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SPECIAL CARTERS COVID-19 WEBINAR: LEGAL ISSUES FOR CHARITIES AND NFPS

April 9, 2020

DUE DILIGENCE CONSIDERATIONS FOR DIRECTORS AND OFFICERS OF CHARITIES AND NFPS IN RESPONSE TO COVID-19

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Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of Corporate and Practice Manual for Charitable and Not-for-Profit Corporations (Thomson Reuters), a co-editor of Charities Legislation and Commentary (LexisNexis, 2020), and co-author of Branding and Copyright for Charities and Non-Profit Organizations (2019 LexisNexis). He is recognized as a leading expert by Lexpert, The Best Lawyers in Canada and Chambers and Partners. Mr. Carter is a member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.

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A. INTRODUCTION

- COVID-19 has created an unprecedented situation for directors and officers (“D&Os”) of charities and not-for-profits (“NFPs”) in knowing how to respond
- D&Os are having to make decisions at lightning speed, some of which could impact the ability of the charity or NFP to continue to operate
- In order to make effective decisions, D&Os should be become familiar with the relevant legal issues that will need to be considered
- This will help D&Os determine the appropriate due diligence steps needed to fulfill their fiduciary obligation to protect the best interest of their organizations

- Under Canadian law, D&Os of charities and NFPs are required in general terms to:
 - act honestly and in good faith with a view to the best interests of the corporation (their **fiduciary duty**),
 - exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances (their **duty of care**)
- The “business judgment rule” recognizes that D&Os are not expected to be perfect, but need to take all reasonable measures and perform the necessary due diligence required to fulfil their fiduciary obligations
- This presentation discusses legal principles generally applicable across Canada, but with a focus on Ontario
- Professional advice should be sought from lawyers in applicable jurisdictions as necessary

B. DUE DILIGENCE CONSIDERATIONS

1. Keep Records of Decisions

- In order to discharge their duties during a crisis like the COVID-19 pandemic, D&Os of a charity or NFP need to become engaged
- The steps being taken, along with the reasoning behind the decisions, the dates on which the decisions and action items are being taken should be documented in writing, including board minutes
- This will provide evidence of the due diligence undertaken by the D&Os of a charity or NFP in the event of a legal challenge at a future time

2. Convene Meetings as Necessary

- Convene **board of directors' meetings** as soon as possible and meet regularly thereafter as necessary
- Determine whether board meetings and members' meetings can be held electronically – review requirements in the legislation and by-laws
- Determine whether **annual members' meetings** may need to be postponed or whether alternative methods for meetings may need to be considered
- Monitor changing filing dates for corporate returns
- Legal advice may be required
- See Theresa L.M. Man's presentation, *Corporate Issues for Charities and NFPs in Responding to COVID-19, including AGMs and Annual Returns*, for further details on meetings and other corporate matters

3. Develop a Communications Strategy

- It is essential to keep members, staff, volunteers, organisational beneficiaries, suppliers, as well as the broader constituent community informed about changes or measures being undertaken that might impact them
- Maintaining open communication during the COVID-19 crisis is key to maintaining reputational integrity
- It is important to have one person in the organization in charge of maintaining consistency in content and methodology of communication
- Keep written or electronic records of what communication was sent, on what date, and to whom

4. Keep Up-to-date with Government Actions

- Monitor federal, provincial and local public policy and public health-related orders, directives and restrictions which may impact the operations of the organization, both inside and outside Canada
- For example, on March 17, 2020, all non-essential workplaces in Ontario were ordered to be closed for 14 days. This order was extended on April 3, 2020, with a significantly shorter list of essential workplaces that can stay open (<https://www.ontario.ca/page/list-essential-workplaces>)
- It is also important to monitor government actions in other jurisdictions in which the charity or NFP may carry out programs affected by COVID-19

5. Review Risk Management Policies

- Review any existing risk management, disaster recovery and remote access policies
 - If these are not in place, consider adopting and implementing such policies as soon as possible
- Consider adopting succession policies for necessary key persons, if not already in place, in order to mitigate against the impact on possible loss of management for the organisation
- Review 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

6. Review Contractual Obligations

- Review contractual obligations in light of government directives and public health recommendations regarding COVID-19 to determine their impact on planned events or conferences, as well as the delivery or receipt of goods and services
- Reviewing pre-existing provisions in contracts will allow D&Os of charities and NFPs to make informed decisions about next steps when contractual obligations cannot be fulfilled or need to be delayed
- See Sean S. Carter's presentation, *Contract Termination Strategies as a Result of COVID-19*, for more details on contract termination

