) Develop historical record of insurance coverage
- (g) Develop risk management procedures
- (h) Educate membership on need for legal risk management
- (i) Implement practical solutions expeditiously
- (j) Regular monitoring of legal risk management procedures

**B. IS CHARITABLE STATUS NECESSARY?**

- 1. Not every non-profit organization is a charity**
- 2. Is charitable status necessary or even desirable?**

- (a) Restricted purposes of a charity
- (b) Charities must be operated with significantly higher level of duty for Directors
- (c) There is no distribution of charitable property to members
- (d) Involuntarily becoming a charity

**3. Some form of fund raising may not require charitable status**

- (a) Government funding, if available
- (b) Monies raised from businesses which can write off contributions

**4. Can charitable purpose be accomplished without creating a new charity**

- (a) Joining forces with an existing charity with similar objects
- (b) Acting as agent for established charity to carry out specific purpose

**C. GENERAL OVERVIEW OF ORGANIZATIONAL & LEGAL DOCUMENTATION**

**1. Identifying key organizational documents**

- (a) Do key documents exist?
- (b) Who has documents?
- (c) Documents should be maintained at head office
- (d) Do Board members have copies of key documents?

**2. Key Organizational Documents for an unincorporated charity**

- (a) Constitution
- (b) Amendments to Constitution, if applicable
- (c) Membership Covenant, if applicable
- (d) Mission Statement

**3. Key Organizational Documents for a corporate charity**

- |   |                                   |
|---|-----------------------------------|
| (a) Letters Patent                              | (f) Directors resolutions         |
| (b) Supplementary Letters Patent, if applicable | (g) Members resolutions           |
| (c) Membership Covenant, if applicable          | (h) Directors & Officers register |
| (d) Mission Statement                           | (i) Members register              |
| (e) Bylaws                                      | (j) Register of debts             |
|   | (k) Copies of Government filings  |

**4. Determining other key legal documents**

- |               |                        |
|---------------|------------------------|
| (a) Leases    | (d) Agency agreements  |
| (b) Deeds     | (e) Licence agreements |
| (c) Mortgages |                        |

- (f) Association agreements
- (g) Joint Venture agreements
- (h) Business name registrations
- (i) Trade mark registrations
- (j) Charitable registration number

**D. REVIEW OF DOCUMENTS FOR UNINCORPORATED CHARITY**

1. Is the charity structured as a trust or an association?
2. Is correct name of charity shown on the Constitution?
3. Is name in Constitution confusing with other existing charities?
4. Are all Constitutional documents available?
5. Are there objects stated in the Constitution?
6. Are the objects exclusively charitable?
7. Is there an organizational structure in the Constitution?
8. Do Constitutional documents correctly reflect how the organization is actually structured and operated?
9. Is there a dissolution clause in Constitution to other charities?
10. Does Revenue Canada have a copy of the Constitution?
11. Does Public Guardian and Trustee have a copy of the Constitution?

**E. REVIEW OF CORPORATE STRUCTURE**

**1. Review of Letters Patent:**

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>(a) Is the name in Letters Patent the correct name of the charity?</li> <li>(b) Is the name misdescriptive of the objects?</li> <li>(c) Are there exclusively charitable objects?</li> <li>(d) Are power clauses ancillary to charitable objects?</li> </ul> | <ul style="list-style-type: none"> <li>(e) Is there a membership covenant, if applicable</li> <li>(f) Is a rotating Board authorized for Ontario Corporations?</li> <li>(g) Is a expansion of investment powers needed?</li> <li>(h) Is there a Dissolution clause to other charities?</li> <li>(i) Are powers of a natural person restricted</li> </ul> |
|---|--|

**2. Review of Supplemental Letters Patent**

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>(a) Change of name</li> <li>(b) Change of objects</li> </ul> | <ul style="list-style-type: none"> <li>(c) Effect of change of objects upon existing charitable property</li> </ul> |
|---|---|

- (d) Establish rotating Board for Ontario Corporations
- (e) Possible need to apply for further Supplemental Letters Patent as necessary

### 3. Letters Patent of Amalgamation

- (a) Only available for Ontario corporations
- (b) Requires the same or similar charitable objects
- (c) Existing charitable property must be held in trust for previous charitable objects
- (d) Requires professional assistance in drafting amalgamation agreement

