Churches, Charities and Not-For-Profits: The LAW and YOU

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UCBA Ukrainian Canadian Bar Association

Суспільна Служба Українців Канади Філія Торонто

Ukrainian Canadian Social Services • Toronto

UCPBA Ukrainian Canadian Professional and Business Association of Toronto

This seminar will be of interest to administrators and directors of charitable, religious and non-profit organizations.

SPEAKERS & TOPICS:

- **Dana De Sante**, Ontario Public Guardian Trustee:
  10 Practice Tips for Directors: Avoiding Governance Problems
- **Alesia Nahirny**, Transparency International Canada:
  Running a charity, the inside perspective
- **Dan Pinnington**, Lawyers' Professional Indemnity Company:
  Risk Management issues to consider when a lawyer is on your board
- **Taras Kulish**, Steinberg Title Hope & Israel LLP:
  International Humanitarian Relief: Money Laundering & Terrorist Issues
- **Andy Balaura**, Pallett Valo LLP:
  Human Resources and Communication
- **Alex Ilchenko**, Pallett Valo LLP:
  Director and Officer Liability
- **Andriy Semotiuk**, Pace Law Firm:
  Refugee Sponsorship Programs
- **Eugene Cholkan**, CPA CA, Cholkan + Stepczuk LLP:
  Common Financial Management and Reporting Issues and CRA Update
- **Inna Larionova**, Ukrainian Credit Union Limited:
  Ins and outs of Setting up charity accounts
- **William Petruck**, Funding Matters Inc.,
  Developing capital, endowment and major gift campaigns
- **Lynn Cassidy**, Ontario Charitable Gaming Association:
  Fundraising through Charitable Gaming

REGISTRATION FEE: $15.00

Thursday, November 23, 2017 | 5:30 to 9:30 pm

The Old Mill, Brulé C Room

21 Old Mill Road, Toronto

Sandwiches, snacks and beverages served | Cash Bar

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TARAS KULISH - What is a Charity? What is a Not For Profit?

STEINBERG TITLE HOPE & ISRAEL LLP

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An essential role in our society

The Four "Heads" of Charity

Relief of poverty

- Basic amenities, such as food, shelter, and clothing to the poor.

- Enabling poor children to participate in organized sports.

Advancement of education

- <u>Educating others</u>
- training the mind, advancing the knowledge or abilities of the recipient, or improving a useful branch of human knowledge.
- computer training courses to the public.
- operating a school
- providing scholarships

Ukrainian Charity Foundation
Chess for Children

Advancement of religion

- A religious belief system and activities to advance that religion.
- Providing chaplaincy services in hospitals, prisons, and universities.
- Preaching
- House of worship
- Missions

Other purposes beneficial to the community

- That the law has recognized as charitable
- Promoting health
- Providing public amenities
- Protecting the environment.
- Providing facilities for the elderly.
- Promoting the Arts
- Not Sports

Wheelchairs for Ukraine

Purposes of a Charity

- All Purposes
- Exclusively and legally charitable
- Public benefit test

A registered charity:

- issue official donation receipts
- exempt from paying income tax
- receive gifts from other registered charities
- exempt from paying HST on many goods and services the charity provides
- Claim partial rebate for the HST it pays

A registered charity must:

- Devote its resources (funds, personnel, and property) to charitable purposes and activities
- File an annual return
- Annual spending requirement
- Keep adequate books and records in Canada
- Complete accurate official donation receipts
- Control and direct the use of all its resources
- Maintain status as a legal entity
- Established and resident in Canada

ANDY BALAURA-
Human Resources and Communication

PALLETT VALO LLP

Lawyers & Trade-Mark Agents

Churches, Charities and Not-For-Profits:
The LAW and You

Human Resources Traps for Churches, Charities and NFPs: How to Avoid Them and Potential Litigation

By Andy Balaura, Partner, Pallett Valo LLP

TOP THREE HR MISTAKES MADE BY EMPLOYERS:

1. Lacking effective employment agreements
2. Misclassifying independent contractors as employees
3. Lacking or not updating HR policies

EMPLOYMENT AGREEMENTS

Common problems with employment agreements:

