
**LEAVE A LEGACY
TAPESTRIES OF LIFE:
LEGACIES THAT INSPIRE**

Regina – May 1, 2008

**Due Diligence Issues for Charities and
Not-for-Profit Organizations:
A Proactive Approach**

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent

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A. OVERVIEW OF PRESENTATION

- The Need for Due Diligence in Addressing Compliance Issues
- Identifying the Differences Between Charities and Not-for-Profit Organizations
- Organizational and Legal Documentation
- Board Management Issues
- Third Party Use of Property
- Real Property Issues
- Intellectual Property Issues
- Employment and Volunteer Issues

2

- Investment Issues
- Donor Restricted Trust Funds Issues
- Maintaining Charitable Registration
- Anti-Terrorism/Money Laundering Issues

Note: For more details see Legal Risk Management Checklist, articles and newsletters at www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismmlaw.ca

3

B. THE NEED FOR DUE DILIGENCE IN ADDRESSING COMPLIANCE ISSUES

- Charities and not-for-profit organizations collectively make up an essential part of Canadian society and its economy
- Charities and not-for-profits constitute the third sector of the economic engine of Canada
- Charities and not-for-profits are facing fundamental changes and challenges in delivering their services to the public, in part because of a more litigious society

4

- In facing these challenges, charities and not-for-profits must become familiar with a vast array of legal requirements ranging from corporate law and trust law to tax and international structures and agreements
- In order for charities and not-for-profits to comply and avoid exposure to legal liability, it is essential that they exercise due diligence in addressing compliance issues with legal obligations that are imposed upon them
- Why do charities and not-for-profits often experience difficulties in complying with legal requirements?

5

- Complicated corporate and charitable requirements at both the federal and provincial level
- Increasingly complicated tax issues
- Expanding fundraising requirements
- Due diligence needed in the management of gifts and charitable receipting
- Inherent risks in operations, such as sexual abuse of children
- Determining appropriate investment policies involving charitable funds
- Incomplete corporate records
- Interrelationships between multiple corporate structures

6

- Privacy issues involving donors, employees and volunteers
- Compliance requirements under anti-terrorism legislation
- Frequently inadequate contractual documents
- Possible consequences arising from non-compliance and deficiencies in organizational structure and operations:
 - Revocation of charitable status
 - Undertaking *ultra vires* activities
 - Allegations of breach of trust
 - Court-ordered investigations under Division XVII of the *Non-profit Corporations Act* (NPCA) (Sask.)

7

- Inquiries by the public under the *Charities Accounting Act* (Ontario) for charities operating in Ontario
- Legal actions by donors and/or the Public Guardian and Trustee (“PGT”) for charities operating in Ontario
- Court supervised audit of accounts
- Confusion in corporate operations
- Loss of corporate status
- Loss of charitable status
- Due diligence in addressing compliance issues involves the charity or the not-for-profit organization asking the following basic questions:
 - What they are legally?

8

- What are their legal obligations?
- How can they effectively comply with those legal obligations?
- Due diligence must be undertaken in a pro-active manner in order to avoid legal problems before they occur
- The approach must change from benign passivity to pro-active legal risk management
- What follows is a series of key considerations and issues that charities and not-for-profits should address in order to identify and comply with basic legal requirements

9

C. IDENTIFYING THE DIFFERENCES BETWEEN CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

Charities

- What is a charity?
 - At common-law a charity includes
 - Relief of poverty
 - Advancement of education
 - Advancement of religion
 - Other purposes beneficial to the community recognized by the courts
 - The *NPCA* defines “charitable corporation” as one incorporated or continued under the *NPCA* “to carry on activities that are primarily for the benefit of the Public” (s. 2(1))

10

- A corporation is deemed to be a charitable corporation under the *NPCA* if it:
 - (a) carries on activities that are not primarily for the benefit of its members
 - (b) solicits or has solicited donations or gifts of money or property from the public
 - (c) receives or has received any grant of money or property from a government or government agency in any fiscal year of the corporation that is in excess of 10%, or any greater amount that may be prescribed, of its total income for that fiscal year
 - (d) is a registered charity within the meaning of the *Income Tax Act* (Canada) (s. 2(9))

11

- Under the *Charities Accounting Act* (Ontario) “charitable purpose” is defined
 - Codifies the common law definition of what is a charity
 - Definition does not extend to broader definition under the *Income Tax Act*
- Under the *Income Tax Act* – “qualified donees” concept was introduced
 - Includes a “registered charity”
 - Defined as “charitable organization”, “public foundation” and “private foundation”
 - No definition of a “charity” but reflects the common law definition

