
Association of Fundraising Professionals (AFP) Ottawa Chapter

RECENT LEGAL DEVELOPMENTS AFFECTING CHARITIES

- 1. How to Reduce Liability for Directors and Officers**
- 2. Branding and Sponsorship Issues for Charities**
- 3. Highlights of Recent Tax Changes Affecting Charities**
- 4. Key Aspects of the New *Federal Not-for-Profit Corporations Act***
- 5. Avoiding Liability in Charitable Fundraising**

Ottawa – September 15, 2005

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How to Reduce Liability for Directors and Officers

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for the
Association of Fundraising Professionals (AFP) Ottawa Chapter
“Recent Legal Developments Affecting Charities”

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PART I: DUTIES AND LIABILITIES

OVERVIEW OF TOPICS

- **Understanding the Duty of Care**
- **Common Law Duties and Liabilities**
- **Statutory Duties and Liabilities**
- **Example: Employees and Volunteers**

Note: For a more detailed discussion, see also Chapter 2, 3 and 6 by Jane Burke-Robertson and Terrance S. Carter in “Primer for Directors of Not-for-Profit Corporations” at

<http://www.carters.ca/pub/book/2002/dirprimch2.pdf>

<http://www.carters.ca/pub/book/2002/dirprimch3.pdf>

<http://www.carters.ca/pub/book/2002/dirprimch6.pdf>

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UNDERSTANDING THE DUTY OF CARE

- **Directors of all corporations must exercise certain standard of care in carrying out duties**
- **Standard of care varies depending on type of corporation and incorporating statute**
 - **Business corporation**
 - **Statutory objective standard of care: Reasonably prudent person**
 - **Directors need to ask: How would a “reasonably prudent person” conduct the affairs of the corporation?**

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- **Not-for-profit corporation (non-charity)**
 - **Common law subjective standard of care**
 - **Director’s own knowledge and experience important**
 - **Directors need to ask: What level of skill and care can reasonably be expected from a person with my knowledge and experience?**
 - **New *Canada Not-for-Profit Corporations Act* will establish an objective standard of care**

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– Charitable corporation

- Additional expectations beyond subjective standard
- Courts in Ontario have held that directors of charities are also subject to fiduciary duties as quasi-trustees of charitable property
- Directors need to ask: What level of care would a reasonable and prudent person managing his own affairs exercise?

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COMMON LAW DUTIES AND LIABILITIES

- Management of the Corporation
 - Directors are responsible for all aspects of corporations operations
 - To fulfill duties, directors must ensure:
 - Objects are properly carried out and activities comply with objects
 - Corporation’s financial stability and overall performance
 - Proper hiring and supervision of management and staff
 - Failure to act, i.e. inaction, can result in personal exposure to liability i.e. liability of Worldcom directors

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- Liability Risk for Lack of Corporate Authority
 - Corporate authority defined by corporate objects in governing documents
 - All corporate activities must fall within parameters of these objects
 - Liability results where directors act outside scope of this authority

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- **Liability Risk for Negligent Mismanagement (Tort)**
 - Tort is civil wrong for which injured party can seek damages from the court
 - Directors can be personally liable for corporation's torts where own conduct or inaction contributed to victim's injury
- **Liability Risk in Contract**
 - Directors generally not personally responsible for contracts signed for corporation
 - However, need to have proper corporate authority to sign contracts and ensure contractual terms are complied with

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- **Liability Risk for Breach of Fiduciary Duty**
 - Overview
 - Directors of charitable corporations are subject to fiduciary duty to act as quasi trustee of charitable property
 - Directors of not-for-profit corporations also have fiduciary duties to put the interest of the corporation ahead of their own interest
 - Fiduciary duties owed to charitable objects, corporation, donors, members and creditors

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- Summary of fiduciary duties
 - Duty to act honestly
 - Conflicts of interest to be avoided and disclosed
 - Directors must not act fraudulently
 - Duty of loyalty
 - Director's sole interest is to the corporation
 - Director's interests not to be placed in conflict with those of corporation

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- **Duty of diligence/duty to act in good faith**
 - **Directors to diligently attend to duties by being familiar with all aspects of corporation**
 - **Directors may have liability exposure at common law for failure to attend to their legal duties or those of the corporation**
 - **Where necessary, advice of qualified professionals should be sought**
- **Duty to exercise power**
 - **Directors responsible for managing corporation**

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- **Delegation to management, staff and volunteers is possible, but directors must always supervise**
- **Duty of obedience**
 - **Directors must comply with applicable legislation and the corporation's governing documents**
 - **All valid corporate decisions must be implemented**

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- **Duty to avoid conflict of interest**
 - **Conflicts of interests to be avoided**
 - **Directors must also avoid anything that gives director appearance of a personal benefit**
 - **Where conflicts occur, they are to be declared, director to not participate in discussions or vote, and may even have to resign**

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- **Duty of prudence**
 - **Directors with special expertise must use it prudently to achieve best result for corporation**
- **Duty to continue**
 - **Resignation as director will not relieve all obligations**
 - **May even constitute breach of trust**
 - **Independent legal advice should be obtained in considering resignation**

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- **Liability for Breach of Trust**
 - **Overview**
 - **In addition to fiduciary quasi trustee duties, directors of charitable corporations may also be trustees of some charitable property**
 - **However, fiduciary duties and trustee duties essentially the same**
 - **Recent *Aids Society* case emphasizes that directors have obligation to apply charitable property to charitable objects**
 - **Where charitable property lost as a result of actions or inactions of directors, breach of trust could be found**

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STATUTORY DUTIES AND LIABILITIES

- **Overview**
 - **Many federal and provincial statutes impose offences and penalties for acts and omissions of corporate directors**
 - **Directors can be held personally liable, as well as jointly and severally, with other directors**
 - **Only defence is due diligence**
 - **Resigning as a director may not limit liability though there are generally limitation periods**

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- **Protection from third party contractual liability**
 - Protection available for corporations under the s. 21(3) and 157(1) *Canada Corporations Act* (CCA) but not under *Corporations Act* (Ontario) (OCA)
 - Protects directors and officers against contracts entered into within the scope of authority of directors or officers

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- **Protection from conflict of interest**
 - Common law rule prohibits directors from being in a conflict of interest
 - Both CCA and OCA permit directors to remain on the board of directors where a director declares a conflict of interest
 - Common law rule, though, does not permit directors of a charity to remain on the board even if conflict of interest declared

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EMPLOYEES

Statutory obligations

- *Income Tax Act* (Canada)
 - Directors jointly and severally liable to pay employee income tax deductions for two years after term of office
 - Avoid liability by showing positive steps taken to ensure compliance
- *Canada Pension Plan Act*
 - Joint and several liability where corporation fails to remit employee pension premiums

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- *Employment Standards Act (Ontario)*
 - Fines imposed on directors for failure of corporation to pay wages, vacation pay and severances
 - 6 months liability for wages and 12 months liability for vacation pay, plus fines
 - However, limitation periods are available

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- *Canada Corporations Act*
 - Wages and vacation pay
- *Workplace Safety and Ins. Board Act (Ontario)*
 - Directors are not liable for corporation's failure to remit premiums unless it can be shown they did not intend to pay them
- *Ontario Health Insurance Program*
 - Directors will be held personally liable for premiums and health tax not paid by corporation

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- All apply to employees, therefore important to understand the distinction between an employee and an independent contractor or consultant: ownership of tools, chance of profit/risk of loss, control, integration
- Quite often only become an issue when employment/contract terminated

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Vicarious Liability

- Erosion of “charitable immunity”, replaced by “*respondeat superior* – the superior will respond”
- Two important S.C.C. cases: *Bazley v. Curry* and *Jacobi v. Griffiths*
- *Bazley* – employer was held vicariously liable even where wrongful acts were outside the employee’s authority

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- Test should focus on whether or not the employer’s enterprise and empowerment on the employee materially increased the risk of sexual assault and, hence, the harm:
 - How much opportunity did the employer’s enterprise afford the employee to abuse
 - To what extent did the wrongful act further the employer’s aims
 - What extent of power was conferred on the employee in relation to the victim
 - How vulnerable were potential victims to the wrongful exercise of the employee’s power

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EXTENSION TO VOLUNTEERS

- More volunteers on the front lines
- As a result of a number of economic and political factors, service delivery has increasingly been shifted from employees to volunteers
- Volunteers are delivering “real services” directly to clients, students, patients, and residents, and they are doing so in a climate where infrastructure cuts have resulted in less supervision and fewer supports

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- Will an organization be held vicariously liable for the actions of volunteers?
 - S.C.C. would not accept the premise that an organization’s responsibility and control over its operations diminish when it employs volunteers
 - Conditions:
 - Was the volunteer acting within the scope of his or her duties?
 - Did the organization have the right of control, if not actual control, over the work of the volunteer?
 - Did the organization have an agreement with the volunteer regarding the latter’s provision of services?

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Practical lessons regarding employees/volunteers

- Look carefully at the work you are asking employee/volunteer to perform
- Think about the nature of the relationship you are creating between the employee/volunteer and the client
- Does the position confer power on the employee/volunteer?
- Is the person (or persons) the employee/volunteer works with vulnerable to an abuse of that power?