### 4. Review of Corporate By-Law for basic terms

- (a) Are objects correctly repeated?
- (b) Is there a variable size of Board? (not Ontario)
- (c) Rotating term of Board members
- (d) Definition of Directors
- (e) Qualifications of Directors
- (f) Removal of Directors
- (g) Procedures for Board meetings
- (h) Board meetings by telephone (not Ontario) conference call
- (i) Is an Advisory Board appropriate?
- (j) Definition of Membership
- (k) Qualifications and rights of Membership
- (l) Discipline procedure
- (m) Procedure for Membership meetings
- (n) Proxy vote of Members (mandatory for Ontario)
- (o) Description of Officers positions
- (p) Appointment and removal of Officers
- (q) Establishment of an effective committee structure
- (r) Provision for Policy Statements
- (s) Lifestyle expectations for employees
- (t) Alternative dispute resolution mechanism (ADR)

- (u) Corporate year end
- (v) Corporate seal
- (w) Incorporation by reference of corporate bylaw of another charity
  
- (x) Indemnification of Directors and Officers
- (y) Borrowing authorized
- (z) Change in head office location
- (aa) Appointment of auditor
- (bb) Appointment of audit committee
- (cc) Requirement for two signatures for checks
- (dd) Bylaw amendment procedure

**5. Incomplete initial corporate organization**

- (a) Initial Bylaws not adopted by Directors or Members
- (b) No initial Directors resolutions
- (c) No initial Members resolutions
- (d) No records of who are initial Members
- (e) No transfer of Membership to incorporated charity
- (f) No assignment of charitable registration number
- (g) No transfer of assets to incorporated charity
 

!	real estate	!	copy rights
!	bank accounts	!	business names
!	investments	!	trademarks
- (h) No assumption of debts and obligations by incorporated charity
 

!	mortgages	!	accounts payable
!	bank loans	!	promissory notes
- (i) No indemnification of Directors and Officers of unincorporated charity
- (j) No consent to act as Directors
- (k) No signed application for Membership
- (l) No Directors or Officers register
- (m) No Membership register
- (n) No debt register
- (o) No registration under *Business Name Act* (Ontario)
- (p) No banking bylaw or resolution

**6. Incomplete records of Board decisions**

- (a) Board minutes not kept in minute book or signed by chair
- (b) No standardized format of Board minutes
- (c) Failure to maintain quorum of Directors in by-law
- (d) Failure to maintain at least three Directors

**7. Inadequate records of Membership meetings**

- (a) No records of admission of new Members
- (b) Membership minutes not kept in minute book or signed by chair
- (c) Missing annual meetings to approve financial statements and appoint an auditor
- (d) Failure to give notice to Members
- (e) Failure to elect Directors
- (f) Failure to admit Directors as Members within 10 days after election or appointment (for Ontario Corporations)
- (g) Failure to obtain Membership approval for by-law
- (h) Failure to record special resolutions requiring Membership approval and publish in Ontario Gazette for Ontario Corporations
  - ! change in head office
  - ! change in number of Directors
- (i) Failure to maintain quorum and/or at least three Members to avoid personal liability for Ontario Corporations
- (j) Possible need to seek court order to remedy deficient records

**8. Inadequate Board and/or Members authorization for indebtedness**

- (a) Bank borrowing
- (b) Unsecured loans
- (c) Mortgages
- (d) Planned giving vehicles

**9. Maintaining corporate records**

- (a) Need for multiple volumes
- (b) Proper format of minutes for annual meetings
- (c) Directors, Officers & Members register
- (d) Location of corporate records
- (e) Debt register

**10. Maintaining corporate filings and registration**

- (a) Ontario
  - ! Initial Form - 1
  - ! Notice of change
  - ! *Business Name Act* registration
  - ! Report to Public Guardian and Trustee
- (b) Canada
  - ! Annual Form 3 - Canada
  - ! Extra-Provincial Form 2 - Ontario
  - ! *Business Name Act* - Ontario registration
  - ! Report to Public Guardian and Trustee - Ontario
- (c) Jurisdiction of Public Guardian and Trustee applies to all charities operating in Ontario no matter where established

- (d) Maintaining registration and information returns under *Federal Lobbyists Registration Act*

**11. Developing, recording and implementing Policy Statements**

- (a) Preparing Policy Statements on
  - ! Avoiding and reporting child abuse
  - ! Avoiding sexual abuse
  - ! Avoiding sexual harassment
  - ! Supervising appropriate counseling
- (b) Adopting Policy Statements by Members
- (c) Recording Policy Statements as part of corporate records