- Absence of termination “without cause” provision (including absence of probationary period)
- Unenforceable termination clauses
- Contracting out of or providing for less than the *Employment Standards Act* minimum requirements
- Improper use of fixed term contracts
- Lack of consideration or lack of opportunity for prospective employee to get legal advice

EMPLOYMENT AGREEMENTS

Valid and enforceable employment agreement:

- Greatly reduces the risk (and significant costs) of “wrongful dismissal” litigation by removing claims for common law entitlements

DISGUISING EMPLOYEES AS INDEPENDENT CONTRACTORS

Reasons for Misclassifying:

- Avoiding required statutory remittances
  - Income Tax
  - Canada Pension Plan
  - Employment Insurance
  - Employer Health Tax
- Administrative convenience
- Individual wants to take advantage of deductions

Disguising Employees as Independent Contractors

Risks of Misclassification:

- Potential Liability for:
  - Unremitted tax
  - EI and CPP contributions
  - Penalties
  - Interest
  - *Employment Standards Act* entitlements
  - Failing to register or report premiums pursuant to the *Workplace Safety and Insurance Act*

INDEPENDENT CONTRACTORS

Relevant Factors for Determining Status:

- What is the level of control/direction over worker?
- Who provides tools of work, equipment?
- What is the worker’s opportunity for profit?
- What degree of financial risk is taken by worker?
- Is the worker an integral part of the organization?
- Can the worker subcontract the work?
- What is the intention of the parties?

HR POLICIES

Problems with HR Policies:

- Lack of employee sign off or awareness
- Addresses matters which should be in the employment contract (i.e. termination clause)
- Failure to include mandatory policies
  - i.e. health and safety; workplace violence and harassment; sexual harassment
- Failure to keep up with legislative changes

HR POLICIES

Opportunity to provide clarity on key workplace rules, such as:

- Hours of work (record-keeping) and Overtime
- Vacation
- Expense reimbursement
- Paid sick time
- Leaves of absence
- Computer/Email Use
- Social Media Usage
- Discrimination and Harassment

CONCLUSION

- Review your HR practices to protect your organization
- Exercise due diligence to avoid HR mistakes
- Seek professional advice for assistance
- Inquire about employment practices liability coverage

Churches, Charities and Not-For-Profits:
The LAW and You

Privacy Concerns for Churches, Charities and NFPs: CASL Developments and Communications with Members, Donors and Volunteers

By Andy Balaura, Partner, Pallett Valo LLP

Canada’s Anti-Spam Legislation (“CASL”)

- CASL requirements
- Recent CASL decisions and Fines
- New Developments
- Compliance with CASL
- Communications with Members, Donors and Volunteers

CASL REQUIREMENTS

CASL prohibits sending a commercial electronic message (CEM) to an electronic address, UNLESS:

- FORM and CONTENT requirements are met; and
- You obtain CONSENT (express or implied)

CASL REQUIREMENTS

Express Consent

- Onus on organization to prove it had express consent
- Can be obtained orally or in writing
- Sending an electronic message seeking express consent is a CEM (and therefore may not permitted unless you have implied consent or fall under another exception)

CASL REQUIREMENTS

Implied Consent

- Can be obtained through an existing non-business relationship, i.e.:
  - The recipient has **made a donation** in the immediate two-year period the day before the CEM was sent and the sender is a registered charity;
  - The recipient **has volunteered** in the immediate two-year period the day before the CEM was sent and the sender is a registered charity;
  - The recipient **was a member** in the immediate two-year period the day before the CEM was sent and the sender is a club, association, or voluntary organization.
- Can be obtained through "conspicuous publication" exemption

CASL REQUIREMENTS

- CASL violations can result in monetary penalties of up to $10 Million for corporations
- Directors and Officers are vicariously liable for breaches committed by their employees
  - Due diligence defence available

RECENT CASL DECISIONS AND FINES

Recent Cases:

