 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Annual <b><i>Church &amp; Charity Law™</i></b> Webinar Continues Virtually November 4, 2021</p>
<p><b>Mergers and Acquisitions: What are the Options?</b></p> <p>By <b>Ryan M. Prendergast, B.A., LL.B.</b> rprendergast@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. WHY DO CHARITIES CONSIDER “MERGERS”?</b></p> <ul style="list-style-type: none"><li>• Common ground<ul style="list-style-type: none"><li>– Charities may have similar charitable purposes, overlapping staff, overlapping boards, share charitable assets or common beneficiaries</li></ul></li><li>• Acquiring expertise or expansion<ul style="list-style-type: none"><li>– Smaller charities may join with a larger charity if the smaller charity offers expertise, or the larger charity’s administrative support helps a smaller charity expand</li></ul></li><li>• “Suggestions” from funders<ul style="list-style-type: none"><li>– Charities predominantly funded by the provincial government may be required to merge with another similarly funder entity under provincial legislation</li></ul></li></ul> <p><a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <span style="float: right;"><a href="http://www.carters.ca">www.carters.ca</a></span></p>

## B. WHAT ARE THE OPTIONS?

### 1. Mergers, Amalgamations, Consolidations

- Merger is term of art, not a legal term
- No one-size-fits all option
- The best option depends on many factors, for example:
  - What is the income tax status of the entities?
  - What would the eventual board and membership structure look like?
  - Is third party approval or consent required?
  - Can the option chosen be achieved under the applicable corporate legislation?

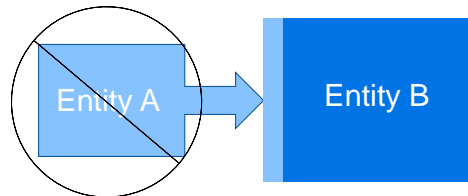
### 2. Are There Alternatives?

- Charities can work with other charities or qualified donees without having to become a single legal entity, e.g., partnership, joint venture
- Charities that wish to work with non-charities must continue to meet the requirements of the *Income Tax Act* (Canada) (ITA) concerning direction and control
  - Registered charities cannot simply fund or support programs of a non-qualified donee
  - They must continue to meet the “own activities” test

## C. MERGERS, AMALGAMATIONS, CONSOLIDATIONS IN-DEPTH

### 1. Merger

- Also referred to as an asset merger, asset acquisition or simply a merger
- A transfers assets to B, then dissolve A
- Possible for a charity to carry out an asset acquisition with a non-qualified donee
- If transfer is between two registered charities, transferor charity would also need to voluntarily revoke its charitable status before dissolution



### • Process

- Entity A and B would need to enter into a transfer agreement to transfer the assets and liabilities
  - Possible to transfer all of the assets and liabilities, including employees and contracts; or
  - Pick and choose which assets and/or liabilities to be transferred
- Assets and liabilities would then be transferred, such as moving funds in bank accounts, registering title, changing employee contracts, *etc.*
  - Timing and process involved to complete the transfer may vary
- After transfer, consideration needs to be given to dissolution of the transferor

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- Advantages of an asset merger
  - Limitation of exposure to liabilities
    - Pick and choosing which assets and/or liabilities to be transferred may restrict the exposure of transferee to liabilities
  - Timing
    - Transfer can be completed rather quickly
- Disadvantages
  - Transfer process
    - Potentially labour intensive transfer process
  - Liability for transfer
    - Dissolving corporation will usually cease having assets
    - Potential for lack of on going directors' and officers' insurance

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## 2. Amalgamation

- Amalgamation is a corporate procedure which allows two or more corporations to continue as one corporation under the applicable corporate legislation
- A and B would be “amalgamated” to form entity AB

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    graph TD
      A[Entity A] --> AB[New Amalgamated Entity AB]
      B[Entity B] --> AB
    
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- Both entities must be in same jurisdiction, e.g. CNCA only permits amalgamation of CNCA corporations
- If amalgamation between two registered charities, charity A and charity B do not cease to exist or dissolve from the Canada Revenue Agency's (CRA) perspective
  - CRA will need to be informed of the amalgamation and approval obtained
  - Charity A and charity B may choose which charitable registration number to keep for the amalgamated entity, and then discontinue the use of the other charitable registration number
- In general, it is not possible for a registered charity to be amalgamated with a non-registered charity

