
**14TH ANNUAL NATIONAL
CAGP-ACPD CONFERENCE**

Halifax – April 12, 2007

**Asset Protection: Inspiring Donor
Confidence in a Charity's Legal Structure**

**By Terrance S. Carter, B.A., LL.B. – Carters Professional Corporation
and Edgar A. Frechette – Fasken Martineau DuMoulin LLP**

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A. INTRODUCTION

1. OVERVIEW

- The Need to Protect Charitable Assets
- Identifying Key Assets to Protect
- Choosing an Appropriate Legal Structure
- Utilizing a Multiple Corporate Structure
- Documenting Multiple Corporate Relationships
- Issues to Consider in Transferring Assets Between Corporations
- Income Tax Considerations in Multiple Corporate Structures

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2. RESOURCE MATERIALS

See the following publications available at www.charitylaw.ca for more information

- Effective Asset Protection Through Multiple Corporate Structures, November 9, 2005 at <http://www.carters.ca/pub/seminar/chrcplaw/2005/index.html>
- “Pro-Active Protection of Charitable Assets” – A Selective Discussion of Liability Risks and Pro-Active Responses, November 20, 2001
- “National and International Charitable Structures: Achieving Protection and Control”, November 26, 1998 <http://www.carters.ca/pub/article/charity/1998/natlstruct.pdf>

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- “Cross-over Liability: Principles from the Residential Schools Cases (Charity Law Bulletin #19 – January 31, 2003)
<http://www.carters.ca/pub/bulletin/charity/2003/chvlb19-03.pdf>
- Update on Christian Brothers (Charity Law Bulletin #24 – September 30, 2003)
<http://www.carters.ca/pub/bulletin/charity/2003/chvlb24-03.pdf>
- New CRA Policy on Umbrella Organizations (Charity Law Bulletin #78, October 12, 2005)
<http://www.carters.ca/pub/bulletin/charity/2005/chvlb78.pdf>
- “Donor Restricted Charitable Gifts: A Practical Overview Revisited II”
<http://www.carters.ca/news/2003/Philanth/vol18no1.pdf> and
<http://www.carters.ca/news/2003/Philanth/vol18no2.pdf>

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- B. THE NEED TO PROTECT CHARITABLE ASSETS**
1. The Importance of Instilling Donor Confidence
 - Donors will not give if they do not have confidence in the ability of the charity to protect the gifts given and the other assets of the charity
 - In addition, concerned or disgruntled donors may have statutory rights to question the management of charitable assets
 - For example, under section 6 of the *Charities Accounting Act* (Ontario), a person has the right to file a letter of complaint with a judge with regard to the manner in which charitable funds are collected from the public or the manner in which those funds are used by the charity

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- Under Section 6 of the *Charities Accounting Act* (Ontario), a court can order the Public Guardian and Trustee to conduct a public inquiry
- Also, under section 10 of the *Charities Accounting Act* (Ontario), two or more people can allege a breach of trust involving a charitable purpose and may apply to the court for an order or direction, including an order for an investigation by the PGT
- Concerned or disgruntled donors can also put a charity and its board under public scrutiny by initiating a complaint to CRA that could result in an audit under the *Income Tax Act* (Canada)

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- As a result, it is incumbent upon directors of charities and their executive staff to exercise due diligence steps to protect charitable assets, including a review of the corporate structure of a charity and the possibility of utilizing a multiple corporate structure

2. The Fiduciary Duty to Protect Charitable Assets

- The 2001 decision of *Ontario Public Guardian and Trustee v. AIDS Society for Children*, emphasized the fiduciary responsibilities placed upon the directors of a charity in relation to charitable property

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- The court held that directors of a charity “are to all intents and purposes, bound by the rules which affect trustees”
- Directors of a charity must be diligent in decision-making, investing charitable property, performing corporate governance and actively managing and protecting charitable assets in order to apply those assets to their stated charitable purposes
- Directors of a charity must therefore be proactive in identifying the risks to charitable property and then taking appropriate steps to protect charitable property from those risks

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3. Examples of Risks That Charitable Assets Can Be Exposed To