- *Porter Airlines* - $150,000 fine
- *Rogers* - $200,000
- *Compu-Finder* - $1,100,000 fine (being contested)
- *PlentyofFish* - $48,000 fine
- *Kellogg Canada Inc*. - $60,000 fine
- *Blackstone* - $50,000 fine (reduced from $640,000)
- William Rapanos (individual) - $15,000 fine

NEW DEVELOPMENTS

- Right to Private Action (was scheduled to come into force July 1, 2017) – was indefinitely delayed by an Order-In-Council issued June 7, 2017

- 3 year grace period ended July 1, 2017

HOW CHARITIES AND NFPs ENSURE CASL COMPLIANCE

Your organization needs to implement a CASL compliance program:

- Have a CASL policy
- Conduct CASL training of all staff
- Conduct an organizational risk assessment
- Monitor and audit CASL compliance
- Demonstrate good record-keeping
- Implement a complaint handling system

COMMUNICATIONS WITH MEMBERS AND DONORS

CASL – CEM exemption

- The regulations under CASL exempt a CEM “that is sent by or on behalf of a registered charity as defined in subsection 248(1) of the *Income Tax Act* and the message has as its **primary purpose** raising funds for the charity”
- Does not apply to not-for-profit organizations or other entities that are not registered charities
- To what extent may a CEM include commercial purposes before it will no longer have a “primary purpose” of raising funds?

EUGENE CHOLKAN, CPA CA -
Common Financial Management and Reporting Issues
CRA Update

CHOLKAN STEPCZUK LLP

CHARTERED ACCOUNTANTS

INNA LARIONOVA -
Ins and Outs of Setting up Charity Accounts

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Churches, Charities and Not-For-Profits: The LAW and YOU

Ins & Outs of setting up Charity accounts

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November 23, 2017

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Ins & Outs of setting up Charity accounts

Not-for-profit organizations

- Churches
- Charities
- Social clubs
- Professional or community organizations
- Sports or athletic teams

Organized and operated exclusively for social welfare, improvement, pleasure or recreation, or any other purpose except profit.

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Ins & Outs of setting up Charity accounts

Questions we ask

1) Are you incorporated?
2) Are you a registered charity?
3) What is the mission of your organization?
4) What kind of products/services you are looking for?
5) How will you be using organization's accounts, for what purpose?

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Ins & Outs of setting up Charity accounts

UCUCommunity

Type of Account | Chequing
Monthly Package Fee | Free
Interest Rate | 0.0%
Min Balance to Waive Package Fee | N/A
Free Transactions | Unlimited

UCUCommunity Virtual

Type of Account | Savings
Monthly Package Fee | Free
Interest Rate | 0.25%
Min Balance to Waive Package Fee | N/A
Free Transactions | Unlimited

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Ins & Outs of setting up Charity accounts

Additional Services

- Internet banking
- Interac e-Transfers
- Debit Card

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Ins & Outs of setting up Charity accounts

Ukrainian Credit Union Limited is proud to sponsor hundreds of great causes in the community

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Ins & Outs of setting up Charity accounts

WILLIAM PETRUCK -

Developing capital, endowment and major gift campaigns

FUNDING matters® Inc

Transformational Philanthropic Consulting http://fmi.giftabulatornow.com/new/best_ways_to_give.php#give-now

LYNN CASSIDY - Fundraising Through Charitable Gaming

ocga

ontario charitable gaming association

providing leadership - providing value - making a difference ocga ontario charitable gaming association

Fundraising Opportunities – Charitable Gaming

Lynn Cassidy , Executive Director
Ontario Charitable Gaming Association

- Provincial association - charities and non-profits fundraising through gaming – approximately 2,000 members
- Information/Advocacy/Support
- Partnerships with Ontario Lottery and Gaming and Alcohol & Gaming Commission of Ontario
- www.charitablegaming.com
- Lynn Cassidy, Executive Director
- lcassidy@charitablegaming.com

Fundraising Opportunities – Charitable Gaming

- Bingo – Paper/Electronics
- Break Open Tickets
- Raffles
- Social Gaming Events

- Gaming is under the Criminal Code of Canada and *regulated* by Alcohol & Gaming Commission of Ontario (AGCO)
- Charities have legal responsibilities
- Municipalities involved in licensing charitable gaming
- Requirements on eligibility and use of proceeds