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PART II: MANAGING RISK AND REDUCING LIABILITY

OVERVIEW OF TOPICS

- The Importance of Good Governance
- Management of Risk
- Operational Due Diligence
- Indemnification and Insurance
- Other ways of Reducing Risk
- Pending Statutory Changes

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A. The Importance of Good Governance

- **Good governance is the primary role of the board of directors and is critical to being able to manage risk effectively**
- **The board cannot look to others to achieve good governance**
- **Good governance is not “perfection” – rather good governance is intended to minimize the risk of things going wrong, identify what may go wrong and prevent it, and address problems when things go wrong in a legal and ethical manner**

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What is Governance

- **“Governance” is a combination of overall processes and the structures that are used in directing and managing the organization’s operations and activities**
- **Two conceptual approaches to “governance”**

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Administrative Governance Model

- **“Traditional approach”**
- **Board makes most substantive decisions based on materials and discussion at board meeting**

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Policy Governance Model

- Board has “oversight” role rather than active role in managing affairs of the organization
- Approach relies more on development of operational policies implemented by staff and officers

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Reality

- Most organizations will – and should – operate on the basis of a mixture of the two models
- Spectrum between “administrative governance” and “policy governance” based on several factors
 - Legal authority of directors, officers and organization itself
 - Statutory or common law obligations or restrictions or contractual obligations
 - Constatng documents

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- Culture of organization
- Views and perspectives of key stakeholders
- Skills, competence and training of staff and volunteers
- Resources
- Size and type of operation
- Activities carried out by the organization

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B. Management of Risk

1. What is Risk?

“Risk is any uncertainty about a future event that threatens your organization’s ability to accomplish its mission”.

The Alliance for Nonprofit Management, 2001

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2. What is Risk Management?

It is about Planning and Forethought

- Understanding the potential for and forecasting of risk in an organization and risk which could affect directors personally
- Doing what is reasonable/prudent to control risks and to minimize the adverse effects of unexpected events
- Protecting and conserving your organization’s resources

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3. Some Points About Risk Management

- Risk is everywhere – Don’t let it immobilize you
- Risk management is not about buying insurance (whether CGL policy or for directors and officers)
- Good risk management is simply good management

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– Ignoring the potential for trouble never makes it go away and can exacerbate the harm and increase liability

– Risk management doesn't "get done" – it is a process

– Almost all NPO's will have a "risk tolerance zone"

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4. General Aims of Risk Management:

– To identify and understand risk and take reasonable steps to prevent injury and loss

– To minimize harm in the event that a risk materializes

– To reduce liability – Existence of risk management program can constitute evidence of due diligence

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5. The Risk Management Team

– Assemble a RM Team with diversity of skill sets and wide knowledge base

– E.g. staff, board member, client served by organization, human resources, insurance and legal professionals, volunteers and front line workers

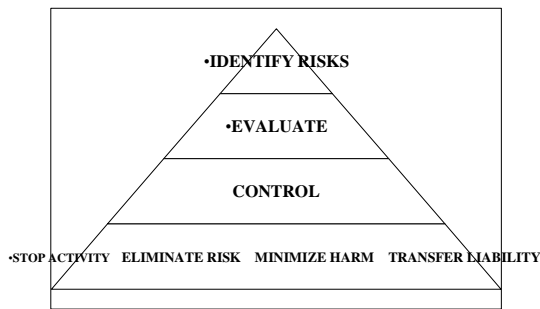
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6. Role of the Risk Management Team

- Identify and evaluate risks and liability exposure
- Prioritize risks to be controlled and develop a risk management plan
- Identify costs and contribute to development of a financing plan
- Help develop policy related to risk management
- Implement plan and monitor ongoing compliance with plan
- Review and revise plan as required
- Report to board as necessary

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7. Risk Management Model (L. Graff)



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C. OPERATIONAL DUE DILIGENCE

Boards and Directors

- Decisions are made by the *Board of Directors* and not by individual directors or groups of directors
- Decisions are articulated through resolutions
- Once decisions are made, the “corporation” has spoken through the *Board* - this is the concept of “corporate authority” of directors

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Operational due diligence requires directors to exercise due diligence on all levels of operation and in a pro-active manner

1. **Directors need to know and understand governing documents of the corporation**
 - Directors must not authorize *ultra vires* activities
 - Membership/governmental approval may be required for certain corporate actions

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2. **Directors should understand their rights/obligations at board meetings**
 - Right (duty) to attend board meeting
 - Directors must be prepared for meetings
 - Directors have equal voting rights
 - Need to record contrary vote
 - Must declare conflict of interest

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3. **Directors should carry out their duties in a way which reflects their ultimate responsibility for corporate operation**
 - Directors should be proactive in management
 - Directors have right of access to property of corporation and to inspect and copy books, corporate records and other documents
 - Directors have a fiduciary duty to protect charitable assets

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4. The board should establish policy

- A policy is a governing principle. It allows the board to delegate to others (staff, volunteers, agents) the authority to act on behalf of the organization
- Board control over the implementation of a policy is essential
- Policy allows staff, volunteers, agents and others to know what the board wants and expects and why

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- When and to what extent can directors delegate?

- Can delegate day to day operations, including officer duties
- parameters of authority of “delegatee” should be defined in by-laws or in policy
- But directors must require accountability and exercise their authority
- Regardless of delegation, directors retain their fiduciary duties and corresponding liability

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5. Directors should seek out and take advantage of training/educational opportunities and ensure participation by senior staff:

- In the area of the corporation’s current operation
- Changes in the law affecting directors’ duties
- Corporate and tax laws affecting organization

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6. Directors of charities should monitor and require reports regarding fundraising program and compliance with ITA obligations

- Monitor fundraising appeals
- Understand director obligations regarding restricted gifts
- Review and enforce terms of restricted and endowed gifts
- Ensure gifts are used for charitable purposes

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7. Directors are entitled to and should rely on advice

- Internally (Management)
 - In anything but a very small organization, directors will generally need to engage a staff person or manager to oversee operations
 - Directors should receive and review reports from management at every board meeting
- Externally (Outside professionals)
 - Relying on professional advisors like accountants and lawyers provides evidence of due diligence

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8. It can be helpful for boards to use due diligence checklists

- Legal Risk Management Checklist
- Sexual abuse checklist
- Fundraising compliance due diligence checklist
- Insurance checklist

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D. INDEMNIFICATION AND INSURANCE

- **Statutory Basis for Directors and Officers insurance and Corporate Indemnity**
- **Federal and Ontario corporate statutes now permit corporate indemnity and Ontario permits purchase of director and officer insurance**
- **Indemnification is only as good as the financial state of the corporation**

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- **In Ontario, charities must first consider the following under the *Charities Accounting Act* (Ontario)**
 - **What is the degree of risk?**
 - **Are there alternatives to insurance**
 - **What is the cost of insurance in relation to the risk?**
 - **What is the cost of insurance in relation to revenue?**
 - **Does indemnity or insurance further the management of charitable property?**

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E. OTHER WAYS OF REDUCING RISK

1. **Size of the Board**
 - **Reducing size of board reduces risk**
 - **Smaller board may also allow for more effective control**
2. **Require treasurer's reports at every meeting with respect to statutory remittances for which directors have liability**

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3. Record dissents of directors & ensure proper minute taking

4. Independent Legal Advice

- Independent legal advice may be needed for directors in high risk situations

5. Formation of Risk Management Team

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6. Form Committees and Advisory Boards

- Committees and advisory boards can be very helpful for directors in discharging their duties as long as board resists temptation to “rubber stamp”
- can be an effective means of attracting good volunteers without the risk of being directors
- Ensure that functions are advisory and decision making not really at level of committee

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7. Transfer of Assets

- Directors will always be somewhat exposed to liability risks
- Therefore directors should consider transferring personal assets to spouse
- However any transfer of assets should ideally be done before becoming a director so as not to defeat claims of creditors

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F. PENDING STATUTORY CHANGES: BILL C-21

- **First reading: November 15, 2004**
- **Will replace *Canada Corporations Act***
- **Modelled on the *Canada Business Corporations Act***
- **All existing CCA corporations will be required to continue under the new Act within 3 years of it coming into force**

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1. Standard of Care for Directors/Officers:

- **The Bill provides increased protection but more accountability as it provides more instances of director obligations and enhancement of member rights**
- **Brought in line with business corporation statutes across the country**

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– **“Every director and officer of a corporation in exercising their powers and discharging their duties shall**

- (a) **Act honestly and in good faith with a view to the best interests of the corporation;**
- (b) **Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”**

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2. Protection from Liability

- Directors and officers are provided a due diligence defence that can be relied on if they are named in an action
- Directors will satisfy the due diligence defence requirement if they “exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances” including good faith reliance on financial statements of the corporation or a report of a professional person (accountant or lawyer)

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3. Indemnification

- Bill C-21 allows a corporation to indemnify a present or former director or officer or another individual who acted at the corporation’s request
- Corporation may advance money to any such person in respect of the costs of a proceeding against them provided that the individual acted honestly and in good faith and with a view to the best interest of the corporation

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4. Insurance

- Corporations are specifically authorized to purchase insurance to protect directors and officers from liability

5. Right of Dissent

- Statutory right to dissent allows a director to avoid responsibility for actions or resolutions taken during a board meeting by having his or her dissent recorded
- Similar protection extended even where not present at board meeting (as long as dissent registered within a prescribed time)

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6. Directors not Trustees

- The Bill clarifies that a corporation owns any property of any kind that is transferred to it and does not hold its property in trust unless the property was expressly transferred in trust for a specific purpose
- It also clarifies that directors are not trustees for any property held in trust by the corporation

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Branding and Sponsorship Issues for Charities

Presented by

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for the

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RESOURCE MATERIALS

- For more information on this topic please see our website at www.charitylaw.ca
 - Paper entitled “*Avoiding Wasting Assets II – Trade-Mark and Domain Name Protection for Charities*” by Terrance S. Carter, which was presented to the Canadian Bar Association in April 2004
 - Charity Law Bulletins #18 and #43

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WHAT IS BRANDING?

- Branding is the marking of products or services for the purpose of identification such as “Kellogg's” or the “Red Cross”
- A brand can be any word, mark, symbol, design, term or a combination of these
- A brand can also comprise of the name, the product to which the name relates, the packaging of the product, the advertising of the product, and the reputation associated with the name or product

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WHY BOTHER BRANDING?