12

- Includes extended statutory list of “qualified donees”
 - Registered Canadian amateur athletics associations
 - Low-cost housing co-operatives for the aged
 - Municipalities
 - United Nations and its agents
 - Prescribed universities
 - Charitable organizations outside Canada to which the federal government or its agents has made a gift during the taxpayer’s taxation year or the 12 months before it
 - Her Majesty in right of Canada or a province

13

- What are the tax advantages of being a charity?
 - A charity does not pay tax on income or capital gains
 - A charity can issue charitable receipts to donors as tax credits for income tax purposes
 - A gift for income tax purposes can now include consideration back to the donor
- What are the legal forms available for a charity?
 - Unincorporated associations
 - Charitable trusts
 - Non-share capital corporations

14

- Not-for-profit Organizations**
- What is a not-for-profit organization under the *Income Tax Act*?
 - Club, society or association
 - Must **not** be a charity
 - Organized and operated exclusively for social welfare, civic improvement, pleasure or recreation, or any other purpose, except profit
 - No part of the income can be payable or available to any proprietor, member or shareholder

15

- **What are the tax advantages of being a not-for-profit organization?**
 - A not-for-profit organization does not pay tax on income or capital gains, except income from property of an organization whose main purpose is to provide dining, recreation or sporting facilities
 - A not-for-profit organization cannot issue charitable receipts for income tax purposes

16

- **What are the legal forms available for not-for-profit organizations?**
 - Unincorporated associations
 - Non-share capital corporations
- **Examples would include**
 - Recreational clubs
 - Service clubs
 - Trade associations
 - Professional associations

17

D. ORGANIZATIONAL AND LEGAL DOCUMENTATION

- **General overview of organizational & legal documentation**
 - Identify the existence and the location of key organizational and legal documents
 - Develop an inventory of key documents
 - Maintain central location for key documents

18

- Identify key organizational documents for an unincorporated association
 - Constitution and amendments , if applicable
 - Policies and procedures, if applicable
- Identify key organizational documents for an incorporated organization
 - Articles of incorporation and articles of amendment (letters patent and supplementary letters patent for Ontario and Canadian corporations)
 - Membership covenant and mission statement, if applicable
 - By-laws and resolutions
 - Directors, members and debt registers
 - Copies of government filings

19

- Identify other key legal documents
 - Leases, deeds and mortgages
 - Agency, partnership and joint venture agreements, contracts for service
 - License agreements
 - Business name, trade-marks, official marks and domain names
 - Charitable registration number, T3010's and correspondence from CRA
 - Policy statements, i.e. sexual abuse and volunteer policy statements
 - Historical record of insurance policies
 - Privacy policies
 - Investment policies

20

- Review of key documents for an unincorporated association
 - Are the objects clearly stated in the constitution and are they not-for-profit in nature or are they charitable in nature?
 - Do constitutional documents correctly reflect how the organization is actually structured and operated?
 - For charitable organizations, is a copy of the constitution filed with the appropriate government agencies, i.e. with Canada Revenue Agency ("CRA")?

21

- **Review of key documents for an incorporated organization**
 - **Review of articles of incorporation (or letters patent in Ontario or Canada)**
 - **Is the name in the articles of incorporation the correct name of the organization and is it consistent with the objects?**
 - **Are its objects appropriate for a not-for-profit organization, i.e. are they not charitable, or for a charity, are they exclusively charitable in nature?**
 - **Are the activities of the organization authorized by its corporate objects?**
 - **Under the *NPCA*, articles of incorporation must specify whether the corporation is a “charitable corporation” or “member corporation” – s. 6(1)(f)**

22

- **For a not-for-profit organization, is the dissolution clause complementary to the objects or does it provide for distribution to its members?**
- **For a charity, does the dissolution clause provide for distribution to other charities**
- **Review of articles of amendment (or supplementary letters patent in Ontario or Canada)**
 - **Have all articles of amendment been identified?**
 - **Has there been a change of corporate name?**
 - **Has there been a change of corporate objects?**

23

- **Does the organization have historical records of all the by-laws**
- **Need to review the current corporate by-law for basic terms, such as**
 - **Do provisions conflict with articles of incorporation concerning objects or dissolution?**
 - **Do the provisions reflect the actual organization and operational structure of the organization?**
 - **Does the by-law reflect recent changes to applicable corporate legislation?**

24

- Is there an adequate indemnification provision for the directors and officers?
- Are the by-law amendment procedures consistent with corporate legislation?
- Was initial corporate organization of the corporation properly done?
- Was there a documented transfer of assets and liabilities at the time of incorporation?
- Are the records of board decisions and/or membership meetings complete?
- Is there adequate board and/or members' authorization for indebtedness, if applicable?