Bingo

- 31 Charitable Bingo & Gaming sites (cGaming)– electronics & paper – bingo, break open ticket machines
- Partnership with Ontario Lottery & Gaming (OLG) and commercial operators
- 1,800 charities participating with 20,000 volunteers
- Revenues for charities 2016/17 - $36.4M
- Charities require "permits" from municipalities
- Requires less volunteers than traditional bingo
- Potential opportunities for participation in cGaming sites

- 30 paper only commercial sites plus numerous 1 night a week – churches/Legions
- Charities require "licenses" from municipalities

cGaming Sites

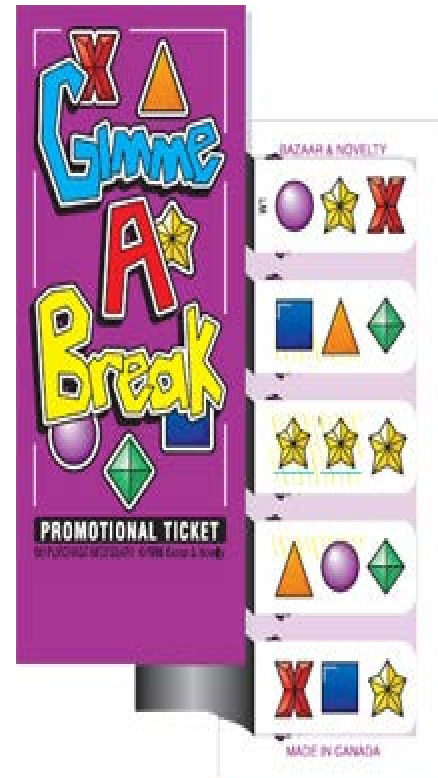
Ontario Charitable Gaming Association

cGaming Sites

Ontario Charitable Gaming Association

Break Open Tickets

- Break Open Tickets/Nevadas – sold in convenience stores, legions
- Charities work with a gaming service supplier who finds sites and assists with administration
- Municipal licenses for most organizations
- Provincial organizations – licensed by AGCO



Raffles

- Raffles over $50,000 licensed by Alcohol & Gaming Commission
- Under $50,000 licensed by municipality

- New Electronic Raffle framework introduced in June 2017 by AGCO
- First phase is for raffles over $50,000 (-e.g hospitals) and for 50/50 raffles – all currently licensed by AGCO
- Must use an approved supplier & solution for E Raffles
- Allows selling on line and use of computer for draws

Social Gaming Events

- Casino style games with a social event –e.g. dinner auction
- Blackjack and Wheel of Fortune only – no poker
- May have a raffle as well
- Maximum 8 hour time span
- Licensed by Alcohol and Gaming Commission of Ontario

For information

Ontario Charitable Gaming Association
www.charitablegaming.com
905-824-5478

Alcohol and Gaming Commission of Ontario
www.agco.ca
1 (800) 522-2876

DANA DE SANTE-

10 Practice Tips for Directors: Avoiding Governance Problems

Ontario

Public Guardian and Trustee (OPGT)

Public Guardian and Trustee's
Ten Practice Tips for Directors: Avoiding Governance Problems

Churches, Charities and Not-for-Profits: The LAW and YOU

Mr. Dana De Sante
Legal Counsel
Charitable Property Program
Public Guardian and Trustee

Mandate of the Public Guardian and Trustee

Plays a role in helping to protect charitable assets in Ontario by:

- Reviewing Ontario applications for incorporation of charitable organizations and corporate-change documents

Mandate of the Public Guardian and Trustee

- Protects charitable property in court proceedings; and
- Acts on complaints regarding misapplication of charitable property or breach of fiduciary duties by directors or trustees

Role of PGT / Charities Directorate

- Monitors compliance with laws regarding proper use of charitable assets and works to ensure that trustees carry out fiduciary duties

- Focuses on tax law and tax principles to prevent abuses of the charitable donation tax credit system

1. Respect Members' Interests

- Provide clear criteria in by-laws as to who can be a member in by-laws and maintain an up-to-date membership list
- Communicate with members; keep them informed; consult with them on significant policy matters; answer their inquiries