**12. Loss of corporate status and dissolution**

- (a) Dissolution through failure to maintain government filings
- (b) Effect of dissolution and the *Escheat Act* of Ontario (vesting of property in the Crown)
- (c) Compliance with the *Income Tax Act* upon dissolution
- (d) Reviving a dissolved corporation
- (e) Developing a contingency plan for dissolution

**13. Proper use of corporate name**

- (a) Is the name consistent with the charitable objects?
- (b) Always use full corporate name
- (c) Use of correct name on all letterhead and documents
- (d) Proper signing of documents using full corporate name

**14. Proper use of business names other than corporate name**

- (a) Identification of business names
- (b) Registration required under *Business Name Act* of Ontario with renewals every five years
- (c) Relationship of business name and corporate name must be shown on all letterhead and documents

**F. SPECIFIC ORGANIZATIONAL ISSUES FOR RELIGIOUS CHARITIES**

**1. Constitutional Issues for churches**

- (a) Are religious objects exclusively charitable or only motivational?
- (b) Is statement of faith documented?
- (c) Have Trustees been appointed under the *Religious Organization Lands Act* to hold land for unincorporated churches?
- (d) Do Trustees understand their responsibility and exposure to liability?
- (e) Should an unincorporated church become incorporated?
- (f) Do objects of local churches reflect objects of a local congregation or those of a denomination?
- (g) Are adherents as well as members to be bound by church Constitution?

**2. Specific Policy Statements for religious charities**

- (a) Lifestyle expectations for Members
- (b) Avoiding and reporting child abuse
- (c) Avoiding sexual harassment

(d) Ensuring that all Members and employees are informed of and agree to abide by Policy Statements

**3. Church Discipline**

- (a) Is the church to exercise discipline over its Members and/or employees?
- (b) Is the basis for church discipline explained in church Constitution?
- (c) Does the church Constitution set out a procedure for church discipline?
- (d) Does the procedure for church discipline reflect principals of natural justice?
- (e) Is there a process of mandatory alternative dispute resolution (ADR) to reduce the threat of legal action?
- (f) Are there limitations on withdrawal from membership in the event of church discipline?

**4. Ministers on controlling Boards of Churches**

- (a) Case law applies in a church context means that ministers should not be members of controlling board of churches
- (b) Alternatives available
  - ! Create one Board to deal with spiritual matters only (i.e., Elders) and another Board to deal with administrative matters only (i.e., Deacons)
  - ! Establish a single Board structure but ensure the minister is given right to attend and participate at Board meetings
  - ! Obtain court order to permit minister to be on church Board

**G. UTILIZING MULTIPLE CHARITABLE CORPORATIONS**

**1. Use of multiple charitable corporations to reduce liability exposure activities**

- (a) Contains liabilities of an associated charitable activity in a separate corporation
- (b) Maintaining control over associated charitable corporations by controlling qualifications to be a Director

**2. Establishing and utilizing a parallel foundation**

- (a) To assist in developing an endowment program
- (b) To protect future assets in a separate corporation
- (c) Using parallel foundation as a holding corporation for existing assets
- (d) Maintaining control over parallel foundations by controlling qualifications to be a Director
- (e) Are foundation objects charitable?
- (f) Are restrictions in objects needed to coincide with implications of foundation name?
- (g) Are funds of operating charity deposited into parallel foundation?
- (h) Are funds of operating charity being transferred to parallel foundation with different objects?

- (i) Does dissolution clause of foundation conflict with limitations implied by name of foundation?

## **H. BOARD MANAGEMENT ISSUES**

### **1. Identifying what group is in charge of the charity**

- (a) Where does defacto control lie?
  - ! executive staff ! the Board
  - ! key committees ! the Membership
  - ! key donors

- (b) Is Board authority recognized by Membership?

### **2. Determining lines of control between Board and C.E.O.**

- (a) Is CEO in charge or is Board?
- (b) Is CEO accountable to the Board?
- (c) Is there regular contact by Board with CEO?
- (d) Are U.S. Board models being relied upon without consideration of Canadian Law?

