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## LEGAL RISK MANAGEMENT CHECKLIST FOR CHARITIES & NOT-FOR-PROFITS (*CONDENSED VERSION*)

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### A. INTRODUCTION

The operations of charities have become complex and the possibility of litigation against charities is greater than ever before. The exposure of charities to liability goes further than the loss of charitable assets and/or the insolvency or winding up of a charity. Directors of charities may also face possible legal action 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 adequately protect or apply the assets of a charity. Given the increased risks to both charities and their directors, there is an increasing need to protect charitable assets from lawsuits and creditors on a pro-active basis.

The purpose of this legal risk management checklist is to provide a brief outline of some of the more important issues that directors and/or executive directors of a charity, whether incorporated or not, may need to consider in ensuring due diligence in the operation of the charity, as well as an overview of liability exposure faced by charities in Canada and some of the steps available to protect charities against such risks. As it is impossible to adequately address all aspects of liabilities being faced by charities and the pro-active steps which need to be taken to protect against such risks, this checklist provides only a general overview of some of the considerations that charities and their board of directors may need to be aware of to both identify and manage legal risks. Some of the comments and recommended procedures contained in this legal risk management checklist may also be applicable to not-for-profit non-charitable organizations.

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

1. Is charitable status needed?
  - a) Do charitable receipts need to be issued?
  - b) Can the organization work under the auspices of an existing charity?
  - c) Business donors may not require charitable receipts.
  
2. General overview of organizational & legal documentation
  - a) Identify the existence and location of key organizational documents
    - Develop an inventory of key documents
    - Maintain central location for key documents
  - b) Identify key organizational documents for an unincorporated charity
    - Constitution and amendments, if applicable
    - Policy statements, if applicable
  - c) Key organizational documents for a corporate charity
    - Letters patent and supplementary letters patent, if applicable
    - Membership covenant and mission statement, if applicable
    - By-laws and resolutions
    - Directors, members and debt registers
    - Copies of government filings
  - d) Determining other key legal documents
    - Leases, deeds and mortgages
    - Agency, association and joint venture agreements
    - License agreements
    - Business name, trade-marks and Section 9 official mark registrations
    - Charitable registration number
    - Policy statements, i.e. sexual abuse policy statement
    - Insurance policies
  
3. Review of key documents for unincorporated charity
  - a) Are there objects stated in the constitution and are they exclusively charitable?
  - b) Do constitutional documents correctly reflect how the organization is actually structured and operated?
  - c) Is a copy of the constitution filed with the appropriate government agencies, i.e. with Canada Customs and Revenue Agency (“CCRA”) and the Public Guardian and Trustee (“PGT”)?

4. Review of corporate structure
  - a) Review of letters patent
    - Is the name in the letters patent the correct name of the charity consistent with the charitable objects of the charity?
    - Are its objects exclusively charitable?
    - Are the activities carried out by the charity authorized by its charitable objects?
    - Is the dissolution clause complementary to the charitable objects?
  - b) Review of supplementary letters patent
    - Has there been a change of corporate name and/or objects?
    - What is the effect of a 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 the charitable objects of the previous charitable corporations
  - d) Need to review corporate by-law for basic terms, such as
    - Do provisions conflict with letters patent?
    - Do provisions reflect changes to corporate legislation?
    - Is there an adequate indemnification provision?
    - Are the by-law amendment procedures consistent with corporate legislation?
  - e) Was the initial corporate organization of the charity properly done?
  - f) Was there a documented transfer of assets and liabilities on incorporation?
  - g) Are the records of board decisions and/or membership meetings complete?
  - h) Was there adequate board and/or members' authorization for indebtedness?
  - i) Have corporate records been properly maintained?
  - j) Have necessary corporate filings and registrations been kept up to date?
    - Ontario Corporations:
      - Initial Notice and Notice of Change - Form 1
      - *Business Name Act* (Ontario) registrations
      - Mandatory reporting to Public Guardian and Trustee
    - Canada Corporations:
      - Annual Summary (Form 3) – Canada
      - Extra-Provincial Initial Notice (Form 2) – Ontario
      - *Business Name Act* (Ontario) registrations
      - Mandatory report to Public Guardian and Trustee
    - Does the charity operate and/or fundraise in any other provinces? If so, there may need to be registration as extra-provincial corporation and/or fundraiser in other provinces.

