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BARRISTERS, SOLICITORS & TRADE-MARK AGENT

Affiliated with **Fasken Martineau DuMoulin LLP**

211 Broadway, P.O. Box 440,
Orangeville, Ontario L9W 1K4
Phone: (519) 942-0001
Fax: (519) 942-0300
www.carters.ca
www.charitylaw.ca

Pro Bono Law Ontario

ADVISING THE CHARITABLE CLIENT

February 28th, 2003

**Terrance S. Carter, B.A., LL.B.
Carter & Associates**

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By Terrance S. Carter, B.A., LL.B.

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OVERVIEW

- **The Significance of Charities and Charity Law**
- **The Fundamentals of a Charity**
- **The Fundamentals of A Non-Profit Organization**
- **The Challenge in Advising the Charitable Client**
- **The Response: Pro-Active Legal Risk Management Advice**
- **Effectively Communicating with the Charitable Client**

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THE SIGNIFICANCE OF CHARITIES AND CHARITY LAW

- **Charities collectively make up an essential part of Canadian society and economy**
- **Charities constitute the third sector of the economic engine of Canada**
- **Most lawyers advise charities on an infrequent basis and often do so for reduced fees or on a pro bono basis**
- **Advising charities, however, is now a very complicated area of the law**

- **Charities are facing fundamental changes and challenges, particularly in a more litigious society**
- **Charities need to rely more on legal advice**
- **Lawyers must provide professional and competent advice no matter what the fee charged is**
- **Lawyers need to have a more active mind-set in identifying problems and providing advice to charitable clients**
- **Legal advice needs to change from benign passivity to pro-active legal risk management**

THE FUNDAMENTALS OF A CHARITY

- **What is a charity?**
 - **At common-law (the *Pensel Test*) includes**
 - **Relief of poverty**
 - **Advancement of education**
 - **Advancement of religion**
 - **Other purposes beneficial to the community recognized by the courts**

- **Under the *Charities Accounting Act* – “charitable purpose” is defined**
 - **Codifies the common law definition of what is a charity**
 - **Definition does not extend to broader definition under the *Income Tax Act***
- **Under the *Income Tax Act* – “qualified donees” concept introduced**
 - **Includes a “registered charity”**
 - **Defined as “charitable organization”, “public foundation” and “private foundation”**

– No definition of a “charity” but reflects the common law

• Includes extended statutory list of “qualified donees”

– Registered Canadian amateur athletics associations

– Low-cost housing co-operatives for the aged

– Municipalities

– United Nations

– Prescribed universities

– Her Majesty in right of Canada or a province

• What are the tax advantages of being a charity?

– A charity does not pay tax on income or capital gains

– A charity can issue charitable receipts to donors as tax credits for income tax purposes

• What are the legal forms available for a charity?

• Charitable trusts

• Unincorporated associations

• Non-share capital corporations

THE FUNDAMENTALS OF A NON-PROFIT ORGANIZATION

- **What is a non-profit organization under the *Income Tax Act*?**
 - **Club, society or association**
 - **Must not be a charity**
 - **Organized and operated exclusively for social welfare, civic improvement, pleasure or recreation, or any other purpose, except profit**
 - **No part of the income can be payable or available to any proprietor, member or shareholder**

- **What are the tax advantages of being a non-profit organization?**
 - **A non-profit organization does not pay tax on income or capital gains except income from property of an organization whose main purpose is to provide dining, recreation or sporting facilities**
 - **A non-profit organization cannot issue charitable receipts for income tax purposes**

- **What are the legal forms available for non-profit organizations?**
 - **Unincorporated associations**
 - **Non-share capital corporations**
- **Examples would include**
 - **Golf clubs and ski clubs**
 - **Service clubs**
 - **Trade associations**

THE CHALLENGE IN ADVISING THE CHARITABLE CLIENT

- **The nature of the charitable client**
 - **Motivated by a sense of the greater good**
 - **Inherent lack of continuity, i.e. frequent change in directors and executive staff**
 - **Varied extent of commitment by volunteers**
 - **Frequently internal differences of opinion in how to structure and operate the charity**
 - **Generally feel thwarted by legal process and the need to comply with the law**

- **General lack of understanding of legal requirements by directors and executive staff**
- **Generally focus on programs and fund raising over compliance with legal requirements**
- **Generally a lack of understanding of the exposure of directors and officers to personal liability**
- **Frequently there is an unrealistic expectation of the lawyer by the charitable client**
 - **Lawyers may be expected to provide complicated legal services pro bono or at reduced rates**