### **3. Frequency and attendance of Board meetings**

- (a) Need to meet between 2-12 times a year depending on size of operations
- (b) Board membership is not a honorary position
- (c) Regular attendance at Board meetings is mandatory

### **4. Establishment of audit committees**

- (a) Number of members of Audit Committee
- (b) Number of Board Members/non-Board members
- (c) Frequency of meetings of Audit Committee

### **5. Communicating Board responsibilities to existing and future Board Members**

- (a) Need to create a Board Binder consisting of
  - (i) Letters Patent
  - (ii) Supplemental Letters Patent
  - (iii) Membership Covenant, if applicable
  - (iv) Mission Statement, if applicable
  - (v) Bylaws
  - (vi) Policy Statements
  - (vii) Legal explanation of
    - ! General operation of a corporation
    - ! Operating a corporation as a charity
    - ! Board legal duties and liabilities
- (b) Need to regularly update Board Binder
- (c) Provide all future Board members with copies of Board Binder

- (d) Ensure return of Board binder on retirement of Directors

**6. Developing an effective Board**

- (a) Provide agenda and relevant information to Board Members in advance of meetings
- (b) Do not allow Chairperson to pre-empt meetings
- (c) Develop long range and short term goals
- (d) Identify critical issues and deal with them
- (e) Develop a Board succession plan
- (f) Develop a Board with a broad range of experience
- (g) Encourage Board members to take and keep notes

**I. REDUCING BOARD LIABILITY**

**1. Addressing conflict of remuneration of Directors**

- (a) Is executive director or other employees members of the Board?
- (b) Do Board members receive any form of direct or indirect remuneration or benefit from the charity?
  - ! salary ! contracts
  - ! free services ! interest on outstanding loans to charity
- (c) Is a court order appropriate to permit remuneration?
- (d) Structure bylaw to avoid problems
  - ! Establish an Advisory Board
  - ! Ensure that appropriate executive employees are given right to attend and participate at Board meetings

**2. Indemnification of Directors and Officers**

- (a) Need to establish indemnify of Directors and Officers by Bylaw
- (b) Need to approve Indemnification Bylaw by Members
- (c) Review wording of Indemnification Bylaw

**3. Caution in delegating Board responsibilities**

- (a) Potential liability of Committee members if doing work of Board
- (b) Potential liability of Members of corporation if doing work of Board

**4. Reducing the size of the Board**

- (a) Reduces number of people exposed
- (b) Alternative means of obtaining participation by non-Board Members
  - ! Officer positions
  - ! Committee members
  - ! Advisory Board

**5. Effective use of Committees**

- (a) Delegate work of Board to Committees where possible
- (b) Committee recommendations must be subject to Board approval

- (c) Committee Members may avoid exposure as Board Members but must be limited to recommendations only

**6. Implementing an Advisory Board**

- (a) Advisory Board facilitates obtaining advice from larger constituency
- (b) No exposure of Advisory Board as directors if the Advisory Board does not function as a Board of Directors.

**7. Protecting personal assets of Directors**

- (a) Wealthier Directors may be more exposed to claims as "deep pockets"
- (b) Investigate financial viability of charity before accepting appointment to Board
- (c) Possibly use of spouse as "safe haven" for family assets
- (d) Need to comply with *Fraudulent Conveyance Act* in conveying assets
- (e) Secure director and officer liability coverage through either the charity or homeowner policy, if applicable
- (f) Mass resignation from Board may not relieve Directors from liability
- (g) Do Directors need to obtain independent legal advice?

**8. Establishing due diligence procedures for Board members**

- (a) Obtain professional advice for difficult decisions and/or general guidance
- (b) Regular review of governing documents and mission statement
- (c) Regular review of activities of CEO and senior management
- (d) Regular training sessions for staff
- (e) Regular monitoring of staff supervision
- (f) Regular review of payroll and statutory deductions from payroll
- (g) Regular review of charitable activities compared to charitable objectives
- (h) Regular review and update of corporate records
- (i) Annual review and upgrade as necessary of insurance policies
- (j) Maintaining Board confidentiality
- (k) Annual assessment of Board's effectiveness
- (l) Maintaining, updating and distributing Board Binder (See H - 5 above) to all Board Members
- (m) Establishing and monitoring work of Legal Risk Management Committee
- (n) Ensuring that Policy Statement on avoiding sexual harassment and child molestation are enforced
- (o) Compliance with statutory duties to report child abuse
- (p) Reduce physical hazards on premises
- (q) Identify high risk ministries requiring greater monitoring
- (r) Obtain release and waivers from the public as necessary
- (s) Annual review of risk management policies

