

## **LEGAL RISK MANAGEMENT CHECKLIST FOR CHARITIES**

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### **A. INTRODUCTION**

The operations of charities have become complex and the possibility of litigation against charities occurring as a result of their operation is greater than ever before. The exposure of charities to liability goes further than the loss of charitable assets and/or the insolvency or winding up of a charity. Directors of charities may also personally face legal actions against themselves by donors, members, third parties and governmental authorities for breach of their fiduciary duties or even breach of trust in failing to adequately protect or apply the assets of a charity. Given the increased risks to both charities and their directors, there is an increasing need to protect charitable assets from lawsuits and creditors on a pro-active basis.

The purpose of this legal risk management checklist is to provide a brief outline of some of the more important issues that directors and/or executive staff of a charity, whether incorporated or not, may want to consider in ensuring due diligence in the operation of the charity, as well as an overview of liability exposure faced by charities in Canada and some of the steps that can be taken to protect charities against such risks. As it is impossible to adequately address all aspects of liabilities faced by charities, and the pro-active steps which should be taken to protect against such risks, this checklist provides only a general overview of the many considerations that charities and their boards of directors may need to be aware of to both identify and manage legal risks. Some of the comments and recommended procedures contained in this legal risk management checklist may also be applicable to not-for-profit non-charitable organizations.

## B. IDENTIFICATION AND MANAGEMENT OF LEGAL RISKS

1. Is separate charitable status needed?
  - a) Are donation tax receipts required?
  - b) Can the organization work under the auspices of an existing charity?
  - c) Business donors may not always require charitable receipts if there is a sponsorship opportunity
  
2. 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 charity
    - Constitution and amendments, if applicable
    - Policy statements and procedures, if applicable
  - c) Key organizational documents for a corporate charity
    - Letters patent and supplementary letters patent, if applicable
    - Membership covenant and mission statement, if applicable
    - By-laws and resolutions
    - Directors, members and debt registers
    - Copies of government filings
  - d) Determining other key legal documents
    - Leases, deeds and mortgages
    - Agency, association and joint venture agreements
    - License agreements
    - Business name, trade-marks, Section 9 (*Trade Marks Act*) official marks and domain names
    - Charitable registration number, T3010's and correspondence from Canada Revenue Agency ("CRA")
    - Policy statements, i.e. sexual abuse and volunteer policy statement
    - Historical record of insurance policies
    - Privacy policies
    - Investment policies
  
3. Review of key documents for an unincorporated charity
  - a) Are the objects clearly stated in the constitution and are they exclusively charitable?

- b) Do constitutional documents correctly reflect how the organization is actually structured and operated?
  - c) Is a copy of the constitution filed with the appropriate government agencies, i.e. with CRA and the Public Guardian and Trustee in Ontario (“PGT”)?
4. Review of key documents for an incorporated charity
- a) Review of letters patent
    - Is the name in the letters patent the correct name of the charity and is it consistent with the charitable objects of the charity?
    - Are its objects exclusively charitable in nature?
    - Are the activities carried out by the charity authorized by its charitable objects?
    - Is the dissolution clause complementary to the charitable objects?
  - b) Review of supplementary letters patent
    - Have all supplementary letters patent been identified?
    - Has there been a change of corporate name?
    - Has there been a change of corporate objects?
    - What is the effect of a change of objects upon existing charitable property?
  - c) Letters patent of amalgamation (only for Ontario corporations)
    - Are the charitable objects the same or similar?
    - What are the terms of the amalgamation agreement?
    - Is the existing charitable property held in trust for the charitable objects of the previous charitable corporations?
  - d) Does the charity have historical records of all by-laws?
  - e) Are the by-law provisions clearly defined and properly passed?
  - f) Review of corporate by-law for basic terms
    - Do provisions conflict with the letters patent concerning objects 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?
    - Has the indemnification provision been authorized in accordance with the *Charities Accounting Act* (Ontario)?
    - Are the by-law amendment procedures consistent with corporate legislation?
  - g) Was the initial corporate organization of the charity 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 Notice and Notice of Change - Form 1
    - ♦ *Business Name Act* (Ontario) registrations
    - ♦ Mandatory reporting to PGT
  - Canada Corporations:
    - ♦ Annual Summary (Form 3) – Canada
    - ♦ Extra-Provincial Initial Notice (Form 2) – Ontario
    - ♦ *Business Name Act* (Ontario) registrations
    - ♦ Mandatory report to PGT
  - Does the charity 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, together with applicant business name registrations.
- n) Has there been loss of corporate status for failure to maintain government filings?
- o) Is the charity aware of the importance of proper use of corporate name and operating names?
- p) Has the charity developed and implemented risk management policy statements on:
  - child protection,
  - sexual harassment,
  - bullying,
  - volunteer conduct and volunteer recruitment,
  - third party use of the charity's facilities
  - privacy (with respect to donors, employees and volunteers)
  - safety in the workplace, and
  - protocol for domestic and foreign volunteer projects, where applicable?
- q) Has the charity conducted an up-to-date inventory of its charitable assets, including intellectual property, i.e. trade-marks and copyright?

