

LEGAL RISK MANAGEMENT CHECKLIST FOR ONTARIO-BASED NOT-FOR-PROFITS

*By Terrance S. Carter and Jacqueline M. Demczur**

A. INTRODUCTION

The operations of not-for-profits are subject to an increasingly complex regulatory framework, and the possibility of litigation occurring as a result of operations is an ever-present reality. For the purposes of this *Legal Risk Management Checklist*, the term “not-for-profits” means organizations that are exempt from tax under subsection 149(1) of the *Income Tax Act* (Canada), and are structured as either not-for-profit corporations or unincorporated associations (“not-for-profits”), but it does not include registered charities or other qualified donees under the *Income Tax Act* (Canada).

The exposure of not-for-profits to liability goes further than the loss of assets and may possibly lead to the insolvency or winding up of a not-for-profit. Directors of not-for-profits may also face legal actions against themselves personally by members, third parties, and governmental authorities for breach of their duties as directors. Given these increased risks of potential liability to both not-for-profits and their directors, there is an increasing need to protect against lawsuits on a proactive basis. While these risks are, in some respects, not as extensive as those faced by charities (as outlined in a separate checklist),¹ not-for-profits still face many of the same risks as charities.

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¹ For charities, a separate *Legal Risk Management Checklist for Ontario-Based Charities* is also available at <http://www.carters.ca/pub/checklist/Charity-Checklist.pdf>.

The purpose of this legal risk management checklist is to provide a brief outline of some of the more important issues that directors, officers and executive staff of not-for-profits, whether incorporated or not, may want to consider in ensuring due diligence in their organizations' operations. As it is impossible to adequately address all issues faced by not-for-profit organizations, this checklist provides only a general overview of the many considerations that not-for-profits and their boards of directors may need to be aware of to identify and manage legal risks, and as a starting point for not-for-profits when consulting with their legal counsel. In particular, and in light of the COVID-19 pandemic, this checklist also includes a dedicated section outlining practical due diligence issues to be considered during public health emergencies.

B. IDENTIFICATION AND MANAGEMENT OF LEGAL RISKS

1. General overview of organizational and legal documentation
 - a) Identify the existence and location of key organizational documents
 - Develop an inventory of key documents
 - Maintain central location for key documents
 - b) Identify key organizational documents for an unincorporated not-for-profit
 - Constitution and amendments, if applicable
 - Policy statements and procedures, if applicable
 - Minutes of directors' and members' meetings
 - c) Identify key organizational documents for an incorporated not-for-profit
 - Letters patent (articles of incorporation) and supplementary letters patent (articles of amendment), if applicable
 - Membership covenant, if applicable
 - By-laws and resolutions
 - Mission statement, if applicable
 - Minutes of board and membership meetings
 - Directors, members and debt registers
 - Copies of government filings
 - d) Identify other key legal documents
 - Leases/subleases, deeds and mortgages
 - Agency, partnership, association and joint venture agreements
 - License agreements
 - Business name, trademarks, section 9 (*Trademarks Act*) official marks and domain name registrations

- Program operational policy statements, *e.g.*, sexual abuse and volunteer policy statements
 - Insurance policies, including a historical record of insurance policies
 - Privacy policies under the Personal Information Protection and Electronic Documents Act (“PIPEDA”)
 - Investment policies
2. Review of key documents for an unincorporated not-for-profit
- a) Are the objects clearly stated in the constitution and are they not-for-profit?
 - b) Do constitutional documents correctly reflect how the not-for-profit is actually structured and operated?
3. Review of key documents for an incorporated not-for-profit
- a) Review of letters patent or articles of incorporation
 - Is the name in the letters patent or articles of incorporation the correct name of the not-for-profit, and is it consistent with the objects or purposes?
 - Are its objects or purposes appropriate for a not-for-profit, *i.e.* are they not charitable?
 - Has there been “mission drift” from the original objects or purposes?
 - Are the activities carried out by the not-for-profit authorized by its objects or purposes?
 - Is the dissolution clause complementary to the objects or purposes?
 - b) Review of supplementary letters patent or articles of amendment
 - Have all supplementary letters patent or articles of amendment been identified?
 - Has there been a change of corporate name?
 - Has there been a change of corporate objects or purposes?
 - What is the effect of a change of objects or purposes upon existing property?
 - c) Letters patent of amalgamation or articles of amalgamation
 - Are the objects or purposes the same or similar?
 - What are the terms of the amalgamation agreement?
 - d) Does the not-for-profit have historical records of all by-laws?
 - e) Are the by-law provisions clearly defined and properly passed?
 - f) Review of corporate by-law provisions for basic terms
 - Do the provisions conflict with the letters patent or articles of incorporation concerning objects, purposes, or dissolution?
 - Do the provisions reflect the actual organization and operational structure of the organization?
 - Does the by-law reflect changes to applicable corporate legislation?
 - Is there an adequate indemnification provision for the directors?
 - Are the by-law amendment procedures consistent with corporate legislation?