- General increased risk of litigation
 - Incidents of sexual abuse
 - Discrimination in the workplace, program delivery and even membership involvement
 - Actions from wrongful dismissal
 - Injuries to volunteers and third parties
- Exigibility of donor restricted funds
 - Until the Ontario Court of Appeal *Christian Brothers* decision, it was assumed that donor restricted funds, i.e., endowment funds were protected as trust property from claims against the charity

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- The Ontario Court of Appeal in the *Christian Brothers* decision held that all assets of a charity, whether beneficially owned or held as a special purpose charitable trust, are available to satisfy the claims of tort victims upon the winding-up of a charity
- Donors have become more sophisticated in their charitable giving and demand more accountability from charities, yet the *Christian Brothers* decision means that charities are no longer able to assure donors that the gift of a donor restricted fund, i.e., an endowment to a charity will be protected

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- Risks from Environment Liability
 - Various provincial and federal statutes place liability for environment contamination on the current owner, whether or not the owner created the contamination
 - Liability from one contaminated property can expose all assets of a charity
- Risks for Anti-terrorism legislation
 - The *Anti-terrorism Act*, which was proclaimed in force on December 24, 2001, is an extremely complicated piece of legislation that involves a charity being exposed to criminal liability for terrorist activities, as well as for money laundering

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- Charitable assets are subject to seizure in the event of a conviction under the *Anti-terrorism Act*
- Risks from new investment powers
 - In 1999, amendments were made to the *Trustee Act* (Ontario) by replacing the outdated statutory list of investment powers with the establishment of a prudent investor standard
 - In 2001, amendments to the *Trustee Act* (Ontario) permitted a charity to delegate investment-making decisions to qualified investment managers

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- **Improper investment by a charity can lead to allegations of breach of trust, and therefore, focused and dedicated management of charitable funds is required**
 - **Liability can arise from investments that are too conservative, as well as from investments that are too risky**
 - **Liability can also arise from improper delegation of investments decision-making that is not properly documented**
 - **Investment liability may necessitate that investments be carried out through a separate charitable entity, like a foundation**
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- **Risks from commingling of donor restricted funds**
 - **At common law, each donor restricted trust fund is required to be held separately from other restricted trust funds, i.e., they cannot be commingled together**
 - **In 2001, under a new Regulation to the *Charities Accounting Act* (Ontario), it became permissible for charities in Ontario to commingle multiple restricted funds in a single account or investment portfolio, but it is not possible to commingle restricted funds with the general funds of a charity**
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- **Therefore, proper management and investment of restricted funds requires segregation of restricted funds from the general fund of the charity to avoid liability for breach of trust**
 - **This may be facilitated by moving restricted funds into a parallel foundation separate from the general fund of the operating charity**
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C. IDENTIFYING KEY ASSETS TO PROTECT

1. The need to take a regular inventory of key charitable assets as part of a protection plan

- Review annual financial statements
- Review bank statements and records
- Review past and current restricted funds records
- Review property deeds and easements/right of ways

2. Examples of Key Assets to Protect

- Endowed funds
- Other donor restricted funds
- Intellectual property
- Major capital assets

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3. Endowed Funds

- What are endowed funds?
 - An endowment is a gift where the capital is held for at least 10 years and extending beyond for any period of time up to in perpetuity
 - Normally, an endowment requires that the capital is held in perpetuity
 - An endowment can be created by either the donor through an endowment agreement (donor endowment agreement) or by the board initiating the creation of an endowment fund (board endowment fund)

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- Under the *Income Tax Act*, an endowed gift is generally referred to as a “ten year gift” under the broader new category of “enduring property”
- The income can either be expended in total each year or can be reinvested in whole or in part
- The income can be restricted to a particular use, such as scholarships, or can be left unrestricted and used for the general charitable purposes of the charity
- The disbursement of income by the charity can be left to its discretion or can be subject to donor advice, e.g. a donor advised fund

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- **What are the advantages of endowed funds?**
 - It is the cornerstone of a planned giving program
 - It permits the creation of a capital fund on a long term or perpetual basis in order to fund either specific projects or the general operation of a charity
 - It creates long term stability by balancing against possible fluctuations in yearly fundraising
 - It allows donors to create a fund in the name of the donor or their families in order to have a long term impact on charitable programs