- Historically, ranchers branded their cattle and craftsmen branded their pottery to identify themselves as owners of the cattle or pottery
- Today, branding also serves to distinguish an owner’s products or services from those of his competitors

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- Branding also increases market share
- Effective branding can provide a product or service with a certain prestige, making it so desirable that consumers will not settle for lesser substitutes
- Branding also creates equity in the goodwill associated with the brand. Brands can now be recognized as an asset of a business and can be included in calculating the equity of a business

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IMPORTANCE OF BRANDING TO CHARITIES

- The business concepts or purposes of branding described in the previous slide, are equally applicable to the charitable sector
- First, charities can use branding to identify themselves to the public as the owner/provider of certain services and goods
- Second, branding also helps to distinguish one charity from another. This is especially important where a legitimate charity needs to distinguish itself from illegitimate predatory charities

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- Third, branding can help charities increase their donor base. This is especially useful if the charity is national or international, as branding will help focus the goodwill from different parts of the country or world into one charity
- Fourth, branding can help charities create equity in the goodwill associated with the brand. Specifically, branding can lead to a significant licensing value in the charity's trade-marks

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BRANDING, MARKETING AND TRADE-MARKS

- Branding is an essential element of marketing in today’s commercial society, including that of charities
- Branding is the process of creating a product identity that permits effective marketing to take place
- Effective marketing is an essential part of a successful branding initiative
- The key element of successful branding and marketing, however, is the careful use of trade-marks. Without the right trade-mark to serve as the foundation for a strong brand, effective marketing cannot take place

WHAT IS A TRADE-MARK?

- A trade-mark is any mark used for the purpose of distinguishing wares and services manufactured, sold, leased, hired or performed from those of others
- A trade-marks can consist of
 - A single word, “Lego”
 - A combination of words, “Miss Clairol”
 - A logo or symbol, the big “M” in McDonalds
 - A slogan, “you deserve a break today”
 - A package or container design, “the Coca-Cola bottle”
 - Even a telephone number, “967-1111”

EXAMPLES OF TRADE-MARKS AND CHARITIES

- Trade-marks are not only for businesses. Trade-marks can also be used in the charitable sector, as illustrated below:
 - The corporate name of a charity
“ABC Charity of Canada”
 - The operating name of a charity
“ABC Charity”
 - The logo of a charity
“The Panda from World Wildlife Fund”
 - The emblem or crest of a charity
“The cross for the Canadian Red Cross”
 - The slogan of a charity
“Run for the Cure”

IMPORTANCE OF TRADE-MARKS TO CHARITIES

- Trade-marks represent the goodwill of a charity by providing a focal point for:
 - Membership
 - Developing sponsorship opportunities
 - Enhancing the reputation of the charity
 - Facilitating donations for charities
- Trade-marks also distinguish one charity from another charity
- Trade-marks have both present and future marketing value in relation to the sale of promotional materials, as well as goods and services
- Trade-marks have licensing value with regard to local chapters and in other jurisdictions

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CHARITIES' FIDUCIARY DUTIES WITH RESPECT TO TRADE-MARKS

- Trade-mark is often one of the most valuable assets of a charity
- Directors of a charity have a fiduciary obligation to protect the trade-mark and good will of a charity
- As such, directors of a charity need to ensure that all trade-marks are properly identified, protected and applied in fulfillment of a charity's charitable purposes

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- Trade-marks are fragile assets that can be lost or eroded through errors of commission and/or omission
- Trade-marks must be used in a proper manner to protect and enhance their value, instead of diminishing their value or turning them into a wasting asset
- As such, both directors and CEO's and those who advise charities need to be familiar with trade-mark issues

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HOW TRADE-MARKS BECOME WASTING ASSETS

- **Confusion with pre-existing trade-marks or trade names**
- **Failure to restrain unauthorized use of trade-marks resulting in loss of distinctiveness**
 - **Similar corporate names**
 - **Similar association names**
 - **Similar logos**
 - **Similar domain names on the internet**
- **Confusion in names involving estate gifts to charitable associations**

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- **Failure to properly control licensing of a trade-mark**
- **Abandonment through lack of use**
- **Limitation on trade-mark rights as a result of not objecting to trade-mark registration by others**
- **Dilution of trade-mark through inconsistent use**
- **Trade-marks are used with wares and services different from those listed in the trade-mark registration**

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TRADE-MARK PROTECTION AND THE COMMON LAW

- **Common law provides protection to restrain a competitor from passing off its goods or services under the trade-mark of another**
- **The cause of action at common law is called a “passing off” action**
- **Common law protection of a trade-mark does not require that the trade-mark be registered**
- **However, trade-mark rights at common law are more difficult to establish and enforce**

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THE ADVANTAGES OF TRADE-MARK REGISTRATION

- Trade-mark registration provides a presumption of a valid trade-mark
- Trade-mark registration is effective throughout Canada
- Trade-mark registration permits enforcement across Canada
- Trade-mark registration provides the exclusive right to use the trade-mark with respect to its goods or services
- Trade-mark registration gives public notice of the trade-mark

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- A trade-mark registration can become incontestable in some situations notwithstanding pre-existing common law trade-mark
- Failure to obtain trade-mark registration may result in a future limitation of trade-mark rights
- Trade-mark registration can assist in protecting a domain name on the internet
- Trade-mark registration facilitates obtaining trade-mark registration in other “Convention” countries

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THE ACQUISITION OF TRADE-MARK RIGHTS

- A trade-mark registration confirms and enhances existing trade-mark rights
- Formal registration not essential
 - A trade-mark registration is not essential to acquire rights in a trade-mark
 - An owner of a trade-mark has the right to prevent the subsequent use of a confusing trade-mark by another but only in the specific geographic area of usage

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- **First use of a trade-mark generally establishes priority as the determining factor**
 - Subject to earlier filing of proposed use of trade-mark
 - There is no minimum length of time that a trade-mark must be used
 - Trade-mark use must be continued and not abandoned
- **There can also be parallel copyright that need to be protected**

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- BARRIERS TO TRADE-MARK REGISTRABILITY**
- **“Primarily merely” the name of an individual who is living or has died within the proceeding thirty years**
 - **Clearly descriptive or deceptively misdescriptive**
 - **It is the name of any of the goods or services in connection with its use**
 - **Confusing with other trade-marks**
 - **Confusing with official mark under Section 9 or 10 of the *Trade-marks Act***
 - **Must relate to services and/or wares provided by the charity**

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- THE SELECTION OF TRADE-MARKS FOR ASSOCIATIONS**
- **Inherently strong marks**
 - Coined words like “Xerox” or “Exxon”
 - **Inherently weak marks**
 - Dictionary words like “Super Glue”
 - **Suggestive marks**
 - “Shake and Bake”
 - **Compound work marks**
 - “Coca-Cola”
 - **Marks that have acquired a secondary meaning**
 - “Fridgedaire”

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THE IMPORTANCE OF CONDUCTING TRADE-MARK SEARCHES

- **When to do a trade-mark search**
 - For existing unregistered trade-marks before proceeding to trade-mark registration
 - For future trade-marks or logos
 - For future corporate names or change of corporate names
 - For future operating names of a charity
 - For internet domain names
 - For charities that are licensing their names

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- **Why conduct a trade-mark search?**
 - To determine the strength of an existing unregistered trade-mark
 - To determine if there are any pre-existing trade-marks that are confusing and should either be avoided or challenged (within 5 years)
 - To determine the extent of future wares and services left open for expansion of trade-mark registration
 - To avoid trade-mark infringement and potential lawsuits

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- **Types of trade-mark searches**
 - Trade-mark office for registered trade-marks
 - Trade name and common law search
- **The trade-mark registrability opinion**
- **Expunging competing trade-marks**
 - Expungement based upon non-use
 - Expungement based upon earlier use

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THE BASIS FOR OBTAINING ORDINARY TRADE-MARK REGISTRATION

- Use in Canada
- Proposed use
- Registration in foreign countries
- Making known in Canada
- Combination application

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FILING AND PROSECUTING TRADE-MARK APPLICATIONS

- What does a trade-mark application cover?
 - A separate trade-mark application must be filed for each trade-mark
 - However, one trade-mark application can cover both wares and services
 - There is no limit to the number of wares and services that can be included in one application

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- When to file the trade-mark application
 - A proposed use application would allow the date of filing to become the priority date instead of a subsequent date of actual usage
 - If a trade-mark application has been filed in another “Convention” country within six months, the charity can claim the earlier filing date as the filing date for the Canadian trade-mark application

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THE IMPORTANCE OF FOREIGN TRADE-MARK REGISTRATION

- Each country requires separate trade-mark registration
- In the United States, there is a class system requiring separate registration in each class
- In the European Union, a single registration can be filed for all member countries
- Member countries to international conventions can claim priority date as the filing date of a trade-mark in another convention country

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SECTION 9 OFFICIAL MARKS

- What is a Section 9 Official Mark?
 - Section 9(1)(n)(iii) of the *Trade-marks Act* prohibits anyone from using an Official Mark of a public authority in association with any wares or services in Canada
 - Example is the Olympic symbol for The Canadian Olympic Association
- The advantages of a Section 9 Official Mark
 - Allows the owner to prohibit anyone else from using the mark for any wares or services

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- Recent court decisions concerning the definition of “public authority”
 - Must be for the benefit of the public
 - Must have a significant degree of government control
- The future for Section 9 Official Marks for charitable organization
 - It is now more difficult for charities to qualify as public authorities
 - Charitable organization with existing section 9 Official Marks should secure parallel trade-mark registrations

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CERTIFICATION MARKS

- A certification mark is a trade-mark that the owner licenses to others to use to distinguish wares or services that are of a defined standard with respect to
 - The quality of the wares or services
 - The market conditions under which the wares are produced or the services performed