- g) Was the initial corporate organization of the not-for-profit properly done?
 - h) Was there a documented transfer of assets and liabilities on incorporation?
 - i) Are the records of board decisions and/or membership meetings complete?
 - j) Was there adequate board and/or members' authorization for indebtedness, if applicable?
 - k) Have corporate records been properly maintained, such as consent to be directors and applications for membership?
 - l) Where are the corporate records kept?
 - m) Have necessary corporate filings and registrations been kept up to date?
 - Ontario Corporations:
 - ◆ Initial Return/Notice of Change (Form 1)
 - ◆ *Business Names Act* (Ontario) registrations
 - Federal Corporations:
 - ◆ Annual Return (Form 4022) – Canada
 - ◆ Extra-Provincial Initial Return/Notice of Change (Form 2) – Ontario
 - ◆ *Business Names Act* (Ontario) registrations
 - Does the not-for-profit operate and/or fundraise in any other provinces? If so, there may need to be registration as an extra-provincial corporation and/or fundraiser in other provinces (such as Alberta), together with applicable business name registrations
 - n) Has there been loss of corporate status for failure to maintain government filings?
 - o) Is the not-for-profit aware of the importance of proper use of corporate name and operating names?
 - p) Has the not-for-profit (if an Ontario corporation) reviewed the still to be proclaimed Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") as applicable, and assessed what changes will need to be made to its constating documents as part of its ONCA transition?
 - As of November 2020, the Ontario Government has taken steps to amend the ONCA in order to enable its proclamation. The deadline to proclaim the ONCA has been extended from December 31, 2020 to December 31, 2021. Once proclaimed, Ontario not-for-profit corporations will have three years to amend their corporate documents to transition under the new legislation
4. Has the not-for-profit developed and implemented operational and risk management policy statements, where applicable, on:
- a) Abuse prevention;
 - b) Accessibility;
 - c) Anti-harassment;
 - d) Anti-terrorism and money laundering;
 - e) Authorization procedures (*e.g.* due diligence as a requirement of obtaining authorization for a decision or action);

- f) Board succession planning, recruitment, and orientation;
 - g) Brain and spinal injury prevention and management (when working with youth sports);
 - h) Bullying;
 - i) Canada's Anti-Spam Legislation ("CASL") policies and compliance program;
 - j) Child protection;
 - k) Code of conduct;
 - l) Collection of personal information (particularly with respect to children);
 - m) Confidential and proprietary information;
 - n) Conflicts of interest;
 - o) Crisis management plan;
 - p) Data breaches;
 - q) Disbursements;
 - r) Electronic record-keeping;
 - s) Fiscal management;
 - t) Fitness to work for staff and volunteers;
 - u) Fundraising;
 - v) Human Resources;
 - w) Infectious diseases (*e.g.* COVID-19);
 - x) Investments;
 - y) Privacy (with respect to donors, employees, and volunteers);
 - z) Privacy breach reporting obligations;
 - aa) Protocol for domestic and foreign volunteer projects;
 - bb) Provision of goods and services to people with disabilities;
 - cc) Public policy dialogue and development activities, including lobbying;
 - dd) Public relations;
 - ee) Safety in the workplace;
 - ff) Social media, computing, and acceptable use of technology equipment;
 - gg) Third party use of the not-for-profit's facilities;
 - hh) Volunteer conduct and volunteer recruitment (including application forms and agreements);
 - ii) Vulnerable persons;
 - jj) Whistleblowing and fraud prevention; and
 - kk) Workplace violence and harassment (including sexual harassment) prevention?
5. Is the content and effectiveness of policies evaluated and reviewed on an annual basis, or as appropriate?

