 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The 2020 Ottawa Region <i>Charity & Not-for-Profit Law</i> Seminar February 13, 2020</p>
<p>Real Estate Challenges for Charities and Not-for-Profits</p> <p>By Nancy E. Claridge, B.A., M.A., LL.B. nclaridge@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p>	
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<p>OVERVIEW</p> <ul style="list-style-type: none">• Corporate/Institutional Memory Problems• Failure to Retain Proper Advisors/Failure to Provide Information to All Advisors• Regulatory Compliance (CRA/PGT)• <i>Planning Act</i> (Ontario)• GST/HST• <i>Assessment Act</i> (Ontario)• <i>Religious Organizations' Lands Act</i> (Ontario)• Land Transfer Tax (Ontario)	
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A. CORPORATE/INSTITUTIONAL MEMORY PROBLEMS

- Continuity of leadership is often lacking in charities and NFPs, leading to loss of institutional memory concerning real property issues, amongst other things
- Failure to fully document decision making and retain documents concerning a real property transaction may result in costly problems in the future
 - e.g. Are there ongoing obligations?
 - e.g. Are there rights that may be triggered by an act or omission of the charity/NFP?



- e.g. Will the form of a transaction dictate future transactions without the benefit of the proper context?
- Without full information, charities or NFPs may take steps that could result in avoidable litigation and the inability to properly respond
- The best defence against the lack of continuity of leadership is the proper documentation of all transactions and a practice of reviewing those documents before taking further steps with the property (sale/lease/mortgaging)

B. FAILURE TO RETAIN PROPER ADVISORS/FAILURE TO PROVIDE INFORMATION TO ALL ADVISORS

- A real property transaction may require multiple advisors for the charity or NFP
 - Real Estate broker/agent
 - Lawyer
 - Mortgage Broker
 - Municipal Planner
 - Building Inspector/Engineer
 - Architect



- Advisors need to communicate amongst each other and cannot work in isolation or else critical information may be missed
- Clients need to ensure that all advisors have the information necessary to provide the proper advice
- Advisors may need jurisdiction-specific knowledge and so a cookie-cutter approach to managing a project may not work
- Cutting corners may save money in the short term, but could be very costly in the long-term



C. REGULATORY COMPLIANCE (CRAPGT)

- Holding property for charitable purposes
 - General principle is that assets of a charity must be applied for the charitable purpose of the charity, subject to restrictions imposed by donors
- What if the property is more than the charity needs?
 - *Income Tax Act* – Passive Investment versus Related Business
 - Need to consider if land is held as a passive investment or related business under the *Income Tax Act*
 - Review CRA's CPS-019 "What is a Related Business"

- CRA's policy on "related business" focuses on 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
- Operating an unrelated business may result in loss of charitable registration or monetary penalty

- The Public Guardian and Trustee also has the ability to review whether the interest of the charity in real estate is appropriate
 - e.g. is the land held for a charitable purpose, a business activity, or a passive investment
- Ontario *Trustee Act* imposes a prudent investment rule for land held by charities as a passive investment
- 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”



- Must also consider *Charities Accounting Act* provisions concerning holding land for purposes of leasing it or as a passive investment:
 - Cannot be prohibited from holding or leasing land by the terms of its investment powers
 - Revenue generated must be used for charitable purposes
 - Investment must be otherwise prudent given the particular investment powers of the charity
 - A substantial interest by a charity (20% or more) in a real estate company permits the PGT to make enquiries



D. PLANNING ACT (ONTARIO)

- The *Planning Act* sets out the ground rules for land use planning in Ontario and describes how land uses may be controlled, and who may control them by:
 - Identifying matters of provincial interest;
 - Requiring municipalities to have regard to provincial interests in their land use planning decisions; and
 - Providing direction on the contents of municipal official plans and zoning by-laws

