Religious and Institutional Properties: Practical Issues for Charities and Not-for-Profit Practitioners

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WHO IS THE CLIENT?
• Charity?
• Not-for-Profit Organization?
• Different rules involving real estate will apply depending on whether the client is a charity or a not-for-profit organization

ORGANIZATIONAL STRUCTURE?
• Organizational structure will impact how an organization holds land
• Trusts
• Unincorporated associations
• Corporations without share capital
  – Incorporated under the Corporations Act (Ontario)
  – Incorporated under the Canada Corporations Act
  – Co-operatives without share capital
• Share capital not-for-profit organizations

OBJECTS AND ACTIVITIES
• If incorporated, the board of directors has authority to sell land owned by the corporation unless that right is restricted by letters patent or by-laws of the corporation
• If trust or unincorporated, it is necessary to review the trust document, by-laws or constitution to determine whether the organization has authority and power to acquire, lease or dispose of real property
• Charitable activities
  – Consider the terms by which the organization received charitable status from the Charities Directorate at CRA and determine whether it encompasses any land purchase
  – If not, it may be necessary to obtain permission from CRA to change charitable activities in order to own land

• Religious Organizations’ Lands Act (ROLA)
  – Unincorporated associations do not have the ability to own property in their own name
  – ROLA permits trustees to be appointed on behalf of religious organizations to hold land on a perpetual succession basis notwithstanding that individual trustees may come and go

• Scope of ROLA
  • ROLA provides a comprehensive statutory code for the acquisition, holding, mortgaging and selling of land through trustees who are appointed to act on behalf of the religious organization
  • Limited to conveying land only
  • Purposes for which trustees can hold land
    – Place of worship
    – Residence of religious leader
    – Burial or cremation ground
- A book store, printing or publishing office
- Theological seminary, institution for religious instruction
- Religious camp, retreat or training centre
- Any other religious purpose

• Authority of trustees
  - Unincorporated religious organization must adopt a resolution conferring authority on trustees to own land in perpetual succession

- Trustees cannot exercise any of the powers contained in ROLA until authorized to do so by membership

  • Limitations of ROLA
    - Trustees can only mortgage religious organizations’ land if debt incurred for
      - Acquisition or improvement of land
      - Building, repairing, improving or extending buildings on land
    - Trustees can only sell land if membership has determined by resolution that the land in question is no longer required

- ROLA is subject to the trusts in any deed, conveyance or instrument
  - Remains biased in favour of religious organizations with a congregational form of government as trustees are appointed and derive all of their authority from members

  • Personal liability of trustees
    - Trustees can maintain/defend actions for the protection of land and the interest of religious organizations in the land
GST Considerations
- Supplies provided by charities and not-for-profit organizations are generally considered to be exempt supplies
- Many charities and not-for-profit organizations are not GST registrants
- Not entitled to any input tax credits on GST
- “public service bodies rebate” – 50% on GST that they pay
- Clause in agreement of purchase and sale for commercial property that GST is in addition to purchase price will not result in input tax credit if organization not a GST registrant

Example A
Charitable/Not-for-Profit
- Cost of property $1,000,000
- Additional GST cost $70,000
- 50% public service bodies rebate on charitable/not-for-profit portion of building $35,000
- Total GST owing $35,000

Example B
Charitable/Not-for-Profit/Commercial
- Cost of property $1,000,000
- Additional GST cost $70,000
- Input tax credit on 50% of commercial portion of building $35,000
- Public service bodies rebate of 50% on charitable/not-for-profit portion of building $17,500
- Total GST owing $17,500

Related business
- If the charity has become a commercial landlord, and it is an unrelated business to the charity, CRA requires that the charity divest itself of the unrelated business within a reasonable time frame or risk revocation of charitable status
An activity that is commercial nature, from which the charity derives revenue from providing goods or services, and which are undertaken with the intention to earn profit.