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- It facilitates the donor acquiring naming rights for a particular project or have naming rights placed on a building for a specific period of time
- It permits the creation of both large segregated endowed funds that are initiated by the donor, as well as smaller contributions to existing board endowed funds that are established by the charity
- In order to encourage donors to give to an endowment fund, it is prudent to protect an endowment fund by having it held in a parallel foundation

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- 4. Other Donor Restricted Funds**
- **Scholarship funds**
 - Educational scholarships
 - Research scholarships
 - **Specified project funds**
 - Domestic charitable programs
 - Foreign charitable programs
 - **Research funds**
 - Research projects
 - Research grants

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- **Building funds**
 - Land acquisition and new building projects
 - Building expansion and renovation projects
- **Ten-year gifts**
 - Funds to be held for a minimum of ten years
 - Funds can be held for longer than ten years if so directed by the donor
 - Ten-year gifts will delay the application of the 80/20 disbursement quota

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- 5. Intellectual Property**
- Intellectual property is one of the most important assets of an organization and consists of both trade-marks and copyright
 - Trade-marks need to be identified, protected, licensed and enforced
 - Trade-marks can be lost if they are not properly protected and, as well, can be seized by creditors of a charity
 - A charity therefore needs to be pro-active in protecting its trade-marks or risk losing its trade-mark rights by default

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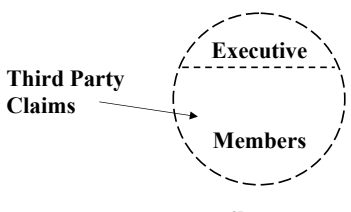
- 6. Major Capital Assets**
- **Land and buildings**
 - Head offices
 - District offices
 - Church buildings
 - Camp facilities
 - Vacant land
 - **Major leasehold improvements**
 - Fixtures and renovations
 - Building constructed on leased land
 - **Major equipment acquisitions**
 - Vehicles
 - Computers, office equipment and furniture

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D. CHOOSING AN APPROPRIATE LEGAL STRUCTURE

1. Unincorporated Associations

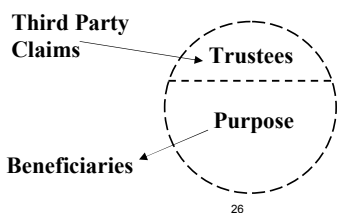
- An unincorporated association is not a legal entity
- Often used when starting up a charity
- However members are exposed to liability



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2. Trusts

- A trust is not a legal entity
- Instead it is a relationship between trustees and beneficiaries involving the separation of legal and beneficial ownership of property
- However trustees are exposed to liability



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3. Not-for-Profit Corporations

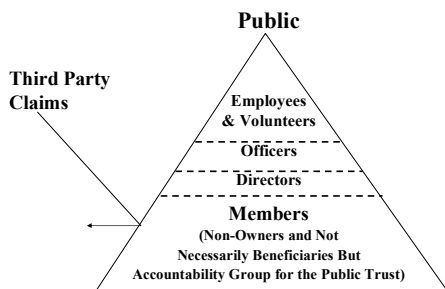
- Non profit purpose but not charitable
- Members are not exposed to liability



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4. Charitable Corporations

- Charitable purpose akin to a public trust
- Members are not exposed to liability



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E. UTILIZING A MULTIPLE CORPORATE STRUCTURE

1. The Purpose of Utilizing Multiple Charitable Corporations

- Multiple corporations have long been used by the for-profit sector to contain liabilities and protect assets
- Similar use of multiple corporations can also be a viable option for the charitable sector as well
- The directors of a charitable corporation have a fiduciary obligation at common law to consider if a multiple corporate structure should be adopted

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2. Different Types of Multiple Charitable Corporations

- Parallel operating charities
 - Can be used to contain liabilities
- Parallel foundations
 - Can be used to protect from liability
- Umbrella associations
 - Can be used to control liability exposure

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Parallel Operating Charities

- Used when an incorporated charity has one or more operating divisions with a greater degree of liability exposure (e.g. a school or an AIDS-HIV clinic)
- The liabilities associated with an operating division (such as a school or an AIDS-HIV clinic) is moved to a separately incorporated entity to contain liability and thereby protect the assets of the main operating charity