6. Has the not-for-profit reviewed its lobbying policy and registered where required by the *Lobbying Act* (Canada) and/or *Lobbyists Registration Act* (Ontario)?
7. Has the not-for-profit conducted an up-to-date inventory of its assets, including intellectual property, *i.e.*, trademarks and copyright?
8. Are there any independent contractors or employees and, if so, are all provisions in their respective contracts in accordance with applicable legislation?

C. UTILIZING MULTIPLE NOT-FOR-PROFIT CORPORATIONS

1. Should the not-for-profit consider utilizing multiple not-for-profit corporations for its high risk activities in order to better manage those risks?
2. Should a provincial or national not-for-profit that consists of member organizations be structured as an umbrella association of multiple not-for-profit corporations (federated model) or as a single corporation?
3. Should the not-for-profit consider establishing a separate foundation to fund exclusively charitable objects that are complementary?
4. Has appropriate consideration been given to balancing inter-corporate relational provisions with regard to multiple corporations with issues involving the possibility of cross-over liability?
5. Has appropriate consideration been given to implementing effective inter-corporate relational provisions through contracts and/or licensing agreements as an alternative to overt corporate governance control?

D. BOARD MANAGEMENT ISSUES

1. Who is a director?
 - a) What are the qualifications and procedures (*i.e.* election rules) to be elected as a director and have all of those qualifications and procedures been met by each director?
 - b) Are there conflicting qualifications to be a director in the by-laws, articles and board policies? If so, these conflicts must be reconciled
 - c) Is the register of directors being maintained at least on an annual basis and are any changes among the directors or their addresses being sent to the relevant government authority? (*i.e.* at a moment's notice, can the not-for-profit definitively determine who the directors are?)
2. Is the not-for-profit able to identify which group is in charge of the not-for-profit?
 - a) Where does the *de facto* control of the not-for-profit lie? Is it with a board, a committee or executive staff?
 - b) Is the authority of the board recognized by the membership?
3. Are the lines of authority between the board and the executive staff clearly defined?
4. Does the board meet on a regular basis with all directors in regular attendance (and by electronic means, where permitted)?
5. Has an audit committee been established to review financial statements and the auditor's report?

6. Is there adequate communication of board responsibilities to existing, new and future board members?
 - a) Has the not-for-profit created a board binder of all corporate documents, as well as an explanation of the general operations of the corporation as a not-for-profit and the board of directors' legal duties and liabilities?
 - b) Does the not-for-profit provide regular updates on changes in the law to board members?
7. Are the individuals who are authorized to enter into contracts as signing officers on behalf of the not-for-profit clearly identified in their official capacity instead of as individuals?
8. Are there policies in place to address board succession planning, recruitment, and orientation?

