

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Ottawa Region 2021 <i>Charity &amp; Not-for-Profit Law</i> Webinar February 11, 2021</p>
<p><b>Critical Board Due Diligence During a Pandemic and Beyond</b></p> <p>By Ryan M. Prendergast, B.A., LL.B.</p> <p>rmp@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <ul style="list-style-type: none"><li>• COVID-19 has created an unprecedented situation for directors and officers (“D&amp;Os”) of charities and NFPs in knowing how to respond both effectively and in compliance with the changing law</li><li>• D&amp;Os are having to make decisions quickly, some of which could impact the ability of the charity or NFP to continue to operate</li><li>• In order to make effective decisions, D&amp;Os should be become familiar with the relevant legal issues that will need to be considered</li><li>• This knowledge will help determine the appropriate due diligence steps needed to fulfill fiduciary obligations to protect the best interests of their charities or NFPs</li></ul>	
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- Under Canadian law, D&Os of charities and NFPs that are corporations 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** quickly to deal with the crisis and meet regularly thereafter as needed
- 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

## 3. Develop a Communications Strategy

- It is essential to keep members, staff, volunteers, beneficiaries of the charity, suppliers, as well as the broader constituent community informed about changes or measures being undertaken that could impact them
- Maintaining open communication during the COVID-19 crisis is key to preserving reputational integrity
- It is important to have one person in the charity in charge of maintaining consistency in content and methodology of communication with that person reporting back to the board
- 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
- See Theresa Man's presentation, *Key Takeaways from CRA's New Guidances*, for further details
- For example, on October 20, 2020, Ontario [introduced](#) the *Supporting Ontario's Recovery Act, 2020*, to protect workers, volunteers, and organizations who make honest efforts to follow COVID-19 public health guidelines. See Esther Oh's presentation, *Essential Charity and NFP Law Update*, for further details
- 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 in order to mitigate against the impact on possible loss of management for the charity
- Review insurance policies, including directors' and officers' insurance and business interruption insurance, if applicable
  - Consider asking the insurance broker to advise in writing on the extent of insurance coverage and exclusions that may apply in a pandemic

## 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 article by Sean S. Carter and Heidi LeBlanc on practical strategies for dealing with termination of contracts in a pandemic: [Charity & NFP Law Bulletin No. 472](#)

## 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
- Review all funding and other agreements with governments or other agencies to determine the charity's or NFP's obligations to deliver services
- It is important for charities to develop a realistic reserve in order to cover operating costs in a crisis
- Evaluate and manage risks related to employee shortages, project cancellations, disruptions, and delays

## 8. Address Employee Issues

- Ensure that salaries of employees continue to be paid, otherwise directors may be left exposed to personal liability for unpaid wages and vacation pay
- 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 concerning required government payments
- If considering layoffs and/or elimination of staff, legal advice should be sought
- See articles by Barry W. Kwasniewski and Luis R. Chacin for further details on employment issues during the pandemic: [COVID-19 Resource](#) and [Charity & NFP Law Bulletin No. 465](#)

## 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
- Ensure compliance with health and safety legislation, such as the *Occupational Health and Safety Act* (Ontario)
- See Esther Oh's presentation, *Essential Charity and NFP Law Update concerning Supporting Ontario's Recovery Act, 2020* for liability protection
- Evaluate and manage risks related to employee shortages, project cancellations, disruptions, and delays
- D&Os need to give special consideration to the role of volunteers during a pandemic
  - Volunteers carry similar obligations and liability as employees

## 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

Public health and safety may supersede usual privacy obligations during this time

Working from home can raise additional privacy concerns, such as increasing the risk of cyber attacks and privacy breaches, exposing D&Os to the risk of litigation for failure to protect PI and confidential business information

See Esther Shainblum's presentation, *Critical Privacy and Security Risks in a Virtual World*, for more information on privacy considerations

## 11. 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, such as endowment funds
- On March 30, 2020, assistance was announced by the Office of the Public Guardian and Trustee of Ontario ("PGT") allowing charities, which are in danger of closing, to access the income and capital of restricted purpose trust funds when necessary, without the need to first obtain a court order to enable them to continue their day-to-day operations, subject to certain conditions, which include:
  - Accessing the restricted purpose trust funds is the last resort, after access to reserve and non-restricted funds, as well as government funding has been used

- The charity is in danger of closing, including becoming insolvent or filing for bankruptcy or receivership
  - This does not mean that the charity must be on the verge of turning off the lights and locking its doors (*i.e.* can foresee closing in 30 to 60 days without other funding)
- To access funds, the PGT needs to be notified in writing, along with meeting other requirements
- While initial approval/consent of the PGT is not required, if the PGT subsequently disagrees, it will look to the reasonableness of the decision and the good faith of the directors at the time and decide what measures to take at that point

- If found to be an unreasonable decision, the PGT may require the funds to be replaced by the charity
- The PGT has advised that D&Os should seek legal advice if uncertain, including PGT's counsel being available to discuss
- D&Os should document the decision contemporaneously for purposes of a subsequent application under the *Charities Accounting Act*
- Charities are also required to keep an accounting of use of accessed funds
- For further details, see article by Ryan M. Prendergast on accessing restricted charitable funds during the pandemic: [Charity & NFP Law Bulletin No. 470](#)



## 12. 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

## 13. 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

## 14. 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

## C. KEY TAKEAWAYS

- Board due diligence remains critical throughout pandemic
- Take pandemic as an opportunity to build for the next crisis:

- Does the board and/or committee need to meet more frequently or receive reporting more frequently?

- Did the pandemic reveal gaps in policies that would protect the board in another crisis?

- How can the board be proactive in preparing for the next crisis?

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