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Parallel Foundations

- Parallel foundations can be used for:
 - Protection of donor restricted funds as a result of the *Christian Brothers* decision
 - Establishment and management of endowment funds, including co-ordinating the delegation of investment management
 - Protection of surplus funds from government directives for religious health care institutions in Ontario as a result of LHINS
 - Separation of capital campaigns from operating campaigns
 - The encouragement of *inter vivos* gifts, testamentary gifts and planned giving

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- A parallel foundation can also be used as a form of holding corporation for a charity's assets, e.g. land and buildings, and/or intellectual property
- Compliance with creditor protection legislation, though, is important
- As a result, only existing assets not subject to past or present claims can be transferred without the possibility of residual claims against them remaining
- Consideration needs to be given to the *Assessment Act* (Ontario) for land holding parallel foundations in order to determine if the municipal tax exemption, such as for a place of worship, can be maintained

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Umbrella Associations

- **Involves structuring a national or provincial charity that consisting of member organizations into separate multiple legal entities**
- **The governing organization is separately incorporated and acts as the umbrella organization, with each member organization being separately incorporated under the auspices of the governing organization**
- **While a single corporate entity can provide simplicity in administration and operations, the disadvantage is that all the assets of the various divisions are left in one single legal entity**

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- **This may result in the loss of all of the assets of the national or provincial charity in the event of a claim being made against any one of the divisions or chapters of the charity**
- **The advantages of utilizing an umbrella association model include:**
 - **Reduced overall liability exposure in operating a national or provincial charity by containing the liability associated with a member organization within a corporate entity separate and apart from the governing organization**

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- **Where one member organization owns real estate that is subject to toxic contamination, the costs associated with the clean up of the contamination will generally be limited to only the assets of the incorporated member organization**
- **Similarly, the operations of the umbrella association that are carried on outside the province of Ontario through separate corporations in other provinces would not be subject to the provisions of the *Charities Accounting Act* (Ontario)**

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F. DOCUMENTING MULTIPLE CORPORATE RELATIONSHIPS

The Need to Document the Relationship

- Unlike business corporations, charities cannot control subsidiary corporations through the ownership of shares
- As separate and autonomous legal entities, a governing organization and a member organization have to carefully structure their relationship to ensure that the two organizations work co-operatively under the oversight but not the control of the governing organization
- There are three types of inter-corporate relationships that can be considered:
 - The ex officio linkage model
 - The corporate linkage model
 - The franchise linkage model

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Ex Officio Linkage Model

- Historically, the ex officio linkage model has been the more common method linking member organizations with a governing organization
- The by-laws of the member organization would provide for ex officio directors who are either the directors or officers of the governing organization
- The number of ex officio board members could vary from one all the way up to all of the board members of the member organization

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- Both the *Canada Corporations Act* and the *Corporations Act (Ontario)* permit the establishment of ex officio directors in the form of corporate by-laws
- A variation involves having the corporate membership of the member organization being limited to the board members and/or the corporate members of the governing organization
- However, the ex officio model can result in increased risks of cross-over liability, as well as failing to address performance expectations between a governing organization and its member organizations or intellectual property licensing considerations

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Corporate Linkage Model

- The corporate linkage model involves the governing organization exercising a right of approval or veto over certain key aspects of the corporate structure of the member organization
- This model can involve different variables, such as:
 - A percentage (e.g. up to 49%) of the directors/members of the member organization being required to receive and maintain the approval of the governing organization
 - It is possible to have more than 49% approval, but a higher percentage increases the possibility of cross-over liability

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- There could be some overlap of members and the board of the member organization with the board of the governing organization, but such overlap should be kept to a minimum
- The governing organization could also have veto authority over some key changes to letters patent and by-laws of the member organization
- Key representatives of the governing organization could also have the right to attend board and member meetings, but would not be a member, and therefore, would not have a vote

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- Generally speaking, the corporate linkage model should be used in conjunction with the franchise linkage model described below

Franchise Linkage Model

- A practical parallel can be drawn between the relationship of a franchisor and a franchisee in a business context and the relationship between structuring multiple charitable corporations

