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**Proven Strategies for Managing Risk, Mitigating Liability
and Litigating Claims**

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**Strategies for Protecting Charitable Assets
Through Multiple Corporate Structures**

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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/chv1b19-03.pdf>
- Update on Christian Brothers (Charity Law Bulletin #24 – September 30, 2003)
<http://www.carters.ca/pub/bulletin/charity/2003/chv1b24-03.pdf>
- New CRA Policy on Umbrella Organizations (Charity Law Bulletin #78, October 12, 2005)
<http://www.carters.ca/pub/bulletin/charity/2005/chv1b78.pdf>
- “Donor Restricted Charitable Gifts: A Practical Overview Revisited II”
<http://www.carters.ca/pub/article/charity/2006/tsc0421.pdf>
- “Legal Risk Management Checklist” for Charities – September 2007
<http://www.carters.ca/pub/checklst/charity.pdf>

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- B. THE NEED TO PROTECT CHARITABLE ASSETS**
1. The Fiduciary Duty to Protect Charitable Assets
 - 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
 - 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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2. 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

- 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

C. VICARIOUS AND CROSS-OVER LIABILITY

1. General Comments

- A charity is not only exposed to liability for its own negligent conduct (“direct liability”), but it may also be liable for the conduct of its employees, agents and (in some cases) separate but affiliated entities
- Recent case law has affirmed that charities and non-profits are not immune from liability solely because of their non-profit or charitable status: see Supreme Court of Canada decisions of *Bazley v. Currey* and *John Doe v. Bennett*

2. Vicarious Liability

- Vicarious liability is imposed on an employer or principal for the wrongful conduct of an employee or agent whose actions result in a loss to a third party
 - Unlike direct liability, vicarious liability does not require that the employer or principal actually have caused the loss
- Two part test established by the Supreme Court of Canada for determining whether and when vicarious liability should be imposed on an employer (*Bazley v. Currey*)

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- First a court should determine whether there are any precedents which unambiguously determine whether vicarious liability should be imposed under the circumstances in the case
- Second if “prior cases do not clearly suggest a solution” the court should determine whether the wrongful act was sufficiently connected to the conduct authorized by the employer or principal
- In determining whether a “sufficient connection” exists, the factors set out by the Supreme Court to be considered include (but are not limited to):
 - The opportunity that the enterprise of the employer or principal affords to the employee or agent to abuse his or her power
 - The extent to which the wrongful conduct may have furthered the employer’s enterprise

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- The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise
- The extent of power conferred on the employee in relation to the victim
- The vulnerability of potential victims to wrongful exercise of the employee’s power
- Charities therefore have a significant obligation to carefully supervise and monitor the conduct of their employees and agents, especially where those employees or agents are in a position of power and authority over others

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- **Effective risk management mechanisms include:**
 - Written policies, e.g., policies against child abuse
 - Careful implementation and monitoring to ensure that policies are being complied with
 - Risk audits to identify, reduce and eliminate potential risk
 - Proper screening mechanisms, such as police record checks and reference checks
 - Implementing security measures
 - Legal Risk Management Checklists, for example see <http://www.carters.ca/pub/checklst/charity.pdf>

- **In addition to these due diligence steps, charities should assess, and if necessary, modify their organizational structure in order to contain liability and protect charitable property in the event of a tort claim**
- **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**

- 3. Cross-over Liability**
- **Although multiple corporate organizational structures can help to insulate charitable assets from the liabilities of other separate but affiliated entities, affiliated entities can still be exposed to each other's liabilities where it can be shown that one corporation is effectively controlled by another, or where they have not operated at arms-length from each other**
 - **This type of liability between corporations is generally referred to as "cross-over liability"**

- A number of steps can be taken by charities in order to assist in reducing the possibility of one affiliated corporation being exposed to cross-over liability for the actions of another affiliated organization (discussed below)
- Notwithstanding the potential of cross-over liability, the directors of a charitable corporation have a fiduciary obligation to consider if a multiple corporate structure can and should be adopted

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D. 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 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
- Consideration of creditor protection legislation, such as *Assignments and Preferences Act* (Ontario) and *Fraudulent Conveyances Act* (Ontario), is necessary
- As a result, only future or existing assets not subject to past or present claims can be transferred without the possibility of residual claims against those assets remaining
- Consideration also 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 consist 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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- The use of separate corporations to coordinate the operations and administration of the entire organization being carried out in different parts of the world, where applicable, while maintaining the overall coordination and supervision of a single governing body having general oversight
- In addition to separate corporations to carry out national and international work, a separate intellectual property corporation for the governing organization can be used, i.e., trade-marks, copyrights and domain names, even on an international basis to ensure that there is consistency and quality assurance in its use throughout the world