E. REDUCING THE BOARD'S EXPOSURE TO LIABILITY

1. Are the directors aware of their duties with respect to ensuring:
 - a) The objects or purposes of the not-for-profit are properly carried out and the organization's activities comply with their objects or purposes?
 - b) The organization's financial stability and overall performance?
 - c) Proper hiring and supervision of management and staff?
2. Do any directors receive direct or indirect remuneration or other financial benefit from the not-for-profit in contravention of their fiduciary duties?
3. Has the not-for-profit given authority to indemnify its existing and former directors and officers in accordance with applicable corporate legislation and regulations?
4. Has the board authorized the not-for-profit to acquire directors' and officers' liability insurance?
5. Has the board delegated excessive responsibility to executive staff by restricting itself to establishing policy decisions only without ensuring careful and ongoing supervision?
6. Should the not-for-profit consider reducing the size of the board to limit the number of people who are exposed to liability as directors?
7. Is the not-for-profit effectively making use of committees as an alternative to a large board of directors?
8. Do the board members occasionally need to receive independent legal advice due to the possibility of liability exposure?
9. Should the not-for-profit consider implementing an advisory board to complement the board of directors without a corresponding exposure to liability?
10. Has the not-for-profit established a comprehensive due diligence review procedure by establishing and utilizing the appropriate legal risk management checklist?
11. Has a legal risk management committee of the board been established or its functions added to the duties of another committee, such as an audit committee?
12. Are the directors and officers aware of their fiduciary responsibilities at law in operating the not-for-profit?

13. Are the directors and officers exercising due diligence in relation to the not-for-profit by remaining knowledgeable about its operations and ensuring its assets are properly protected?
14. Are new and existing directors and officers receiving proper orientation and training?
15. Are the directors ensuring that employee source deductions under the *Income Tax Act* (Canada), *Canada Pension Plan* and *Employment Insurance Act* (Canada), as well as and GST/HST amounts pursuant to the *Income Tax Act* (Canada) and *Excise Tax Act* (Canada) are being remitted to avoid personal liability?

F. INSURANCE CONSIDERATIONS / RISK TRANSFER

1. Has the not-for-profit maintained a historical record of its insurance coverage in the event of a future claim, together with copies of the original policies?
2. Is there occurrence-based or claims-made insurance coverage for sexual abuse?
3. Has the not-for-profit provided full written disclosure each year of all risks to its insurer to avoid denial of coverage?
4. Does the not-for-profit request regular written reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?
5. Is there a regular review of the adequacy and extent of general liability coverage and property insurance, as well as employment benefits and practices liability?
6. Is there directors' and officers' liability coverage in place and is it reviewed on a regular basis to ensure its adequacy?
7. Does there need to be special insurance endorsements to extend insurance coverage to "out-of-the-ordinary" activities, *e.g.* third party use of facilities, non-owned vehicles, activities of volunteers and agents in foreign countries, and errors and omissions (*i.e.* professional services) including counselling?
8. Has the not-for-profit considered obtaining the services of an independent insurance consultant or specialist to conduct a risk management review of the not-for-profit's operations and policies from an insurance perspective to determine the adequacy of insurance coverage?
9. Has the not-for-profit developed and administered effective liability shields in the form of informed consents, disclaimers, releases, waivers and indemnities for program participants as necessary as part of a volunteer agreement?

G. THIRD PARTY USE OF NOT-FOR-PROFIT ORGANIZATION PROPERTY

1. Is the not-for-profit aware of the potential liability exposure in permitting third parties to use its property?
2. Has the not-for-profit developed and implemented a facility use policy and facility use agreement with appropriate waiver releases and indemnification?
3. Does the not-for-profit require evidence of liability insurance from third party users of its facilities?

4. Has the not-for-profit provided written notice to its insurer concerning the use of its property by third parties?
5. Does the not-for-profit charge appropriate fair market rental fees to any user of these properties that is not a not-for-profit organization?
6. Does the not-for-profit have the corporate authority to allow third party use of its property?
7. For not-for-profits with lifestyle requirements, has consideration been given to compliance with the *Human Rights Code* (Ontario), including the exception available to special interest organizations?

