VOLUNTEER LAWYERS AND THE LAW SOCIETY OF UPPER CANADA CHARITABLE AND NONPROFIT PRIMER CLE

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LAWYERS’ DUE DILIGENCE
(Legal Risk Management Checklist)

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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

• 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

Note: For more details see articles and newsletters at www.charitylaw.ca and www.antiterrorism.ca
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 and volunteer policy statements
- 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 Revenue Agency (“CRA”) 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 statement on:
  • child abuse
  • sexual abuse
  • sexual harassment
  • bullying
  • volunteer conduct
  • safety in the workplace
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?

- Has an audit committee been 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?

• Do the board members need to receive independent legal advice?
• 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 a legal risk management checklist?

• Has a legal risk management committee of the board been established

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?

• Does there need to be special insurance endorsements to extend insurance coverage, e.g. activities of agents in foreign countries?

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

• Are there trust provisions in old title documents that may impact real property?
• 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?
• Is the charity entitled to exemptions or rebates from municipal taxation?
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?

• Is the charity and the board exposed to criminal liability under the *Criminal Code* i.e. Bill C-45 (Westbury Mines)?

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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?

• Are sponsorship arrangements properly documented?

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?
• Is there an audit committee in place?

• 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?

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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 CRA?

• Does CRA 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?

• Has the charity complied with its disbursement quota?

• Is the charity involved in political activities?
• Is the charity involved in related business activities?
• Is the charity aware of the applicable rules on the issuance of charitable receipts and split receipting?
• Are agency and/or joint venture relationships with non-qualified donees properly documented?
• Is the charity involved in fundraising through tax shelters?
• Does the board of directors review the annual return (T3010A) for the charity before it is filed each year?
• Is the charity prepared for a spot audit by CRA?

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
  – Conducting due diligence internet searches on directors, officers and agents
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