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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
- If a member organization was to lose its charitable status with CRA, the charitable status of the governing organizations and other organizations would not be at risk

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– For national charities which carry on operations in Ontario, the creation of a separate charitable corporation in Ontario to oversee Ontario activities would mean that the jurisdiction of the Public Guardian and Trustee in Ontario (“PGT”) would generally be limited to only the assets of the Ontario charity

– 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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E. 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 should be reviewed:
 - The ex officio relational model

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- The corporate relational model
- The franchise relational model

Ex Officio Relational Model

- Historically, the ex officio relational model has been the more common method relating 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 their 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 relational 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 Relational Model

- The corporate relational model involves the governing organization exercising a limited right of approval or veto over certain key aspects of the corporate governance 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, subject to quorum considerations
 - It is possible under corporate law 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 a right of approval over some key changes to letters patent (e.g. the objects) and certain by-law provisions of the member organization (dealing with specific rights to the governing organization)
- Key representatives of the governing organization could also have the right to attend board and member meetings, but would not be members, and would not have a vote

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

Franchise Relational 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 relational 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 arrangement is based on the licensing of trade-marks and copyrights owned by the governing organization
- a) Overview of Franchise Relational Model
- The franchise relational 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 relational 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 a reasonable term for the association agreement (e.g. normally five years) with renewal provisions (possibly automatic renewal) and subject to termination only under limited circumstances at the end of the term**

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- **Basic requirements of the association relationship include:**
 - **The contents of the letters patent of the member organization, specifically the objects, the corporate name and possibly the dissolution clause**
 - **The contents of the general operating by-law, such as directors, officer and member qualifications and specific rights to be given to the governing organization**
 - **The governing organization possibly review and approve limited fundamental changes to corporate documentation, such as those set out above**
 - **The parameters under which the trademarks and copyrighted materials of the governing organization can be utilized by the member organization**

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- The actions by the member organization which can lead to termination and the resulting consequences of that termination
 - An appropriate arbitration or mediation clause if disagreements arise between the organizations
- Provided that the member organization complies with the terms of the association agreement, the governing organization will normally agree that the member organization will be entitled to the following rights flowing from the association relationship:

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- 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 but not direction from the governing organization on fundraising, administrative, governance, donor care, public relations, human resources and programming matters
- 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

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- 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 (GST may be due)
- In return, the member organization will be required to comply with certain expectations
- Operate pursuant to agreed upon charitable objects
 - Maintain identifiable standards in operations
 - Maintain corporate and charitable status
 - Provide for regular reporting

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- Permit inspection of operations in limited situations where default has occurred e.g. to ensure that the intended charitable purposes are being achieved
- The consequences of termination of the association relationship
 - Loss of right to use trade-mark and copyrights, and operating names
 - Possible transfer of remaining charitable property to another registered charity, subject to consultation with and/or approval by the governing organization, to ensure the property is used in accordance with the intent of the donors, particularly with regard to donor restricted charitable gifts

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c) 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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d) 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 could 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” or in the U.S., an alter ego corporation
- In the context of for-profit franchise agreements, franchisors may be held liable for negligent acts of franchisees, especially where it is not made clear that the two are separate and independent of each other

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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 recent 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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- Therefore cross-over liability is less likely to be imposed where a governing organization has little or no involvement in the actions of members or employees of a member organization
- It appears similar principles of cross-over liability apply between associated entities which operate on an equal horizontal level as well as between those relating vertically within a hierarchical relationship
- In the situation of a single national legal entity, liability in any part of the entity will likely affect the assets of all of the other parts of the national entity

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- While there are no guarantees, the following are some practical steps that can assist in possibly reducing 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 and publicly state that the entity is independently operated
 - 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
 - Contributions to the general operating expenses of the member organization
 - Contributions to the pension plan for employees
 - Annual mandatory inspections of the program
 - The appointment of committees to monitor implementation of policies

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- Having common bank accounts or investments
- Making explicit or implicit representations that the governing organization is responsible for the operations of the member organization
- 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

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- Using the land, buildings or property of the other organization without an arm's length lease agreement
- 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
- Given recent case law, there is no guarantee that any type of multiple corporate structure will necessarily stop a finding of cross-over liability

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- F. 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 may 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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**G. 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 October 2007 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) 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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