
Endnotes

INTRODUCTION

¹ M. Gill, *Governance Do's & Don'ts – Lessons from Case Studies on Twenty Canadian Non-Profits, Final Report* (Ottawa: Institute on Governance, May 2001) at p. 5.

² *Talking About Charities*, a 2000 public opinion survey conducted by the Canadian Centre for Philanthropy for the Muttart Foundation, found that more than 75% of respondents stated that they have “a lot of” or “some” trust in charities. The survey also found a similar percentage of respondents agreeing that “Charities are Generally Honest About the Way They Use Donations”. Copies of complete survey are available on the Muttart Foundation website at www.muttart.org.

CHAPTER 1

¹ While members are sometimes referred to, in not-for-profit literature, as owners of the organization, this term is generally used in the context of the membership in their role as funder and electorate, as distinguished from their role as consumers of the organization's programs.

² Industry Canada does not consider the following transfers of money to be pecuniary gain:

- a transfer to a member for the purpose of carrying on activities as an agent of the corporation (e.g., salary payments to an employee who is also a member);
- a transfer to a member charity to carry out the objectives of the corporation;

- a transfer by a corporation that is a registered charity to a member who is a legitimate beneficiary under the corporation's purposes; and,
- a transfer to a member or director for services rendered to the corporation (e.g., payments for services rendered by a supplier who is also a member).

Note, however, with respect to this last point that other not-for-profit corporate law rules may restrict or prohibit a director from dealing with the corporation. See Chapters 2 and 6.

- ³ At dissolution, unless stated otherwise in the bylaws or other governing documents, the assets of a non-charitable not-for-profit corporation may be distributed to the members. Such payments may be taxable in the hands of the members. Registered charities must transfer their assets to another registered charity or other qualified donee, or face a tax penalty effectively resulting in the forfeiture of all their assets.
- ⁴ The specific objects or purpose of the not-for-profit corporation is the basis for its incorporation. It has no power outside these objects. This contrasts with the approach taken in most Canadian jurisdictions to for-profit corporations, where after incorporation they enjoy ‘natural person powers’ – i.e., the same powers a person has to conduct day-to-day business without a need for any specific authorization.
- ⁵ The main cause of this distinction is that, federally and in most provinces, not-for-profit legislation is quite dated. For-profit corporation legislation was modernized across Canada in the 1970s and 1980s. One of many major changes was to simplify the process of incorporation. Under this legislation, all incorporators need to do to create a for-profit corporation is file ‘articles of incorporation.’ In contrast, not-for-

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profit incorporators typically must still apply for 'letters patent of incorporation', which are issued at the discretion of the relevant government agency.

- ⁶ This approval process is limited to certain bylaws, and approval is not required if the bylaw addresses an internal matter that has no impact on governance. For example, a bylaw setting out equipment standards or professional conduct criteria would not be subject to review. Bylaw requirements with respect to basic governance issues are found in the *Canada Corporations Act*, s. 155(2). Where a bylaw change relating to governance is proposed, but does not receive Ministry approval, it should not be implemented.
- ⁷ While the plural is used for employees, the common practice in not-for-profit entities is for the board to hire the executive director, who hires the other staff.
- ⁸ R.S.O., c. C.10
- ⁹ *Ibid.* s. 1.(2).
- ¹⁰ See S. Robert, *et al.* eds, *Robert's Rules of Order Newly Revised*, 10th ed. (Perseus: Cambridge, Massachusetts, 2000) at p. 466.
- ¹¹ For example, the executive director's right to attend board meetings can be set out in the bylaws.
- ¹² H. Kelly & M. Frederick, *Duties and Responsibilities of Directors of Non-Profit Corporations*, (Canadian Society of Association Executives: Toronto, 1999) at p. 32 – note 10.
- ¹³ E. Mina, *The Guide to Better Meetings for Directors of Non-Profit Organizations*, (Canadian Society of Association Executives; Toronto, 2000) at p. 29.
- ¹⁴ Final Report to the Panel on Accountability and Governance in the Voluntary Sector in Canada, *Building on Strength: Improving Governance in the Voluntary Sector*, (Ottawa, February 1999) [hereinafter Broadbent Panel]. The tasks are set out on p. 24.
- ¹⁵ The Broadbent Panel's work focused on the voluntary sector. While there was considerable discussion on what organizations constitute this sector, the Panel specifically identified trade associations and professional societies as being outside the scope of its work. While its recommendations and conclusions might apply to the broader not-for-profit sector, the Panel indicated that they were developed for charities and public-benefit organizations.