- k) Has there been loss of corporate status for failure to maintain government filings?
- l) Is the charity aware of the importance of proper use of corporate name and operating names?
- m) Has the charity developed and implemented a policy statement on child abuse, sexual abuse, sexual harassment or bullying, where applicable?

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

- 1. Should the charity consider using multiple charitable corporations for its high risk activities in order to reduce liability exposure?
- 2. Should the charity consider establishing and utilizing a parallel foundation for either fundraising or protection of charitable assets?
- 3. Has consideration been given to balancing control of multiple corporations with issues involving cross over liability?
- 4. Has consideration been given to implementing control through contracts and/or licensing agreements as an alternative to corporate control?

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

- 1. Is the charity able to identify which group is in charge?
  - a) i.e., Where does the de facto control of the charity lie? Is it with a board, a committee or executive staff?
  - b) Is board authority recognized by the membership?
- 2. Are there clearly defined lines of control between the board and the executive staff?
- 3. Does the board meet on a regular basis and do directors regularly attend?
- 4. Does an audit committee need to be established to review financial statements and the auditors' report?
- 5. Is there adequate communication of board responsibilities to existing and future board members?
  - a) Need to create a board binder of all corporate documents, as well as an explanation of the general operations of the corporation as a charity and the board of directors' legal duties and liabilities
  - b) Need to provide regular updates on changes in the law to board members

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

- 1. Do directors receive direct or indirect remuneration or other financial benefit from the charity in contravention of their fiduciary duties?

2. Has the charity indemnified its directors and officers in accordance with the *Charities Accounting Act* (Ontario)?
3. Is there corporate authority to acquire directors' and officers' liability insurance in accordance with the requirements of the *Charities Accounting Act* (Ontario)?
4. Has the board delegated too much responsibility to executive staff by restricting itself to policy decisions only?
5. Should the charity consider reducing the size of the board?
6. Is the charity effectively making use of committees as an alternative to a large board of directors?
7. Should the charity consider implementing an advisory board to complement the board of directors?
8. Has the charity established a comprehensive due diligence procedure by utilizing legal risk management checklists?

#### **F. INSURANCE CONSIDERATIONS**

1. Has the charity maintained a historical record of its insurance coverage in the event of a future claim?
2. Is there occurrence-based or claims-made insurance coverage for sexual abuse?
3. Has the charity provided full disclosure of all risks to its insurer to avoid denial of coverage?
4. Does the charity require regular reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?
5. Is there a regular review of the adequacy and extent of general liability coverage and property insurance?
6. Is there a regular review of directors' and officers' liability coverage?

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

1. Is the charity aware of the potential liability exposure in permitting third parties to use its property?
2. Has the charity developed and implemented a third party property use agreement with appropriate indemnification?
3. Does the charity require evidence of liability insurance from third party users of its facilities?
4. Does the charity charge appropriate fair market rental fees to non-charities?

## **H. REAL PROPERTY ISSUES**

1. Has the charity re-registered deeds within forty (40) years to avoid possible loss of priority under the *Registry Act* (Ontario) where conversions to qualified land title is pending?
2. Has the charity addressed and rectified encroachments with neighbouring lands?
3. Are there charitable trust restrictions in old trust deeds on title and, if so, are they being complied with?
4. Are municipal zoning and legal non-conforming uses being complied with?
5. Could the charity be forced to sell surplus land under *Charities Accounting Act* (Ontario)?
6. Has the charity identified and evaluated the extent of liability exposure for toxic property?

## **I. INTELLECTUAL PROPERTY ISSUES**

1. Does the charity need to register any of its key names and/or logos as trade-marks?
  - a) Identify trade-marks
  - b) Protect trade-marks
  - c) License trade-marks
2. Who owns the copyright for publications of the charity?
3. Should copyright be registered, assigned or licensed?

