
**Ontario Bar Association
Charity & Not-For-Profit**

**A DANGER TO DABBLE -
CHARITY LAW HOT SPOTS**

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Risk Management Strategies

(Powerpoint Presentation)

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

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PROFESSIONAL CORPORATION

BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
Affiliated with Fasken Martineau DuMoulin LLP

Offices / Bureaux

Orangeville (519) 942-0001

Ottawa (613) 212-2213

Toll Free / San frais:

1-877-942-0001

www.carters.ca

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www.charitylaw.ca

OVERVIEW

- **The Significance of Charities and Charity Law**
- **The Fundamentals of a Charity**
- **The Fundamentals of a Non-Profit Organization**
- **Advising Directors About Their Liability Risks:
The Challenge in Advising the Charitable Client**
- **Minimizing Personal Exposure to Risk**
- **Strategies to Address Those Risks**
- **Developing a Legal Risk Management Checklist**

Note: For more details see articles and newsletters at www.charitylaw.ca

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THE SIGNIFICANCE OF CHARITIES AND CHARITY LAW

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

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

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THE FUNDAMENTALS OF A CHARITY

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

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

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- No definition of a “charity” but reflects the common law
- Includes extended statutory list of “qualified donees”
 - Registered Canadian amateur athletics associations
 - Low-cost housing co-operatives for the aged
 - Municipalities
 - United Nations
 - Prescribed universities
 - Her Majesty in right of Canada or a province

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- **What are the tax advantages of being a charity?**
 - **A charity does not pay tax on income or capital gains**
 - **A charity can issue charitable receipts to donors as tax credits for income tax purposes**
 - **A gift for income tax purposes can now include consideration to donor**
- **What are the legal forms available for a charity?**
 - **Charitable trusts**
 - **Unincorporated associations**
 - **Non-share capital corporations**

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THE FUNDAMENTALS OF A NON-PROFIT ORGANIZATION

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

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

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

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ADVISING DIRECTORS ABOUT THEIR LIABILITY RISKS: THE CHALLENGE IN ADVISING THE CHARITABLE CLIENT

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

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

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

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- **Increased exposure of directors and officers to liability in a more litigious environment**
- **Complicated tax issues, particularly with recent technical changes to the *Income Tax Act***
- **Fundraising requirements both federally and provincially**
- **Complicated management of gifts and compliance with receipting requirements**
- **Inherent risks in operations, such as sexual abuse of children**
- **Compliance with requirements under anti-terrorism legislation**

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

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

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

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

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MINIMIZING PERSONAL EXPOSURE TO RISK

- **Need to develop a proactive response**
- **Lawyer must be more than a legal technician**
- **Must change from giving passive advice that is reactive only to proactive advice given in a preventative context**

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STRATEGIES TO ADDRESS THOSE RISKS

- **Lawyer must be familiar with many aspects of the law in order to advise charitable clients of applicable legal issues**
- **Lawyer should assume that the charitable client knows little about charity law**
- **Lawyer must be diligent in asking questions of the charitable client**
- **Lawyer needs to explain the relevant law to the client in order to avoid problems in the future**
- **Lawyer needs to fully explain consequences of intended course of action and alternatives**

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

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DEVELOPING A LEGAL RISK MANAGEMENT CHECKLIST

- **Checklist helps to keep track of a multitude of legal issues**
- **Assists clients in understanding the interrelationship between legal issues**
- **Helps to identify and focus on problem areas to be addressed**

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

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EFFECTIVELY COMMUNICATING WITH THE CHARITABLE CLIENT

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

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

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

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