

---

**WILD ROSE FOUNDATION – VITALIZE 2008**

**DIRECTOR’S AND OFFICER’S LIABILITY:  
THE ESSENTIALS AND BEYOND  
FOR CHARITIES AND NONPROFITS**

**Edmonton – June 13, 2008**

---

**Part II**  
**Due Diligence in Avoiding Liability for  
Directors and Officers of Charities and  
Not-For-Profits (Alberta)**

---

**By Terrance s. Carter, B.A., LL.B., Trade-Mark Agent**

© 2008 Carters Professional Corporation

**CARTERS**.ca

**CARTERS PROFESSIONAL CORPORATION**

**Société professionnelle Carters**

Barristers, Solicitors & Trade-mark Agents

Affiliated with **Fasken Martineau DuMoulin LLP**

Avocats et agents de marques de commerce

Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

**Offices / Bureaux**

Ottawa (613) 235-4774

Mississauga (905) 306-2791

Orangeville (519) 942-0001

**Toll Free: 1-877-942-0001**

**By Appointment / Par rendez-vous**

Toronto (416) 675-3766

London (519) 937-2333

Guelph (519) 838-2004

Vancouver (877) 942-0001

**www.charitylaw.ca**

---



WILD ROSE FOUNDATION – VITALIZE 2008  
DIRECTOR’S AND OFFICER’S LIABILITY:  
THE ESSENTIALS AND BEYOND  
FOR CHARITIES AND NOT-FOR-PROFITS  
Edmonton – June 13, 2008

Part II  
Due Diligence in Avoiding Liability for Directors  
and Officers of Charities and Not-for-Profit  
(Alberta)

By Terrance S. Carter, B.A., LL.B.  
© 2008 Carters Professional Corporation



CARTERS PROFESSIONAL CORPORATION  
BARRISTERS, SOLICITORS & TRADE-MARK AGENTS  
Affiliated with Feshen Martineau Duboulin LLP

Offices in Ottawa, Mississauga & Orangeville  
Locations also in Toronto, London, Guelph & Vancouver  
Toll Free: 1-877-942-0001

www.carters.ca  
www.charitylaw.ca

---

---

---

---

---

---

---

---

---

---

A. OVERVIEW OF TOPICS

- Due diligence through good governance
- Due diligence in the choice of charitable structures
- Due diligence in relying upon statutory protection
- Due diligence in operations
- Due diligence in indemnification and insurance
- Other means of due diligence in reducing risk

Note: For a more detailed discussion, see Summary “B” entitled “Due Diligence in Avoiding Risks for Directors of Charities and Not-for-Profits (Alberta)” at <http://www.carters.ca/pub/article/charity/2008/tsc0613b.pdf>. See also Chapter 6 Risk Protection by Terrance S. Carter in “Primer for Directors of Not-for-Profit Corporations” at <http://www.carters.ca/pub/book/2002/dirprimch6.pdf>

2

---

---

---

---

---

---

---

---

---

---

B. DUE DILIGENCE THROUGH GOOD GOVERNANCE

- Developing a mission and strategic plan
  - Ensure that the mission statement is consistent with corporate objects
  - Do periodic reviews of both
- Ensure transparency and communication
  - Communicate to members, donors and the public
  - Focus on ensuring accountability
- Maintain organizational structure
  - Be knowledgeable of corporate structure

3

---

---

---

---

---

---

---

---

---

---

- Memorandum of Association (Letters Patent)
- Articles of Association (By-laws)
- Special Resolutions
- Policies
- Be prepared to change corporate structure as necessary to better reflect programs undertaken
- Understand the role of the board
  - Continually educate board members
  - Develop conflict of interest and code of conduct policies
  - Prepare a board manual

4

---

---

---

---

---

---

---

---

- Exercise fiscal responsibility
  - Establish and maintain a budget
  - Monitor all fiscal expenditures and/or commitments
  - Monitor human resources
  - Review and approve all fundraising and initiatives and donation receipts
- Plan for the diversity and succession of the board
  - Determine specific needs of the board and recruit in accordance with those needs
  - Plan for an orderly succession of directors

5

---

---

---

---

---

---

---

---

- C. DUE DILIGENCE IN THE CHOICE OF CHARITABLE STRUCTURES**
- Charities as unincorporated associations
    - Use of unincorporated association is simpler, faster and less expensive
    - But exposes members and leaders to personal liability
  - Charities as Charitable Trusts
    - A trust is a relationship between trustees and beneficiaries involving the separation of legal and beneficial ownership of property
    - Trustees are exposed to liability

6

---

---

---

---

---

---

---

---

- **Charities as Corporations**
  - Separate legal entity protects members from personal liability
  - Directors may still be exposed to personal liability from fiduciary and management responsibilities
- **Using a multiple charitable corporation structure**
  - Multiple charitable corporations can help to protect charitable assets in one charity and contain liabilities in another charity