25

- Have corporate records generally been properly maintained, such as consent to be directors and applications for membership?
- Where are the corporate records kept?
 - Saskatchewan Corporations under the *NPCA* must, under s. 20(1), "prepare and maintain, at its registered office or at any other place in Saskatchewan designated by the directors, records containing:"
 - The articles and the bylaws, and all amendments to them, and a copy of any unanimous member agreement
 - Minutes of meetings and resolutions of members
 - Copies of certain notices required by the *NPCA*

26

- A securities register that complies with the *NPCA*
- A register of members entitled to vote
- In addition, s. 20(2), requires a corporation to "prepare and maintain adequate accounting records and records containing minutes of meetings and resolutions of the directors and any committee"
- Have necessary corporate filings and registrations been kept up to date?
 - Saskatchewan Corporations under *NPCA*
 - Articles of Incorporation
 - Articles of Amendment

27

- Notice of Registered Office if there is a change of address
- Notice of Directors if there is a change in directors
- Annual return and financial statements
- **Federal Corporations**
 - Annual Summary (Form 3) - Canada
 - Application for Registration (Form 22) and Power of Attorney (Form 24) - Saskatchewan
 - *Business Names Registration Act* (Saskatchewan) registrations

28

- Does the organization operate and/or fundraise in any other provinces? If so, there may need to be registration as extra-provincial corporations in other provinces, together with business name registrations
- Has there been loss of corporate status for failure to maintain government filings?
- Is the organization aware of the importance of proper use of corporate name and operating names?

29

- Has the organization developed and implemented risk management policy statements concerning:
 - Child protection
 - Sexual harassment
 - Bullying
 - Volunteer recruitment
 - Safety in the workplace
 - Protocol for foreign volunteer projects
- Has the organization conducted an up to date inventory of its assets?

30

E. BOARD MANAGEMENT ISSUES

- **Is the organization able to identify who is in charge of the organization?**
 - Where does the de facto control of the organization lie? Is it with a board, a committee or executive staff?
 - Is board authority recognized by the membership?
- **Are there clearly defined lines of authority between the board and the executive staff?**
- **Does the board meet on a regular basis and do directors regularly attend?**

- **Has the board delegated too much responsibility to executive staff by restricting itself to policy development only without a careful and ongoing monitoring and review of policy implementation?**
- **Has an audit committee been established by the board to review financial statements and the auditors' report?**
 - *NPCA* requires a charitable corporation to have an audit if its revenue exceeds \$250,000 in the previous financial year (s. 151(1))
 - If the revenue is between \$25,000 and \$250,000, the charitable corporation can pass a resolution to have a review instead of an audit (s. 151(2))

- **Has the board established a comprehensive due diligence review process by establishing and utilizing a legal risk management checklist?**
- **Has a risk management committee of the board been established?**
- **Is there adequate communication of board responsibilities to existing and new board members?**
 - Need to create a board binder of all organizational documents and inventory of assets, as well as an explanation of the general operations of the organization and the board of directors' legal duties and liabilities
 - Need to provide regular updates on changes in the law to board members

F. THIRD PARTY USE OF PROPERTY

- Has the organization been made aware of potential liability exposure in permitting third parties to use its property?
- Has the organization developed and implemented a third party facility use agreement with appropriate releases and indemnification?
- Does the organization require evidence of liability insurance from third party users of its facilities?
- Has the organization provided written notice to its insurer concerning the use of its property by third parties?
- Does the organization charge appropriate fair market rental fees to users of these properties?

34

- Charitable property requires fair market value for rent charged to non-charities
- Non-charitable properties have more flexibility in the amount of rent that it can charge

- Does the organization have the corporate authority to allow third party use of its property?
- For organizations that are charities, does the third party use constitute an unrelated business prohibited by the *Income Tax Act*?
- For religious charities involved with same-sex issues, has consideration been given to compliance with human rights legislation?