**J. INSURANCE CONSIDERATIONS**

**1. Maintain Historical Record of Insurance Coverage**

- (a) Type of insurance coverage, i.e., occurrence basis v. claims made
- (b) Need for historical records of insurance policy occurs where policy is on occurrence basis
- (c) Maintain historical list of insurance companies

- (d) Maintain historical list of names of insurance brokers

**2. Annual report on existing coverage and recommendations from insurance broker**

- (a) Insurance broker as professional advisor
- (b) Need to obtain and carefully review annual report from insurance broker to determine coverage provided, coverage excluded and recommendations for additional coverage

**3. Review and upgrade property insurance**

- (a) Does policy cover protection for replacement cost?
- (b) Is the amount of property coverage adequate?
- (c) Review and upgrade policy endorsements as necessary
- (d) Review and eliminate exclusions in policy as necessary or as possible

**4. Review and enhance general liability coverage**

- (a) Is the amount of general liability coverage adequate to cover future claims?
- (b) Need to provide written disclosure of all changes in material risks to insurance broker annually
- (c) Liability insurance provides coverage for negligent actions but does not generally provide coverage for:
  - (i) intentional acts
  - (ii) criminal acts
  - (iii) fines and penalties
  - (iv) punitive and exemplary damages
  - (v) wrongful acts of directors and officers, ie., discriminatory practices and breach of fiduciary duty
  - (vi) pollution and contamination
  - (vii) contract liability
- (d) Possible problems in general liability policy
  - (i) Sexual abuse or harassment exclusion
  - (ii) Molestation of children exclusion
  - (iii) Mental anguish and distress exclusion
  - (iv) Clergy malpractice
  - (v) Counseling coverage limitations
    - ! breadth of coverage
    - ! coverage only for named individuals
  - (vi) Exclusion for broadcasting, telecasts and advertising
  - (vii) Who are the insured?
    - ! Directors
    - ! Committee members
    - ! General Membership
    - ! Volunteers
    - ! Spouses
  - (viii) Limitations on geographic area covered
  - (ix) Non-owned automobile liability rider
  - (xi) Professional liability coverage for specialized services
  - (xii) Are legal defense costs a part of or in addition to coverage limit?

## **5. Securing directors and officers liability coverage**

- (a) Is Director and Officer coverage for wrongful acts a justifiable expenditure of charitable monies?
- (b) Is amount of Director and Officer coverage adequate?
- (c) General exclusions in coverage for:
  - ! criminal acts
  - ! fines and penalties
  - ! libel and slander
  - ! wrongful dismissal
  - ! personal injury including mental anguish and distress
  - ! pollution and contamination
- (d) Is coverage for Directors and Officers or for corporate indemnification?
- (e) Are former directors, officers, trustees, managers and other leaders of the charity included as named insureds?
- (f) What geographic area is covered and can it be extended?
- (g) Are legal defense costs a part of or in addition to the coverage limit?
- (h) Possibly use separate insurance company depending upon financial capability
- (i) Possibly obtain Director and Officer endorsement on homeowner coverage

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

### **1. Potential Liability**

- (a) Exposure under the *Occupier's Liability Act*
- (b) Charity owned or operated vehicles
- (c) Contaminated food
- (d) Defective equipment

### **2. Develop a Property Use Policy**

- (a) Property use Policy needs to be in writing
- (b) Develop appropriate forms as necessary
- (c) Property use Policy applies to land, buildings and vehicles
- (d) Need for signed waiver from members of the public in some situations

### **3. Develop a sample licence agreement with indemnification**

- (a) Licence agreement can be built into application form to use properly
- (b) Indemnification of charity needed

### **4. Obtaining evidence of liability insurance**

- (a) Require certificate of insurance from licensee
- (b) Does insurance policy of charity cover use by licensees?