CHAPTER 2

- ¹ In Québec, this principle is expressed in art. 309 of the *Civil Code of Québec*, which states: "Legal persons are distinct

from their members. Their acts bind none but themselves, except as provided by law."

- ² *Re: City Equitable Fire Insurance Company Limited*, [1925] 1 Ch. 407 at 428. In Québec, art. 322 of the *Civil Code of Québec* expressly imposes a subjective standard of care ("prudence") on directors of legal persons.
- ³ *Ibid.* at p. 428.
- ⁴ See D. Waters, *Law of Trusts in Canada*, 2d ed. (Carswell: Toronto, 1984) at p. 690.
- ⁵ Under Québec civil law, no "breach of trust" exists as such, but directors who direct the corporation to violate the terms of a gift or legacy made to it may be held personally liable for the prejudice caused, under the principles of extracontractual liability set out in art. 1457 of the *Civil Code of Québec*.
- ⁶ *Trustee Act*, R.S.O. 1990, c. T.23.
- ⁷ H. Picarda, *The Law and Practice Relating to Charities*, 2d ed. (London: Butterworths, 1995) at p. 374.
- ⁸ Art. 322 of the *Civil Code of Québec*.
- ⁹ This rule is expressly set out at art. 324 of the *Civil Code of Québec*, which requires the director to disclose any interest he has in an enterprise or association that may place him in a situation of conflict of interest.
- ¹⁰ Art. 325 of the *Civil Code of Québec* requires the interested director to disclose his interest to the board of directors and to abstain from the discussion and voting on the question, unless it relates to his remuneration or conditions of employment.
- ¹¹ *Ibid.*
- ¹² In Québec, see art. 313 and 321 of the *Civil Code of Québec*.
- ¹³ *Barrie v. Royal Colwood Golf Club*, (2001) 18 B.L.R. (3d) 21 (B.C.S.C.), at par. 71.

CHAPTER 3

- ¹ *Craik v. Aetna Life Insurance Company of Canada*, [1995] O.J. No. 3286 (Gen.Div.). In Québec this is reflected in art. 309 of the *Civil Code of Québec*.
- ² *ADGA Systems International Ltd., v. Valcom Ltd., et al.* (1999), 43 O.R. (3rd) 101 (C.A.). See also, *ScotiaMcLeod et al. v. Peoples Jewelers Limited et al.* (1996), 26 O.R. (3d) 481 (C.A.) at p. 491. Under Québec civil law, directors are liable for their extra-contractual (i.e. tortious) faults against third parties under art. 1457 of the *Civil Code of Québec*, whether or not committed in the execution of their duties. They are not liable for the contractual faults of the corporation (art.

