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LEGAL RISK MANAGEMENT CHECKLIST
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LEGAL RISK MANAGEMENT CHECKLIST FOR NOT-FOR-PROFIT ORGANIZATIONS

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A. INTRODUCTION

The operations of not-for-profit organizations have become complex and the possibility of litigation occurring as a result of their operations is an ever present reality. The exposure of not-for-profit organizations to liability goes further than the loss of the assets themselves and/or the insolvency or winding up of the not-for-profit. Directors of not-for-profit organizations may also personally face legal actions against themselves by members, third parties and governmental authorities for breach of their duties as directors. Given the increased risk to both not-for-profit organizations and their directors, there is an increasing need to protect their assets from lawsuits and creditors on a pro-active basis. While the risks are in some respects not as extensive as those faced by charities (which risks are outlined in a separate checklist), not-for-profit organizations still face many of the same risks as those that face charities.

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 staff of not-for-profit organizations, whether incorporated or not, may want to consider in ensuring due diligence in the organization's operation, as well as an overview of liability exposure faced by not-for-profit organizations in Canada and some of the steps that can be taken to protect them against such risks. As it is impossible to adequately address all aspects of liabilities faced by not-for-profit organizations, and the pro-active steps which should be taken to protect against such risks, this checklist provides only a general overview of the many considerations that not-for-profit organizations and

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their boards of directors may need to be aware of to both identify and manage legal risks.

B. IDENTIFICATION AND MANAGEMENT OF LEGAL RISKS

1. General overview of organizational and 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 not-for-profit organization
      - Constitution and amendments, if applicable
      - Policy statements, if applicable

   c) Key organizational documents for an incorporated not-for-profit organization
      - Letters patent (articles of incorporation) and supplementary letters patent (articles of amendment), if applicable
      - Membership covenant or 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, Section 9 (*Trade Marks Act*) official marks and domain names
      - Operational policy statements, e.g. sexual abuse policy statement and volunteer policy statement
      - Historical record of insurance policies
      - Privacy policies
      - Investment policies

2. Review of key documents for an unincorporated not-for-profit organization

   a) Are the objects clearly stated in the constitution and are they not-for-profit?

   b) Do constitutional documents correctly reflect how the organization is actually structured and operated?

3. Review of key documents for an incorporated not-for-profit organization

   a) Review of letters patent/articles of incorporation
      - Is the name in the letters patent/articles of incorporation the correct name of the not-for-profit organization, and is it consistent with the objects?
      - Are the objects appropriate for a not-for-profit organization, i.e. are they not charitable?
      - Are the activities of the not-for-profit organization authorized by its objects/purposes?
      - Is the dissolution clause complementary to the objects/purposes?

   b) Review of supplementary letters patent/articles of amendment
      - Have all supplementary letters patent/articles of amendment been identified?
      - Has there been a change of corporate name?
      - Has there been a change of corporate objects/purposes?

   c) Letters patent of amalgamation (articles of amalgamation) (only for Ontario corporations)
      - Are the objects the same or similar?
      - What are the terms of the amalgamation agreement?

   d) Does the not-for-profit organization have historical records of all by-laws?

   e) Are the by-law provisions clearly defined and properly passed?

   f) Review of corporate by-law for basic terms
      - Do provisions conflict with the letters patent/articles of incorporation concerning objects/purposes or dissolution?
      - Do the provisions reflect the actual organization and operational structure of the organization?
      - Does the by-law reflect changes to applicable corporate legislation?
      - Is there an adequate indemnification provision for the directors?
      - Are the by-law amendment procedures consistent with corporate legislation?

   g) Was the initial corporate organization of the not-for-profit organization properly done?

   h) Was there a documented transfer of assets and liabilities on incorporation?

   i) Are the records of board decisions and/or membership meetings complete?

   j) Was there adequate board and/or members' authorization for indebtedness, if applicable?

   k) Have corporate records been properly maintained, such as consent to be directors and applications for membership?

   l) Where are the corporate records kept?

   m) 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

- Federal Corporations:
  - Annual Summary (Form 3) – Canada
  - Extra-Provincial Initial Notice (Form 2) – Ontario
  - *Business Name Act* (Ontario) registrations
- Does the not-for-profit organization operate in any other provinces? If so, there may need to be registration as an extra-provincial corporation in other provinces (such as Alberta), together with applicable business name registrations.

n) Has there been loss of corporate status for failure to maintain government filings?