7. Address Financial Matters

- It is essential to review the financial health of the charity or NFP on a regular basis by determining the anticipated impact of COVID-19 on donations, grants, investment income and capital, sponsorship income, membership income, sales of goods and services, and any other sources of income
- Then determine what corresponding actions need to be taken to offset the anticipated reduction in income
- Review all funding and other agreements with governments or other agencies to determine the charity's or NFP's obligations to deliver services and how that might be impacted by COVID-19

8. Address Employee Issues

- Ensure that salaries of employees continue to be paid, otherwise directors can be left exposed to personal liability for unpaid wages and vacation pay (e.g. up to six months' wages for CNCA corporations)
- Ensure that employee source deductions (e.g. CPP, EI) and GST/HST amounts pursuant to relevant legislation, are remitted when required to avoid personal liability
- Keep up-to-date with provincial and federal legislative changes to required government payments
- If considering layoffs and/or elimination of staff, legal advice should be sought
- See Barry W. Kwasniewski's presentation, *Employer Issues and Considerations in Response to COVID-19*, for more information on employment issues

9. Ensure Workplace Health and Safety

- Essential to keep abreast of all appropriate health and safety measures for staff, volunteers, and beneficiaries so that exposure to COVID-19 is appropriately managed, particularly with respect to vulnerable persons
- Monitor mandatory closures of non-essential workplaces (see Ontario's amended list of essential workplaces)
- Ensure compliance with health and safety legislation, such as the *Occupational Health and Safety Act* (Ontario)
- Evaluate and manage risks related to employee shortages, project cancellations, disruptions, and delays
- See Barry W. Kwasniewski's presentation, *Employer Issues and Considerations in Response to COVID-19*, for more information on workplace health and safety

10. Consider Privacy Implications

- Determine the extent to which the organization's measures in response to COVID-19 are in line with privacy legislation, where applicable, and consider what steps may be necessary in order to obtain appropriate consent
- Public health and safety may supersede usual privacy obligations during this time
- Working from home can raise additional privacy concerns
- See Esther Shainblum's presentation, *Privacy and Data Security Issues in Response to COVID-19*, for more information on privacy considerations

11. Canada Revenue Agency's Charities Directorate

- Form T3010 submission deadlines for charities:
 - The deadline for charities to file Form T3010, *Registered Charity Information Return* due between March 18, 2020 and December 31, 2020 has been extended to December 31, 2020 (announced by the CRA on March 20, 2020)
- Suspension of Charities Directorate operations:
 - All operations of the Charities Directorate, including call centre as well as registration and audit activities, have been suspended until further notice
 - Charities are encouraged to review the CRA Charities Directorate's Charities and Giving webpages, and visit the Charities Directorate's digital services through My Business Account

12. Use of Restricted Purpose Trust Funds

- As charities start to deplete their resources, they may be forced to consider encroaching on restricted purpose trust funds (e.g. endowments)
- However, to do so generally requires court approval
- In Ontario, assistance was announced by the PGT <http://www.carters.ca/pub/bulletin/charity/2020/covid/PGT-Statement-re-Accessing-Restricted-Funds.pdf>
 - PGT is allowing charities that are in danger of closing to access the income and capital of restricted purpose trust funds when necessary to enable them to continue their day-to-day operations, subject to certain conditions.
 - See announcement by the PGT for details

13. Manage Investments of Funds

- Investments of charitable funds must be carefully monitored at all times, particularly in a volatile market
- It is important for a charity to have a robust investment policy that reflects prudent investment standards, *i.e.* “the care, skill, diligence and judgment that a prudent investor would exercise in making investments” in accordance with s.27(1) of the *Trustee Act* (Ontario), or other applicable provincial legislation
- Important to document compliance with prudent investor standard
- Some provinces, like Ontario, provide statutory protections to D&Os if they have acted in accordance with an investment policy

14. Utilize an Audit Committee

- Generally, it is important for a charity or NFP to have an audit committee in order to review financial statements before they are approved by the board
- Audit committees are generally responsible for overseeing financial reporting, disclosure, corporate reporting and risk management
- Audit committees will be particularly important in reviewing financial outcomes from COVID-19
- Important to ensure that the audit committee complies with any requirements that may be imposed by the incorporating legislation, *e.g.* requirements on size, composition, and responsibilities of committee

15. Maintain Solicitor-Client Privilege

- If charities and NFPs are facing legal challenges and/or potential litigation, discussions with legal counsel to seek legal advice should be protected from disclosure in future litigation as long as privilege (e.g. solicitor-client) is properly maintained
- In this regard, important not to waive solicitor-client privilege by disclosing the content of discussions with third parties, even with former board members
- When the board meets to discuss legal advice, that portion of the minutes should be identified as being privileged and confidential as a result of legal advice being discussed

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