- 309, 321 and 2160 of the *Civil Code of Québec*) unless they personally commit extra-contractual faults against the contracting third parties.
- ³ 39 E.T.R. (2d) 96.
- ⁴ For a detailed discussion on directors' duties to protect charitable assets, see the article by T. Carter, "Pro-active Protection of Charitable Assets – A Selective Discussion of Liability Risks and Pro-active Responses," presented to the Law Society of Upper Canada on November 20, 2001 (available at www.charitylaw.ca).
- ⁵ See, *Public Trustee v. Toronto Humane Society* (1987) 40 D.L.R. (4th) 111 (Ont. H.C.); *Re David Feldman Charitable Foundation* (1987), 58 O.R. (2d) 626; *Re Faith Haven Bible Training Centre* (1988), 29 E.T.R. 198 (Ont. Surr. Ct.); *Harold G. Fox Education Fund v. Ontario (Public Trustee)* (1989), 69 O.R. (2d) 742; For more information, please also see article by T. Carter, "Remuneration of Directors in Ontario," available at www.charitylaw.ca.
- ⁶ It does not, however, apply in Québec.
- ⁷ R.S.O. 1990, c. C-10.
- ⁸ For more information on donor restricted gifts, see a paper by T. Carter, "Donor Restricted Charitable Gifts Revisited: A Practical Overview," presented to the Third Annual Estate and Trust Forum of the Law Society of Upper Canada on November 22, 2000, available at www.charitylaw.ca.
- ⁹ For more information concerning the requirements of the regulations under the *Charities Accounting Act* (Ontario), see Charity Law Bulletin #4, available at www.charitylaw.ca.
- ¹⁰ R.S.C. 1970, c. C-32.
- ¹¹ The section imposes personal liability on directors who:
- use or authorize any use of a corporate seal purporting to be the seal of the corporation where the name is not legible;
 - issue or authorize an advertisement or notice or other publication of the company where the corporate name is not legible;
 - sign or authorize a bill of exchange, promissory note, endorsement, cheque, order for money or goods on behalf of the corporation where the corporate name is not legible;
 - issue or authorize to be issued any invoice or receipt where the corporate name is not legible.
- ¹² R.S.C. 1985, c. W-11.
- ¹³ R.S.O. 1990, c. D.2.
- ¹⁴ *Ibid.*, s. 99(2).
- ¹⁵ R.S.C. c.1 (5th Suppl.) [hereinafter *ITA*]. A similar regime exists in Québec, under s. 24.0.1 ff. of the *Act respecting the Ministère du Revenu*, R.S.Q. c. M-31.
- ¹⁶ *ITA*, s. 227.(1)(1).
- ¹⁷ See, for example, *Moose Jaw Kinsmen Flying Fins Inc. v The Minister of National Revenue*, [1988] 2 C.T.C. 2377 and *Thunder Bay Symphony Orchestra Ass. Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1998] T.C.J. No. 955.
- ¹⁸ R.S.C. 1985, c. E-5.6.
- ¹⁹ R.S.O. 1990, c. E-11, as am.
- ²⁰ R.S.C. 1985, c. L-2, as am. S.C. 1993 c. 42.
- ²¹ R.S.C. 1985, c. E-15, as am.
- ²² A director will not be liable for the amount of GST which the corporation failed to remit unless:
- a certificate for the amount of the corporation's liability has been registered in the Federal Court and the debt remains unsatisfied;
 - the corporation has started liquidation or dissolution proceedings or has been dissolved and claim for the amount of the debt has been proved within six months after the earlier of the date of commencement of the proceedings or the dissolution; or
 - the corporation has made an assignment or a receiving order has been made under the *Bankruptcy and Insolvency Act* and the amount of the debt has been proved within six months after the date of the assignment or receiving order.
- ²³ R.S.C. 1985, c.16 (4th Suppl.).
- ²⁴ R.S.O. 1990, c. E.19., s 194.
- ²⁵ R.S.O. 1990, c. C-8.
- ²⁶ R.S.O. 1990, c. R-23.
- ²⁷ R.S.A. 1995, c. C-45.
- ²⁸ R.S.M. 1993, c. 41, s. 10.
- ²⁹ R.S.P.E.I. 1994, c. 48, s. 4.
- ³⁰ R.S.C. 1985, c. C-34.
- ³¹ R.S.C. 1985, c. P-21.
- ³² R.S.O. 1990, c. I.8.
- ³³ R.S.O. 1990, c. L.25.
- ³⁴ R.S.O. 1990, c. S.5.
- ³⁵ S.C. 2001, c. 41.
- ³⁶ R.S.C. 1985, c. C-46.
- ³⁷ For more information of the *Anti-terrorism Act* (Canada) and its application to charities, see Charity Law Bulletins #10 and #11, available at www.charitylaw.ca.