H. REAL PROPERTY ISSUES

1. Property Owned by the Not-for-Profit
 - a) Has an environmental assessment been conducted to determine the extent of possible liability exposure for the not-for-profit in relation to future acquisitions as well as existing properties?
 - b) Has the not-for-profit addressed and rectified encroachments with neighbouring lands?
 - c) Are municipal zoning and legal non-conforming uses being complied with?
 - d) Has the not-for-profit reviewed its municipal property tax assessment for accuracy and to determine both classification and valuation? If so, has there been a request for reconsideration or appeal of assessment?
 - e) Has the not-for-profit leased its lands and have the terms of the lease been reviewed for possible liability concerns?
 - f) Does the not-for-profit maintain a register of its ownership interests in land showing the identity of each property and the dates the corporation acquired it and, if applicable, disposed of it, in accordance with the *Corporations Act* (Ontario) and, when it comes into force, the ONCA?
 - g) Does the not-for-profit own property with a cultural heritable value or interest that is therefore subject to the *Ontario Heritage Act*?
 - h) If the not-for-profit has fuel oil storage tanks either above or below ground, is it aware of, and compliant with, the requirement for upgrading or removal pursuant to Ontario Regulation 213/01, *Fuel Oil*, under the *Technical Standards and Safety Act, 2000* (Ontario)?
 - i) Have accommodations been made for people with disabilities in accordance with the Accessibility Standards for Customer Service and the Integrated Accessibility Standards in accordance with the *Accessibility for Ontarians with Disabilities Act, 2005*, and have the appropriate accessibility reports been filed?
2. Property Leased From Third Parties by the Not-for-Profit
 - a) Does the lease include personal guarantees or indemnities?
 - b) Has access to adequate parking been ensured?
 - c) Has the extent of tenant expenses under a net lease arrangement been limited?

- d) Has the possible right to sublet and assign the lease, with a release, been ensured?
- e) Have the issues of environmental liability for both the landlord and tenant been adequately addressed?
- f) Has there been careful monitoring of the date by which an option to renew the lease must be exercised?
- g) Has the amount of rent on renewal been made subject to arbitration?
- h) Has there been an attempt to obtain a covenant from the landlord to prohibit offensive uses of adjoining leased premises?
- i) Does the lease include a clause requiring restoration of leased premises at the end of the lease?
- j) Does the lease include a clause permitting the landlord to unilaterally relocate the tenant?
- k) Has there been an attempt to obtain a right of first refusal to lease adjoining leased premises?
- l) Does the lease need to be registered on title?
- m) Have accommodations been made for people with disabilities in accordance with the Accessibility Standards for Customer Service and the Integrated Accessibility Standards in accordance with the *Accessibility for Ontarians with Disabilities Act, 2005* and have the appropriate accessibility reports been filed?

I. INTELLECTUAL PROPERTY ISSUES

- 1. Do the board members and executive staff of the not-for-profit recognize that trademarks, internet domain names and copyright are essential assets of the not-for-profit that need to be protected and managed?
- 2. Does the not-for-profit need to register any of its key names and/or logos as trademarks?
 - a) Identify trademarks, including domain names and social media hashtags
 - b) Protect trademarks by registration
 - c) License and enforce trademarks
 - d) Use trademarks in conjunction with appropriate markings of either a TM or an ®, as applicable
 - e) Ensure that any third parties using trademarks enter into a trademark licensing agreement
- 3. Has the not-for-profit protected its trademarks by securing multiple corresponding domain names?
- 4. Has the not-for-profit removed all copyrighted material owned by any other organizations from its website?
- 5. Who owns the copyright for publications of the not-for-profit and is it properly identified with a notice of copyright protection, *i.e.* ©?
 - a) Does the copyright material produced by employees/volunteers need to be registered, assigned or licensed?

- b) Has the designer of the not-for-profit's website assigned the copyright for the website design?
- 6. Does the not-for-profit have a social media, computing and use of technology policy statement that:
 - a) Prohibits employees and volunteers from using the trademarks, logos, copyrighted material or other intellectual property in any non-work related social networking and blogging activities?
 - b) Prohibits employees and volunteers from using the not-for-profit's email address in their personal profiles on social networking sites?

