A. LEGAL OVERVIEW OF THE NOT-FOR-PROFIT SECTOR

1. Two Types of Not-For-Profit Entities in Canada
   1. Registered Charities (about 85,000 in number)
   2. Non-Profit Organizations (NPOs) (about 80,000 in number)

2. Under the Income Tax Act (ITA), NPOs and charities are two mutually exclusive categories of organizations - an organization cannot be both.

3. There is also jurisdiction over charities at the provincial level under the Constitution of Canada - in Ontario, that oversight is exercised by the Office of the Public Guardian and Trustee.

B. OVERVIEW OF DIFFERENT TYPES OF CHARITIES

1. If an organization has charitable purposes, it is a charity at common law and can seek registration under the ITA to avoid becoming taxable.

2. Four categories of charitable purposes at common law:
   - Relief of poverty;
   - Advancement of education;
   - Advancement of religion; and
   - Other purposes beneficial to the community not falling under any of the preceding heads.

3. Designations of Registered Charities under the ITA:
   - Charitable Organizations
   - Public Foundations
   - Private Foundations
Advantages of being a registered charity:
- It is tax exempt
- Can issue official tax receipts to donors
- Can receive gifts from a registered charity
- Entitled to a 50% rebate on HST/GST
- Benefit from the charitable sector's positive reputation

Benefits to providing tax receipts to donors:
- Individuals - tax credit
- Businesses - tax deduction

1. Charitable Organization
- All resources must be devoted to charitable activities
- Three legal forms permitted:
  - Corporations
  - Unincorporated associations
  - Trusts
- Generally considered to be a “doer” organization
- May disburse funds to qualified donees (e.g. generally other registered charities) provided that such disbursement is not more than 50% of its income
- No personal benefit to members, directors or trustees
- No control by related persons and no control by a person who has contributed more than 50% of the capital or someone related to such person
- May carry on limited political activities and related business activities

2. Public Foundations
- Not a “charitable organization”, i.e. it therefore primarily not a “doer” organization
- Generally considered to be a “funding” organization
- May disburse funds to other qualified donees (e.g. other registered charities) with more than 50% of its income to be given to qualified donees
- No control by persons who are not at arms length
- No control by a person who has contributed more than 50% of the capital or someone related to such person
- May carry on limited political activities as well as related business
- However may not acquire control of any corporation or incur certain debts
3. Private Foundations
   • Not either a “charitable organization” nor a “public foundation” (therefore a default category)
   • May disburse funds to qualified donees (e.g. generally other registered charities) with no limit on percentage of income given to qualified donees
   • May be closely held and controlled
   • However may not carry on any related business
   • Also may not acquire control of any corporation or incur certain debts
   • Subject to complicated “excess business holdings” rule, as well as other limitations

C. OVERVIEW OF NON-PROFIT ORGANIZATIONS
   • To qualify as a non-profit organization, an organization must:
     – Not be a charity
     – Be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
     – Be operated exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
     – Not distribute or otherwise make available for the personal benefit of a member any of its income
   • E.g. trade associations, sporting organizations, social clubs, service clubs

• A non-profit can operate with partially charitable goals, whereas a registered charity cannot, like a service club
• A non-profit does not pay tax
• But it has no tax receipting privileges for donations received
• However, more flexibility and less regulations
  – No CRA application or approval process
  – No T3010B annual return
  – No fundraising guidance requirements
  – Less requirements for books and records
  – No restrictions on political activities
  – No restrictions on foreign activities
D. LEGAL STRUCTURES FOR CHARITIES AND NON-PROFIT ORGANIZATIONS

1) Trusts;
2) Unincorporated associations;
3) Corporations without share capital;

1. Trusts
   • Generally regarded as the relationship between the settlor (the donor) and the trustee
     – Trustee holds the trust property for the benefit of some persons or for some objectives (e.g. charitable)
     – The benefit of the property accrues to the beneficiaries of the trust, not the trustee
   • Useful where there will be a limited number of individuals wishing to aid in the administration of a non-profit or charitable endeavour

2. Unincorporated Associations
   • Defined as "a group of two or more persons united together by mutual consent in order to determine, deliberate and act jointly for a common purpose"
   • Members may be governed by a contractual arrangement, referred to as a "Memorandum of Association", a Constitution, or bylaws
     • No legal capacity to sue or be sued, as the organization is not a legal person
   • Not available for public or private foundations

3. Corporations without Share Capital
   • Incorporation results in the creation of a separate legal person and provides the members with protection from liability
   • Akin to the traditional share capital corporation, except that there are no shareholders who have ownership interest, but rather members who elect the board
   • Can be incorporated either federally under the Canada Not-for-Profit Corporations Act or provincially under the Ontario Corporations Act
     • Must set out the purposes of the corporation, describing the scope of its proposed activities
E. OPERATIONAL ISSUES
- Implement appropriate hiring policies and practices for employees and volunteers
- Use restricted trust funds only in accordance with their applicable restrictions
- Protect trade-mark and copyright from infringement within Canada and abroad
- Ensure compliance with anti-terrorism, money laundering legislation and anti-corruption laws both locally and abroad
- Implement operational and risk management policy statements, e.g.:
  - Child Protection
  - Sexual Harassment
  - Workplace Safety

F. LEGAL RISK MANAGEMENT AND LIABILITY
- Exposure of not-for-profits to liability goes further than the loss of assets and/or the insolvency or winding up of a not-for-profit
- Directors may personally face legal action against themselves by donors, members, third parties, and governmental authorities for breach of their fiduciary duties or breach of trust
- Liability and risk management must be reviewed from many different standpoints, including from the level of the organization or corporation and from the level of directors and officers

- At the level of the corporation/organization, directors and managers must consider:
  - Choice of non-profit or charitable structure
  - Whether to incorporate or not
  - Vicarious liability of officers, staff, and volunteers
- At the level of the directors and officers, consideration should be given to:
  - Roles and duties of directors and officers
  - Standard of care and duty of care
  - Liability of directors
  - Rights and powers of directors
  - Statutory protection of directors
Other means of reducing risk include:
1) Due diligence in operations (managing the corporation)
2) Risk transfer documents (e.g. consents and releases)
3) Indemnification of directors and officers
4) Directors and officers insurance
5) Legal risk management committees
6) Independent legal advice for directors in crisis

QUESTIONS?