- How does this impact a charity or NFP purchasing or leasing land?
 - Charity and NFP must consider impact of
 - Provincial Policy Statements – municipal land use planning decisions are required to be consistent with the Provincial Policy Statement
 - See also Greenbelt Plan, Niagara Escarpment Plan, Oak Ridges Moraine Conservation Plan, Growth Plan for the Greater Golden Horseshoe and Growth Plan for Northern Ontario
 - These plans take precedence over local official plans and zoning by-laws

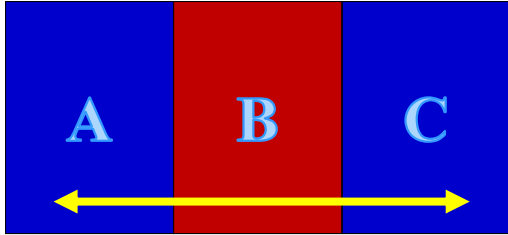
- Charities and NFPs must determine first if the land supports the proposed use generally
- If the use is supported generally, can the land specifically support the intended use
 - Road access
 - Set-back requirements
 - Height requirements
 - Parking
- Failure to ensure all elements are met may result in the acquisition of property that cannot be used by the organization



Severances/Merger of Title

- Section 50 of Ontario's *Planning Act* deals with issues of "subdivision control" and "part lot control"
 - intended to control the manner in which land can be divided and dealt with
- Compliance with Section 50 is required or else a transaction may be invalid
- Failure to understand the Planning Act may result in inadvertent merger of title
 - merger of title may impact ability to finance or sell land

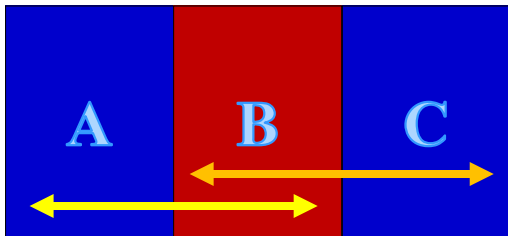
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- Example of merger of title: NFP-2020 owns Lots A and C (which are not lots on a registered plan of subdivision)
 - NFP-2020 can sell or mortgage Lots A and C independent of one another
 - But if NFP-2020 buys Lot B, Lots A, B & C merge in title and NFP-2020 must sell or mortgage all three lots together unless it obtains consent from the municipality

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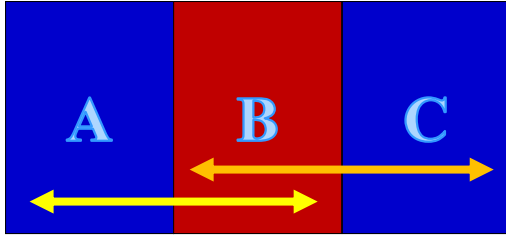
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- Let's complicate matters! NFP-2020 owns Lot A and Lot B. Lot A is a lot within a registered plan of subdivision. Lot B and Lot C used to be a single lot but Lot B was severed
- NFP-2020 can currently deal with Lots A and B independently of one another
- NFP-2020 buys Lot C and wants to mortgage it – it can't! Lot C is the remainder of a severance

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- To mortgage Lot C, Lot B must be included, but the same does not apply in reverse
- Lot B can be sold independently, but if Lot C is to be sold, it must include Lot B
- Such issues may be addressed by avoiding common ownership of abutting lots – not an easy thing for charities and NFPs
- Important to review exceptions

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E. GST/HST

- Generally, the Goods and Services Tax (GST) of 5% (Harmonized Sales Tax (HST) of 13% in ON and 15% in NS, NB, PEI and NL) is normally payable on the purchase of real property unless a specific exemption applies
- There is no general exemption for charities/NFPs
- Unlike for-profit HST registrants, GST/HST is not “a wash” for most charities in utilizing input tax credits
- Depending on agreement (HST included in or in addition to), if GST/HST is payable, the party responsible for payment must either pay the tax or self-assess; the party receiving the tax must remit

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- In most cases, a church or charity will not be a GST/HST registrant for the purpose of claiming an input tax credit and therefore self-assessing
- As such, it is very important to carefully examine the issue of GST/HST and determine whether an exemption applies or if the GST/HST will have to be paid
- If ignored, whole transaction can be in peril if funds not available for closing
- If GST/HST is paid, the charity/NFP may need to consider applying for the Public Service Bodies' Rebate
 - (50% GST or federal portion of the HST and in Ontario 82% of the provincial portion of the HST)