### **C. UTILIZING MULTIPLE CHARITABLE CORPORATIONS**

1. Should the charity consider utilizing multiple charitable corporations for its high risk activities in order to reduce liability exposure and protect assets?
2. Should a provincial or national charity that consists of member organizations be structured as an umbrella association of multiple corporations or as a single corporation?

3. Should the charity consider establishing and utilizing a parallel foundation for either fundraising or protection of charitable assets?
4. Has appropriate consideration been given to balancing indirect control of multiple corporations with issues involving the possibility of cross over liability?
5. Has appropriate consideration been given to implementing effective indirect control through contracts and/or licensing agreements as an alternative to overt corporate control?

#### **D. BOARD MANAGEMENT ISSUES**

1. Is the charity able to identify which group is in charge of the charity?
  - a) Where does the *de facto* control of the charity lie? Is it with a board, a committee or executive staff?
  - b) Is authority of the board recognized by the membership?
2. Are the lines of authority between the board and the executive staff clearly defined?
3. Does the board meet on a regular basis with all directors in regular attendance?
4. Has an independent audit committee been established to review financial statements and the auditors' report?
5. Is there adequate communication of board responsibilities to existing, new and future board members?
  - a) Need to create a board binder of all corporate documents, as well as an explanation of the general operations of the corporation as a charity and the board of directors' legal duties and liabilities.
  - b) Need to provide regular updates on changes in the law to board members.
6. Are the individuals who are authorized to enter into contracts as signing officers on behalf of the charity clearly identified in their officer capacity instead of as individuals?

#### **E. REDUCING BOARD LIABILITY**

1. Are the directors aware of their duties with respect to ensuring:
  - a) the objects of the charity are properly carried out and the charity's activities comply with their objects?
  - b) the charity'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 charity in contravention of their fiduciary duties?

3. Has the charity given authority to indemnify its existing and former directors and officers in accordance with the *Charities Accounting Act* (Ontario)?
4. Is there corporate authority to acquire directors' and officers' liability insurance in accordance with the requirements of the *Charities Accounting Act* (Ontario)?
5. Has the board delegated too much responsibility to executive staff by restricting itself to policy decisions only without careful and ongoing monitoring and review?
6. Should the charity consider reducing the size of the board to limit the number of people who are exposed to liability as directors?
7. Is the charity 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 charity consider implementing an advisory board to complement the board of directors without a corresponding exposure to liability?
10. Has the charity 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?
12. Are the directors and officers aware of their fiduciary responsibilities at law in operating the charity?
13. Are the directors and officers exercising due diligence in relation to the charity 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?

#### **F. INSURANCE CONSIDERATIONS / RISK TRANSFER**

1. Has the charity maintained a historical record of its insurance coverage in the event of a future claim?
2. Is there occurrence-based or claims-made insurance coverage for sexual abuse?
3. Has the charity provided full written disclosure of all risks to its insurer to avoid denial of coverage?
4. Does the charity request regular 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?
6. Is there directors' and officers' liability coverage in place and is it reviewed on a regular basis?

7. Do there need to be special insurance endorsements to extend insurance coverage to “out of the ordinary” activities, e.g. third party use of facilities and activities of volunteers and agents in foreign countries?
8. Has the charity considered obtaining the services of an insurance consultant or specialist to conduct a risk management review of the charity’s operations and policies from an insurance perspective to determine the adequacy of insurance coverage?
9. Has the charity developed and administered effective liability shields in the form of informed consents, disclaimers, releases, waivers and indemnities for program participants as necessary?

#### **G. THIRD PARTY USE OF CHARITABLE PROPERTY**

1. Is the charity aware of the potential liability exposure in permitting third parties to use its property?
2. Has the charity developed and implemented a third party property use agreement with appropriate releases and indemnification?
3. Does the charity require evidence of liability insurance from third party users of its facilities?
4. Has the organization provided written notice to its insurer concerning the use of its property by third parties?
5. Does the charity charge appropriate fair market rental fees to users of these properties that are not charities?
6. Does the organization have the corporate authority to allow third party use of its property?
7. Does the third party use constitute an unrelated business prohibited by the *Income Tax Act*?
8. For religious charities involved with same-sex issues, has consideration been given to compliance with the *Human Rights Code* (Ontario)?

#### **H. REAL PROPERTY ISSUES**

1. Land Owned By the Charity
  - a) Has an environmental assessment been conducted to determine the extent of possible liability exposure for the organization in relation to future acquisitions as well as existing properties?
  - b) Are there trust provisions in old trust deeds or title documents? If so, are they being complied with? Should they be varied by a court?
  - c) Has the charity addressed and rectified encroachments with neighbouring lands?
  - d) Are municipal zoning and legal non-conforming uses being complied with?