o) Is the not-for-profit organization aware of the importance of proper use of corporate name and operating names?

p) Has the not-for-profit organization developed and implemented risk management policy statements on:

- Abuse prevention,
- Accessibility,
- Authorization procedures (e.g. due diligence as a requirement of obtaining authorization for a decision or action),
- Board succession planning, recruitment, and orientation,
- Brain and spinal injury prevention and management (when working with youth sports),
- Bullying,
- Child protection,
- Codes of conduct,
- Confidential and proprietary information,
- Conflicts of interest,
- Crisis management plan,
- Donor recognition,
- Fiscal management,
- Human resources,
- Investment,
- Privacy (with respect to employees and volunteers),
- Public relations,
- Provision of goods and services to people with disabilities,
- Safety in the workplace,
- Sexual abuse
- Sexual harassment,
- Social media, computing, and acceptable use of technology equipment,
- Volunteer conduct and volunteer recruitment,
- Whistle blowing and fraud prevention, and

- Workplace violence and harassment prevention?

q) Is the content and effectiveness of policies evaluated and reviewed on an annual basis?

r) Has the not-for-profit organization conducted an up-to-date inventory of its assets, including intellectual property, i.e. trade-marks and copyright?

4. Has the not-for-profit corporation reviewed the *Canada Not-for-profit Corporations Act* (Canada) or *Not-for-Profit Corporations Act* (Ontario) to assess what changes will need to be made to its constating documents and to begin continuance process?

   a) Existing federally incorporated not-for-profits have until October 17, 2014 to continue under the *Canada Not-for-profit Corporations Act*

   b) The *Ontario Not-for-Profit Corporations Act* is expected to be proclaimed in force in mid-2014. Once proclaimed, not-for-profit corporations that are incorporated in Ontario will have three years to amend their corporate documents to transition under the new legislation

C. UTILIZING MULTIPLE CORPORATIONS

1. Should the not-for-profit organization consider utilizing multiple corporations for its high risk activities in order to contain future liability exposure?

2. Should a provincial or national not-for-profit organization that consists of member organizations be structured as an umbrella association of multiple corporations or as a single corporation?

3. Should the not-for-profit organization consider establishing a separate foundation to fund exclusively charitable objects that are complementary?

4. Has appropriate consideration been given to balancing indirect control of multiple corporations with issues involving the possibility of cross over liability?

5. Has appropriate consideration been given to implementing effective indirect control through contracts and/or licensing agreements?

D. BOARD MANAGEMENT ISSUES

1. Who is a director?

   a) What are the qualifications and procedures (i.e. election rules) to be elected a director and have all of those qualifications and procedures been met by each director?

   b) Are there conflicting qualifications to be a director in the by-laws, articles and board policies? If so, these conflicts must be reconciled.

   c) Is the register of directors being maintained at least on an annual basis and are any changes among the directors or in their addresses being sent to the relevant government authority? (i.e. At a moment's notice, can the not-for-profit organization definitively determine who the directors are?)

2. Is the not-for-profit organization able to identify which group is in charge of the not-for-profit organization?

   a) Where does the *de facto* control of the not-for-profit organization lie? Is it with a board, a committee or executive staff?

   b) Is authority of the board recognized by the membership?

3. Are the lines of authority between the board and the executive staff clearly defined?

4. Does the board meet on a regular basis with all directors in regular attendance?

5. Does an independent audit committee need to be established to review financial statements and the auditor's report?

6. Is there adequate communication of board responsibilities to existing, new 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 not-for-profit organization and the board of directors' legal duties and liabilities.

   b) Need to provide regular updates on changes in the law to board members.

7. Are the individuals who are authorized to enter into contract as signing officers on behalf of the not-for-profit organization clearly identified in their officer capacity instead of as individuals?

8. Are there policies in place to address board succession planning, recruitment, and orientation?

E. REDUCING BOARD LIABILITY

1. Are the directors aware of their duties with respect to ensuring:

   a) The objects/purposes of the not-for-profit organization are properly carried out and the organization's activities comply with their objects/purposes?

   b) The organization's financial stability and overall performance?

   c) Proper hiring and supervision of management and staff?

2. Has the not-for-profit organization given authority to indemnify its existing and former directors and officers?

3. Has the board authorized the not-for-profit organization to acquire directors' and officers' liability insurance?

4. Has the board delegated too much responsibility to executive staff by restricting itself to establishing policy decisions only without careful and ongoing monitoring and review?