## • Process

- Entity A and B would need to enter into an amalgamation agreement
- Amalgamation agreement
  - Name of the amalgamated corporation
  - Purposes of the amalgamated corporation
  - Membership
  - Names and addresses of the first directors
  - Any other details for the subsequent management and working of the amalgamated corporation
- Amalgamation agreement must be submitted to the members of each of the amalgamating corporations
- Provincial amalgamation may require review by PGT

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- Advantages of an amalgamation
  - Simple process
    - Assets and liabilities deemed to be those of the amalgamated corporation
  - No dissolution or application for charitable status
    - Neither corporation legally dissolves but charitable status of one corporation dissolved
- Disadvantages
  - Exposure to liability
    - All of the assets of the amalgamated corporation are available to satisfy all of the existing or contingent liabilities of both entities
  - Full disclosure process
    - Each party must disclose fully all of its assets and current and in particular liabilities

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### 3. Consolidation

- Form new entity C, transfer assets and operations of both A and B to C, then wind up and dissolve A and B
- If a consolidation is between two registered charities, then the new corporation must obtain charitable status before it can receive the assets from the two charities

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- Process

- Entity C is created to receive a transfer of the assets of Entities A and B
  - Afterwards Entity A and Entity B would dissolve
- New corporation C is created which would apply for charitable status from CRA
- The process of incorporation and application itself would take approximately a year to complete
  - This option is the longest and most complex among the three options

- Advantages of a consolidation

- Reduced liability exposure
  - “Fresh start” from liabilities associated with its programs and day to day operations
- Public perception
  - Neither corporation is being subsumed into the other

- Disadvantages

- Additional time required and expense
- Additional approvals

## D. DUE DILIGENCE PROCESS AND SELECT ISSUES

### 1. Due Diligence Process

- Necessary for all the parties to fully disclose to the others all of their assets and current and potential liabilities
  - Review documents, including governing corporate documents, contracts, insurance, employment, real property and other documents to see what deficiencies and liabilities are evident;
  - Consider the results of the review with regard to the options; and
  - Prepare a strategic plan to proceed with option chosen and to manage the remaining areas of risk

### 2. Select Issues for Review

- Program Liability
  - Identify potential areas of liability and ongoing obligations in relation to past program related liability
  - Determine whether there is any potential ongoing liability remaining, and if there is, if there is appropriate insurance and/or indemnities in place
  - Potential liability for past programs would need to be examined in relation to the applicable limitations periods
- Charitable and CRA Compliance
  - Review whether either party has been in compliance with requirement of *Income Tax Act* (Canada) and CRA
  - If prior audits review audit outcomes



- Employment Issues
  - Section 9 of the *Employment Standards Act, 2000* (ESA), an amalgamation or asset acquisition of the corporations will not be deemed to give rise to a termination of employment, which would otherwise trigger termination and severance pay obligations under the ESA
  - Deemed continuance of employment will occur so long as the employees continue to be employed upon substantially the same terms and conditions as their present employment
  - Consents will be required from any employees where there is a change in role, compensation, etc.
  - Employees who are terminated if redundant will need appropriate termination packages

- Intellectual Property Issues
  - Trademarks are very important assets and need to be properly managed and protected
  - As part of amalgamation, asset transfer, or consolidation, IP assets of parties should be reviewed
  - Review applicable trademark licenses for parties to see if any assignments or corrections need to be done
  - If new branding is being created for newly established consolidated or amalgamated entity, registering a trademark offers significantly enhanced protection

- Review of Service Contracts or Agreements
  - Contracts or agreements with third-parties would continue without need for assignment or assumption
  - In other options, review needs to be done to determine impact of asset acquisition or consolidation
- Review of Insurance Policies
  - Review and retain all past insurance policies, in the event that a claim is ever made arising from historical operations of any of the corporations
  - Consider if and how any new insurance may be able to also respond to any historical claims
  - Consult with brokers retained to act on behalf of all parties

- Externally and Internally Restricted Fund
  - Examination of both the internally and externally restricted funds will form an important part of the amalgamation process
    - If amalgamation chosen, amalgamation agreement should identify externally restricted funds and agree that there will be compliance with the terms
    - In consolidation or asset transfer, restrictions will need to be tracked and complied with between the parties

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