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- The franchise linkage model involves a contractual relationship by way of a type of franchise agreement which establishes an effective inter-corporate mechanism between a governing organization and its member organization (e.g. a member organization or a parallel foundation)
- Key factors in the contractual relationship include the requirements for an ongoing relationship in the governing organization and the consequences of losing that relationship

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- The franchise type of agreement can also be used to authorize the licensing of trade-marks and copyrights owned by the governing organization

a) Overview of Franchise Linkage Model

- The franchise linkage model works well with all types of multiple charitable corporations, e.g. a governing organization and member organizations, parallel operating foundations and umbrella organizations

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- Basic components are set out in an association agreement, which includes corporate linkage provisions, as well as implementing a licensing arrangement based upon applicable intellectual property

b) Basic Terms of an Association Agreement

- The association agreement sets out the contractual relationship between the governing organization and its member organizations

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- **An association agreement should generally include the following:**
 - **Recognition that the governing organization and the member organization have similar charitable purposes, but are separate and distinct corporate entities with separate boards of directors, and that they are to remain independently responsible for their own management and governance**
 - **Need to establish the term for the association agreement (e.g. normally five years) with renewal provisions**
 - **Basic requirements of the association relationship include:**

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- **The contents of the letters patent of the member organization**
- **The governing organization to review and approve the general operating by-law for the member organization, as well as other fundamental changes to corporate documentation, including supplementary letters patent**
- **The parameters under which the trade-marks and copyrighted materials of the governing organization can be utilized by the member organization**
- **The actions by the member organization which can lead to termination and the resulting consequences of that termination**

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- **Provided that the member organization complies with the terms of the association agreement, the governing organization will normally agree that the affiliate will be entitled to the following rights flowing from the association relationship:**
 - **The right to use of the governing organization's trade-marks and copyrighted materials in accordance with the license agreement**
 - **The right to seek advice from the governing organization on fundraising, administrative, governance, donor care, public relations, human resources and programming matters**

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- The right to use a specific way of operating a charitable program or a fundraising campaign, both of which might be copyrighted and possibly even patentable
- Obtain resource, promotional administrative and financial services from the governing organization
- The expenses connected with these rights are often at the sole expense of the member organization
- In return, the member organization will be required to comply with certain expectations
 - Operate pursuant to agreed upon charitable objects

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- Maintain identifiable standards in operation
- Provide for regular reporting
- Permit inspection and audit of operation
- The consequences of termination of the association relationship
 - Loss of right to use trade-mark and copyrights, and industry name
 - Possible transfer of charitable property to another charity
- The need for arbitration and/or mediation to resolve disagreements

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- c) Incorporating Documentation for Member Organizations
- The incorporating documents for a member organization should be drafted or amended in accordance with the requirements set out in the association agreement
 - The governing organization should be given an opportunity to review the final form of the application for letters patent and general operating by-law for the member organization before it is filed for incorporation or subsequent amendments

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d) Trade-mark Considerations

- **The most important asset of a charity is often the goodwill associated with its name as a trade-mark. In the context of a governing organization, its name as a trade-mark and associated design logo constitute the basis by which the public will identify the organization and activities that it carries on**
- **The corporate name and various operating names and logos of the governing organization should be separately registered as trade-marks**

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- **The registered trade-marks should then be licensed to each member organization by a separate trade-mark license agreement that is attached to the association agreement as a schedule to include:**
 - **Recognition of the ownership of the trade-marks**
 - **How the trade-marks can be used and controlled**
 - **How the trade-marks are to be protected and enforced**
 - **What constitutes default and the consequences of termination of the trade-mark license**

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e) Copyright Considerations

- **Copyright issues can also be an important part of establishing an association relationship**
- **It may be prudent for the governing organization to register the copyright for materials used in the public domain**
- **Examples of copyright materials belonging to the governing organization that are used by member organizations include resource materials, audiotapes, videotapes, training manuals, checklists, brochures, fundraising documentation, charitable programs, etc.**
- **A copyright license should be prepared and entered into similar to a trade-mark license**

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Reducing the Risk of Cross-Over Liability