J. EMPLOYMENT AND VOLUNTEER MATTERS

- 1. Are individuals being paid as employees or independent contractors, and if it is as independent contractors, is it in accordance with CRA's requirements?
- 2. Are there written employment contracts with all employees?
- 3. Is there a volunteer agreement and application form to be used with all volunteers?
- 4. Has the not-for-profit developed and implemented appropriate hiring policies and practices for its employees and volunteers?
 - a) Is there compliance with applicable human rights legislation in the hiring process?
 - b) Has the not-for-profit developed and implemented a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in the *Human Rights Code* (Ontario)?
 - c) Do employees and volunteers, especially those who deal with children, need to be screened, including criminal record checks, and supervised in accordance with an appropriate sexual abuse policy statement?
 - d) For religious not-for-profits that require employees and volunteers to sign Lifestyle Statements, have these statements been reviewed to ensure compliance with the *Human Rights Code* (Ontario), including the exception available to special interest organizations?
- 5. Is there a need to develop and adopt policy statements and/or manuals for managing employees as well as volunteers in relation to conduct and performance structure?
 - a) Has the not-for-profit developed and implemented a policy concerning sexual harassment?
 - b) Has the not-for-profit developed and implemented a policy concerning workplace violence and harassment prevention?
 - c) Has the not-for-profit developed and implemented a policy concerning social media, computing and the use of technology?
 - d) Has the not-for-profit developed and implemented a drug, alcohol and cannabis/fitness-to-work policy for employees and volunteers?
 - e) Is there need for a discipline procedure for employees and/or volunteer members?

- f) Is the not-for-profit aware of and addressing ownership issues regarding intellectual property created by the employees and volunteers, such as assignment of copyright and waiver of moral rights?
 - g) Is the not-for-profit aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation and occupational health and safety prerequisites?
6. Are the not-for-profit and its board of directors exposed to liability with regards to the actions of its employees or volunteers?
- a) Has the not-for-profit and its representatives (*i.e.* directors, officers and all others who act on behalf of the not-for-profit) taken every reasonable precaution to ensure the safety of workers, volunteers and the public?
 - b) Has the not-for-profit and its representatives complied with federal and provincial occupational health and safety legislation?
 - c) Has the not-for-profit and its representatives established a safety committee or equivalent program or system?
 - d) Have all reasonable steps been taken to ensure that the committee, program or system is effective on an ongoing basis?
7. Are the not-for-profit and the board exposed to potential criminal liability under section 217.1 of the *Criminal Code* or taken reasonable steps to prevent bodily harm to any person arising from the work or tasks the board directs them to perform?
8. Has the not-for-profit undertaken an occupational health and safety audit conducted by an experienced work place safety consultant?
9. Has the not-for-profit developed and implemented appropriate policies and practices regarding the termination of employees and complied with appropriate provincial and/or federal legislation?
- a) In relation to wrongful dismissal, is the organization aware that punitive damages may be awarded in a case where the employer's conduct was harsh, vindictive, reprehensible and malicious?
 - b) Does the not-for-profit draft termination clauses in its employment contracts to limit its potential liability to the minimum allowable under employment standards legislation?
10. Have the recent amendments to the *Employment Standards Act, 2000* (Ontario) been complied with, including Infectious Disease Emergency Leave (IDEL)?
11. For not-for-profits that have hired construction services, has the not-for-profit obtained a Workplace Safety and Insurance Board ("WSIB") clearance certificate from the contractor or the subcontractor before any construction work begins to ensure registration with the WSIB and good standing with respect to payment of its WSIB premiums?
12. Has the not-for-profit implemented policies on effective confidentiality and conflict of interest?
13. Has the not-for-profit developed job descriptions for the different employment and volunteer positions?

14. Has the not-for-profit properly managed the performance and expectations of older employees to avoid wrongful dismissal or human rights claims by them?
15. Does the not-for-profit have interns (unpaid individuals being trained for employment), and if so, do they meet any of the exemptions from minimum wage under the *Employment Standards Act, 2000* (Ontario)?
16. Does the not-for-profit have a policy setting out the expectations for staff working remotely, and if so, does it clarify working hours and overtime requirements to comply with the *Employment Standards Act, 2000* (Ontario)?

