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Pro Bono Law Ontario

LAWYERS' DUE DILIGENCE *(LEGAL RISK MANAGEMENT CHECKLIST)*

February 28th, 2003

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PRO BONO LAW ONTARIO
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(LEGAL RISK MANAGEMENT
CHECKLIST)

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

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OVERVIEW

- Identification and Management of Legal Risks
- Utilizing Multiple Charitable Corporations
- Board Management Issues
- Reducing Board Liability
- Insurance Considerations
- Third Party Use of Charitable Property
- Real Property Issues
- Intellectual Property Issues

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- **Employment And Volunteer Matters**
- **Charitable And Fundraising Activities**
- **Fiscal Management Issues**
- **Investment Issues**
- **Donor Restricted Trust Fund**
- **Maintaining Charitable Registration**
- **National/International Relationships**
- **Anti-Terrorism Legislation**

IDENTIFICATION AND MANAGEMENT OF LEGAL RISKS

- **Is charitable status needed?**
 - **Do charitable receipts need to be issued?**
 - **Can the organization work under the auspices of an existing charity?**
 - **Business donors may not require charitable receipts**
- **General overview of organizational & legal documentation**
 - **Identify existence and location of key organizational documents**

- **Develop an inventory of key documents**
- **Maintain central location for key documents**
- **Identify key organizational documents for an unincorporated charity**
 - **Constitution and amendments , if applicable**
 - **Policy statements, if applicable**
- **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**
- **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**
- **Review of documents for unincorporated charity**
 - **Are there objects stated in the constitution and are they exclusively charitable?**

- **Do constitutional documents correctly reflect how the organization is actually structured and operated?**
- **Is a copy of the constitution filed with the appropriate government agencies, i.e. with Canada Customs and Revenue Agency (“CCRA”) and the Public Guardian and Trustee (“PGT”)?**
- **Review of corporate structure**
 - **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?**
- **Review of supplementary letters patent**
 - **Has there been a change of corporate name and/or objects?**
 - **What is the effect of change of objects upon existing charitable property?**

- **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**
- **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?**
- **Was initial corporate organization of the charity properly done?**
- **Was there a documented transfer of assets and liabilities on incorporation?**
- **Are the records of board decisions and/or membership meetings complete?**

- **Was there adequate board and/or members' authorization for indebtedness?**
- **Have corporate records been properly maintained?**
- **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 reporting 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

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

– Is the charity aware of the importance of proper use of corporate name and operating names?

- **Has the charity developed and implemented a policy statements on child abuse, sexual abuse, sexual harassment or bullying, where applicable?**

UTILIZING MULTIPLE CHARITABLE CORPORATIONS

- **Should the charity consider using multiple charitable corporations for its high risk activities in order to reduce liability exposure?**
- **Should the charity consider establishing and utilizing a parallel foundation for either fundraising or protection of charitable assets?**
- **Has consideration been given to balancing control of multiple corporations with issues involving cross over liability?**

- **Has consideration be given to implementing control through contracts and/or licensing agreements as an alternative to corporate control?**

BOARD MANAGEMENT ISSUES

- **Is the charity able to identify which group is in charge?**
 - **Where does the de facto control of the Charity lie? Is it with a board, a committee or executive staff?**
 - **Is board authority recognized by the membership?**
- **Are there clearly defined lines of control between the board and the executive staff?**
- **Does the board meet on a regular basis and do directors regularly attend?**

- **Does an audit committee need to be established to review financial statements and the auditors' report?**
- **Is there adequate communication of board responsibilities to existing and future board members?**
 - **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**
 - **Need to provide regular updates on changes in the law to board members**

REDUCING BOARD LIABILITY

- **Do directors receive direct or indirect remuneration or other financial benefit from the charity in contravention of their fiduciary duties?**
- **Has the charity indemnified its directors and officers in accordance with the *Charities Accounting Act* (Ontario)?**
- **Is there corporate authority to acquire directors and officers liability insurance in accordance with the requirements of the *Charities Accounting Act* (Ontario)?**

- **Has the board delegated too much responsibility to executive staff by restricting itself to policy decisions only?**
- **Should the charity consider reducing the size of the board?**
- **Is the charity effectively making use of committees as an alternative to a large board of directors?**

- **Should the charity consider implementing an advisory board to complement the board of directors?**
- **Has the charity established a comprehensive due diligence procedure by utilizing legal risk management checklists?**

INSURANCE CONSIDERATIONS

- **Has the charity maintained a historical record of its insurance coverage in the event of a future claim?**
- **Is there occurrence-based or claims-made insurance coverage for sexual abuse?**
- **Has the charity provided full disclosure of all risks to its insurer to avoid denial of coverage?**
- **Does the charity require regular reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?**

- **Is there a regular review of the adequacy and extent of general liability coverage and property insurance?**
- **Is there a regular review of directors' and officers' liability coverage?**

THIRD PARTY USE OF CHARITABLE PROPERTY

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

REAL PROPERTY ISSUES

- Has the charity re-registered deeds within forty (40) years to avoid loss of priority under the *Registry Act* where conversions to qualified land title is pending?
- Has the charity addressed encroachments with neighbouring lands?
- Are there charitable trust restrictions in old trust deeds on title and, if so, are they being complied with?
- Are municipal zoning and legal non-conforming uses being complied with?