- A fundamental aspect of utilizing multiple charitable corporations is the need to maintain the integrity of the limited liability protection of the various incorporated entities
- While the concept of limited liability protection is still the general rule for corporate entities, there are instances where the governing organization might be found to be liable for the actions of a member organization as a result of the equitable doctrine known as “piercing the corporate veil”

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- The *Christian Brothers* decision was a landmark case in Canada on the application of cross-over liability for charitable and not-for-profit organizations
- Based on a review of residential school case law, cross-over liability may result where a governing organization has a significant degree of control over the actions of the members or employees of the member organization either based upon the assertion of an employer/employee relationship or a principal/agent relationship

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- The following are some practical steps that can help to reduce a finding of cross-over liability between multiple charitable corporations:
 - Ensure separate incorporation of each entity is properly done
 - Expressly define the limits of power and authority of each entity
 - Maintain separate board of directors as much as possible
 - Keep up-to-date records of activities in separate corporate minute books for each entity

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- **Some of the factors to avoid that may suggest “central control”:**
 - **Having the governing organization involved in the licensing, hiring, disciplining, payment or general day-to-day direction and supervision of employees of the member organization**
 - **Having common bank accounts or investments**
 - **Making explicit or implicit representations that the governing organization is responsible for the operations of the member organization**

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- **Having both organizations occupy the same location for either operational or administrative activities**
- **Using the same officers or employees unless it is clear that one organization is invoicing the other organization for the services provided by its employees through a contract for service**
- **Using the land, buildings or property of the other organization without an arm’s length lease agreement**

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- **Having the same individuals serve on the board of directors or key committees of both entities where there is a significant overlap in membership**
- **Indicating on letterhead, signs, brochures, or other documentation that the member organization is an operating division of the governing organization**

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G. ISSUES TO CONSIDER IN TRANSFERRING ASSETS

1. The Corporate Authority of the Transferor

- It is important to ensure that the transferor charity has the required corporate authority to transfer charitable assets
- Need to refer to both letters patent and authorizing resolution of the directors, as well as possibly even the corporate members

2. The Corporate Authority of the Transferee

- Similarly, the transferee charity would need to ensure that it has the requisite corporate authority to receive the transfer of assets and apply those assets toward its intended purpose

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3. Compliance with Donor Restricted Gifts

- Donor restrictions must be complied with to avoid allegations of breach of trust
- The transfer of donor restricted gifts should be documented as a transfer from trustee to trustee
- The transferee must give a commitment to ensure future compliance with donor restricted gifts

4. Need to Document the Transfer of Assets Through a Deed of Gift

- Deed of Gift evidences transfer of title of the charitable assets

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- Deed of Gift will identify whether the transfer is to the transferee charity as a subsequent trustee of donor restricted gifts
- The Deed of Gift should identify what investment powers will apply to the funds being transferred
- The Deed of Gift should identify whether the gift consists of donor restricted gifts, and if so, that it will ensure compliance with any restrictions by the transferee charity

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- The Deed of Gift can identify whether unrestricted funds are to become restricted for a particular purpose in the transfer to the transferee charity
- The Deed of Gift should include a *cy près* clause for variations for newly created restricted gifts
- The Deed of Gift can provide protection from future insolvency through the inclusion of a determinable gift provision
- The Deed of Gift should provide for compliance with applicable Anti-terrorism Legislation

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- The Deed of Gift should address issues of inter-charity disbursement quota issues
 - The Deed of Gift can authorize a later transfer of the gifts to a subsequent transferee
5. Commingling of Restricted Gifts
- Commingling of restricted gifts must be done in Ontario in accordance with requirements of the Regulations under the *Charities Accounting Act* (Ontario)
 - Deed of Gift should ensure compliance with rules regarding the commingling of restricted gifts

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- H. INCOME TAX CONSIDERATIONS IN MULTIPLE CORPORATE STRUCTURES**
1. CRA Draft Policy On Umbrella Organizations
- Overview
- CRA released a draft policy on umbrella organizations in July 2005, entitled “Guidelines for the Registration of Umbrella Organizations”
 - The Guidelines will be relevant in the establishment of a multiple corporate structure involving property holding and umbrella organizations