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- The class of persons producing the wares or performing the services from wares or services that are not of such a defined standard
- A registered owner of a certification mark cannot be the user of the mark, but may only license others to use the trade-mark when satisfied that the licensee deals in wares or provides services that meet the defined standard

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- Examples of certification marks include:
 - Good Housekeeping Seal of Approval
 - Canadian Standards Association i.e. CSA approved mark
 - Swiss Chocolate
 - Stilton Cheese
 - VQA Vintners Quality Alliance
 - Canadian Dental Association Recognized Seal
 - Canadian Counselling Association, i.e. CCC

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- **Liability associated with certification marks**
 - No reported cases of liability for failing to hold a licensee to the standards claimed
 - Liability still exists as third parties could potentially sue for damages arising from reliance on owner’s representation that the certification marks attest to a certain standard
 - Third parties could also file a complaint with Canadian Intellectual Property Office so that the certification mark might be expunged or not renewed on its fifteenth anniversary
 - Owners of certification marks must monitor and enforce standards

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- TRADE-MARKS AND INTERNET DOMAIN NAMES**
- **Conflicts between domain names and trade-marks**
 - There is a limited number of internet domain names
 - There can be multiple similar trade-marks
 - Both ICANN and CIRA have policies to resolve disputes between domain names and trade-marks
 - **Securing and protecting domain names**
 - **Contesting existing domain names that the charity has failed to secure**
 - **Licensing of domain name may be appropriate in certain situations**

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- PROPER USE OF TRADE-MARKS**
- **Ensure continued usage**
 - **Ensure proper marking, i.e. ™ for unregistered trade-mark and ® for registered trade-mark**
 - **Ensure identification of license arrangement**
 - **Trade-marks should be distinctive**
 - **Trade-marks should be used as an adjective, not a noun**

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- Trade-marks may need to be followed by generic name, i.e. “Jell-O Gelatin”
- Trade-marks should avoid plural or possessive applications and maintain consistency
- Essential to file and show change of name of trade-mark owner
- Other wares/services may require extension of the trade-mark registration
- Importance of education concerning trade-mark use with the staff and board of a charity

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- TRADE-MARK LICENSING**
- When is trade-mark licensing relevant?
 - When a charity is setting up local chapters and wishes to maintain the ownership and control of a trade-mark
 - When a charity expands to other countries and wishes to maintain ownership and control of its trade-marks
 - When a charity permits other organizations to use its trade-mark as evidence of membership or standards be maintained

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- When a charity permits its trade-mark to be used in conjunction with an event conducted by others on behalf of the charity
- When a foreign charity is sponsoring a new organization in Canada and wishes to retain ownership and control of the trade-mark
- When a charity enters into a sponsorship agreement with a sponsor

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- **Current licensing requirements for trade-marks**
 - There must be a licensing arrangement
 - The license arrangement should be in writing but not necessarily
 - License must be granted by the owner of the trade-mark
 - Owner must maintain direct or indirect control of the character, quality and use of the trade-mark in association with wares and services
 - The *Trade-marks Act* deems the use of a licensee to be use of the owner

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- **Use and enforcement of the trade-mark license**
 - **Marking**
 - Important to show that the user is a licensee
 - e.g., “Help The Children” is a Reg™ of “Help The Children International” used under license by “Help the Children Canada”
 - **Enforcement**
 - Licensee may call on owner to take proceedings to enforce protection of trade-mark
 - Licensee can establish evidence of use for a proposed use by licensor

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- **General licensing considerations**
 - Scope of license
 - Licensee’s undertaking
 - Quality control
 - Controlling use
 - Assignment and sub-license
 - Licensee’s standing

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- Prescribe boundaries for licensed goods and services
 - Liability concerns
 - Maintaining confidentiality
 - Royalties
 - Termination of license agreement
 - Effect of termination of agreement
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- PROTECTING THE TRADE-MARK**
- A “portfolio management” approach in protecting trade-marks is required
 - Ensure parallel registrations of the trade-marks, trade names and corporate names
 - Monitor infringement by other competing trade-marks
 - Be pro-active in stopping infringement of a trade-mark
- 45

- Protect an unregistered trade-mark
 - Protection under corporate law
 - Expunging a competing registered trade-mark
 - “Passing off” action at common law
 - Protection under the *Trade-marks Act* for registered trade-marks
 - Ensure proper usage of the trade-mark
 - Ensure proper monitoring and enforcement of trade-marks
 - Avoid abandonment under common law
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Highlights of Recent Tax Changes Affecting Charities

Presented by
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For the
Association of Fundraising Professionals (AFP) Ottawa Chapter
“Recent Legal Developments Affecting Charities”

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RESOURCE MATERIALS

This power point presentation consists of excerpts from:

- A paper entitled "Recent Changes to the *Income Tax Act* Affecting Charities and Gift Planning" dated March 16, 2005
- Charity Law Bulletins #54, #55, #56, #59, #67, #69, #74 and #75
- two articles in *The Lawyers Weekly*

all available at www.charitylaw.ca

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A. OVERVIEW OF RECENT CHANGES TO THE *INCOME TAX ACT*

Legislative and CRA Initiatives

- December 20, 2002 - Draft Amendments
- December 24, 2002 - Income Tax Technical News No. 26
- February 28, 2003 Federal Budget
- December 5, 2003 Draft Amendments
- February 27, 2004 Revised Draft Technical Amendments
- March 23, 2004 Federal Budget
- December 6, 2004 Ways and Means Motion – Bill C-33 from March 2004 Federal Budget
- May 13, 2005 Passage of Bill C-33 (May 2005 Amendments)
- July 18, 2005 Special Release – Legislative Proposals Relating to Income Tax

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Topics will include:

1. Disbursement Quota Rules
2. Intermediate Sanctions
3. Appeals Regime
4. Increased Transparency
5. Split-Receipting
6. New Definitions
7. Tax Shelters
8. Reasonable Inquiry

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B. HIGHLIGHTS OF MAY 2005 AMENDMENTS

1. Overview

- **The March 2004 Federal Budget reflected a major initiative by the Federal Government to rewrite the tax rules concerning charities**
- **Draft enabling legislation was initially released on September 16, 2004**
- **Notice of Ways and Means Motion was introduced on December 6, 2004 (Bill C-33)**
- **Bill C-33 enacted May 13, 2005 (“May 2005 Amendments”)**

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- **The Budget reflected the proposals of the Voluntary Sector Initiative’s Joint Regulatory Table, particularly with respect to intermediate sanctions for charities**
- **The Budget also sought to rectify a number of technical problems with the disbursement quota rules**
- **The resulting legislative provisions are complex and will be very challenging for charities to comply with**

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2. New Disbursement Quota Rules (“DQ”)

a) Introduction

- **What is DQ?**
 - **A prescribed amount that registered charities must disburse each year in order to maintain their charitable registration**
- **Purpose**
 - **To ensure charities use charitable funds on charitable activities**
 - **To discourage charities from spending excessive amounts on fundraising and from accumulating funds**

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b) Proposed changes to Disbursement Quota Formula:

Reduction of Disbursement Quota Rate

- The May 2005 amendments reduce the 4.5% disbursement quota that previously applied to the capital assets of public and private foundations to a more manageable rate of 3.5%

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Extension of 3.5% Disbursement Quota to Charitable Organizations

- In the past, only public and private foundations were subject to a separate disbursement quota upon their capital assets not used in charitable activities
- The reduced 3.5% disbursement rate will now also apply immediately to charitable organizations registered on or after March 23, 2004 (after 2008 for charitable organizations registered before March 23, 2004)

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Disbursement Quota Threshold

- The 3.5% disbursement quota will no longer apply to charities that hold investments equal to or less than \$25,000 in a given year
- This *de minimus* threshold is generally considered to be too low to be of much relief

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Gifts Transferred to Charitable Organizations

- Previously charitable organizations were exempt from the 80% disbursement quota involving transfer of funds from other charities
- Now, all transfers of funds from one registered charity to another, including transfers to a charitable organization (but excluding transfers of enduring property) will be subject to the 80% disbursement obligation, i.e. 80% of the gift must be expended in the following taxation year

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Enduring Property

- The amendments combine 10 year gifts and gifts of capital property from estates under the new term of “enduring property”
- Enduring property also includes certain gifts received by a charitable organization from another registered charity.

