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# **REAL ESTATE ISSUES UNIQUE TO CHARITIES**


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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>OBA Institute</b> <b>February 7, 2017</b></p>
<p><b>Real Estate Issues Unique to Charities</b></p> <p><b>By Theresa L.M. Man</b> tman@carters.ca 1-877-942-0001</p> <p>© 2017 Carters Professional Corporation</p>	
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<p><b>OVERVIEW</b></p> <ul style="list-style-type: none"><li>• Potpourri of complex issues</li><li>• Will only cover selected key issues</li><li>• Holding real estate by unincorporated associations</li><li>• Holding real property for charitable purposes</li><li>• Holding real property in parallel foundations or land holdcos</li><li>• Tax issues relating to land holdings</li></ul>	
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## A. Holding Real Estate By Unincorporated Associations

- If incorporated - the corporation holds title to real estate in the name of the corporation, and the board of directors has authority to sell land owned by the corporation unless that right is restricted by letters patent/articles or by-laws of the corporation
- If trust or unincorporated - necessary to review the trust document, by-laws or constitution to determine whether the organization has authority and power to acquire, lease or dispose of real property

- Unincorporated associations cannot own property in their own name because they are not legal entities
- Historically, individuals have to hold property in their own names in trust as trustees for the unincorporated church association as a charitable purpose - the property would need to be conveyed on their death to successive trustees
- To remedy the problem, Ontario special legislation was enacted in the 1800s to allow specific religious organizations to have successive trustees to hold land
- *Religious Organizations' Lands Act* (ROLA) - general legislation to allow successive trustees to hold land for religious organizations - predecessor legislation was enacted in 1828

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- Should also check if the religious organization is incorporated by or subject to special act – if so, need to review the legislation to determine if there are additional requirements that the organization should be concerned with
- Some legislation require consent of hierarchical bodies within organizations before property can be transferred or the naming of certain church officials as trustees for the purposes of holding land
- Even if no special legislation applies, church may be subject to regulations or agreements between the religious body and the specific denomination to which the religious body belongs

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## Religious Organizations' Lands Act (ROLA)

- ROLA permits trustees to be appointed on behalf of religious organizations to hold land on a perpetual succession basis notwithstanding that individual trustees may come and go
- ROLA provides a comprehensive statutory code for the acquisition, holding, mortgaging, selling and leasing of land through trustees who are appointed to act on behalf of the religious organization
- Limited to land only, not other property of religious organizations
- ROLA does not apply to unincorporated charities that are not religious organizations, so they will generally have individuals to hold property in their own names in trust as trustees

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- Purposes for which trustees can hold land (section 2)
  - Place of worship
  - Residence of religious leader
  - Burial or cremation ground
  - Bookstore, printing or publishing office
  - Theological seminary, institution for religious instruction
  - Religious camp, retreat or training centre
  - Other religious purpose

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- Unincorporated religious organization must adopt a resolution conferring authority on trustees to own land in perpetual succession (section 3)
- Trustees cannot exercise any of the powers contained in ROLA until authorized to do so by resolution of the members (section 6)
- Trustees can only purchase land for the benefit of the religious organization for purposes set out in ROLA (section 7)
- Trustees can maintain and defend actions for the protection of the land and of the interest of the religious organization (section 8)

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- Trustees can only lease land that is no longer required by the religious organization for purposes in ROLA (section 10)
- Trustees can only mortgage land if debt incurred is for any of the following (section 9)
  - Acquisition or improvement of land
  - Building, repairing, extending or improving buildings on land
- Trustees can only sell land if land in question is no longer required, subject to special powers or trusts contained in deed, conveyance or instrument (section 12)

- Trustees selling or leasing land under ROLA are required to have ready and open for the inspection of the members of the organization on the first Monday in June in each year a detailed statement showing the following (section 16)
  - Rents that accrued during the preceding year
  - All sums in their hands for the use and benefit of the organization that were in any manner derived from land under their control or subject to their management
  - Application of any portion of the money that has been expended on behalf of the organization

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- Members' resolutions for purposes of ROLA (sections 17, 18)
  - Majority of the members present at the meeting for the required purpose and entitled to vote
  - Notice of meetings - according to the constitution of the religious organization or default in ROLA (ie 2 weeks notice given personally or by mail, or announcement at open service for 2 consecutive weeks)
- Court application possible by any interested person or Public Guardian and Trustee (PGT) for direction (sections 23, 24, 25)

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- If selling under ROLA, practitioner should requisition the following
  - Certified copy of the members' resolution appointing the trustees
  - Certified copy of the members' resolution authorizing sale of the property
  - Review any deed of trust existing regarding property to see if there are any requirements for trustees and if so, requisition a declaration stating that such duties have been fulfilled by trustees

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## B. Holding Real Property For Charitable Purposes

- General principle - assets of a charity must be applied for the charitable purpose of the charity, subject to restricted purposes imposed by donors (special purpose charitable trusts)