35

G. REAL PROPERTY ISSUES

Deeded land

- Has an environmental assessment been conducted to determine the extent of liability exposure for the organization for future acquisitions as well as existing property?
- If the organization has fuel oil tanks, either above or below ground, has there been compliance with new mandatory provincial fuel oil tank regulations?
- Are there trust provisions in old title documents that may impact real property held by a charitable organization that should be varied by a court?

36

- Has the organization addressed and rectified encroachments with neighbouring lands?
- Are municipal zoning and legal non-conforming uses being complied with?
- Has the organization reviewed its municipal property tax assessment to determine both classification and valuation and if so has there been a request for reconsideration or appeal of assessment?

37

- Leased Land**
- Need to avoid personal guarantees on lease document as much as possible
 - Avoid clauses requiring restoration of leased premises at the end of the lease
 - Ensure access to adequate parking
 - Need to limit the extent of tenant expenses under a net lease arrangement
 - Ensure the right to sub-let and assign the lease, with a release, if possible
 - Need to address issues of environmental liability for both the landlord and the tenant

38

- Need to carefully monitor the date by which an option to renew the lease needs to be exercised
- The amount of rent on renewal should be made subject to arbitration
- Try to obtain a covenant from the landlord to prohibit offensive uses of adjoining leased premises
- Does the lease need to be registered on title?
- Try to obtain a right of first refusal to lease adjoining leased premises

39

H. INTELLECTUAL PROPERTY ISSUES

- Intellectual property is an essential asset of an organization and consists of both trade-marks and copyright
- Trade-marks need to be identified, licensed and enforced
- Trade-marks can be lost if they are not properly protected
- An organization needs to be pro-active in protecting its trade-marks or risk losing its trade-mark rights by default
- Registration of a corporate name or business name does not by itself give trade-mark protection

40

- Trade-mark rights exist at common law but those rights are limited and should be protected by trade-mark registration under the *Trade-marks Act*
- There is enhanced trade-mark protection available for those organizations that qualify as public authorities under the *Trade-marks Act* for official marks
- Separate trade-mark registration must be done in each country in which the organization is operating
- It is essential that a trade-mark be properly marked with either a TM for an unregistered trade-mark or a ® for a registered trade-mark

41

- It is essential to properly use and license trade-marks, otherwise the trade-mark can be lost
- An infringement of a trade-mark by others, even if done unintentionally, must be immediately challenged
- The board members and executive staff of an organization need to be informed of the importance of trade-mark rights
- The organization should develop a portfolio management approach to identifying, registering, using and protecting trade-marks, both in Canada and in other jurisdictions as applicable

42

- In addition to obtaining a trade-mark registration, an organization should secure multiple domain names as soon as possible using its trade-mark as part of the domain name
- Has the designer of the organization’s website assigned the copyright for the website design?
- Who owns the copyright for publications of the organization and is it properly identified with a notice of copyright protection, i.e. ©?
- Should the copyright material of the organization be registered, assigned or licensed?

43

- I. EMPLOYMENT AND VOLUNTEER ISSUES**
- Has the organization developed appropriate policies and practices for hiring, disciplining and terminating employees and volunteers?
 - Does the organization have a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in human rights legislation?
 - Does the organization have a policy concerning sexual harassment?
 - Is there a need to develop and adopt statements and/or manuals for employees as well as volunteers in relation to conduct and performance structure?

44

- Are employees and volunteers who deal with children screened and supervised in accordance with an appropriate sexual abuse policy statement?
- Is the organization aware of and addressing ownership issues regarding intellectual property created by the employees and volunteers?
- Is the organization aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation and occupational health and safety legislation?
- Is the organization and the board exposed to criminal liability under the *Criminal Code* i.e. Bill C-45 (Westray Mines)?

45

J. INVESTMENT ISSUES

- What investment powers apply to investment of surplus funds of the organization?
 - For some corporations, investment power may be found in their incorporating documents
 - Investment power may also be found in incorporating legislation, i.e. *NPCA*:
 - “Subject to the limitations contained in any gift and the articles, a charitable corporation may invest its funds only in shares, debentures, bonds, mortgages or other financial instruments in which trustees are by law permitted to invest.” (s. 29(1))

46

- *The Trustee Act* (Sask.) provides that “[a] trustee may invest trust property in any form of property or security in which a reasonable, prudent investor would invest...” (s. 3(1))
- Under the *NPCA*, a membership corporation may “invest its funds as its directors think fit”, subject to the limitations contained in any gift and the articles or by-laws (s. 29(2))
- Investment power may be also be found within the terms of a gift or a will
- Does the organization have an investment policy or need one?
 - i.e. Documenting compliance with investment power

47

- i.e. Establishing requirements for delegation of investment decision making
- i.e. Establishing proper management of endowed funds
- Are charitable funds being used to fund separate business operations of the charitable organization?
- In Ontario, is there violation of the *Charitable Gifts Act* (Ontario) by a charitable organization owning more than 10% of a business as an investment?