5. Should the not-for-profit organization consider reducing the size of the board to limit the number of people who are exposed to liability as directors?

6. Is the not-for-profit organization effectively making use of committees as an alternate to a large board of directors?

7. Do the board members occasionally need to receive independent legal advice due to the possibility of liability exposure?

8. Should the not-for-profit organization consider implementing an advisory board to complement the board of directors without a corresponding exposure to liability?

9. Has the not-for-profit organization established a comprehensive due diligence review process by establishing and utilizing appropriate legal risk management checklists?

10. Has a risk management committee of the board been established?

11. Are the directors and officers aware of their fiduciary responsibilities at law in operating the not-for-profit organization?

12. Are the directors and officers exercising due diligence in relation to the not-for-profit organization by remaining knowledgeable about its operations and ensuring its assets are properly protected?

13. Are new and existing directors and officers receiving proper orientation and training?

14. Are the directors ensuring that employee source deduction and GST/HST amounts pursuant to the *Income Tax Act* (Canada) and *Excise Tax Act* (Canada) are being made to avoid personal liability?

F. INSURANCE CONSIDERATIONS / RISK TRANSFER

1. Has the not-for-profit organization 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 not-for-profit organization provided full written disclosure each year of all risks to its insurer to avoid denial of coverage?

4. Does the not-for-profit organization request regular written 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, as well as employment benefits and practices liability?

6. Is there directors' and officers' liability coverage in place and is it reviewed on a regular basis to ensure its adequacy?

7. Do there need to be special insurance endorsements to extend insurance coverage to "out of the ordinary" activities, e.g. third party use of facilities, non-owned vehicles, activities of volunteers and agents in foreign countries, and errors and omissions (i.e., professional services)?

8. Has the not-for-profit organization considered obtaining the services of an independent insurance consultant or specialist to conduct a risk management review of the organization's operations and policies from an insurance perspective to determine the adequacy of insurance coverage?

9. Has the not-for-profit organization developed and administered effective liability shields in the form of informed consents, disclaimers, releases, waivers and indemnities for program participants as necessary?

G. THIRD PARTY USE OF NOT-FOR-PROFIT ORGANIZATION PROPERTY

1. Is the not-for-profit organization aware of the potential liability exposure in permitting third parties to use its property?

2. Has the not-for-profit organization developed and implemented a facility use policy and facility use agreement with appropriate releases and indemnification?

3. Does the not-for-profit organization require evidence of liability insurance from third party users of its facilities?

4. Has the not-for-profit organization provided written notice to its insurer concerning the use of its property by third parties?

5. Does the not-for-profit organization charge appropriate fair market rental fees to third parties?

6. Does the organization have the corporate authority to allow third party use of its property?

H. REAL PROPERTY ISSUES

1. Property Owned By the Not-For-Profit Organization

   a) Has an environmental assessment been conducted to determine the extent of possible liability exposure for the organization in relation to future acquisitions as well as existing properties?

   b) Has the not-for-profit organization addressed and rectified encroachments with neighbouring lands?

   c) Are municipal zoning and legal non-conforming uses being complied with?

d) Has the not-for-profit organization reviewed its municipal property tax assessment for accuracy and to determine both classification and valuation? If so, has there been a request for reconsideration or appeal of assessment?

e) Does the not-for-profit organization own property with a cultural heritable value or interest and is therefore subject to the *Ontario Amendment Act*?

f) If the not-for-profit organization has fuel oil storage tanks either above or below ground, is it aware of the requirement for upgrading or removal pursuant to Ontario Regulation 213/01, *Fuel Oil*, under the *Technical Standards and Safety Act, 2000* (Ontario).?

g) Have accommodations been made for people with disabilities in accordance with the *Accessibility for Ontarians with Disabilities Act, 2005* (Ontario)?