### Ontario Charities Accounting Act (CAA)

- Section 8 of CAA - a person who holds an interest in real or personal property for a charitable purpose shall use the property for the charitable purpose
- ROLA section 12(2) - when land of a religious organization is not required for its actual occupation for a purpose and is not leased, then the CAA applies in the same manner as if the land were then assured to the religious organization for charitable purposes

## ITA – Passive Investment vs Related Business

- Needs to consider if land is held as passive investment or related business under *the Income Tax Act* (ITA)
- CRA's CPS-019 "What is a Related Business"  
<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-026-eng.html>
- Charitable organizations and public foundations may carry on related businesses, but not private foundations
- If non-compliance
  - Penalty of 5% of gross revenue from the activity on first offence
  - Repeat offence in 5 years: 100% penalty and suspension of receipting privileges
  - Revocation of charitable status



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- CRA's policy on "related business" is in relation to a "business" that involves a commercial activity undertaken with the intention to earn profit and the charity derives revenues from providing goods and services
- Passive investments are generally not considered by CRA as business activities
- If leasing, buying or selling activities are considered to be "business" activities, then it can only be carried on by registered charities if they meet the criteria to be a related business
- It is an issue if a charity has become a commercial landlord and the rental is not a related business to the charity

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- Two types of related businesses
  - Substantially run by volunteers (90%) (based on a head count)
  - Linked and subordinate to the charity's purpose
- Four forms of linkage
  - A usual and necessary concomitant of charitable programs
  - An off-shoot of a charitable program
  - A use of excess capacity
  - Sale of items that promote the charity or its objects

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- Factors of subordination to a charity's purpose
  - Business activity receives a minor portion of the charity's attention and resources
  - Business is integrated into the charity's operations (not acting as a self-contained unit)
  - Charity's charitable goals continue to dominate its decision-making
  - Charity continues to operate for an exclusively charitable purpose, not permitting any private benefit

## Ontario Trustee Act Investment Issues

- If land is held as passive investment, then needs to comply with prudent investment rules under the Ontario *Trustee Act*
- ss. 1(2) of CAA provides that charitable corporations are deemed to be trustees of their charitable property within the meaning of CAA
- s. 10.1 of CAA provides that charitable corporations must comply with the investment decision making requirements in s. 27 to 31 of Ontario *Trustee Act*
- ss. 27(9) and (10) of Ontario *Trustee Act* provide that the Act does not require a trustee to act inconsistent with the terms of the trust (which terms include the constating documents of a corporation)

- Standard of care required of a trustee involved in the investment of charitable property is "the care, skill, diligence and judgment that a prudent investor would exercise in making investments."
- Seven mandatory criteria must be considered in making investment decisions "that are relevant to the circumstances"
  - General economic conditions
  - Possible effect of inflation or deflation
  - Expected tax consequences of investment decisions or strategies

- Role that each investment or course of action plays within the overall trust portfolio
- Expected total return from income and appreciation of capital
- Need for liquidity, regularity of income and preservation or appreciation of capital
- An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries

## C. Holding Real Property in Parallel Foundations or Land Holdcos

- Real property may be held in a separate parallel foundation or land holding structure (land holdco) for various reasons
- Generally, land holdco would also be a registered charity

### CRA Umbrella Organizations Guidance

- Consider application of CRA's Guidelines for the Registration of Umbrella Organizations and Title Holding Organizations, CPS-026

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-026-eng.html>

- Umbrella Organization - works to achieve a charitable goal by supporting, improving, and enhancing the work of groups involved in the delivery of charitable programs

- Three types of umbrella organizations
  - A. Promote the efficiency of Canadian registered charities ("Efficiency Umbrella Organization")
  - B. Work through a network of registered charities and non-registered entities to achieve a recognized charitable purpose ("Network Umbrella Organization")
  - C. Hold title to property on behalf of other registered charities ("Title Holding Umbrella Organization")

## **Type A Efficiency Umbrella Organizations**

- Promoting the efficiency and effectiveness of other registered charities
- Activities that
  - Improve the efficiency of charities by increasing the amount of resources dedicated directly to charitable programs - e.g., by reducing the amount of overall charitable property contributed to operational costs and administration
  - Improve the effectiveness of charities by increasing the capacity of charities to deliver programs and serve individual beneficiaries - e.g., by providing assistance and expertise

- At least 90% of its services benefits other registered charities
- Can target its activities at improving the services of other registered charities, and can focus on improving most aspects of the beneficiary groups (e.g., direct delivery of charitable programs, planning fundraising campaigns, human resources)

- Examples of activities
  - providing a facility at no-cost or at reduced-cost to house the activities of registered charities
  - holding title to property on behalf of registered charities (See type C )
  - providing specialized administrative services (such as a website) or professional consulting services
  - providing training on a variety of topics for managers, staff, and volunteers
  - purchasing goods and services on behalf of a group of registered charities
  - generating, collecting, and disseminating data of interest and of use to registered charities