- e) Could the charity be forced to sell off surplus land or risk vesting of land in the PGT under *Charities Accounting Act* (Ontario) if it has been held for more than three years?
- f) Has the charity 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?
- g) Has the charity leased its lands and have the terms of the lease been reviewed for possible liability concerns?
- h) Does the charity own property with a cultural heritable value or interest and is therefore subject to the *Ontario Heritage Amendment Act*?
- i) If the charity has fuel oil storage tanks either above or below ground, is it aware of the Ontario legislative requirement for upgrading or removal?

## 2. Land Leased by the Charity

- 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?

## I. INTELLECTUAL PROPERTY ISSUES

- 1. Do the board members and executive staff of the charity recognize that trade-marks and copyright are an essential asset of an organization that need to be protected and managed?
- 2. Does the charity need to register any of its key names and/or logos as trade-marks?
  - a) Identify trade-marks

- b) Protect trade-marks by registration
  - c) License and enforce trade-marks
  - d) Use trade-marks in conjunction with appropriate markings of either a <sup>TM</sup> or an ®, as applicable
  - e) Ensure that any third parties using trade-marks enter into a trade-mark licensing agreement
3. Has the charity protected its trade-marks by securing multiple corresponding domain names?
4. Who owns the copyright for publications of the charity 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 organization's website assigned the copyright for the website design?

#### **J. EMPLOYMENT AND VOLUNTEER MATTERS**

1. Are individuals being paid as employees or independent contractors?
2. Is there need for employment contracts with employees?
3. Has the charity 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 charity developed and implemented a policy 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?
4. 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 charity developed and implemented a policy concerning sexual harassment?
  - b) Is there need for a discipline procedure for employees and/or volunteer members?
  - c) Is the charity aware of and addressing ownership issues regarding intellectual property created by the employees and volunteers?
  - d) Is the charity 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?
5. Is the charity and its board of directors exposed to liability with regards to the actions of its employees or volunteers?

- a) Have the charity and its representatives (i.e. directors, officers and all others who act on behalf of the charity) taken every reasonable precaution to ensure the safety of workers, volunteers and the public?
  - b) Have the charity and its representatives complied with Federal and Provincial Occupational Health and Safety Legislation?
  - c) Have the charity and its representatives established a safety system?
  - d) Have all reasonable steps been taken to ensure that the system is effective on an ongoing basis?
6. Has the charity undertaken an occupational health and safety audit conducted by an experienced work place safety consultant?
  7. Has the charity 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 charity aware that punitive damages may be awarded in a case where the defendant's conduct was harsh, vindictive, reprehensible and malicious?
  8. Have the provisions of the *Employment Standards Act* (Ontario) been complied with?
  9. Has the charity implemented policies on effective compensation and conflict of interest?

#### **K. FUNDRAISING ACTIVITIES**

1. Are fundraising and/or administrative costs kept within the 80/20 disbursement quota?
2. Will the charity be able to comply with the new CRA Fundraising Policy?
3. Has provincial fundraising legislation, where applicable, been complied with?
4. Have fundraising programmes been reviewed by legal counsel?
5. Are donors' rights to require accountability respected, particularly rights under the *Charities Accounting Act* (Ontario)?
6. Does the charity have a privacy policy in place in order to protect donors' rights?
7. Are sponsorship arrangements properly documented?
8. Has the charity developed and implemented a gift acceptance policy?
9. Do the charity's fundraising activities comply with the applicable corporate objects and powers of the charity?
10. Has the charity developed an appropriate standard of conduct for fundraising in accordance with sample fundraising codes established by umbrella organizations, such as the Association of Fundraising Professionals?

11. Has the fundraising venue met proper health and safety standards where applicable?
12. If the fundraising event involves catered food, has the caterer assumed the responsibility of safe food preparation?
13. If the fundraising event involves non-catered food, are the employees and volunteers knowledgeable about the potential for food spoilage and contamination? Are any permits or licences required to provide food service?
14. If the fundraising event involves service of alcohol, is the duty of care to prevent intoxication and protect intoxicated individuals being met?

#### **L. FISCAL MANAGEMENT ISSUES**

1. Are all salaries, benefits and statutory deductions being paid by the charity on a timely basis with appropriate reports to the board of directors?
2. Is the charity operating with a deficit and, if so, for how long?
3. How is the deficit being funded?
4. Has a sinking fund been established to retire debt of the charity?
5. Are investments being offered to the public without full disclosure to potential investors?
6. Is there an audit committee in place?
7. Are charitable funds being used to fund separate business operations of the charity?
8. Is a charity that is a private foundation aware of the proposed excess business holding rules concerning limitations on the ownership of shares?
9. Is there a violation of the *Charitable Gifts Act* (Ontario) by the charity owning more than 10% of a business?