### **5. Appropriate Rental Charges**

- (a) Flexible charges for charities
- (b) Fair market value charge required for non-charities

### **6. Effectively implementing a Property Use Policy**

- (a) Establishing a Property Use Committee
- (b) Consistently applying Property Use Policy

## **L. REAL PROPERTY ISSUES**

- 1. Re-register deeds within forty (40) years to maintain priority under the *Registry Act* (Ontario)**
  - (a) need to deal with lands at least once every 40 years if not in Land Titles
  - (b) Possible loss of lands through fraud and/or boundary misdescription
  - (c) Problems of inadequate legal description in old deeds
- 2. Possible loss of exemption from municipal taxation for churches under the *Assessment Act***
  - (a) Sale of church lands to third parties with lease back
  - (b) Effect of transfer to an associated corporation or parallel foundation
- 3. Implications of terms of trust under a church trust deed**
  - (a) Relevancy of old church trust deeds outside of 40 year search period in *Registry Act*
  - (b) Possible reversion to the Grantor
  - (c) Doctrinal trusts
  - (d) Use trusts
  - (e) Possible need for Cy-Pres court application if trusts cannot be complied with
- 4. *Planning Act* (Ontario) pitfalls**
  - (a) Merging of properties in the same name
  - (b) Inability to convey assembled parcels of land separately
- 5. Encroachments with neighbouring land**
  - (a) 10 year rule in *Limitation Act*
  - (b) Documenting a beneficial encroachment
  - (c) Eliminating a prejudicial encroachment
- 6. Municipal zoning and legal non-conforming uses**
  - (a) Determine current zoning
  - (b) Monitoring change in zoning
  - (c) Effect of legal non-conforming use
  - (d) Upgrading zoning designation
- 7. Forced sale of land under *Charities Accounting Act***
  - (a) Only applies to charitable corporations
  - (b) Public Guardian and Trustee may register notice on title of intent to sell land if  
! land is not actually used for charitable purposes for three years

- !
  - !
- land is not required for actual use for charitable purposes  
land will not be so required in the immediate future

## **8. Liability for Toxic Property**

- (a) Potential contamination from
  - !
  - !
  - !underground oil/gas tanks  
previous owners  
tenants
- (b) Effect of environmental legislation on current owners
- (c) Liability exposure for Trustees and/or Directors
- (d) Disclosure requirements on sale of property
  
- (e) Investigate possibility of contamination before accepting gift of land from donors or estates
- (f) Is an environmental audit needed?

## **M. LEASING ISSUES**

### **1. Pitfalls in offers to lease**

- (a) Long form of lease not attached to offer
- (b) Improper description of parties and premises
- (c) Need for subsearch and corporate search
- (d) Tenant required to sign Landlord's "standard form"
- (e) No definition of "proportionate share" of operating expenses
- (f) Limiting operating expenses in additional rent
- (g) Permitted use by tenant
- (h) Possible restriction on usage by other tenants
- (i) Right of renewal
- (j) Right of first refusal for additional space

### **2. The effects of personal guarantees in leases**

- (a) Do guarantors understand effect of guarantee on their credit rating?
- (b) Guarantee applies to whole debt not just pro-rata share of debt
- (c) Guarantee should be limited in time
- (d) Guarantee should be terminated on assignment of lease

### **3. Registering Notice of Lease on title - when and why**

- (a) Seven year priority rule under *Registry Act* (Ontario)
- (b) Effect of amendments to lease on registered notice of lease

## **N. INTELLECTUAL PROPERTY ISSUES**

### **1. Trademark Registration**

- (a) Protection of key names and/or logos may require trademark

- registration
- (b) Possibly extend trademark registration to include future use of trademark or "Section 9" registration to block use by others
- (c) Proper notation of trademarks, ie., "TM" for unregistered marks and "R" for registered marks

**2. Ownership of Copyright**

- (a) Who owns copyright for books, pamphlets, and audio/video tapes
- (b) Possible need to register copyright
- (c) Possible need to assign and/or licence copyright

**O. EMPLOYMENT AND VOLUNTEER MATTERS**

**1. Hiring Policies and Practices**

- (a) Developing a Hiring Policy
- (b) Compliance with exception provisions of the Human Rights legislation
- (c) Application forms for employment
- (d) Maintenance of personnel records

**2. Documenting lifestyle expectations for employees**

- (a) Establishing general Policy Statements on lifestyle expectations
- (b) Specific Policy Statements for employees and volunteers

**3. Establishing employment contracts**

- (a) Form of contract
- (b) Developing job description
- (c) Use of contracts with present employees
- (d) Use of contracts with future employees

**4. Documentation for volunteers**

- (a) Written acknowledgment to set out expectations
- (b) Consistent application of Volunteer Policies

**5. Developing and implementing an employee and volunteer manual**

- (a) Initial development of an Employee and Volunteer Manual
- (b) Updating Manual
- (c) Consistently applying Manual