Respect Members' Interests

- Make arrangements for fair and independently observed elections. If appropriate, establish an electoral commission to supervise election
- Provide for dispute resolution mechanism in by-laws, possibly to private mediator, umbrella body or a charities lawyer

2. Avoid Splits on the Board

- Ensure all directors are made aware of their fiduciary obligations
- Require regular board meetings
- Establish rules requiring information be provided before board meetings

Avoid Splits in the Board

- Provide a copy of Agenda before the board meeting and allow new items to be added to the Agenda before the meeting

- Ensure that all directors have access to all financial and corporate information

Avoid Splits in board

- If a complex issue or change of direction is contemplated, consider setting up a group or committee consisting of some directors, members and external persons with expertise in the matter. The decision to act on the recommendation would rest solely with the board

avoid spits in the board

By-laws should specify when a director may be removed (failure to comply with fiduciary or corporate obligations, consistently failing to attend specified number of board meetings, etc.)

When appropriate, act collectively

3. Conflict of interest guidelines

Directors have a duty to avoid a conflict of interest situation. They must not have a personal interest in the result of a decision made by the charity. The interests of the charity must be paramount

Conflict of Interest Guidelines

Directors of charities are prohibited from being employed by the charity or receiving payment from the charity's funds, other than reasonable out-of-pocket expenses, unless the governing documents explicitly allow payments to directors or court approval is obtained

Conflict of interest guidelines

This includes contracting with the charity, such as leasing a building or loaning funds to the charity at fair market interest rates

Directors are eligible to receive benefits from the charity which are offered to the public at large, provided they meet the criteria and do not receive preferential treatment

conflict of interest guidelines

If a director wishes to transact business with the charity or apply for a position with the charity, then the person can resign as a director or the charity can apply for court approval

Section 13 *Charities Accounting Act* – simplified out-court-process to obtain court order, where all parties with a financial interest consent, as well as PGT

Conflict of interest guidelines

- The Public Guardian and Trustee may consent to a s.13 Order if it is clearly in the best interests of the charity
- Procedures to obtain a section 13 Order can be found on the Attorney General's website at: www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charities

New Draft Remuneration Regulation

- The regulation is expected to be in force in the new year.;
- It gives incorporated charities the power to pay directors for goods, services or facilities, provided specific safeguards are met;
- Services that are not covered: as a director; for fund-raising ; sale or purchase of real estate; or as an employee

New Draft Remuneration Regulation

- Safeguards include:
- Board must act unanimously and in the best interests of the charity;
- No more than 20 % of the total number of the directors can contract with the charity;
- There must be a written agreement;
- The amount must be reasonable;

New DRAFT Remuneration Regulation

- The director receiving the benefit cannot participate in the deliberations or vote;
- The payments must be reported in the financial statements and at the annual members' meeting;
- The board must consider guidance published by the OPGT.

New Draft Remuneration Guidance

- The regulation will allow a spouse and close relatives of a director, or a company owned by a director, to do business with the charity, provided safeguards are met;
- A copy of the draft regulation is available at: http://www.ontariocanada.com/registry/view.do?postingId=24430&language=en

4. charitable foundations

- If a charity establishes a foundation, it is recommended its purposes be limited to directly benefiting the endowed charity
- Generally, a foundation should not be able to distribute its funds to other registered charities
- It is recommended that a foundation's dissolution clause specify that the endowed charity is the sole beneficiary

charitable Foundations

- The foundation often should have a representative on the charity's board and the charity often should have a representative on the foundation's board
- It can be helpful if regular meetings are conducted between the executive directors of the charity and its foundation, and possibly between other key staff

5. fund-Raising practices

- Like any business, a charity should create a business plan that considers the costs and risks of different fundraising strategies.
- Check to see if the proportion of net receipts after fund-raising expenses, is reasonable
- Directors are personally responsible even if others do the fundraising including hired for-profit fundraisers

fund-raising Practices

- Charities that engage a commercial fund-raiser should check its references and require a written contract.
- Such contracts often should be reviewed by a lawyer or a qualified specialist in fund-raising, and include a termination clause, a term that requires the charity maintain control of the funds and a clause requiring a complete accounting be provided on a periodic basis