2. Property Leased by the Not-For-Profit Organization

a) Does the lease include personal guarantees or indemnities?

b) Has access to adequate parking been ensured?

c) Has the extent of tenant expenses under a net lease arrangement been limited?

d) Has the possible right to sublet and assign the lease, with a release, been ensured?

e) Have the issues of environmental liability for both the landlord and tenant been adequately addressed?

f) Has there been careful monitoring of the date by which an option to renew the lease must be exercised?

g) Has the amount of rent on renewal been made subject to arbitration?

h) Has there been an attempt to obtain a covenant from the landlord to prohibit offensive uses of adjoining leased premises?

i) Does the lease include a clause requiring restoration of leased premises at the end of the lease?

j) Does the lease include a clause permitting the landlord to unilaterally relocate the tenant?

k) Has there been an attempt to obtain a right of first refusal to lease adjoining leased premises?

l) Does the lease need to be registered on title?

m) Have accommodations been made for people with disabilities in accordance with the *Accessibility for Ontarians with Disabilities Act, 2005* (Ontario)?

I. INTELLECTUAL PROPERTY ISSUES

1. Do the board members and executive staff of the not-for-profit organization recognize that trade-marks, internet domain names and copyright are an essential asset of an organization that need to be protected and managed?

2. Does the not-for-profit organization need to register any of its key names and/or logos as trade-marks?

a) Identify trade-marks

b) Protect trade-marks by registration

c) License and enforce trade-marks

d) Use trade-marks in conjunction with appropriate markings of either a ™ or an ®, as applicable

e) Ensure that any third parties using trade-marks enter into a trade-mark licensing agreement

3. Has the not-for-profit organization protected its trade-marks by securing multiple corresponding domain names?

4. Who owns the copyright for publications of the not-for-profit organization and is it properly identified with a notice of copyright protection, i.e. ©?

   a) Does the copyright material produced by employees/volunteers need to be registered, assigned or licensed?

   b) Has the designer of the not-for-profit organization's website assigned the copyright for the website design?

5. Does the not-for-profit organization have a social media, computing and use of technology policy statement that:

   a) Prohibits employees and volunteers from using the trade-marks, logos, copyrighted material or other intellectual property in any non-work related social networking and blogging activities?

   b) Prohibits employees and volunteers from using the not-for-profit organization's email address in their personal profiles on social networking sites?

J. EMPLOYMENT AND VOLUNTEER MATTERS

1. Are individuals being paid as employees or independent contractors, and if it is as independent contractors, is it in accordance with CRA requirements?

2. Is there need for written employment contracts with employees?

3. Has the not-for-profit organization developed and implemented appropriate hiring policies and practices for its employees and volunteers?

   a) Is there compliance with applicable human rights legislation in the hiring process?

   b) Has the not-for-profit organization developed and implemented a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in the *Human Rights Code* (Ontario)?

   c) Do employees and volunteers, especially those who deal with children, need to be screened, including criminal record checks, and supervised in accordance with an appropriate sexual abuse policy statement?

4. Is there a need to develop and adopt policy statements and/or manuals for managing employees as well as volunteers in relation to conduct and performance structure?

   a) Has the not-for-profit organization developed and implemented a policy concerning sexual harassment?

   b) Has the not-for-profit organization developed and implemented a policy concerning workplace violence and harassment prevention?

   c) Has the not-for-profit organization developed and implemented a policy concerning social media, computing and the use of technology?

   d) Is there need for a discipline procedure for employees and/or volunteer members?

   e) Is the not-for-profit organization aware of and addressing ownership issues regarding intellectual property created by the employees and volunteers?

   f) Is the not-for-profit organization 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?

   g) Is the not-for-profit organization and its board of directors possibly exposed to criminal liability under recent amendments with regards to the *Criminal Code* from actions of its employees or volunteers?

   h) Has the not-for-profit organization and its representatives (i.e. directors, officers and all others who act on behalf of the organization) taken every reasonable precaution to ensure the safety of workers, volunteers and the public?

   i) Has the not-for-profit organization and its representatives complied with federal and provincial occupational health and safety legislation?

   j) Has the not-for-profit organization and its representatives established a safety committee or equivalent program or system?

   k) Have all reasonable steps been taken to ensure that the committee, program or system is effective on an ongoing basis?

5. Has the not-for-profit organization undertaken an occupational health and safety audit conducted by an experienced work place safety consultant?

6. Has the not-for-profit organization developed and implemented appropriate policies and practices regarding the termination of employees and complied with appropriate provincial and/or federal legislation?

   a) In relation to wrongful dismissal, is the organization aware that punitive damages may be awarded in a case where the employer's conduct was harsh, vindictive, reprehensible and malicious?

7. Have the provisions of the *Employment Standards Act* (Ontario) been complied with?

8. Has the not-for-profit organization implemented policies on effective compensation and conflict of interest?

9. Has the not-for-profit organization developed job descriptions for the different employment positions?

10. Has the not-for-profit organization properly managed the performance and expectations of older employees to avoid wrongful dismissal or human rights claims of older employees?