### **Type C Title Holding Umbrella Organizations**

- Acts as a holding company for property beneficially owned by another related registered charity
- Can carry on varying degrees of activity
  - Least "active" - simply hold title to the property of another registered charity
  - May also provide other services, e.g.,
    - Property management services
    - Other support services
    - Securing and developing additional properties to be used for charitable purposes

## Relationship Considerations

- How to align vision and mission of the two charities
- Crossover liability issues
- Distinctive names to avoid confusion
- Corporate governances issues - e.g., membership structure, board composition, operational issues
- Contractual issues - e.g., licensing of brand, leasing of real property from holdco to opco
- Legal agreements where appropriate
- Possible land transfer tax issues when transferring land from opco to holdco

## D. Tax Issues Relating To Land Holdings

- Lots of tax issues related to land holdings, such as land transfer tax, HST, municipal tax, etc.
- Will only briefly review land transfer tax and HST issues

### Land Transfer Tax (LTT)

- Anyone who buys land in Ontario has to pay Ontario's land transfer tax - subject to some exceptions
- LTT is an escalating rate of 0.5% on first \$55,000, 1% up to \$250,000, 1.5% over \$250,000, 2% over \$400,000, and 2.5% over \$2 million for one or two single family residences
- In Toronto, the Municipal Land Transfer Tax virtually mirrors the provincial tax and is in addition to the provincial tax

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- Gifts of land are still subject to land transfer tax, but if no consideration passes the LTT will be nil
- Assumption of any liability (registered or unregistered) will be considered to be consideration for the purposes of calculating land transfer tax, e.g., the assumption of a mortgage or other contract related to the land

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- In 2010, Ontario introduced an exemption LTT for charities for certain transfers of land between qualifying corporations (or trusts) which are registered charities where there is consideration
- To qualify for the exemption, all of the following must be met
  - value of consideration must be nil, other than the assumption of any registered encumbrance
  - if a qualifying corporation, must have been the beneficial owner immediately prior to the transfer
  - must have paid LTT when it acquired the land
  - must have held the land for a charitable purpose
  - transferee must be a qualifying corporation and continue to hold the land for same charitable purpose for at least one year after date of transfer

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- A qualifying corporation is a non-profit non-share capital corporation that is a registered charity
- Evidence in the form of an affidavit will need to be submitted to evidence the “nil” value of consideration - will set out information about the property and about the corporations (trusts)
- In the event LTT was paid and the transfer qualifies, the transferee may apply for a refund within four years of tax payment
  - This may occur where paperwork cannot be completed in time

## HST

- The rules are complex, will only cover a few points

### Real property purchases

- There is a general misconception that charities are entitled to an exemption of the GST/HST on real property purchases
- There is also the misconception among professionals who regularly deal with for-profit corporations that the GST/HST is “a wash” for charities
- Both misconceptions can lead to sticky situations and costly last-minute searches for additional funding

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- It is safer to start with a general rule that a sale of real property is taxable unless there is a specific exempting provision under the *Excise Tax Act*
- Common exemptions include
  - the sale of used housing (1/2 hectare and house)
  - vacant land sold by an individual
  - the sale of a parking space in a residential condominium complex
  - the sale of real property by a public service body (unless a further exclusion applies)
- The seller must determine whether the transaction is subject to GST/HST prior to finalizing the agreement to avoid costly errors

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- The buyer must determine whether it is considered a GST/HST registrant for the purposes of claiming input tax credits (check at <http://www.cra-arc.gc.ca/esrvc-srvce/tx/bsnss/gsthstrgstry/menu-eng.html>)
- If a charity is properly registered, the HST payable on the transaction would not be paid to the seller on closing. Instead the transaction would be reported on the buyer's return for the period in which the transaction closed
- However - many charities do not qualify for registration as they only provide exempt supplies
- Voluntary registration may result in unintended consequences, e.g., failure to qualify for property tax exemptions

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- It is important to confirm whether GST/HST is “in addition to” or “included in” the purchase price
  - If a charity is the seller, it is safer to have it “in addition to” unless the application of GST/HST to the transaction is confirmed
  - If a charity is the buyer, it is safer to have it “included in” unless the expense has been calculated into the acquisition cost
- If there is any question as to the applicability of GST/HST to the transaction, it is best to obtain an advance ruling from CRA
- Do not rely on the call by a board member to CRA’s HST helpline

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## Public Service Body Rebate

- Charities may claim the Public Service Body Rebate on eligible purchases and expenses
- What is an eligible purchase?
  - general operating expenses, such as rent, utilities, and administration expenses, for which you cannot claim input tax credits
  - most allowances and reimbursements you pay to employees involved in your exempt activities
  - property and services used, consumed, or supplied in your exempt activities
  - capital property
- Rebate amounts to approx. 50% of federal portion and 82% of Ontario portion

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## Conclusion

- Lots of unique complex issues related to real property held by charities
- Need to be aware of the issues and how they interplay with each other
- Not just real estate conveyancing issues, need to be sensitive to the charitable aspects

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