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Gifts Made By Way Of Direct Designation

- Where an individual has designated in his/her will a charity as a direct beneficiary of the individual’s RRSP, RRIF or life insurance policy, the May 2005 amendments treat such gifts as enduring property for the purposes of the disbursement quota rules
- This will mean that direct designation of RRSP, RRIF and life insurance proceeds will be subject only to the 3.5% disbursement quota while they are held as capital and then subject to the 80% disbursement quota in the year in which they are disbursed

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Encroachment on Enduring Property

- **New concept of a “capital gains pool”, which is a notional account to keep track of the amount of capital gains realized by a charity from the disposition of “enduring property”**
- **A charity will now be able to encroach on these capital gains, provided that the terms of the gift permit such encroachment, but only up to the lesser of the amount of the 3.5% disbursement quota and the amount in the “capital gains pool”**

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- **Charities will be able to decide how much to claim within the permitted encroachment limit of the capital gains pool but charities will need to track their capital gains pool each year on their T3010A**
- **The combination of the yearly tracking requirement for the “capital gains pool” and the determination of what is a capital gain will make the calculation of the disbursement quota challenging for charities to comply with**

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Transfers of Enduring Property

- **Enduring property received by a registered charity from another registered charity will result in the same treatment by the recipient as if the enduring property had been received directly from the original donor, i.e. 80% will not need to be expended in the following taxation year**

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- **Gifts to charitable organizations will need to comply with the specified gift rules in order to avoid having to expend 80% in the following taxation year unless it is a transfer of “enduring property”**
- **There will therefore be three choices in tracking inter-charity transfers**
 - **Ordinary gifts (i.e., not specified gifts, as enduring property)**
 - **Specified gifts**
 - **Enduring property (that are not received as specified gift)**

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2. Intermediate Sanctions

Purpose of Intermediate Sanctions

- **The May 2005 amendments establish a more responsive approach to the regulation of charities under the *Income Tax Act* by introducing sanctions that are more appropriate than revocation for relatively minor breaches of the *Income Tax Act***
- **The sanctions will apply in respect of taxation years that begin after March 22, 2004**

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Offence	First Infraction	Repeated Infraction (Within 5 years)
<ul style="list-style-type: none"> • Late filing or failure to file T3010A • Issuing incomplete receipts • Carrying on prohibited business activity <ul style="list-style-type: none"> • Private foundation – any business • Public foundation or charitable organization – unrelated business • Foundation acquiring control of corporation • Failure to comply with certain verification and enforcement requirements (e.g. keeping proper books and records) 	<ul style="list-style-type: none"> • \$500 penalty • Penalty of 5% of eligible amount stated on receipt • Tax of 5% on gross revenue from the offending activity • 5% tax on dividends paid to charity • Suspension of tax receipting privileges 	<ul style="list-style-type: none"> • \$500 penalty. May lead to revocation • Penalty of 10% of eligible amount stated on receipt • Tax of 100% on gross revenue from the offending activity and suspension of receipt privileges • 100% tax on dividends paid to charity • Suspension of tax receipting privileges

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Offence	First Infraction	Repeated Infraction (Within 5 years)
<ul style="list-style-type: none"> Issuing receipts in taxation year that do not exceed \$20,000 where there is no gift or if receipt contains false information Issuing receipts totaling more than \$20,000 if there is no gift or receipt contains false information Transfer among charities to avoid disbursements quota (joint and several liability with recipient charity) Undue personal benefit 	<ul style="list-style-type: none"> 125% tax on eligible amount of receipts Tax of 125% on eligible amount of receipts and suspension of tax privileges Tax of amount transferred and 10% of amount transferred Penalty of 105% of benefit 	<ul style="list-style-type: none"> 125% tax on eligible amount of receipts Tax of 125% on eligible amount of receipts and suspension of tax privileges Tax of amount transferred and 10% of amount transferred Penalty of 115% of benefit and suspension of tax receipt privileges

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Undue Benefit

- Gifts other than to qualified donee
- The amount of any “rights, income, property or resources” paid, payable, assigned or otherwise made available to member, trustee, over 50% contributor or not at arms length person

Exceptions

- Reasonable remuneration or consideration for property acquired or services rendered
- Gift made or benefit conferred in course of charitable activities unless improper eligibility
- Gift to qualified donee

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Tax/Penalty

- Sanctioned charity can transfer the amount of tax or penalty to CRA or to another arm’s length charity (eligible donee)
- Arm’s length – more than 50% of directors deal at arms length with all directors of taxed charity

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Revocation

- Still available for any offence and can be applied with intermediate sanctions
- The charitable status of a charity may also be revoked if it obtained its charitable registration status on the basis of false, misleading or omitted information

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Revocation Tax

- In lieu of paying revocation tax to CRA, equivalent amount may be paid to eligible donees, i.e. other registered charities dealing at arm's length

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Annulment

- Where registration obtained in error or if charity ceases to be a charity because of changes in the law
 - No effect on issued receipts
 - No 100% Part V revocation tax or other penalty will be charged
- Useful tool – permits errors to be rectified without negative public notice which goes with notice of revocation

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3. Appeals Regime

Pre Budget

- **Federal Court of Appeal judicial review**
- **No administrative appeal process**
- **Costly, ineffective**

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Internal Appeals Process

- **CRA's existing internal objection review process is extended to Notices of Decision regarding**
 - **Denial of applications for charitable status**
 - **Revocation or annulment of charitable status**
 - **Designation of a charity as a private or public foundation or charitable organization**
 - **Imposition of any taxes or penalties against a registered charity**

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Judicial Review Process

- **Appeals of intermediate sanctions and penalties entitled to trial de novo before Tax Court of Canada**
- **Appeals of refusals to register, revocation, annulment, and charitable designation are by judicial review application to Federal Court of Appeal**
- **Both can occur only after Notice of Objection has been filed as part of internal review process and 90 days have passed**

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**4. Additional Information Available to Public
Increased Transparency**

- **Financial information**
- **Registration/annulment correspondence from CRA**
- **Material filed and CRA responses regarding requests for exemption and special status**
- **Information detailing application of sanctions**
 - Identification of charity
 - Sanction imposed
 - Grounds for sanction
- **CRA decisions regarding objections to assessment of tax or penalties**

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- **Increased website information**
 - Reasons for registration decisions
 - Policies
 - Procedures
 - Research database
- **Will help charities in regulating their activities and to comply with law and CRA administrative positions**
- **Additional information required on official tax receipts starting in 2005**

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**C. HIGHLIGHTS OF THE JULY 2005 SPECIAL
RELEASE**

1. Meaning of Gift

- **The traditional common law definition of a gift requires:**
 - the donor must have an intention to give
 - there must be a transfer of property
 - the transfer must be made voluntarily without contractual obligation; and
 - no consideration or advantage can be received by the donor

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- 2002 draft amendments to the *Income Tax Act* create a new concept of “gift” for tax purposes which permits a donor to receive benefit, provided that the value of the property donated exceeds the benefit received by the donor
- Concept is commonly referred to as “split-receipting”

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- The 2002 draft amendments reflect an importation of the civil law concept of gift which permits a benefit back to the donor
- While a gift with an advantage may be deemed a gift under the *Income Tax Act*, it will not necessarily be a gift at common law and therefore should not be identified as a gift in order to avoid subsequent challenges to the validity of the transfer

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2. New Split-Receipting Rules

- The key elements of what will be recognized as a gift for income tax purposes are as follows:
 - There must be voluntary transfer of property with a clearly ascertainable value
 - There must be a clear donative intent by the donor to benefit the charity

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– Donative intent will generally be presumed provided that the fair market value of the advantage does not exceed 80% of the value of the gift

– The eligible amount of a gift will be the excess of the value of the property transferred over the amount of the advantage received by the donor

– Any advantage received by the donor must be clearly identified and its value ascertainable

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– The amount of the advantage is the total value of all property, services, compensation or other benefits to which the donor, or a person not dealing at arms length with the donor, has received or obtained or is entitled either immediately or in the future as partial consideration for or in gratitude for the gift or that is in any other way related to the gift

– Excluded from the value of the advantage is token consideration for the gift calculated on the basis of a “*de minimis* threshold” of the lesser of 10% of the value of the gift and \$75.00

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• The charitable receipt will now need to identify the advantage and the amount of the advantage, as well as the eligible amount of the resulting gift

• The advantage can be received prior to, at the same time as, or subsequent to the making of the gift

• It is not necessary for a causal relationship to exist between the making of the gift and the receiving of the advantage as long as they are “in any other way” related to each other

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- Therefore, if a donor makes a gift in consideration of the charity employing his spouse, or the charity hires his spouse in gratitude of the gift being made in the future, then the value of the advantage might include the current value of the employment of the spouse
- In addition, the advantage could even be provided by third parties unbeknownst to the charity, which fact will necessitate that charities make inquiries of donors to determine if they have received a related benefit from anyone

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3. New Definitions of Charitable Organizations and Public Foundations

- The definitions of charitable organizations and public foundations have been amended by replacing the “contribution” test with a “control” test
- The rationale for amending the definitions is to permit charitable organizations and public foundations to receive large gifts from donors without concern that they may be deemed to be a private foundation

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- The previous “contribution” test meant that where more than 50% of the capital of a charity was contributed from one donor or donor group then the charity would be deemed to be a private foundation subject to more stringent activity and disbursement obligations
- The new “control” test means that while a donor may donate more than 50% of the capital of a charity, the donor or donor group cannot exercise control directly or indirectly in any manner over the charity or be in a non-arm’s length relationship with 50% or more of the directors or trustees of the charity

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- As a result of the introduction of a “control” test, the convoluted business rules in relation to “control” will become applicable as a result of the phrase “controlled directly or indirectly in any manner whatever”
- Charities will now need to be careful that they do not unwittingly become designated as a private foundation instead of either a charitable organization or public foundation

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4. The Evolving Shutdown of Tax Shelter Donation Programs

Definition of Tax Shelter:

- Tax shelter is defined under the *Income Tax Act* as a promotion which represents that an investor can claim deductions or credits which equal or exceed the actual amount of the investment within four years of its purchase
- The definition of tax shelter was amended in the February 2003 Budget to include tax credits on charitable donations and limited-recourse debt

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- This meant that tax shelter donation programs with promises of net return on investments were required to be registered as tax shelters
- The potential misuse of tax shelter donation programs has been identified by CRA in numerous publications
- These donation programs turn on the fact that the item in question is purchased at a substantially lower price than its purported much higher fair market value, and that a donation receipt is issued by a registered charity for the fair market value when the item is donated

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- **The December 2003 and February 2004 proposed amendments to the *Income Tax Act* attempt to shut down tax shelter donation programs by severely restricting the tax benefits from donations made under tax shelter donation arrangements**

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New Deeming Provision:

- **The proposed amendment deems the fair market value of property donated for the purpose of issuing charitable receipts to be the lesser of (i) the fair market value of the property and (ii) the cost (or the adjusted cost base where applicable) of the property to the tax-payer immediately before the gift is made in the following three situations:**