Two kinds of related businesses:
- Businesses that are liked to a charity’s purpose and subordinate to that purpose (e.g. parking lot, cafeteria, gift shop at hospital, museum)
- Businesses that are run by volunteers – 90% of staff unpaid volunteers – does not have to be linked to charitable purposes

Charitable Gifts Act (CGA)
- Primarily concerned with operation of business activities by charitable organizations
- Charity limited in its ownership of a for-profit business to only 10% of its interest in the business
- If the charity owns more than 10% of business, must dispose of excessive interest within seven years
- If the charity owns more than 50% of a for-profit business, must co-ordinate with the PGT to address the profits generated by the business each year

Charities Accounting Act (CAA)
- S.8 of CAA - Use and occupation of land for charitable purposes
- S.8(1) of CAA - A person shall “hold the land only for the purpose of actual use or occupation of the land for the charitable purpose”
- Broad prohibition on trustees of land held for a charitable purpose from allowing that land to be used for any other purpose than the organization’s objects
• S.8(2) of CAA
Where in the opinion of the Public Guardian and Trustee, land held for a charitable purpose,
(a) has not been actually used or occupied for the charitable purpose for a period of three years;
(b) is not required for actual use or occupation for the charitable purpose; and
(c) will not be required for actual use or occupation for the charitable purpose in the immediate future

• S.8(3) of CAA
– Permits PGT to sell land that is no longer used or required for a charitable purpose
– PGT vests the land in itself by registering a notice in the land registry office
– Proceeds of sale are then applied to charitable purpose

• S.8(2) of CAA contains two thresholds that PGT must satisfy itself of:
– PGT must form opinion that all three of the statements in clauses (a) to (c) are applicable to the land in question
– Even if all three criteria are satisfied, PGT has discretion as to whether or not to vest land in itself
• PGT can consider the specific use that the charity’s surplus land is being used for
• Amount of land that could be used for ancillary or incidental purpose is a grey area:
  – S.2(1) of Charitable Gifts Act restricts interest of a charity in for profit business to 10%
  – S.149.1 of the ITA – disbursement quota requirements – charity may utilize 20% of its land for an ancillary use

SELLING UNDER ROLA

• If selling under ROLA, practitioner should requisition the following:
  – Certified copy of the members resolution appointing the trustees
  – Certified copy of the members resolution authorizing sale of the property
  – Carefully review any deed of trust existing regarding property to see if there are any requirements for trustees and if so, requisition a declaration stating that such duties have been fulfilled by trustees

Special Incorporating Legislation

• Should review whether or not a charity, such as a church, may be subject to special legislation
• If so, review legislation to determine if there are additional requirements that charitable client should be concerned with
• Some statutes require consent of hierarchical bodies within organizations before property can be transferred or the naming of certain church officials as trustees for the purposes of holding land
• Even if no special legislation applies, church may be subject to regulations or agreements between the religious body and the specific denomination to which the religious body belongs
Heritage Properties

- Designation of property as “heritage property”
  - Stays all demolition and alteration permits previously issued
  - Restricts owner’s right to alter, renovate, demolish or remove heritage attributes of property without consent
  - May result in requirements to restore or upkeep property’s heritage qualities

Proposed Act: An act to amend the Ontario Heritage Act (Bill 60)

- Expands municipal powers
- Provides for new provincial powers to identify and designate properties
- Enhances the jurisdiction of the OMB
- Provides for enhanced demolition controls over designated properties
- Properties subject to both municipal and provincial designation if Minister believes property has “cultural heritage value or interest to the province”

MUNICIPAL ISSUES

Zoning

- Many churches and charities are now using facilities for more than just worship e.g. child care, schools, soup kitchens, etc.
- Inquire regarding present and future uses intended for a property
- Assist client in determining whether property properly zoned for intended use
Municipal Tax Assessment
- Assessment Act – S.3(1) provides that some properties are exempt from taxation including:
  - Cemeteries or burial sites
  - Land owned by church or religious organization
  - Land a church or religious organization leases from another church or religious organization

- Land owned, used and occupied solely by public educational institution
- Land owned, used and occupied solely by non-profit organization
- Land used and occupied by public hospital
- Land owned, used and occupied by charitable institution
- Conservation land

- In order to be tax exempt must satisfy two criteria:
  - Ownership of property
  - Occupation of property
- Ottawa Salus Corporation v. Municipality Property Assessment Corporation et al
  - Interpreted word “occupied” by taking into account organization’s charitable purpose – to relieve poverty
  - Occupation does not require actual or exclusive occupation
  - Sufficient that property is being used by charity to further its charitable objective
Tax rebate from the business occupancy tax
- Municipality provided special rebate to eligible charity if occupies commercial or industrial property
- Charity eligible if registered under ITA
- Rebate shall be at least 40% of property tax paid (Municipal Act, S.361)