7

---

---

---

---

---

---

---

---

- Need integrated corporate structure and trade-mark licensing to avoid loss of control
- Multiple charitable corporations can include parallel foundations and associated operating charities
- Parallel foundations have become more common in protecting long term gifts and endowment funds as a result of recent case law

8

---

---

---

---

---

---

---

---

- **Multi-tiered provincial or national charities**
  - Single corporate structure provides ease of administration, but results in greater risk of liability exposure for total assets of a single corporate entity
  - Multiple corporate structure reduces risk of liability, but top tier organization may still be exposed to liability where too much control is imposed or employer/employee relationship exists
- **Need to avoid overlapping board of directors to reduce the chance of crossover liability**

9

---

---

---

---

---

---

---

---

**D. DUE DILIGENCE IN RELYING UPON STATUTORY PROTECTION**

- **Due diligence defence**
  - The proposed *Canada Not-for-Profit Corporation Act* would provide a due diligence defence, although its enactment is in doubt
  - Will be available where a director exercises the care, diligence and skill of a reasonably prudent person
- **Protection from third party contractual liability**
  - Protection available for corporations under the current *Canada Corporations Act* but *Companies Act* (Alberta) and *Societies Act* (Alberta) are silent on this matter
  - Protects directors and officers against contracts entered into within the scope of authority of directors or officers

10

---

---

---

---

---

---

---

---

---

---

- **Protection from conflict of interest**
  - Both CCA and ACA permit directors to remain on the board of directors where a director declares a conflict of interest
  - Common law rule, at least in Ontario, though, does not permit directors of a charity to remain on the board even if conflict of interest declared

11

---

---

---

---

---

---

---

---

---

---

**E. DUE DILIGENCE IN OPERATIONS**

1. **The Rights and Powers of a Director in Exercising Due Diligence**
  - **Corporate authority**
    - Directors need to know governing documents of the charity
    - Directors must not authorize *ultra vires* activities
    - Membership approval may be required for certain activities
    - Amendments to governing documents may be necessary

12

---

---

---

---

---

---

---

---

---

---

- **Management access and control over the affairs of the corporation**
  - Directors are responsible for all aspects of operations of the charity
  - Directors must be proactive in management and not be limited to setting policy only
- **Proactive protection of charitable assets**
  - Directors have a fiduciary duty to protect charitable property

13

---

---

---

---

---

---

---

---

- When trustees, directors need to invest in accordance with prudent investment under the *Trustee Act* (Alberta)
- Need to take an inventory of charitable assets
  - Review annual financial statements
  - Review bank statement and records
  - Review past and current restricted funds
  - Review property deeds
  - Comply with statutory requirements where applicable

14

---

---

---

---

---

---

---

---

- Protecting and managing intellectual property
  - Registering trade-marks and copyright
  - Securing internet domain names
  - Proper marking of trade-marks and copyrights
  - Licensing of trade-marks and copyrights
- Fundraising
  - Monitor fundraising costs as part of 80/20 disbursement quota for receipted gifts
  - Monitor which is appropriate fundraising costs under the proposed new Fundraising Policy from CRA – for more details see Charity Law Bulletin #138 at <http://www.carters.ca/pub/bulletin/charity/2008/chv1b138.pdf>

15

---

---

---

---

---

---

---

---

- Due diligence enquiries of donors to determine correct amount for “eligible gift” in receipt by determining the FMV of a gift and the amount of any advantage received by the donor
- Ensure gifts are used for charitable purposes
- Review and enforce terms of restricted and endowed gifts
- Comply with *Charitable Fund-Raising Act* (Alberta) (See Part III of this presentation for more details)
- Notice/attendance at meetings/minutes
  - Right to notice of board meetings
  - Right to attend board meetings

16

---

---

---

---

---

---

---

---

- Right to vote
  - Equal voting rights
  - Must declare conflict of interest
  - Need to record contrary vote
- Appropriate delegation
  - Can delegate day to day operations, including officer duties
  - But directors must retain control and require accountability
  - Establish an audit committee for finances and legal liability

17

---

---

---

---

---

---

---

---

- 2. Policies and Procedures in Achieving Due Diligence**
- Establishing and following policy statements and procedures
    - Develop policies and procedures for staff, volunteers and board members
    - i.e. Policy statements on sexual abuse, sexual harassment, work place safety, counseling and third party use of facilities of the charity

18

---

---

---

---

---

---

---

---

- **Screening procedure**
  - An appropriate screening process is an important protection against increase in abuse claims
  - Screening involves utilizing appropriate questions, interviews, reference of employees and volunteers, together with police checks when individuals are dealing with children
- **Training/education**
  - Directors should maintain their skills and knowledge in the area of the charity’s current operation
  - Directors need to educate themselves about changes in the law affecting directors’ duties

