
**ONTARIO BAR ASSOCIATION
CHARITY AND NOT-FOR-PROFIT LAW**

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

**By Terrance S. Carter, B.A., LL.B.
and John Latham, B.A., LL.B.**

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Main Office Location

211 Broadway, P.O. Box 440
Orangeville, ON, Canada, L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300
Toll Free: 1-877-942-0001

www.carters.ca

National Meeting Locations

Toronto (416) 675-3766
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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

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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

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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

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- **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

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- **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

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- **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

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- 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

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- 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

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- 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

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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**

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**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% 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

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• **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**

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– 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 linked 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

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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

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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

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- **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

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- **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

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- **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

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- 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

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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

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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

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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

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- 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”

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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

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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

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- 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

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- 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

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- 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*)

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RESTRICTED PURPOSE TRUSTS AND THE DOCTRINE OF CY-PRÈS

- 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*)

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- 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?

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- **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

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- **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

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- **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

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- **Charity itself can impose terms of trust stating that property can only be used for a specific purpose**
- **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**

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- **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 or other special purpose trust fund**
- **Charity cannot unilaterally vary terms of trust without court authorization**
- **Charity must either comply with restrictions or seek court authorization to vary it**

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- **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**

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- 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

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- 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

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- 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

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- 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

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- 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

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