Fund-Raising Practices

If a fund-raiser is asked about the costs of an appeal, it should be prepared to be open and honest

Check commercial fund-raiser's representations to public to ensure they are fair, clear and accurate

Monitor performance of the fund-raising appeal

If the appeal is for a specific purpose, notify donors what will happen to funds in the event the purpose cannot proceed, or if there are surplus funds

Fund-Raising Practices

- The PGT has a bulletin on fund-raising, 'Charitable Fundraising, Tips for Directors and Trustees' available at: www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charities
- In June 2009 CRA published Guidance of Fundraising, available at:
- www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-eng.html

6. Finding New Directors

Finding the right persons with the necessary skills to be a director will help the charity run more effectively

Draw-up a ‘job description’ listing the desired qualities of prospective directors and approach possible candidates

Look for persons who have had experience working for another charity, or with management skills, book-keeping experience, fund-raising abilities, retired persons with time to take an active part in the charity

Finding new directors

- Consider users of the charity’s services
- If appropriate, a diverse board can be very useful in terms of age, culture, skills
- Check if they are an undischarged bankrupt, convicted of offence involving theft or dishonesty, if their interests might conflict with the charities activities

7. Provide Guidance to new Directors

- New directors should be provided a manual or package of material or an information session that explains the work of the charity and what will be expected of them
- The information should include copies of the governing documents, the latest financial statements and T3010 Returns
- They should be advised of specific problems or challenges facing the charity

Provide Guidance to new Directors

New directors should be also be advised of their fiduciary duties which include:

a. to act reasonably and prudently;
b. to keep proper accounts;
c. to not place one's personal interests in conflict, or in an appearance of conflict, with the charity;
d. to protect the property under the board's care;
e. to be actively involved in the charity's decision making process;
f. to act in the best interests of the charity, making sure the charity operates effectively and within the law

Provide Guidance to New Directors

- More information is available about fiduciary duties in the OPGT's bulletin, 'I am a director or trustee of a charitable corporation' at www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charities

8. Understanding what May be delegated

- As fiduciaries, directors are bound by the rule that they cannot delegate their functions
- This rule is subject to a significant qualification: directors can employ others in circumstances where an ordinary prudent person in the ordinary course of business would do so

Understanding what May be delegated

- When it is necessary to delegate certain day-to -day management decisions to staff, their authority should be clearly set out in writing and procedures put in place to ensure accountability and timely reports to directors
- Ultimately the directors are responsible for running the charity and they must maintain proper supervision and control over the employees
- They cannot retain others to make major decisions or set policies

understanding What May be delegated

- Subject to the terms of the governing document, directors may delegate their investment functions, provided there is a written plan and written agreement with the agent
- See sections 26 to 31 of the *Trustee Act*

9. Restricted purpose trust funds

Directors should check to see if the charity holds restricted purpose trust funds, and if so, check:

- What restrictions apply
- That the funds are being used for the intended purposes, segregated from the charity's corporate property and separately accounted for in the charity's financial statements

Restricted purpose trust funds

– That the funds are properly invested

– That the charity maintains copies of the trust documents, will or other documents

10. Become Familiar with principal Ontario legislation

- *Charities Accounting Act*
- *Social Investing*
- *Religious Organizations' Lands Act*
- *Trustee Act*
- *Corporations Act*

- As well as the cy-près doctrine

Social Investing

- Royal assent was given this month to
- amendments to the *Charities Accounting Act*
- that will enable charities to make social
- investments. The amendments are expected
- to be in force in the new year.
- A social investment means using a charity's

Social Investing

- funds to directly further its purposes and achieve
- a financial return. The ‘financial return’ is not
- required to be at market rates.
- The PGT will be publishing guidance on social
- investing.

contact information

Office of the
Public Guardian and Trustee
Charitable Property Program
595 Bay St., Suite 800
Toronto, ON M5G 2M6