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- **If the tax-payer acquires the property through a “gifting arrangement” where it is represented that the acquisition of the property would generate any combination of tax credits or deduction that in total would equal or exceed the cost of acquiring the property in question, whether or not it was acquired within three years**
- **If the tax-payer acquired the property less than three years before the gift was made**

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– If the taxpayer acquired the property less than 10 years before making the gift, if it was reasonable to conclude that when the taxpayer acquired the property one of the main reasons for the acquisition was to make the gift (donor must prove that the donor did not have an expectation to make a gift when the property was acquired)

- New provision also requires a “look-back” to see if the property was acquired within the 3 or 10 years from a non-arm’s length person

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- The deeming provision does not apply to inventory, real property situated in Canada, certified cultural property, publicly traded shares and ecological gifts
- The deeming provision also does not apply to situations where the gift is made as a consequence of the donor’s death, a shareholder has transferred property to a controlled corporation in exchange for shares and the shares are donated, or a rollover transaction to a corporation for the same purpose of donating shares

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Limited Recourse Debt:

- The proposed amendments also preclude charitable receipts for limited recourse debt in respect of gifting arrangements (commonly referred to as “leveraged loans” or “leveraged donation schemes”)
- Limited-recourse debt is a form of tax shelter in which the tax-payer incurs a debt for which recourse is limited and which can reasonably be considered to be related to a charitable gifting arrangement

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- Even in situations where the recourse is not limited, the debt may be deemed to be a limited recourse debt unless the arrangement is in writing to repay the debt within 10 years and interest is paid annually within 60 days of the debtor's taxation year at not less than CRA prescribed rate
- If a gift includes a limited-recourse debt, then the amount of the loan would be deducted from the amount of the gift

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Substantive Gifts:

- Amendments related to "substantive gifts" are intended to prevent a donor from avoiding the application of the Deeming Provision by disposing of property to a charity and then donating the proceeds of disposition, rather than the donor donating the property directly to the charity

Anti-Avoidance Rule:

- In addition to the deeming provision, the amendments include an anti-avoidance rule

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5. Reasonable Inquiry/Information from Donor

- Charities issuing a receipt with an eligible amount in excess of \$5,000 will be required to make "reasonable inquiry" as to the existence of any circumstances in respect of which the new split-receipting or tax shelter rules might apply to cause the eligible amount to be less than the fair market value of the property donated
- Failure to make reasonable inquiry will likely result in an incorrect receipt and could trigger the imposition of intermediate sanctions

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- Charities will be required to inquire of donors of gifts in kind when the property donated was acquired by the donors
- Where possible, a written confirmation should be obtained from the donors to evidence the date of acquisition
- If the deeming provision applies, then the charity will need to inquire of the donor to determine the amount of the ACB of the gifted property, if applicable

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- Charities may be required to inquire of donors of gifts in kind to determine whether the donors had an expectation to make a gift at the time when the donor acquired the property
- Charities receiving gifts of private shares will need to determine if the shares were acquired within three years prior to the making of the gift or whether such shares had been exchanged for another class of shares i.e. in an estate freeze, either within three years or for the purpose of making a gift

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- The sanction imposed on the donor for failing to provide any of this information, whether or not the charity made reasonable inquiries, is for the eligible amount to be deemed to be nil – no credit or deduction in respect of the gift
- It remains unclear whether when a charity has made reasonable inquiries but the donor has not provided the required information the intermediate sanction/penalty will be applied

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6. Expanded Basis for Revocation of Registration of Charities

- Proposed amendments will permit the revocation of the charitable status of a charity if it “*makes a disbursement by way of a gift*” which is not a gift made “*in the course of charitable activities carried on by it*” or not a gift “*to a donee that is a qualified donee*” at the time of the gift
- All gifts made by a charity must be made in the course of furthering its charitable activities, transferred in accordance with an authorized agency/joint venture/partnership agreement, or transferred to qualified donees (i.e. generally other registered charities)

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7. Charitable Annuities:

- CRA indicated in Technical News No. 26 in December 2002 that the previous administrative position with regard to charitable annuities has no basis in law and cannot be continued as a consequence of the amendment to subsection 248(33) of the *Income Tax Act*
- Instead, a new administrative policy has been proposed which provides for a charitable receipt based on the difference between the cost of the annuity and the gift, rather than the difference between the anticipated annuity payments and the amount of the gift

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8. Additional Qualified Donee

- The February 27, 2004 Draft Amendments expand “qualified donees” to include a municipal or public body performing a function of a government in Canada
- This amendment is in response to the Quebec Court of Appeal decision in *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec*, 2001 D.T.C. 5144

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Key Aspects of the New *Federal Not-for-Profit Corporations Act*

**Presented by
Jane Burke-Robertson, B.Soc. Sci., LL.B.**

**for the
Association of Fundraising Professionals (AFP) Ottawa Chapter
“Recent Legal Developments Affecting Charities”**

Ottawa – September 15, 2005

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Overview of Topics

- CCA and Status of Bill C-21
- What It Means to be a “Soliciting Corporation”
- What Happened to Corporate Objects?
- Continuing Under the New Statute

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1. CCA and Status of Bill C-21

(a) *Canada Corporations Act*

- Has remained largely unchanged since 1917
- Its provisions are skeletal and ill defined in terms of any governance regime
- Limited number of corporate actions available
- Cumbersome process – SLP & by-law changes
- File annual summaries to avoid dissolution

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(b) Status of Bill C-21

- Received first reading - November 15, 2004
- In process of public consultation & review by the Standing Committee on Industry, Natural Resources, Science and Technology
- Earliest could become law: mid-late 2006

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(c) Highlights of Bill C-21

- Modelled on the CBCA
- All CCA corporations must continue under Act within 3 years of it coming into force
- Streamlined incorporation “as of right”
- No filing of by-laws
- Many more corporate actions possible
- Rights of members better enhanced and protected

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- Objective standard of care and due diligence defence for directors and officers and clarifies directors and officer duties
- Graduated levels of financial review depending on a corporation’s category and gross annual revenue
- Requirement to provide financial statements to members, directors and officers as well as to the Director under the Act

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2. What It Means to be a “Soliciting Corporation”

“...a corporation that has in the current year or in any preceding period that has been prescribed:

- (a) requested donations or gifts of money or other property from the public;
- (b) received a grant or similar financial assistances from the federal government or a provincial or municipal government or an agency of such government; or
- (c) accepted money or other property from a corporation or other entity that has made a request referred to in paragraph (a) or has received assistance referred to in (b).”

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(a) The Definition

- Definition is broad and will “catch” a variety of corporations
- Will result in increased accountability for many organizations
- Corporations may change their status from year to year

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(b) The Implications

- Number of Directors
- Under Section 126 a soliciting corporation must have a minimum of 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates.
- A non-soliciting corporation may have a minimum of 1 director

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(ii) Filing of Financial Statements

- Subsection 172(1) requires soliciting corporations to provide annual financial statements to the Director

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(iii) Public Accountant & Financial Review

(a) What is a “Designated Corporation”?

- **Different Rules for Soliciting Corporations - depending on if a corporation is a “Designated Corporation”**
- **Designated corporations include both soliciting and non-soliciting corporations with annual revenues equal to or less than the prescribed amount:**
 - **Soliciting corporations - \$50,000.**
 - **Non-soliciting corporations - \$1 million.**

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(b) Public Accountant: Qualifications

Section 179: A public accountant must:

- (1) Be a member in good standing of an institute or association of accountants incorporated by or under an Act of the legislature of a province;**
- (2) Meet the requirements under provincial law for performing any duty required under the statute;**
- (3) Be independent of the corporation, its affiliates or the directors or officers of the corporation or its affiliates.**

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(c) Rules for Appointment

- **Designated Corporations: The members of a designated corporation may unanimously resolve not to appoint a public accountant**
- **Non-Designated Corporations: Must appoint a public accountant**

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(d) Financial Review: Designated Corps.

Review Engagement:

- **If the members of a designated corporation do not resolve to dispense with the appointment of a public accountant, then the public accountant will conduct a review engagement in the prescribed manner**

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Financial Review: Designated Corps.

Audit Engagement:

- **The public accountant of a designated corporation will conduct an audit engagement in the prescribed manner if the corporation's members pass an ordinary resolution requiring an audit engagement.**

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(e) Financial Review: Non-Designated

Audit Engagement – Soliciting and Non-Soliciting

- **The public accountant of a corporation that is not a designated corporation must conduct an audit engagement in the prescribed manner unless the corporation falls within the exception (next slide) for soliciting corporations that are not designated corporations.**

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Financial Review: Non-Designated

Review engagement – Soliciting Corporation that is not a Designated Corporation:

- **The public accountant of a soliciting corporation that is not a designated corporation will conduct a review engagement in the prescribed manner if the corporation has annual revenues that are equal to or less than \$250,000. and its members pass a special resolution requiring a review engagement.**

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The Implications:

(iv) **Liquidation and Dissolution**

- **S. 233: A soliciting corporation is required to include a dissolution clause in the articles**
- **On dissolution, the remaining property of the corporation is required to be distributed to one or more “qualified donees” within the meaning of subsection 248(1) of the *Income Tax Act* (Canada)**

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Liquidation and Dissolution

Corporations caught by this requirement:

- **Registered charities**
- **Soliciting corporations; and**
- **A corporation that has within the last 5 years requested donations from the public or received grants from government, or accepted money from a corporation that has made such requests or received such grants**

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The Implications:
(v) Unanimous Member Agreement
Under Section 170(1), a soliciting corporation may not have a unanimous member agreement

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3. What Happened to Corporate Objects?
(a) Capacity of a “Natural Person”

- Corporations have full capacity unless there is a restriction in the articles on either activities or corporate powers
- **Subsection 16(1):** “A corporation has the capacity and subject to this Act, the rights, powers and privileges of a natural person.”