CHAPTER 4

- ¹ R.S.C. 1970, c. C-32 [hereinafter *CCA*].
- ² Industry Canada, August 22, 2000.
- ³ S. 109(1) of the *CCA*.
- ⁴ S. 117 of the *CCA*.
- ⁵ R.S.C. 1985, 5th Supp., c. 1 [hereinafter *ITA*].
- ⁶ S. 230(3) of the *ITA*.
- ⁷ S. 155(2) of the *CCA*.
- ⁸ S. 112 of the *CCA*.
- ⁹ R.S.O. 1990, c. C-10.
- ¹⁰ S. 149.1(3) and (4) of the *ITA*.
- ¹¹ S. 65(2) of the *CCA*.

CHAPTER 5

- ¹ Industry Canada, Corporations Directorate Policy Summary on Not-for-profit Corporations, Part F, ss. 1-4 [hereinafter Policy Summary].
- ² Though an argument can be made that a "standing committee" must also necessarily be contemplated in the bylaws, in practice there is no operational difference between a temporary special committee established by board resolution and an on-going committee mandated to deal with, for instance, audit or board nomination matters, through a resolution.
- ³ Policy Summary, Part G, ss. 1-7.
- ⁴ See S. Robert, *et al.* eds. *Robert's Rules of Order Newly Revised*, 10th ed. (Perseus: Cambridge, Massachusetts, 2000) at pp. 489-491.

CHAPTER 6

- ¹ See J. Carver, *Boards That Make a Difference* (Jossey-Bass Inc.: San Francisco, 1990); Also see H.B. Johnson, "Getting on Board: Legal, Ethical, and Practical Considerations for Nonprofit Board Members" (1997) Winter, *Tulsa Law Journal*.
- ² S. 93 of the *Canada Corporations Act*, R.S.C. 1970, c. C-32 [hereinafter *CCA*].
- ³ The "wilful neglect" test set out in s. 93 of the *CCA* is not found in s. 124 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. The indemnification bylaw should be drafted to reflect this.
- ⁴ R.S.O. 1990, c. C-38, s. 80.
- ⁵ S. 90 of the *Québec Companies Act*, R.S.Q. c. C-38.
- ⁶ S. 21(3) and s. 157(1) of the *CCA*.
- ⁷ S. 98 of the *CCA*.

CHAPTER 7

- ¹ *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) [hereinafter *ITA*]
The exemption from income tax in favour of registered charities is provided for in para. 149(1)(f). Exemptions from other taxes in the Act - taxes under Parts IV, IV.1, V.1, VI - are provided for in s. 227(14). The exemption from tax under Part 1.3 is provided for in para. 181.1(3)(c). Under para. 149(1)(l) an organization which "in the opinion of the Minister" is not a charity, is exempt from income tax as a non-profit organization. By virtue of this provision, if, in the Minister's opinion, an organization is a charity, it must become registered as one, or else lose its exemption.
- ² The credit for individuals is provided for in s. 118.1 and the deduction for corporations is provided for in s. 110.1.
- ³ See Interpretation Bulletin, IT-496R, Non-profit organizations," s. 13.
- ⁴ *Ibid.* s. 8. Directors of not-for-profit corporations should be aware of the distinction between a surplus and a profit, and understand that an entity's non-profit status will not be jeopardized merely because revenues exceed expenses. What constitutes an excessive surplus cannot be stated with certainty, as it will vary from situation to situation. If a significant surplus is characteristic of the corporation's operations or is anticipated, the board may wish to consider setting out a policy on when and/or for what the surplus is to be used.
- ⁵ "Qualified donees" are defined in s. 149.1(1) of the *ITA*.
- ⁶ S. 248(1) "registered charity".
- ⁷ S. 149.1(1).
- ⁸ (1601), 43 Eliz. 1, c. 4. (U.K.).
- ⁹ [1891] AC 531 (HL) (hereinafter *Pemsel*).
- ¹⁰ [1982] Ch. 321.
- ¹¹ *Ibid.* at 332.
- ¹² *Pemsel*, *supra* note 9 at 583.
- ¹³ S. 149.1(6).
- ¹⁴ S. 149.1(1) "charitable purposes".
- ¹⁵ S. 149.1(1) "charitable foundation".
- ¹⁶ S. 149.1(1) "charitable foundation".
- ¹⁷ S. 149.1(1) "charitable organization" and "public foundation".
- ¹⁸ S. 149.1(1) "charitable organization" and "public foundation".
- ¹⁹ S. 168(1).
- ²⁰ S. 172(3).
- ²¹ S. 189.