**6. Discipline Process**

- (a) Development of Employee Discipline Policy
- (b) Application of Discipline Policy
- (c) Natural Justice requirements for Discipline Policy

**7. Occupational Health and Safety**

- (a) Employer's duties
- (b) Health and Safety Committees
- (c) Employee refusal to do unsafe work

**8. Collateral Statutory Compliance Matters**

- (a) Pay Equity
- (b) Employment Standards Legislation
- (c) Human Rights Legislation

**P. CHARITABLE ACTIVITIES**

**1. Ensuring that operations are done in accordance with charitable objects**

- (a) Activities that are ultra vires corporate authority
- (b) Activities that contravene charitable purposes
- (c) Need to regularly review charitable operations compared to objects

**2. Related business activities**

- (a) Permitted if related to charitable activities
- (b) Need to regularly monitor related business operations
- (c) Private foundations not permitted to carry on business operations

**3. Deemed related business activities**

- (a) Unrelated business activities will be deemed related business activities if done exclusively by volunteers
- (b) Otherwise unrelated business activities need to be carried out through separate non-charitable corporation

**4. Determine if charitable monies are used to fund deficits in business operations**

- (a) Are charitable monies used to fund deficits in related or unrelated business operations?
- (b) Potential liability for using charitable monies to cover deficits in unrelated business operations

**5. Political activities**

- (a) Is activity fundamentally charitable or fundamentally political
- (b) If activity is fundamentally political then
  - ! must not involve partisan political activities
  - ! must ensure that substantially all of its resources are devoted to charitable activities
  - ! must not exceed 10% of disbursement quota on political activities

**6. Restrictions on gifting of charitable property**

- (a) Charitable property can only be gifted to another registered charity

- (b) Not every "Qualified Donee" under *Income Tax Act* is a charity
- (c) Dissolution clause should refer to transfers to other charities not qualified donees

**7. Prohibitive fundraising activities by charitable staff**

- (a) Staff drafting wills for donors
- (b) Staff drafting powers of attorney for donors
- (c) Staff acting as an executor for a donor
- (d) Staff acting as an attorney under a Power of attorney for a donor

**Q. FISCAL MANAGEMENT ISSUES**

**1. Are all salaries and benefits being paid?**

- (a) Board needs to ensure regular payments of salaries and deductions
- (b) Statutory and directed deductions must be treated as trust funds

**2. Is the charity operating with a deficit and for how long?**

- (a) Charity should not operate with continuing deficits
- (b) Problematic deficits can occur through
  - ! ongoing operating deficits
  - ! substantial cost overruns in a building program
  - ! improvident investments
- (c) Potential liability of Directors to creditors if bills left unpaid
- (d) Continuing deficits may expose Directors to liability if charitable objects or statutory obligations cannot be met

**3. How is deficit being funded?**

- (a) Mortgaging of equity
- (b) Promissory notes - unsecured
- (c) Bonds and debentures - secured and unsecured
- (d) Mortgage Investment Certificate programs
- (e) Accounts payable to creditors
- (f) Improper use of trust funds

**4. Has a sinking fund been established to retire debt?**

- (a) Debt requires a plan to repay debts, i.e., a sinking fund
- (b) Consequences if no repayment plan
- (c) Continuing deficit may require wind-up of charity

**5. Are improper fund raising vehicles in use?**

- (a) The danger of "follow the leader syndrome" in fund raising

- (b) Improper or illegal issuance of annuities
- (c) Unsecured bonds
- (d) Charity acting as trustee
- (e) Government audits are not necessarily a "seal of approval"
- (f) May need a court ruling or a definitive legal opinion before utilizing a particular fund raising program

**6. Are investments being offered to the public without full disclosure?**

- (a) Possibly need a "prospective" type of disclosure
- (b) Is there full explanation of risk?
- (c) Can obligations arising out of investment be met by charity?
- (d) Need for independent legal advice for investors

**7. Are funds being correctly invested and managed**

- (a) Restriction on investment powers in *Trustee Act*
- (b) Possible expansion of investment powers in letters patent
- (c) Improvident investments by charity
- (d) The danger of "follow the leader syndrome" in investments
- (e) Are charitable funds being held by charity officers either personally or through a private corporation?
- (f) Are two signatures required on cheques and contracts?
- (g) Are precautions being taken against fraud and theft?
- (h) Is there full disclosure of terms of consulting contracts?
- (i) Are payments under consulting contracts reasonable?