REstricted Purpose Trusts and the Doctrine of Cy-Pres
- Charities (especially churches) sometimes hold property subject to a restricted purpose
- Definition of restricted purpose trust: “A charitable purpose trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.” (Restatement of Trusts)

Donor agrees to provide real property to the organization on the condition that it only be used for a certain purpose
- Practitioners should consider:
  - Does the restricted purpose cease to have effect when the property is sold?
  - Does the restricted purpose run with the land?
  - Do the proceeds from the sale continue to be subject to the restricted purpose?
• Attributes of charitable purpose trust:
  – Exempt from requirement that there be a beneficiary of the trust
  – Will not fail for uncertainty of objects even though there are not identifiable beneficiaries
  – Court can write or rewrite charitable purpose trust by supplying a cy-près scheme
  – Exempt from the prohibition against remoteness of vesting (modern rule against perpetuities)
  – Charitable purpose trust is exempt from the prohibition against indestructible or perpetual trusts

• Application to charitable corporation
  – Case law has been divergent
  – CAA in Ontario – states that charitable corporation is a trustee of its property for purposes of the CAA
  – Attributes of charitable trust will have application to a charitable corporation when the corporation holds property in accordance with a “special purpose charitable trust”
  – Christian Brothers decision: charitable corporation holds its unrestricted assets beneficially to be used in accordance with its corporate objects – unrestricted assets not held in trust
  – Unincorporated association has more in common with a charitable purpose trust

• Charitable trust property
  – Charitable trust property: real estate that is acquired subject to certain terms of trust contained in deed of property
  – Religious charities often receive or acquire property through deeds that set out specific terms of trust which will continue in perpetuity even if land and buildings are sold
  – Grantor donates property to be used only for a particular purpose
  – May include reversionary clause that states that property reverts back to grantor if terms not complied with
Charity itself can impose terms of trust stating that property can only be used for a specific purpose. The Board of charity has to determine whether any of its real property is subject to charitable trust. If so, must ensure that property was, or is, being used in accordance with applicable restrictions. Restrictions tend to be of a religious nature – three categories:

- Pertaining to religious doctrine e.g. property only used by person of that particular religion
- Pertaining to use e.g. property can only be used as cemetery, seminary
- Particular religious practice e.g. adhere to practice of “strict communion”

Is a trust in perpetuity which will have permanent implications similar to an endowment fund. Charity cannot unilaterally vary terms of trust without court authorization. Charity must either comply with restrictions or seek court authorization to vary it.

If monies given for the construction of a building on a particular piece of land for a particular purpose – has the effect of imposing a special purpose charitable trust on the land itself. Failure of donor restriction:

- Donor-restricted gift will fail if:
  - Restricted term becomes impossible or impractical
- Condition precedent or subsequent is unfulfilled
- Limited interest in a determinable gift comes to an end
- Court will interpret gift in liberal and lenient manner to avoid failure
- Failure of condition
  - If condition precedent unfulfilled then gift will not take effect
  - If condition subsequent unfulfilled then gift will revert to donor

- Failure of special purpose charitable trust
  - Donor’s restriction is either impossible or impractical to comply with
  - Means of carrying out the special purpose trust can no longer be realistically accomplished
  - Seek assistance of court in exercising its general scheme-making power the cy-près application or administration of administrative scheme
  - Cy-près
    - Means “as near as possible”
    - Applied if becomes impossible or impracticable or illegal to carry out specific purpose

- Court will direct that property be applied to some charitable purpose which falls within the general charitable intention of settlor
- Examples of when applied
  - Insufficiency of subject matter (gift too small)
  - No suitable site available to carry out program
  - Charity amalgamated with other charity
  - Charity changes its charitable objects
• Gift is surplus to need of charitable purpose
• Gift refused by charity
• Charity dissolved
• Surplus of capital or income after charitable purpose carried out
  – Examples of when not available:
    • If gift fails because of failure to fulfill a condition precedent or subsequent
    • Restrictions are not impractical or impossible

• Capital endowment i.e. capital amount that is held in trust by the charity the income of which can only be used for a particular purpose
  – Courts can also permit deviation from administrative term where change in circumstances makes adherence to original terms impossible