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(b) Restrictions on Activities

- **Subsection 17(2):** “A corporation shall not carry on any activities or exercise any power in a manner contrary to its articles.”
- Where are restrictions on activities placed in the articles?

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Restrictions on Activities

- Subsection 7(1) of the Bill provides a list of information to be included in the articles
- Includes:
 - (e) any restrictions on the activities that the corporation may carry on
- Restrictions on activities = Former objects clauses

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(c) The Mission

- Articles also to include: (f) “a statement of the mission of the corporation”.
- What is the “mission” of the Corporation?
- No definition in statute
- Potentially creates more flexibility in structuring non-profits and charities

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The Mission

- Inclusion of mission statement is mandatory
- The more specific or constraining the corporate purposes (as restrictions in the articles), the more general the mission statement should be
- The mission should always be consistent with and complement any corporate purposes included in the articles

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(d) Options: Corporate Purposes
Continuance – Non-Profits

- 1) **Include no corporate purposes (i.e. no restrictions). Mission will constitute evidence of non-profit intention for purposes of ITA.**
- 2) **Retain existing objects as restrictions (broad mission).**
- 3) **Prepare new corporate purposes (broad mission).**

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Options: Corporate Purposes
Continuance - Charities

- 1) **Retain existing CRA approved objects as restrictions (broad mission – must be consistent).**
- 2) **Prepare new corporate purposes as restrictions with CRA approval (broad mission – must be consistent).**

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Corporate Purposes: Example
Restrictions on Activities (Charity):

The activities of the Corporation shall be restricted to the following:

Carrying out research in the field of pediatric oncology and making the results of such research available to the interested public.

Mission:

The mission of the Corporation is the elimination or reduction in incidents of cancer among children.

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4. Continuing Under the New Statute

- **Section 295:** All existing CCA corporations will be required to continue under the new Act within 3 years of it coming into force (or face possibility of dissolution)
- Content of articles of continuance similar to that of articles of incorporation under Section 7
- **Section 209:** Can make amendments at same time as apply for continuance

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(a) Effect of Continuance

- **S. 209(6):** Articles and certificate of continuance deemed to be the articles and certificate of incorporation
- Members cease to be members of the “old corporation” and become members of the continued corporation.

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(b) Rights Preserved

- **S. 209(8) -** Property of the body corporate continues to be property of continued corporation
- Existing causes of action, claims or liability to prosecution unaffected
- Any action or proceeding pending by or against the body corporate may be continued against the corporation
- Any conviction or order in favour of or against the body corporate may be enforced

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(c) Timing of Continuance

- Corporations may wish to continue early or delay until the last possible moment depending on circumstances

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Timing of Continuance

Factors to consider:

- (i) Increased director protection
- (ii) Enhanced rights/protections to members
- (iii) By-laws or letters patent require amendment

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Timing of Continuance

- (iv) Different levels of financial review and appointment of public accountant
- (v) Contemplation of Fundamental Changes
- (vi) Availability of unanimous member agreement

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Avoiding Liability in Charitable Fundraising

Presented by

Terrance S. Carter, B.A., LL.B., Trade-Mark Agent

for the

Association of Fundraising Professionals (AFP) Ottawa Chapter
“Recent Legal Developments Affecting Charities”

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A. OVERVIEW

- Legal Responsibility of Charities and Directors in Fundraising
- Developing a Proactive Risk Management Approach to Fundraising
- Donor’s Rights and Remedies in Fundraising
- Avoiding Liability from Testamentary Charitable Gifts
- Avoiding Liability from Donor Restricted Charitable Gifts
- Avoiding Liability in Gift and Fundraising Programs

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B. RESOURCE MATERIALS

- www.charitylaw.ca
 - Article entitled “*Looking a Gift Horse in the Mouth - Avoiding Legal Liability in Fundraising*”
 - Article entitled “*Donor Restricted Charitable Gifts Revisited: A Practical Overview*”
 - Article entitled “*Recent Changes to the Income Tax Act Affecting Charities*”
 - Charity Law Bulletins #8, #9, #13, #17, #35 and #72
- www.antiterrorism.ca
 - Article entitled “*Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law*”

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C. LEGAL RESPONSIBILITY OF CHARITIES AND DIRECTORS IN FUNDRAISING

- Improper or negligent actions by development officers or fundraisers could expose a charity and its directors to legal liability
- The court held in *The Aids Society for Children (Ontario)* that
 - Although a charity does not hold its charitable property in trust for its charitable purpose, a charity has a fiduciary obligation to apply donations for its charitable purposes

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– A fiduciary has a legal obligation to put the interests of others ahead of the interests of the fiduciary

– There is little practical distinction for directors between being a trustee and having fiduciary obligations

– A charity and its directors have a fiduciary obligation to account to the public for all funds raised from donors

– Charities and directors therefore have a fiduciary obligation to donors to ensure that donations are applied for the charitable purposes of the charity

5

– It is essential for charities and their directors to review charitable objects on a regular basis and amend those objects as necessary

– Third party fundraisers and subcontractors are agents of the charity and may cause liability for both the charity and its board of directors personally

– Fundraising contracts which provide for unreasonable compensation may be voidable based upon both violation of public policy and/or misrepresentation

6

– Misrepresentation is determined by the perception of the donor, not by the intent of the charity or its directors in receiving the gifts

– The fiduciary duty of a charity and its board of directors to account for donations applies to the gross amount of donations raised by third party fundraisers, not to the net amount that the charity may be entitled to pursuant to a fundraising contract

– Fundraising costs of between 70% to 80% renders the contracts void as being contrary to public policy

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- The directors were found personally liable for unreasonable fundraising costs in the amount of \$766,000
- Fundraising companies were required to repay unreasonable fundraising costs
- The directors were subjected to a penalty of \$50,000.00 under the *Charities Accounting Act* (Ontario)
- The court in *National Society for Abused Women and Children* confirmed
 - Fiduciary obligation of directors to account for unconscionable fundraising costs

8

- Fundraising contract was declared void *abinitio* as being contrary to public policy
- Donors are entitled to know about fundraising and administrative costs when making donations
- For more information on these cases, see Charity Law Bulletins #9, #13 and #17 at www.charitylaw.ca
- The “buck” stops with the board of directors of a charity after everyone else has left the charity
- The board of directors must therefore be made familiar with all fundraising programs and the liabilities that are associated with those programs

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- D. DEVELOPING A PROACTIVE RISK MANAGEMENT APPROACH TO FUNDRAISING**
- Legal liability in fundraising can be reduced by developing a proactive legal risk management approach to fundraising
 - Fundraising must comply with the applicable corporate objects and powers of the charity
 - The fundraising program must not be *ultra vires* the charitable objects of the charity
 - The charitable purpose being furthered by fundraising must not be *ultra vires* the charitable objects
 - A donor restricted gift resulting from fundraising must not be *ultra vires* the charitable objects

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- **Fundraising must not violate applicable statutory provisions**
 - **Selected specific charitable statutes affecting fundraising**
 - *Charities Accounting Act (Ontario)*
 - *Charitable Gifts Act (Ontario)*
 - *Religious Organizations Land Act (Ontario)*
 - *Income Tax Act (Canada)*
 - *Charitable Fund-raising Act (Alberta)*

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- *The Charities Endorsement Act (Manitoba)*
- *Charities Act (PEI)*
- *Charitable Fund-raising Businesses Act (Saskatchewan)*
- *Anti-terrorism Act (Canada)*
- *Taxation Act (Quebec)*
- **In August 2005, the Uniform Law Reform Conference of Canada adopted a draft *Uniform Charitable Fundraising Act*, which when enacted will provide in part for the following:**
 - **Requires charities to register in order to use the services of a fundraising business**

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- **Requires charities to maintain detailed financial records and fundraising contracts for a period of six years, where records should be made available to the public on request**
- **Makes the list of donors names the exclusive property of the charity that can only be used by a fundraising business with the charity's permission**
- **Makes fundraising businesses trustees of contributions received on behalf of the charity**

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- Makes written fundraising agreements mandatory, detailing contribution estimates and expenses, and establishing how fundraising business is to be remunerated
- Enables the donor to apply to the Superior Court for an order compelling the proper use of contributions
- Fundraising must not involve gifts that are contrary to public policy
 - Charitable gifts involving discrimination
 - Charitable gifts involving illegal activities

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- The impact of 2001 Regulations under the *Charities Accounting Act* (Ontario)
 - No relief to the common law rule prohibiting directors from receiving remuneration
 - Indemnification of directors and officers and liability insurance is now permitted under prescribed circumstances
 - Charities may commingle restricted and special purpose funds, provided that prescribed accounting records are maintained
 - However, the *Public Guardian and Trustee of Ontario* does not permit commingling of restricted funds and general funds

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- D. DONOR'S RIGHTS AND REMEDIES IN FUNDRAISING**
- General exposure to liability involving donors
 - Misrepresentation involving issuance of charitable receipts and/or the amount
 - Failure to comply with donor restrictions
 - Failure to disclose excessive fundraising costs
 - Detrimental reliance upon charitable endorsements
 - Detrimental reliance upon improper tax advice involving donations
 - Breach of fiduciary duty and/or breach of trust in applying funds to charitable purposes

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- Donor's statutory rights
 - *Charities Accounting Act (Ontario)*
 - Section 6 of the CAA (public inquiry)
 - Section 10 of the CAA (alleged breach of trust)
 - Section 4(d) of the CAA (noncompliance with donor directions)
 - Section 3 of the CAA (formal passing of accounts)
 - The *Income Tax Act (Canada)*
 - Informal complaint to CRA
 - Resulting audits
 - Receiving and disbursement violations