**R. TRUST FUND ISSUES**

**1. Are there donor designated trust funds being held by the charity?**

- (a) Donor designated vs. Board designated funds
- (b) Donor designated monies are trust funds to be used only in accordance with designation

**2. Are trust funds kept segregated from operating funds?**

- (a) Must be held as segregated funds
- (b) Must be accounted for separately

**3. Are trust funds used for operational purposes or borrowed against?**

- (a) Improper use of trust funds for operational purposes
- (b) Improper borrowing from trust funds for operational purposes

**4. Are charitable funds used only in accordance with charitable objects?**

- (a) Charitable funds must only be used for charitable objects
- (b) Effect of using charitable funds for non-charitable purposes

**5. Misdirection of charitable funds**

- (a) Are funds of one charity deposited into bank account of another charity?
- (b) Are funds of operating charity being transferred to charity with different objects?

**6. Trust Funds Issues in Building Projects**

- (a) Are statutory trust obligations under *Construction Lien* legislation being complied with?
- (b) Are holdbacks in building projects being complied with?

**7. Consequences of Breach of Trust**

- (a) Personal liability of Directors and Officers
- (b) Involvement of Public Guardian and Trustee under *Charities Accounting Act* (Ontario)
- (c) Violation of the *Trustee Act* (Ontario)

**S. MAINTAINING CHARITABLE REGISTRATION**

**1. Co-ordinating correct name of charity with records of Revenue Canada**

- (a) Compare name in Letters Patent to that recorded with Revenue Canada
- (b) Communicate with Revenue Canada to rectify any errors

**2. Maintaining current address with Revenue Canada**

- (a) Does Revenue Canada have current head office address?
- (b) Improper head office address may result in de-registration of charity

**3. Obtaining Quebec charitable registration**

- (a) Is Quebec registration required?
- (b) Procedure to obtain registration in Quebec

**4. Maintaining Statutory Requirements of Revenue Canada**

- (a) Is 80% disbursement quota being met?
- (b) Do more than 50% of the directors deal with each other at arms length?
- (c) Does more than 50% of the capital contributed come from one person or persons not dealing at arms length?
- (d) Has annual return (Form T3010) been filed with Revenue Canada within six months of fiscal year end?

**5. Monitoring improper issuance of charitable receipts**

- (a) Improper receipts for mix of purchase of goods and donations
- (b) Improper receipts for donations that benefit donors
- (c) Improper receipts for gifts of service
- (d) Improper receipts for gifts of kind
- (e) Improper receipts for gifts with inducements

- 6. Properly documenting Agency relationship with Non-Qualified Donees**
  - (a) Agency requirements of Revenue Canada when transferring funds and/or assets to non-qualified donees
  - (b) Agency documentation required
- 7. Properly documenting Joint Venture arrangements**
  - (a) Determine if a Joint Venture Agreement is needed with non-qualified donees
  - (b) Preparing and negotiating a Joint Venture Agreement
  - (c) Complying with terms of the Joint Venture Agreement
- 8. G.S.T. considerations**
  - (a) When to register for G.S.T.
  - (b) Availability of input tax credit and rebates for charities

## **T. NATIONAL/INTERNATIONAL RELATIONSHIPS**

- 1. Documenting relationship with National Organizations and/or Subsidiary Chapters**
  - (a) Relationship with National Organization
    - ! Membership in National Organization
    - ! National Board structure
  - (b) Relationship with Subsidiary Chapters
    - ! Separate incorporation of Chapters to limit liability
    - ! Grant of licence of charity name to Chapters
    - ! Structure to oversee standards of Chapters
    - ! Alternative dispute resolution mechanism (ADR) to reduce litigation
    - ! Improper control by National Organization over Chapters, i.e., unilateral imposition of dissolution on chapters
- 2. Documenting relationship of National Organization to International Structure**
  - (a) Documenting international structure
  - (b) Grant of licence of name to National Organization
  - (c) International input through National Board qualification
  - (d) Alternative dispute resolution mechanism (ADR)
- 3. Establishing ownership of trademarks and licensing documentation**
  - (a) Who owns key trademarks internationally
  - (b) Registration of trademarks
    - ! in Canada
    - ! in other jurisdictions
  - (c) Usage of trademarks through licensing
  - (d) revoking grant of licence