K. FISCAL MANAGEMENT ISSUES

1. Does the not-for-profit continue to meet the test to be a non-profit organization under section 149(1)(l) of the *Income Tax Act* (Canada) in relation to both income and reserves?
2. Are all salaries, benefits and statutory deductions being paid by the not-for-profit on a timely basis with appropriate reports to the board of directors?
3. Is the not-for-profit required to register for GST/HST purposes?
4. Is the not-for-profit in compliance with its income tax obligations, including its compliance with requirements to file Ontario income tax returns, if applicable?
5. Is the not-for-profit operating with a deficit and, if so, for how long?
6. How is the deficit being funded?
7. Has a sinking fund been established to retire any long-term debt of the not-for-profit?
8. Are investments being offered to the public without appropriate exemptions for the distribution of securities?
9. Is there an audit committee in place?
10. Is the not-for-profit, if incorporated, ensuring compliance with audit requirements imposed under applicable corporate legislation, such as the CNCA?
11. Are the not-for-profit funds being used to fund separate business operations of the not-for-profit? And if so, does it still comply with the requirements of a non-profit organization under section 149(1)(l) of the *Income Tax Act* (Canada).

L. NATIONAL AND/OR INTERNATIONAL RELATIONSHIPS

1. Are relationships with national organizations and/or subsidiary chapters adequately documented with specific reference to controlling trademarks in Canada?
2. Are relationships between national and international organizations adequately documented in order to effect an international operation?
3. Is there a need for an international umbrella organization?
4. Has the ownership of trademarks and/or copyrights been determined and documented?

5. Have trademarks and copyrights been adequately protected and licensed in Canada or in other countries, as necessary?

M. ANTI-TERRORISM/MONEY LAUNDERING LEGISLATION

1. Does the not-for-profit carry on operations that may require it to be in compliance with anti-terrorism/money laundering legislation?
 - a) International operations
 - b) Domestic operations
2. Has the not-for-profit undertaken appropriate due diligence procedures in complying with anti-terrorism legislation?
 - a) Development of an anti-terrorism/money laundering policy statement
 - b) Development of resource materials on anti-terrorism/money laundering legislation
 - c) Requiring disclosure statements for board members and staff
 - d) Evaluating all programs for compliance
 - e) Requiring disclosure statements from affiliated not-for-profits, third party agents and/or partners and conducting appropriate inquiries
 - f) Determining when to make inquiries of donors
 - g) Conducting due diligence internet searches on directors, officers and agents
3. Are directors aware of risks associated with failing to comply with anti-terrorism/money laundering legislation?
 - a) Personal liability in civil law
 - b) Possible criminal law sanctions
4. If the not-for-profit is working in the U.S. or in conjunction with U.S. organizations in conflict zones, is it aware of the impact of the *Patriot Act* (United States) and other international anti-terrorism legislation on its programs and operations?
 - a) Does the not-for-profit investigate significant ownership interest in any organizations it works with domestically and abroad?
 - b) Does the not-for-profit conduct due diligence for any subcontractors it hires for work domestically and abroad?
5. Does the not-for-profit comply with anti-bribery prohibitions under the *Corruption of Foreign Public Officials Act, 1998* (Canada)?
 - a) Is the not-for-profit caught by the broader definition of “business” that does not require a “for profit” element?
 - b) Is the not-for-profit aware that the “facilitation payment” exemption has been repealed?
6. Does the not-for-profit have any close associations with foreign or domestic politically-exposed persons?

7. If the not-for-profit is making payments through the U.S. banking system or selling goods of U.S. origin or with U.S. content, is it aware of the impact of the *Foreign Corrupt Practices Act* (United States) on not-for-profits with U.S. affiliations?

N. CRISIS MANAGEMENT ISSUES

1. Does the not-for-profit have an existing committee or group that can develop a crisis management plan? If so, is the group diverse enough to consider the full range of crises that the not-for-profit might face?
2. Is the not-for-profit overly dependent on another organization? Could the relationship between the organizations be terminated with little or no warning?
3. Does the not-for-profit have contingency plans in the event of the following circumstances?
 - a) Death or injury of a key individual
 - b) Loss of access to the use of facilities and equipment
 - c) Disrupted or significantly diminished operations
 - d) Loss of crucial information
 - e) Intense media scrutiny
 - f) Irreparable damage to a not-for-profit's reputation
 - g) Cyber security attack
4. Can some of the liability risk associated with a possible crisis be covered by a specialized insurance policy?