- ²² Para. 149.1(4)(a). Investing in a limited partnership is carrying on a business. See Document 2000-60005475, May 10, 2000.
- ²³ Information Circular IC87-1, "Reg. Charities - Ancillary/ Incidental Political Activities", February 25, 1987 sets out in more detail the Canada's Customs and Revenue Agency's views on the permissible political activities of a charity. IC87-1 does not define "political activity." It does provide examples.
- ²⁴ S. 149.1(1.1).
- ²⁵ 89 DTC 5115; [1989] 1 CTC 274 (FCTD) varied 92 DTC 6031; [1992] 1 CTC 1, (FCA) (hereinafter *Friedberg*).
- ²⁶ *Ibid.* at 6033, citing *MNR v. Zandstra*, 74 DTC 6416; [1974] CTC 503, per Heald J. at 6419.
- ²⁷ Interpretation Bulletin IT 110-R3, "Gifts and Official Donation Receipts", June 20, 1997.
- ²⁸ *Ibid.* at para. 3.
- ²⁹ *Slobodrian v. MNR*, [1998] 3 CTC 2654 (TCC).
- ³⁰ Document 9800525, April 15, 1998.
- ³¹ (1999). 99 DTC 5722; [2000] 1 CTC 35 (FCA).
- ³² S. 118.1(1) "total charitable gifts".
- ³³ S. 118.1(1) "total gifts".
- ³⁴ Capital Gains realized from dispositions of the gifted property are, in the view of the Canada Customs and Revenue Agency, substituted property. These are included back into the quota regime in the year in which they are actually expended (s. 149.1(1) "disbursement quota", clause A.1).
- ³⁵ S. 149.1(1) "disbursement quota", clause A(c). S. 149.1(4.1) prohibits this exception from being used to delay unduly the expenditure of amounts on charitable activities of a charity. Where that is the purpose of the payment, the Minister may deregister the charities. Thus one charity cannot grant to another, counting the grant towards the satisfaction of its quota, then the recipient charity, in the second year, grant back to the donor, counting the grant towards the satisfaction of its quota, and so on.
- ³⁶ This would be available where a charity has had high start-up costs or an unsuccessful and costly fundraising campaign or has not, because of market conditions, achieved its expected rate of return on its investments.
- ³⁷ S. 149.1(20).
- ³⁸ The calculation of the disbursement quota allows for some flexibility. Reg. 3701 provides that the prescribed amount against which the 4.5% is applied is determined as follows: (a) choose a number not less than 2 and not more than 8 of equal and consecutive periods that total 24 months and that

end immediately before the beginning of the year; (b) aggregate for each period chosen under para. (a) all amounts, each of which is the value, determined in accordance with s. 3702, of the property owned by the foundation and not used directly in its charitable activities or administration on the last day of the period;

(c) aggregate all amounts each of which is the aggregate of values determined for each period under para. (b); and (d) divide the aggregate amount determined under para. (c) by the number of periods chosen under para. (a). Reg. 3702 provides a series of rules to determine the value of property held by the foundation. S. 3701(3) states that the number of periods chosen by the foundation cannot be changed without the authorization of the Minister. The decision as to the number of periods that a foundation chooses can make a considerable difference in its disbursement quota.

- ³⁹ Ss. 149.1(6.3), (13).

CHAPTER 8

- ¹ This discussion on board manuals focuses on the traditional board manual. In our view, the policy governance manual favoured by adherents to the policy governance model does not eliminate the need for the material contained in a traditional board manual. Their purposes are much different.