K. FISCAL MANAGEMENT ISSUES

1. Are all salaries, benefits and statutory deductions being paid by the not-for-profit organization on a timely basis with appropriate reports to the board of directors?

2. Is the not-for-profit corporation in compliance with its income tax obligations, including its compliance with requirements to file Ontario income tax returns, if applicable?

3. Is the not-for-profit organization operating with a deficit and, if so, for how long?

4. How is the deficit being funded?

5. Has a sinking fund been established to retire any long-term debt of the not-for-profit organization?

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

7. Is there an audit committee in place?

8. Does the not-for-profit organization continue to meet the test to be a non-profit organization under section 149(1)(l) of the *Income Tax Act* in relation to both income and reserves?

L. NATIONAL/INTERNATIONAL RELATIONSHIPS

1. Are relationships with national organizations and/or subsidiary chapters adequately documented with specific reference to controlling trade-marks in Canada?

2. Are relationships between national and international organizations adequately documented in order to effect an international operation?

3. Is there a need for an international umbrella organization?

4. Has the ownership of trade-marks and/or copyrights been determined and documented?

5. Have trade-marks and copyrights been adequately protected and licensed in Canada or in other countries as necessary?

M. ANTI-TERRORISM/MONEY LAUNDERING LEGISLATION/FOREIGN CORRUPTION ISSUES

1. Does the not-for-profit organization carry on operations that may require it to be in compliance with anti-terrorism/money laundering legislation?

   a) International operations

   b) Domestic operations

2. Has the not-for-profit organization undertaken appropriate due diligence procedures in complying with anti-terrorism legislation?

   a) Development of an anti-terrorism/money laundering policy statement

   b) Development of resource materials on anti-terrorism/money laundering legislation

   c) Requiring disclosure statements for board members and staff

   d) Evaluating all programs for compliance

   e) Requiring disclosure statements from affiliated not-for-profit organizations, third party agents and/or partners and conducting appropriate inquiries

   f) Determining when to make inquiries of donors

   g) Conducting due diligence internet searches on directors, officers and agent

3. Are directors aware of risks associated with failing to comply with anti-terrorism/money laundering legislation?

   a) Personal liability in civil law

   b) Possible criminal law sanctions

4. If the not-for-profit organization is working in the U.S. or in conjunction with U.S. organizations in conflict zones, is it aware of the impact of the *Patriot Act* (United States) and other international anti-terrorism legislation on its programs and operations?

5. Does the not-for-profit organization comply with anti-bribery prohibitions under the *Corruption of Foreign Public Officials Act, 1998* (Canada), as amended in June 2013?

   a) Is the not-for-profit organization caught by the broader definition of "business" that no longer requires a "for profit" element?

   b) Is the not-for-profit organization aware that the "facilitation payment" exemption is being repealed?

6. If the not-for-profit organization organization is making payments through the U.S. banking system or selling goods of U.S. origin or with U.S. content, is it aware of the impact of the *Foreign Corrupt Practices Act* (United States) on not-for-profit organizations with U.S. affiliations?

N. CRISIS MANAGEMENT ISSUES

1. Does the not-for-profit organization have an existing committee or group that can develop a crisis management plan? If so, is the group diverse enough to consider the full range of crises that the not-for-profit organization might face?

2. Is the not-for-profit organization overly dependent on another organization? Could the relationship between the organizations be terminated with little or no warning?

3. Does the not-for-profit organization have contingency plans in the event of the following circumstances?

   a) Death or injury of a key individual

   b) Loss of access to the use of facilities and equipment

   c) Disrupted or significantly diminished operations

   d) Loss of crucial information

   e) Intense media scrutiny

   f) Irreparable damage to a not-for-profit organization's reputation

4. Can some of the liability risk associated with a possible crisis be covered by a specialized insurance policy?

O. FUNDRAISING ACTIVITIES

1. Is the not-for-profit organization a "broader public sector organization" for the purposes of hiring external lobbyists, as that term is defined in the *Broader Public Sector Accountability Act* (Ontario)?

2. Does the new federal "Anti-Spam Legislation" apply to the not-for-profit organization? If so, is the not-for-profit organization aware of the prohibition against sending unsolicited "commercial electronic messages"?

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