O. PRACTICAL DUE DILIGENCE CONSIDERATIONS DURING PUBLIC HEALTH EMERGENCIES (e.g. COVID-19)

1. Have meetings of the board of directors been convened to discuss the emergency, and a committee established to oversee initiatives of the board? If necessary, have the bylaws or governing legislation of the not-for-profit been amended to allow board meetings to be held by telephone or electronic means?
2. Has the not-for-profit documented in writing all of the appropriate due diligence steps being taken in response to the emergency and the dates for undertaking those actions?
3. Does the not-for-profit have appropriate health and/or safety measures for staff, volunteers, clients and beneficiaries so any potential exposure to the emergency is either reasonably minimized or eliminated, particularly with respect to vulnerable beneficiaries that may be adversely impacted by the emergency, and evaluated and managed risks related to employee shortages, project cancellations, disruptions, and delays?
4. Has the not-for-profit reviewed any existing risk management, disaster recovery and remote access policies, and, if these are not in place, developed, adopted and implemented such policies?
5. Are there any federal, provincial or local public policies and public health-related orders, directives and restrictions which may impact the operations of the not-for-profit, both inside and outside Canada?

6. Do any government actions affect any programs of the not-for-profit in any jurisdiction in which they are carried out by the not-for-profit?
7. Has the not-for-profit developed and implemented an effective communications strategy, and is the not-for-profit maintaining open communication and transparency with staff, members, volunteers, clients, beneficiaries, suppliers, counterparties, and other third parties?
 - a) Is there one person in the not-for-profit in charge of maintaining consistency in content and methodology of communication, who reports back to the board?
 - b) Does the not-for-profit keep written or electronic records of what communication was sent, on what date, and to whom?
8. Has the not-for-profit reviewed insurance policies, including directors' and officers' insurance and business interruption insurance, if applicable, as well as any travel insurance policies covering staff or volunteers unable to return to Canada as a result of international travel restrictions?
9. Has the not-for-profit reviewed all contracts with regard to the effect of the emergency, as well as any government directive or public health recommendation as a result of the emergency, on planned events or conferences, real estate transactions or the delivery or receipt of goods and services generally?
10. Has the not-for-profit reviewed its financial health and how it may have been impacted, and continue to be impacted moving forward, by the emergency?
 - a) Review funding and other agreements with governments and agencies to determine the not-for-profit's obligations to deliver goods and services
 - b) Consider impact of the emergency upon all sources of income and how to offset the anticipated reduction in income
 - c) Ensure that employee salaries and statutory deductions and remittances continue to be paid on a timely basis to avoid exposing directors to personal liability for unpaid amounts
11. Has the not-for-profit sought legal advice from employment counsel on the extent of potential layoffs and/or elimination of staff?
12. Has the not-for-profit asked legal counsel to review bylaw provisions concerning members' meetings and determine if annual members' meetings may need to be postponed or whether alternative methods for holding member meetings may need to be considered, such as by telephonic or other electronic means if permitted in the bylaws or governing statute for the not-for-profit, and if so, has the not-for-profit taken action to postpone or provide alternate means for holding annual members' meetings?
13. Have corporate filing dates for annual returns been monitored for any changes?
14. Has the not-for-profit taken appropriate steps to protect privacy and personal information, including obtaining appropriate consent, and are the not-for-profit's responses to the emergency in line with privacy legislation?

- a) Educate and train staff to be extra-vigilant against phishing scams, and comply with privacy policies
- b) Setting up a virtual private network for accessing work data
- c) Restricting data access on a need-to-know basis
- d) Encrypting data on portable devices and removable media
- e) Having robust contracts with third-party service providers, and ensuring adequate and trustworthy IT support is available
- f) Regularly backing up data and updating software, and requiring the same from the employees
- g) Requiring employees to fortify passwords and ensure their Wi-Fi connection is secure, along with storing work devices safely and securely, without access to anyone.