

**VOLUNTEER OTTAWA  
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**Avoiding Liability in Charitable  
Fundraising**

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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 in Gift and Fundraising Programs

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**B. 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

– 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

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– 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

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– 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

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- 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](http://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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- C. 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
    - 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)*

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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 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**

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- **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**
  - **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](http://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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- **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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