- **Could the charity be forced to sell surplus land under *Charities Accounting Act* (Ontario)?**
- **Has the charity identified and evaluated the extent of liability exposure for toxic property?**

INTELLECTUAL PROPERTY ISSUES

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

EMPLOYMENT AND VOLUNTEER MATTERS

- **Has the charity developed appropriate hiring policies and practices for its employees?**
- **Is there need for an employment contract with key employees?**
- **Is there a need to develop and adopt statements and/or manuals for employees as well as volunteers?**
- **Do employees and volunteers who deal with children need to be screened and supervised in accordance with an appropriate sexual abuse policy statement?**

- **Is there need for a discipline procedure for employees and/or volunteer members?**
- **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?**

CHARITABLE AND FUNDRAISING ACTIVITIES

- **Has the charity ensured that charitable activities are done in accordance with its charitable objects?**
- **Are fundraising and/or administrative costs kept within the 80/20 disbursement quota?**
- **Has fundraising legislation, where applicable, been complied with?**
- **Have fundraising programmes been reviewed by legal counsel?**

- **Are donors' rights to require accountability respected, particularly rights under the *Charities Accounting Act (Ontario)*?**
- **Does the charity have a privacy policy in place in order to protect donor's rights?**

FISCAL MANAGEMENT ISSUES

- **Are all salaries and benefits being paid by the charity?**
- **Is the charity operating with a deficit and, if so, for how long?**
- **How is the deficit being funded?**
- **Has a sinking fund been established to retire debt?**
- **Are investments being offered to the public without full disclosure to potential investors?**

- **Are charitable funds being used to fund separate business operations of the charity?**
- **Is there violation of the *Charitable Gifts Act* (Ontario) by the charity owning more than 10% of a business?**

INVESTMENT ISSUES

- **What investment powers apply to surplus funds of the charity?**
 - **Prudent investor rule under the *Trustee Act* (Ontario) will generally apply**
 - **However, specific investment powers may sometimes apply as contained in**
 - **Letters patent and supplementary letters patent**
 - **Endowment and gift agreements**
 - **Testamentary gifts**

- **Does the charity need and/or have an investment policy?**
 - **Documenting compliance with prudent investor rule**
 - **Establishing requirements for delegation of investment decision making**
 - **Prohibition on sub-delegation**

DONOR RESTRICTED TRUST FUNDS

- **Are there donor restricted trust funds being held by the charity?**
 - **Building funds**
 - **Endowment funds**
 - **Special project funds**
 - **Ten year gifts**
- **Are restricted funds used only in accordance with applicable restrictions?**

- **Are restricted funds being used in whole or in part for general operational purposes or are they being borrowed against?**
- **Are restricted funds segregated from operating funds?**
- **Is there compliance under the *Charities Accounting Act* (Ontario) to co-mingle restricted funds for investment purposes?**
- **Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?**

MAINTAINING CHARITABLE REGISTRATION

- **Is the legal name of the charity and/or its operating name consistent with the records of CCRA?**
- **Does CCRA have the current head office address of the charity?**
- **Has the charity obtained Quebec charitable status for fundraising in Quebec?**
- **Does the charity submit its annual charity information return (form T3010) on a timely basis?**

- **Is the charity involved in political activities?**
- **Is the charity involved in unrelated business activities?**
- **Is the charity aware of the applicable rules on the issuance of charitable receipts?**
- **Are agency and/or joint venture relationships with non-qualified donees properly documented?**

NATIONAL/INTERNATIONAL RELATIONSHIPS

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

ANTI-TERRORISM LEGISLATION

- **Does charity carry on operations that may require it to be in compliance with anti-terrorism legislation?**
 - **International operations**
 - **Domestic operations**
- **Has the charity undertaken appropriate due diligence procedures in complying with anti-terrorism legislation?**
 - **Development of an anti-terrorism policy statement.**

- Development of resource materials on anti-terrorism legislation**
- Requiring disclosure statements for board members and staff**
- Evaluating all charitable programs for compliance**
- Requiring disclosure statements from affiliated charities, third party agents and/or partners and conducting appropriate inquiries**
- Determining when to make inquiries of donors**

- Are directors aware of risks associated with failing to comply with anti-terrorism legislation?**
 - Loss of charitable status**
 - Personal liability in civil law**
 - Possible criminal law sanction**

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