- **Reduced fees or pro-bono service does not justify or incomplete legal advice**
- **Lawyer's involvement in even small matters is often seen as the legal seal of approval on everything that a charity does**
- **Lawyers may be susceptible to accountability in not having warned the client of risks**
- **Why the charitable client often experiences difficulties**
 - **Compliance with complicated statutory requirements both federally and provincially**

- **Increased exposure of directors and officers to liability in a more litigious society**
- **Complicated tax issues**
- **Fund raising requirements both federally and provincially**
- **Complicated management of gifts and compliance with receipting requirements**
- **Inherent risks in operations, such as sexual abuse of children**
- **Compliance with requirements under anti-terrorism legislation**

- **Investment issues involving charitable funds**
- **Complicated organizational structures**
- **Interrelationships between multiple corporations**
- **Employment issues involving full and part time staff**
- **Privacy issues**
- **Lack of adequate contractual documents**

- **Consequences of legal deficiencies in charitable structure and operations**
 - Legal actions by donors and/or the Public Guardian and Trustee
 - Allegations of breach of trust
 - Revocation of charitable status
 - Confusion in corporate operations
 - Loss of corporate status
 - Undertaking *ultra vires* activities
 - Court supervised audit of accounts
 - Inquiries under *Charities Accounting Act*

- **How the lawyer can encounter difficulties in advising the charitable client**
 - Charities often do not know what questions to ask let alone the answers
 - Lawyers must fully explain the legal process to the charitable client
 - Lawyer must warn the charity of applicable risks
 - Lawyer must advise if there are better alternatives available
 - Lawyer must advise charitable client on related risks notwithstanding limited nature of retainer

- **Conflicts of interest for lawyers in advising the charitable client**
 - **If a lawyer is a member of the board of a charity, the lawyer cannot receive fees**
 - **Lawyers who are members of a board may face conflict if called upon to provide legal advice to the charity**
 - **Acting as solicitor for two related charities**
 - **Lawyer acting for a charity cannot advise directors of that charity personally**
 - **May need to communicate with board members directly where executive director is blocking communication from the lawyer**

THE RESPONSE: PRO-ACTIVE LEGAL RISK MANAGEMENT ADVICE

- **Need to develop a professional response**
 - **Lawyer must be more than a legal technician**
 - **Must change from giving passive advice that is reactive only to pro-active advice given in a preventative context**
- **What constitutes legal risk management advice?**
 - **Lawyer must be familiar with many aspects of the law in order to advise charitable clients of applicable legal issues**

- **Lawyer should assume that the charitable client knows little about charity law**
- **Lawyer must be diligent in asking questions of the charitable client**
- **Lawyer needs to explain the relevant law to the client in order to avoid problems in the future**
- **Lawyer needs to fully explain consequences of intended course of action and alternatives**
- **Lawyer needs to provide recommendations to rectify the problems identified**

- **Lawyer needs to provide a prioritization of action items to be undertaken**
- **Lawyer needs to provide an organized report even if it is only in point form**
- **The onus to take action should be clearly placed on the client**
- **Lawyer needs to provide explanation of steps that need to be taken and time frame to do so**
- **Lawyer needs to follow up with client, particularly where there is a change of staff or board members**

- **Utilizing a legal risk management checklist**
 - **Develop a charity legal risk management checklist for discussion with client**
 - **Checklist helps to keep track of a multitude of legal issues**
 - **Assists clients in understanding the interrelationship between legal issues**
 - **Helps to identify and focus on problem areas to be addressed**

- **How to utilize a checklist**
 - **Provide a copy of a checklist to the client and retain a file copy**
 - **Keep notes on the checklist**
 - **Provide a report and review of the checklist**
 - **Hold subsequent meeting with client to follow up on the checklist**

EFFECTIVELY COMMUNICATING WITH THE CHARITABLE CLIENT

- **Written report to charitable client is essential**
 - **The collective memory of a charitable client can quickly lapse**
 - **e.g. frequent change of executive staff and/or directors**
 - **e.g. poor record keeping by the charity**
- **Confirm retainer with charitable client**
 - **What the lawyer is doing for the client**
 - **What the lawyer is not doing for the client**

- **Report to client should be of an educational nature**
 - **Explain issues to be addressed**
 - **Explain law and application to facts**
- **Document advice given to charitable client**
 - **Identify who the advice is being given to**
 - **Confirm any verbal advice given**
 - **Set out steps to remedy problems**
 - **Explain areas of uncertainties**

- **Provide proactive action plan for the charitable client**
 - **Prioritize legal issues to be addressed by the charity**
 - **Set out realistic time line for work to be done**
 - **Explain the nature of the legal work that is required**

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