Tel: (416) 326-1963
In Ontario 1-800-366-0335

Website www.attorneygeneral.jus.gov.on.ca

ALESIA NAHIRNY -

Running a Charity: The Inside Perspective

TRANSPARENCY INTERNATIONAL CANADA

DAN PINNINGTON -
Risk Management Issues

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ALEX ILCHENKO-
Director and Officer Liability

PALLETT VALO LLP
Lawyers & Trade-Mark Agents

Director and Officer Liability and Not-For-Profit Corporations

A GOOD CAUSE IS NOT A PERFECT DEFENCE

ONTARIO REGIONAL FIRM 2017-18 TOP 10 CANADIAN Lawyer

PALLETT VALO LLP
Lawyers & Trade-Mark Agents

Why is Liability Imposed?

- Directors and officers of corporations may be subject to personal liability while acting within their corporate capacity
- This liability is imposed to encourage directors to be accountable to third parties and directors may be responsible for the failure of a corporation to meet its legal obligations
- Being a Director of a “Non-Share Capital” or a “Not For profit” does not remove Director liability

Duties: Act in best interest of Corporation

- Directors are considered “fiduciaries” of the corporations they serve – which are legal persons
- This duty requires directors to act honestly and in good faith and in the best interests of the corporation, putting the corporation’s interests ahead of their own
- Directors have duty to act in the best interests of the corporation over the interests of the of the shareholders, members or creditors

Avoid Conflicts of Interest

- A director's fiduciary duty also requires avoidance of conflicts of interest that can arise where a director holds a personal interest in a material contract with the corporation or gains an opportunity because of information learned in the course of his/her position
- Generally, directors are required to disclose all such conflicts and refrain from voting on any related resolution
- Failure to disclose a conflict may make a director liable to the corporation for any gain earned from the conflicting interest

Don’t take personal advantage

– Directors are also, generally, prohibited from taking advantage of a business opportunity that the corporation either had or was seeking

– Taking advantage of such a corporate opportunity may attract personal liability even where a director resigns prior to engaging in the opportunity

Standard of Care

- Directors must carry out responsibilities by exercising "the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances"

- Common Law requires that a director exhibit the degree of care and skill that might be expected of a person with the knowledge and experience of the director in question

Standard of Care

- Courts generally apply the “business judgment rule” in evaluating whether the minimum standard has been applied
- The rule focuses on the process applied in coming to a decision, rather than on the results of such a decision
- The “reasonableness” of the actions of the directors in the process of reaching their decision is an important factor considered by the Courts

Delegation of Authority and Reliance

- While directors may delegate certain authority to management, special committees and, in certain cases, independent advisors- they cannot entirely delegate the director's responsibility
- All work must be done under the general supervision of the directors

Delegation of Authority and Reliance

- Directors are entitled to rely on the information provided by such parties, provided the director verifies such person(s) is qualified, and makes the proper inquiries when the work product is presented to them

Delegation of Authority and Reliance

- Directors should keep in mind that they are liable for any acts or omissions of the board of directors carried out in their absence, since they are deemed to have consented, unless they register their dissent according to the procedures set out in the governing corporate statute

Environmental Legislation

- Directors may be held liable for environmental offenses, for causing or permitting environmental damage or for environmental offenses committed by the companies they serve, for their personal involvement in the activity constituting the offense, and as indirect actors, on the basis that control over the corporation and its employees had been improperly exercised

Environmental Legislation

- Common law liability can arise out of, among other things, nuisance, negligence, trespass and strict liability actions. Statutory liability can arise under the federal *Canadian Environmental Protection Act* (CEPA) or any of a number of provincial statutes

- Under CEPA, a director may incur liability for offenses committed by the corporation that the director "directed, authorized, assented to, acquiesced in or participated in"

Environmental Legislation

- In Ontario, for example, directors and officers have a statutory duty to “take all reasonable care” to prevent the corporation from committing environmental offenses

- Directors may also face civil liability for damages suffered by third parties as a result of an environmental offense committed by a corporation. The defence of due diligence (discussed below) may be available to directors in respect of certain environmental liabilities