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- The Guidelines define a charitable umbrella organization as one that “works to achieve a charitable goal by supporting, improving and enhancing the work of groups involved in the delivery of charitable programs”
- The Guidelines make it clear that an umbrella organization can now qualify for registration

Types of Umbrella Organizations

a) Charities Established to Assist Other Registered Charities

- These are organizations that support the charitable sector by promoting the efficiency and effectiveness of registered charities
- The beneficiaries of the services of an umbrella organization must be predominantly other registered charities

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- The objects of these charities must clearly reflect that the purpose of the organization is to improve the efficiency and effectiveness of other registered charities

b) Umbrella Organizations Advancing a Recognized Charitable Purpose

- These are organizations which are established to further a particular charitable purpose, i.e., other than assisting charities, which may convey benefits on constituent groups as ancillary to the achievement of that purpose
- It is also acceptable for such umbrella organizations to increase the capacity and ability of member organizations as a secondary result of their work

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c) Charities Established to Hold Title to Property

- It is now possible for charities, as foundations, to incur debts in taking title to property, thereby increasing the availability of asset protection arrangements by including both foundations and charitable organizations
- The beneficiaries of this third type of umbrella organization must only be registered charities
- Its formal purpose must be to provide a charitable service or benefit to the tenant charity and not merely to hold title to property
- The activities of these title holding organizations can vary from mere title-holding entities to ones that provide a more comprehensive range of services, e.g. property management services

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- The land holding charity must show that it provides some benefit to the tenant charity, although it is not clear why
- The Guidelines then address the requirements of these title holding entities with regard to reporting expenses
- CRA takes the position that a mere permission to occupy the premises does not constitute an expenditure, nor does it constitute a gift to the tenant charity
- However, there is no reason why the fair market value of the provision of the premises to the tenant charity should not also constitute a charitable expenditure for a title-holding charity

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- 2. Inter-charity Disbursement Quotas (DQ) Issues on Transfer of Assets**
- New DQ rules apply to inter-charity transfer of assets and may impact transfers done for asset protection
 - Previously, only transfers from registered charities to public and private foundations were subject to the 80% DQ (100% DQ for private foundations)
 - i.e., transfers from registered charities to charitable organizations were exempt from the 80% DQ

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- 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% DQ obligation, i.e., 80% of the gift must be expended in the following taxation year
- Exception for a “specified gift” will continue to apply

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Three categories of property transfers

- **Ordinary gifts (i.e., not specified gifts, nor enduring property)**
- **Specified gifts**
- **Enduring property that has not been designated as specified gifts by the transferor charity**

Transfer of ordinary gifts

- **i.e., neither specified gifts, nor enduring property**
- **For the transferor charity, the transfer can be used to satisfy its DQ obligation**
- **For the transferee charity, there will be an obligation to expend the gift in the following year**

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- **If the transferee charity is either a charitable organization or a public foundation, the DQ obligation is 80% of the gift**
- **If the transferee charity is a private foundation, the DQ obligation is 100% of the gift**
- **As a result of proposed amendments in Nov/2006 to the ITA, it is not clear whether the amount to be included in the DQ calculation involving the transfer of property that is subject to a debt, such as a mortgage, is to be the gross amount of the FMV of the gift or the net amount after deducting the debt**

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Transfer of specified gifts

- **For the transferor charity, the transfer cannot be used to satisfy its DQ obligation**
- **For the transferee charity, there is no obligation to expend the specified gift in the following year**
- **A specified gift is therefore a benefit to the transfer charity for DQ purposes**
- **A specified gift can be an effective way to transfer a DQ surplus from the transferor charity to the transferee charity**

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Transfer of enduring property

- **The transfer of enduring property (i.e., 10 year gifts, such as endowed gifts, or estate gifts) 10 Year Gifts will be treated as a neutral transfer for DQ purposes**
- **For the transferor charity, there will be a DQ obligation to expend 100% of the enduring property in the year, but the DQ obligation is met by the transfer itself**
- **For the transferee charity, there is no obligation to expend the enduring property in the following year, but there will be an 80% inclusion in DQ obligation in the year that the gift is disbursed**

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