48

K. DONOR RESTRICTED TRUST FUND ISSUES

- Are there donor restricted trust funds being held by the charity?
 - Building funds
 - Endowment funds
 - Special project funds
 - Ten year gifts
- Are restricted funds used only in accordance with applicable restrictions?

49

- Are restricted funds being used in whole or in part for general operational purposes or are they being borrowed against? In either event there would be breach of trust
- Are restricted funds segregated from operating funds?
- Is the board of the charitable organization aware of the consequences of breach of trust for failing to comply with restricted funds?
- If not, is there compliance under the *Charities Accounting Act* (Ontario) to co-mingle restricted funds for investment purposes in Ontario?

50

L. MAINTAINING CHARITABLE REGISTRATION

- Is the legal name of the charity and/or its operating name consistent with the records of CRA?
- Does CRA have the current head office address of the charity?
- Has the charity obtained Quebec charitable status for fundraising in Quebec?
- Does the charity submit its annual charity information return (form T3010) on a timely basis, i.e. within 6 months of year end of the charity?
- Is the charity and its directors aware of the recent key amendment to the *Income Tax Act* in May/2005 concerning the disbursement quota as outlined below?

51

- The 4.5% disbursement quota is reduced to 3.5%
- The 3.5% disbursement quota is extended to charitable organizations
- Inter-charity transfers to charitable organizations are now subject to the 80% disbursement quota
- The 80% disbursement quota can be delayed through utilizing “enduring property” including ten year gifts
- Inter-charity transfers have become more complicated
- Is the charity and its directors aware of the new penalties and sanctions that are part of the May/2005 amendments to the *Income Tax Act*?

52

- Is the charity aware of proposed legislation dealing with excess business holding rules for private foundations?
- Is the charity and its directors aware of the key amendments proposed to the *Income Tax Act* in October/2007 dealing with split receipting and anti-tax shelter provisions outlined below?
 - New split receipting rules will apply, which will permit the donor to receive some consideration when making a gift
 - New broader definition of “advantage” may reduce the amount of a charitable receipt

53

- New broader definition of a charitable organization and public foundation will apply
- Complicated new rules to curtail tax shelter schemes may result in reduction of charitable receipts for gifts in kind
- Charities will need to make reasonable inquiries of donors for all gifts, whether gifts in kind or cash
- Is the charity aware of the proposed CRA Policy on Fundraising by Registered Charities?
 - <http://www.cra-arc.gc.ca/tax/charities/consultations/fundraising-e.html>

54

- Is the charity involved in political activities and if so are they operating within limits permitted by CRA?
- Is the charity involved in business activities and if so, are they operating within the related business guideline permitted by CRA?
- Are agency, joint venture relationships or contractual transfer arrangements with non-qualified donees properly documented?
- Does the board of directors review the annual return (T3010A) for the charity before it is filed each year?
- Is the charity prepared for an audit by CRA?

55

- M. ANTI-TERRORISM/MONEY LAUNDERING ISSUES**
- Does the organization carry on operations that may require it to be in compliance with anti-terrorism/money laundering legislation?
 - International operations
 - Domestic operations
 - Fundraising and anti-terrorism
 - Anti-terrorism Legislation is very complicated, see www.antiterrorism.ca for article “*The Impact of Anti-terrorism Legislation on Charities in Canada: The Need for Balance*”

56

- Charity and its directors need to have a working knowledge of the anti-terrorism legislation in making a gift to charity
- Are directors aware of risks associated with failing to comply with anti-terrorism/money laundering legislation?
 - Loss of charitable status
 - Personal liability in civil law
 - Possible criminal law sanction
- Has the organization undertaken appropriate due diligence procedures in complying with anti-terrorism/money laundering legislation?
 - Development of an anti-terrorism/money laundering policy statement

57

- Development of resource materials on anti-terrorism/money laundering legislation
- Requiring disclosure statements for board members and staff
- Evaluating all organization programs for compliance
- Requiring disclosure statements from affiliated organizations, third party agents and/or partners and conducting appropriate inquiries
- Determining when to make inquiries of donors
- Conducting due diligence internet searches on directors, officers and agents

58

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