Employee Related Legislation

- In the event of a corporate insolvency, Directors can be held liable for unpaid employee wages and vacation pay and for a corporation's failure to remit source deductions such as Canada Pension Plan and Employment Insurance on behalf of its employees
- Directors can also be held personally liable for a corporation's failure to comply with provincial occupational health and safety legislation requirements

Tax Legislation

- Personal liability arises for directors as a result of a variety of offenses under federal and provincial tax statutes
- Most commonly, directors are responsible for a corporation’s failure to remit any prescribed amounts under the federal *Income Tax Act* (Canada) and *Excise Tax Act* (Canada) (covering the Goods and Services Tax) which is considered to be held in trust for the Crown

Tax Legislation

- There is also a general liability section in the *Income Tax Ac*t (Canada) which applies when a corporation has committed an offense
- Under that provision, a director “who directed, authorized, assented to, acquiesced in, or participated in commission of the offense” is considered a party to it
- Both the *Income Tax Act* and the *Excise Tax Act* provide a due diligence defence

Questions?

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TARAS KULISH -

International Humanitarian Relief: Money Laundering & Terrorist Issues

STEINBERG TITLE HOPE & ISRAEL LLP

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Use of resources

- Only two ways:

➢ carrying out its own activities

➢ gifts to qualified donees

Qualified donees

- Eight types qualified donees:

Own activities

- using its staff (including volunteers, directors, or employees), or
- through an intermediary (for example, an agent or contractor).

  - ✓ direct and control
  - ✓ delegate authority
  - ✓ No conduit to funnel money

Direction and control when using intermediaries

- Written agreement
- Describe activities
- Monitor and supervise
- Ongoing instructions
- Separate funds
- Separate books and records
- Periodic transfers based performance
- Maintain records
- allow CRA to verify

Obey Local Laws

- Comply with laws in foreign jurisdictions
- Canadian Registration does not exempt a charity from local compliance

Risk and Safety

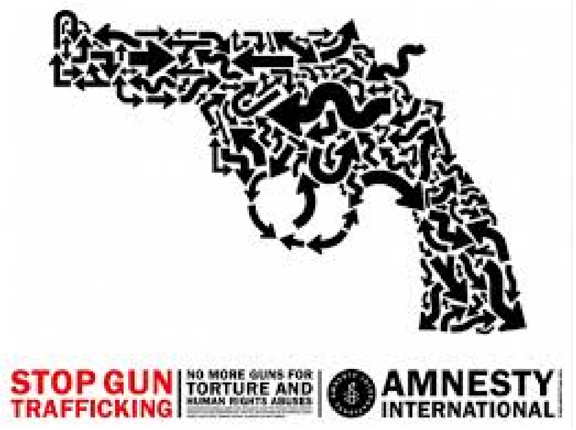
- Risky activity may affect charitable status.

- Public benefit test looks at Potential Harm

- Risk Management:
  - Type of harm
  - Urgency
  - Experience
  - Risk mitigation measures

No Funding of Terrorism

- Revocation of status under:
  - ➢ Charities Registration (Security Information) Act
  - ➢ Income Tax Act



- For funding a **listed entity** as defined in ss. 83.01(1) Criminal Code; or

- any other entity <u>that engages in or supports terrorist activities</u>

No Money Laundering

- ***Proceeds of Crime (Money Laundering) and Terrorist Financing Act***
- ➢ detect and deter and facilitate investigation or prosecution

- record keeping and client identification requirements
- reporting of suspicious financial transactions and movement of money

Reporting

Financial Transactions and Reports Analysis Centre of Canada

(FINTRAC)

Who reports to FINTRAC

- banks, credit unions, etc.
- life insurance industry
- securities dealers
- money services businesses;
- accountants and accounting firms
- real estate industry
- casinos;
- dealers in precious metals and stones

Other reporting

- RCMP's National Security Information Line, 1-800-420-5805

- Complaint about a registered charity to CRA and OPGT

Checklist

- Know your partner
- Due diligence
- Agreements
- Project designation: activity description and budget
- Tranches
- Reports
- Monitoring trips
- Key staff visit Canada
- Hire experts
- Constant communication
- Ask questions
- Best Practices

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