## **J. EMPLOYMENT AND VOLUNTEER MATTERS**

1. Has the charity developed appropriate hiring policies and practices for its employees?
2. Is there need for an employment contract with key employees?
3. Is there a need to develop and adopt policy statements and/or manuals for employees as well as volunteers?
4. Do employees and volunteers who deal with children need to be screened and supervised in accordance with an appropriate sexual abuse policy statement?
5. Is there need for a discipline procedure for employees and/or volunteer members?
6. Is the charity aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation and occupational health and safety prerequisites?

### **K. CHARITABLE AND FUNDRAISING ACTIVITIES**

1. Has the charity ensured that its charitable activities are done in accordance with its charitable objects?
2. Are fundraising and/or administrative costs kept within the 80/20 disbursement quota?
3. Has fundraising legislation, where applicable, been complied with?
4. Have fundraising programmes been reviewed by legal counsel?
5. Are donors' rights to require accountability respected, particularly rights under the *Charities Accounting Act* (Ontario)?
6. Does the charity have a privacy policy in place in order to protect donors' rights?

### **L. FISCAL MANAGEMENT ISSUES**

1. Are all salaries and benefits being paid by the charity?
2. Is the charity operating with a deficit and, if so, for how long?
3. How is the deficit being funded?
4. Has a sinking fund been established to retire debt?
5. Are investments being offered to the public without full disclosure to potential investors?
6. Are charitable funds being used to fund separate business operations of the charity?
7. Is there violation of the *Charitable Gifts Act* (Ontario) by the charity owning more than 10% of a business?

### **M. INVESTMENT ISSUES**

1. What investment powers apply to surplus funds of the charity?
  - a) Prudent investor rule under the *Trustee Act* (Ontario) will generally apply
  - b) However, specific investment powers may sometimes apply as contained in
    - Letters patent or supplementary letters patent
    - Endowment and gift agreements
    - Testamentary gifts
2. Does the charity need and/or have an investment policy?
  - a) Documenting compliance with prudent investor rule
  - b) Establishing requirements for delegation of investment decision making
  - c) Prohibition on sub-delegation

## **N. DONOR RESTRICTED TRUST FUNDS**

1. Are there donor restricted trust funds being held by the charity?
  - a) Building funds
  - b) Endowment funds
  - c) Special project funds
  - d) Ten year gifts
2. Are restricted funds being used only in accordance with applicable restrictions?
3. Are restricted funds being used in whole or in part for general operational purposes or are they being borrowed against?
4. Are restricted funds segregated from operating funds?
5. Is there compliance under the *Charities Accounting Act* (Ontario) to co-mingle restricted funds for investment purposes?
6. Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?

## **O. MAINTAINING CHARITABLE REGISTRATION**

1. Is the legal name of the charity and/or its operating name consistent with the records of CCRA?
2. Does CCRA have the current head office address of the charity?
3. Has the charity obtained Quebec charitable status for fundraising in Quebec?
4. Does the charity submit its annual charity information return (Form T3010) on a timely basis?
5. Is the charity involved in political activities?
6. Is the charity involved in unrelated business activities?
7. Is the charity aware of the applicable rules on the issuance of charitable receipts?
8. Are agency and/or joint venture relationships with non-qualified donees properly documented?

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

1. Are relationships with national organizations and/or subsidiary chapters adequately documented?
2. Are relationships between national and international structures adequately documented?
3. Has the ownership of trade-marks and/or copyrights been determined?
4. Have trade-marks and copyrights been adequately protected and licensed?

**Q. ANTI-TERRORISM LEGISLATION**

1. Does the charity carry on operations that may require it to be in compliance with anti-terrorism legislation?
  - a) International operations
  - b) Domestic operations
  
2. Has the charity undertaken appropriate due diligence procedures in complying with anti-terrorism legislation?
  - a) Development of an anti-terrorism policy statement
  - b) Development of resource materials on anti-terrorism legislation
  - c) Requiring disclosure statements for board members and staff
  - d) Evaluating all charitable programs for compliance
  - e) Requiring disclosure statements from affiliated charities, third party agents and/or partners and conducting appropriate inquiries
  - f) Determining when to make inquiries of donors
  
3. Are directors aware of risks associated with failing to comply with anti-terrorism legislation?
  - a) Loss of charitable status
  - b) Personal liability in civil law
  - c) Possible criminal law sanction

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