19

---

---

---

---

---

---

---

---

- Directors need to ensure that senior management are also kept adequately informed on current legal issues
- **Utilizing due diligence checklists**
  - Legal risk management checklist (see sample checklist at <http://www.carters.ca/pub/checklst/charity.pdf>)
  - Sexual abuse checklist
  - Fundraising compliance due diligence checklist
  - Anti-terrorism due diligence checklist
  - Insurance checklist

20

---

---

---

---

---

---

---

---

- **Utilizing outside professionals**
  - Relying on professional advisors like accountants and lawyers provides evidence of due diligence
  - Reduces exposure to liability
- **Delegation of investment decision making to investment manager requires directors to act prudently in delegating authority and monitoring performance under *Trustee Act* (Alberta)**

21

---

---

---

---

---

---

---

---

**F. DUE DILIGENCE IN INDEMNIFICATION AND INSURANCE**

**1. Statutory Basis for Directors and Officers Insurance and Corporate Indemnity**

- Federal and some Provincial corporate statutes (such as Ontario) permit corporate indemnification and director and officer insurance
- In Ontario, corporations must consider the following under the *Charities Accounting Act*:
  - What is the degree of risk?
  - Are there alternatives to insurance?
  - What is the cost of insurance in relation to the risk?

22

---

---

---

---

---

---

---

---

---

---

- What is the cost of insurance in relation to revenue?
- Does indemnity or insurance further the management of charitable property?

**2. Corporate Indemnification**

- Corporate indemnification provides compensation for the following:
  - Legal fees
  - Fines that were paid under a statute
  - A financial settlement that results from a lawsuit
  - Any other obligation that a director was required to fulfill

23

---

---

---

---

---

---

---

---

---

---

- Corporate indemnification should always be implemented but may be of limited benefit
- Indemnification is only as good as the financial state of the charity

**3. Insurance Considerations**

- Insurance policies to consider obtaining would include
  - General liability insurance
  - Directors' and officers' insurance
  - Sexual abuse and/or harassment
  - Insurance for particular risks, i.e. counseling, non-owned auto, third-party use of property, etc.

24

---

---

---

---

---

---

---

---

---

---

- **Additional factors to consider**
  - How much coverage does the policy provide for?
  - Who are the named insured?
  - Does insurance cover all past and present directors, officers and committee members?
  - Are there exclusionary clauses that limit the protection offered by the policy, such as sexual abuse?
  - Is coverage on a “claims made basis” or on an “occurrence basis”?

25

---

---

---

---

---

---

---

---

- Are there geographical limits to the coverage?
- Insurance will likely not provide coverage for actions by public authorities for breach of trust, improper investments, or violations of the *Anti-terrorism Act* (Canada), Bill C-45 amendments to the *Criminal Code* (Westray Mines) or other similar strict liability legislation
- Advise agent in writing each year of all activities of the charity and all known risks

26

---

---

---

---

---

---

---

---

- Ask agent/insurance company to respond in writing to the following:
  - What risks are covered?
  - Who is covered under the policy?
  - What is the amount of the coverage?
  - What risks are not covered under the policy?
  - What additional insurance should be obtained by the charity?

27

---

---

---

---

---

---

---

---

**G. OTHER MEANS OF DUE DILIGENCE IN REDUCING RISK**

**1. Legal Risk Management Committees**

- Legal risk management committee needs to be formed to conduct review and identify risks
- Need to conduct ongoing review of assets and risks utilizing legal risk management checklist
- Undertake a legal risk audit

**2. Independent Legal Advice**

- Independent legal advice needed for directors in high risk situations

28

---

---

---

---

---

---

---

---

- Directors may need to seek independent legal advice before resigning from the board of directors

**3. Size of the Board**

- Reducing size of board reduces risk
- Smaller board may also allow for more effective control

**4. Committees and Advisory Boards**

- Committees and advisory boards can be an effective means of attracting volunteers without the risk of being directors

29

---

---

---

---

---

---

---

---

- But board of directors must always remain in control

**5. Transfer of Assets**

- Directors will always be somewhat exposed to liability risks
- Therefore directors should consider transferring personal assets to spouse
- However any transfer of assets must be done before becoming a director so as not to defeat claims of creditors

30

---

---

---

---

---

---

---

---

**DISCLAIMER**

This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2008 Carters Professional Corporation



**CARTERS PROFESSIONAL CORPORATION**  
BARRISTERS, SOLICITORS & TRADE-MARK AGENTS  
Affiliated with Fesken Martineau Duboulin LLP

Offices in Ottawa, Mississauga & Orangeville  
Locations also in Toronto, London, Guelph & Vancouver  
Toll Free: 1-877-942-0001

[www.carters.ca](http://www.carters.ca)  
[www.charitylaw.ca](http://www.charitylaw.ca)

---

---

---

---

---

---

---

---