#### **M. INVESTMENT ISSUES**

1. What investment powers apply to the investment of surplus funds of the charity?
  - a) Prudent investor rule under the *Trustee Act* (Ontario) will generally apply
  - b) However, specific investment powers may sometimes apply as contained in
    - Letters patent or supplementary letters patent,
    - Incorporating legislation,
    - Endowment and gift agreements, or

- Testamentary gifts.
2. Does the charity need and/or have an investment policy?
    - a) Documenting compliance with prudent investor rule
    - b) Establishing requirements for delegation of investment decision making
    - c) Prohibiting sub-delegation of investment decision-making
    - d) Proper management of endowed funds
  3. Is there a violation of the *Charitable Gifts Act* (Ontario) by a charitable organization owning more than 10% of a business as an investment?
  4. Is the charity aware that CRA now allows public and private foundations to incur debt for the purpose of acquiring investments?

#### **N. DONOR RESTRICTED TRUST FUNDS**

1. Are there donor restricted trust funds being held by the charity?
  - a) Building funds
  - b) Endowment funds (perpetual)
  - c) Ten year gifts as part of “enduring property” under the *Income Tax Act*
  - d) Special project funds
2. Are restricted funds being used only in accordance with applicable restrictions?
3. Has a breach of trust occurred as a result of restricted funds being used in whole or in part for general operational purposes or are being borrowed against?
4. Are restricted funds segregated from operating funds?
5. If not, is there compliance under the *Charities Accounting Act* (Ontario) to co-mingle restricted funds for investment purposes?
6. Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?

#### **O. MAINTAINING CHARITABLE REGISTRATION**

1. Does the charity know that all receipts must now include the name and website address ([www.cra-arc.gc.ca](http://www.cra-arc.gc.ca)) of the CRA?
2. Has the charity ensured that its charitable activities are being undertaken in accordance with its charitable objects?

3. Is the legal name of the charity and/or its operating name consistent with the records of CRA?
4. Has the charity filed all of its governance documents with CRA, including supplementary letters patent and by-laws?
5. Does CRA have the current head office address of the charity?
6. Has the charity obtained Quebec charitable status for fundraising in Quebec?
7. Does the charity submit its annual charity information return (Form T3010A) within six months of the financial year end of a charity in order to avoid deregistration?
8. Does the board of directors, the charity's accountant and legal counsel review and approve the annual return (T3010A) for the charity before it is filed each year?
9. Is the charity aware of the amendments to the *Income Tax Act* concerning the disbursement quota as outlined below?
  - The 4.5% disbursement quota is reduced to 3.5%.
  - The 3.5% disbursement quota is extended to charitable organizations.
  - Inter-charity transfers to charitable organizations are now subject to the 80% disbursement quota.
  - The 80% disbursement quota can be delayed through utilizing "enduring property" including ten year gifts.
  - The new concept of "capital gains pool".
  - Inter-charity transfers have become more complicated.
10. Is the charity aware of the intermediate sanctions and penalties for minor and unintended infractions?
11. Is the charity involved in political activities within CRA limits?
12. Is the charity involved in related business activities within CRA guidelines?
13. Are charitable funds being used to fund separate business operations of the charitable organization?
14. Is the charity aware of the applicable rules concerning the issuance of donation receipts?
15. Is the charity aware of the new rules on split receipting and anti-tax shelter provisions?
16. Are agency, joint venture relationships or contractual transfer arrangements with non-qualified donees properly documented and implemented?
17. Are the charity's books and records maintained in accordance with the requirements of the *Income Tax Act*?
18. Is the charity aware of the need to avoid donating tax shelters?

19. Is the charity prepared for a spot audit by CRA?

**P. NATIONAL AND/OR INTERNATIONAL RELATIONSHIPS**

1. Are relationships with national organizations and/or subsidiary chapters adequately documented with specific reference to controlling trade-marks 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 trade-marks and/or copyrights been determined and documented?
5. Have trade-marks and copyrights been adequately protected and licensed in Canada and in other countries as necessary?

**Q. ANTI-TERRORISM/MONEY LAUNDERING LEGISLATION**

1. Does the charity 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 charity 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 charitable programs for compliance
  - e) Requiring disclosure statements from affiliated charities, 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) Loss of charitable status
  - b) Personal liability in civil law
  - c) Possible criminal law sanctions

**R. CRISIS MANAGEMENT ISSUES**

1. Does the charity 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 charity might face?
2. Is the charity overly dependent on another organization? Could the relationship between the organizations be terminated with little or no warning?
3. Does the charity 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 charity's reputation
4. Can some of the liability risk associated with a possible crisis be covered by a specialized insurance policy?