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- When determining whether or not an exemption will apply, it is important to first examine the existing use of the real property
 - Future use is not a factor to consider
- e.g. if the existing use is commercial, then GST/HST is applicable
- e.g. if the existing use is by a charity for zero-rated goods or services, then GST/HST may not be payable
- The sale of real property by a “public service body” may be exempt – non-profit organization, charity, municipality, school authority, hospital authority, public college, university (all defined in legislation)

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- A sale of real property by a public service body (PSB) is exempt unless one of the exclusions below applies:
 - Sale of a “residential complex”
 - Deemed sale
 - Sale to an individual
 - Sale to a trust all of whose beneficiaries are individuals
 - Sale of property used primarily in commercial activities
 - Sale of real property where PSB has made an election under s. 211 of the *Excise Tax Act*



F. ASSESSMENT ACT

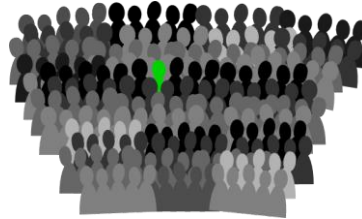
- All real property in Ontario is liable to assessment and taxation, subject to specific exemptions:
 - Cemeteries, burial sites
 - Religious or municipal cemetery land
 - Churches
 - Land ancillary to operation of a cemetery
 - Philanthropic organizations
 - Care homes
 - Non-profit hospices
 - Long-term care homes
 - Boy Scouts and Girl Guides
 - House of refuge
 - Charitable institutions, etc.

- It is important to carefully examine the requirements for the exemption
- If a charity does not qualify under the *Assessment Act* exemptions, there is a potential property tax rebate under Ontario's *Municipal Act*
 - Individual municipalities may also allow not-for-profits that are not registered charities to qualify for a rebate
 - Property must be occupied by the charity to qualify
 - Annual application

G. RELIGIOUS ORGANIZATIONS' LANDS ACT (ROLA)

- ROLA was established to enable unincorporated associations to own and administer real property
 - Permits trustees appointed on behalf of the religious organization to hold land on a perpetual succession basis
 - Limits the purposes for which trustees may hold land for a religious organization:
 - Place of worship; Residence of its religious leader; Burial or cremation ground; Book store, printing or publishing office; Theological seminary or similar institution for religious instruction; Religious camp; Any other religious purpose

- It is very important to review the limitations of authority of the trustees and recognize when authorization must be obtained from the members
 - Section 6 of ROLA: The trustees of a religious organization **shall not** exercise any of the powers conferred upon them by this Act **until** they are authorized to do so by resolution of the organization, and the organization may attach such terms or conditions to any such authorization as it considers expedient



H. LAND TRANSFER TAX (ONTARIO)

- Most transfers of real property in Ontario will result in the Land Transfer Tax (LTT) being payable (and in the City of Toronto, Municipal Land Transfer Tax (MLTT))
- LTT is an escalating tax rate from 0.5% to 2.5% (the MLTT virtually mirrors the LTT)
- Few exceptions to the imposition of this tax
- Gifts of land are still subject to LTT, unless there is no consideration passing for the gift, in which case the LTT will be nil
- The government includes the assumption of a liability as consideration passing for the gift

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- e.g. the assumption of a mortgage or part of a mortgage or other contract related to the land would be considered as consideration
- Such a situation could be costly for a charity/NFP
- In 2010, Ontario introduced an LTT exemption for charities for certain transfers of land between qualifying corporations (or trusts) that are registered charities and there is consideration
- To qualify, 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

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- 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 the same charitable purpose for at least one year after the date of transfer
- A qualifying corporation is a non-profit non-share capital corporation that is a registered charity
- If there is going to be deemed consideration on the transfer of the real property, it will be very important to carefully review the requirements of the exemption in order to avoid a costly land transfer


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