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E. AVOIDING LIABILITY FROM TESTAMENTARY CHARITABLE GIFTS

- Reducing legal risks from estate planning programs
 - Shift the legal risk away from the charity
 - Download the risk to professionals, i.e. accountants or lawyers, to establish evidence of due diligence
 - Raise the shield of liability insurance whenever possible, if available
 - Return any original wills or codicils to donors or their lawyers

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- Avoid circumstances conducive to allegations of undue influence
 - Directing work to a particular lawyer
 - Paying for a portion of donor's legal costs
 - Acting as either an estate trustee (executor) or attorney under a power of attorney
 - Preparing a will or power of attorney
 - Providing advice on how to structure disposition clauses in a will
 - Providing recommendations on how much of the estate should be given to a charity or charities in general

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- **Completing the will guide on behalf of the testator instead of only assisting with background information**
- **Meeting with the lawyer when the donor gives instructions for the will**
- **Being present when the will is being signed**
- **Offering to store the original will, codicil to a will, or power of attorney**
- **Managing testamentary gifts**
 - **Ensure that a copy of the will is received and carefully review charitable gift provisions**
 - **Review any applicable donor restrictions before agreeing to receive the gift**

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- **Require progress reports on the administration of an estate**
- **Request the distribution of gifts to the estate at the earliest opportunity**
- **Have legal counsel review estate releases as the charity cannot sign an indemnity for money or cause of action beyond what the estate would have otherwise been liable for**
- **Have legal counsel review estate accounts before signing estate releases**
- **Review appropriateness of investments**
- **Ensure that tax credits are used against 100% of income in the year of death and carried back one year, if applicable**

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- **Make sure that only duly authorized signing officers execute the releases**
- **Resist voluntarily renouncement of a gift**
 - **A charity may be asked to renounce a testamentary gift in situations of financial hardship involving family members of the deceased**
 - **There is no legal authority for a charity to unilaterally renounce a gift**
 - **Even court authorization for a renunciation of a testamentary gift is unlikely**
 - **The charity therefore has a fiduciary obligation to pursue testamentary gifts**
- **Ensure that testamentary gifts continue to honour outstanding pledges**

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F. AVOIDING LIABILITY FROM DONOR RESTRICTED CHARITABLE GIFTS

- **The difference between unrestricted and donor restricted charitable gifts**
 - **What is an unrestricted charitable gift?**
 - **An unrestricted charitable gift is a gift to the charity that is not subject to any restrictions or limitations**
 - **What is a donor restricted charitable gift?**
 - **A donor restricted charitable gift that is a gift subject to binding restrictions, conditions or limitations**

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- **Instances of breach of trust involving donor restricted charitable gifts**
 - **Diverting a fund to another application**
 - **Withholding a fund**
 - **Pooling restricted funds with funds of another donor**
 - **Encroaching on the capital of an endowment fund**
 - **Altering the terms of a trust deed**
 - **Borrowing from a restricted fund**
 - **Using surplus funds from a fundraising appeal for a different purpose**

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- **Altering terms of a donor restricted fund without court authorization**
- **Can a donor restriction be unilaterally varied?**
 - **Only a court can vary a donor restricted charitable gift on a *cyprés* application**
 - **Exceptions are**
 - **Gift reverting to the donor on a failed *cyprés* application**
 - **Gift reverting to the donor on the failure of either a condition precedent or a condition subsequent**

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- **How should donor restricted gifts be managed once received?**
 - Identify the nature of the charitable gift
 - Review and approve donor restrictions
 - Effective ongoing management of donor restricted charitable gifts
 - Deposit into the bank account of the named charity
 - Invest fund in accordance with applicable investment power
 - Do not borrow against restricted fund
 - Commingle restricted funds only in accordance with regulations in Ontario and not with general funds

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- **How can donor restricted charitable gifts be avoided in the first instance?**
 - Encourage unrestricted gifts
 - Alternatively encourage the use of non-binding directions
 - Advise donors that all gifts are deemed to be unrestricted unless specifically stated otherwise

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- **Preventative steps to reduce liability involving donor restricted charitable gifts**
 - Public fundraising appeals should state that any surplus funds will be used for the general charitable purposes of the charity
 - Ensure that donor restricted gift includes a *cyprès* clause that will allow the charity to amend the purpose
 - Ensure that documentation creating donor restricted charitable trusts include the words “in trust”

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- **Protecting donor restricted charitable gifts**
 - **Impact of the Christian Brothers Ont. Court of Appeal decision**
 - **Claims against charities may increase**
 - **Special purpose trust endowments will be at risk to creditors of the charity**
 - **The ability of donors to create enforceable restricted gifts will be weakened**
 - **Donors will be reluctant to give large gifts directly to an operating charity**

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- **Developing a strategy in response**
 - **Utilize an arms length parallel foundation**
 - **Utilize a community foundation or trust company as an attendee**
 - **Structure gift as a determinative gift with a gift over to another charity**
 - **For more information see www.charitylaw.ca article on “Donor Restricted Charitable Gifts Revisited: A Practical Overview”**
- **Proposed legislation in B.C. (Bill 63) to protect special purpose charities trusts could prove to be problematic**

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- G. AVOIDING LIABILITY IN GIFT AND FUNDRAISING PROGRAMS**
- **Gifts of Shares**
 - **Gift of shares or interests in a business will be subjected to the *Charitable Gifts Act* (Ontario)**
 - **Charities can not own more than a 10% interest in a business for longer than 7 years**
 - **If a charity owns more than a 50% interest in a business then reporting requirements to P.G.T. apply**
 - **Potential liability in relation to improper valuing and receipting of shares of publicly traded companies**

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- Need to review CRA position on determining fair market value
- Need to review factors outlined by CRA in valuing shares as set out in Registered Charity Newsletter No. 12
- Gifts of real estate
 - Three year restriction on leasing property under the *Charities Accounting Act* (Ontario)
 - Forty year restriction on leasing property under the *Religious Organization Land Act*
 - Liability for toxic property and need for environmental assessment
 - Need for due diligence searches
 - Inability of charity to manage real property

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- Receiving used “gifts in kind”
 - Need for appraised fair market value
 - Potential liability to third parties from using recycled property
- Self insured gift annuities
 - The difference between self insured and reinsured gift annuities
 - Self insured gift annuity
 - Reinsured gift annuity
 - Legal risks associated with self insured annuities
 - Lack of corporate authority

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- Possible violation of the *Insurance Act* (Ont)
- Operational financial risks
- Restrictions on foundations issuing annuities
- Debt instruments forgivable on death
 - Need testamentary instrument to forgive debt
 - If not properly forgiven, will become an asset owing to the estate
- Bill C-45 Amendments to the *Criminal Code* (Westray Mines)
 - In effect criminalizes situations which previously were only matters of gross negligence

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- Charities, directors and officers may be exposed to personal liability
- insurance may not be available for defence costs
- See Charity Law Bulletin #35 at www.charitylaw.ca for more details
- Transferring capital funds between charities
 - Ensure that there are charitable objects to permit the transfer of funds
 - Identify donor restricted charitable gifts
 - Identify impossible or impractical donor restrictions
 - Change of trustees by deed of trust
 - Unrestricted funds to be applied for original charitable purpose

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- Investment issues in fundraising
 - Determine which investment powers apply and in what jurisdiction
 - Adapt and implement an investment plan
 - Investment plan needs to comply with *Trustee Act* (Ontario) particularly for delegation
 - Investment plan needs to incorporate and override the investment plan and/or agency agreement of an investment manager
 - See www.charitylaw.ca, Charity Law Bulletin #8 and “Looking a Gift Horse in the Mouth Avoiding Liability in Charitable Fundraising” article for more information

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- Managed or pooled investment of charitable funds
 - Does the recipient charity have the corporate power to operate a pooled fund?
 - Does the investment power of each participating charity permit it to invest charitable monies by pooling monies with a third party?
 - Does the *Loan and Trust Corporations Act* (Ontario) have application?
 - Does the *Bank Act* (Canada) have application?
 - Does the *Securities Act* (Ontario) have application?
 - Is court authorization required to pool investment funds of various charities?

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- **Federal *Competition Act* - Deceptive telemarketing & false or misleading misrepresentation**
 - The *Competition Act* covers deceptive telemarketing, false or misleading representations and deceptive marketing practices
 - Definition of “business” includes the raising of funds for charitable or other non-profit purposes, meaning that persons engaged in fundraising efforts will be covered by the deceptive telemarketing and deceptive marketing practices provisions
 - The misleading representations and deceptive marketing practices provisions do not apply to advertisements or representations made solely for a charitable purpose

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- However, if the part of the purpose of the fundraising includes promoting products or services, the *Competition Act* may apply
- Telemarketing is prohibited unless there is statutorily mandated disclosure
- Violation of the *Competition Act* constitutes a criminal offence
- A due diligence defence is available
- Directors and officers of a charity can be held personally liable
- The prohibition on false or misleading representation applies to telemarketing, door-to-door solicitation, and items offered for sale by the charity

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- **Legal issues involving fundraising on the internet**
 - Territorial jurisdictional issues
 - Intellectual property law issues
 - Potential for civil action from the internet
 - Domain names, trade-marks and the internet
 - Marketing and advertising on the internet
 - PIPEDA and provincial privacy legislation

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- **Fundraising Liability and Anti-terrorism**
 - **Anti-terrorism Legislation is very complicated, see www.antiterrorismlaw.ca for article “Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law”**
 - **Charity and its directors need to have a working knowledge of the anti-terrorism legislation in making a gift to charity**

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- **Even gifts that unintentionally end up in the wrong hands through agents of the charity can violate anti-terrorism legislation and create exposure to liability for the charity and its board**
- **A charity could lose its charitable status**
- **Directors, donors and fundraisers could be found personally liable**
- **Need to develop a due diligence checklist to avoid unintentional violations of the legislation**
- **However, anti-terrorism legislation generally involves strict liability legislation so due diligence is not necessarily a defence**

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