

**LEGAL CONSIDERATIONS FOR YOUR
SCHOOL'S BUILDING AND
CAPITAL PROJECTS**

**SCSBC Business &
Development Conference**

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CEDAR SPRINGS CHRISTIAN RETREAT CENTER

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RECENT LEGAL DEVELOPMENTS

- ▶ New Society Act in BC
 - In force November 2016
 - 2 years from November 2016 to “transition”
 - However new Act will prevail over current Bylaws

- ▶ What We Are Recommending
 - Review constitution and bylaws in 2016
 - Adopt new Constitution and Bylaws that are compliant with Act in 2016
 - File new documents and transition as soon as possible after new Act in force

WORKSHOP OVERVIEW

- ▶ Property Issues
- ▶ Legal Agreements
 - General Principles
 - Financing and Security Agreements
 - Property Development and Construction Agreements
 - Property Acquisition & Use Agreements
 - Third Party Use of Property
- ▶ Fundraising Issues
- ▶ Asset Protection/Risk Management

PROPERTY ISSUES

Real Estate

- ▶ Review Title(s)
 - How is title held?
 - Are there multiple parcels?
 - Review financial charges (mortgages)
 - Review non-financial charges (restrictive covenants)
- ▶ Review municipal zoning
- ▶ Has the school identified and evaluated the extent of liability exposure for environmental issues?
- ▶ Have property tax exemption opportunities been considered?

PROPERTY ISSUES

Bill 29 and Community Charter – Statutory Exemption

- ▶ a ***building owned by an incorporated institution of learning that is regularly giving children instruction*** accepted as equivalent to that given in a public school, ***and that is actually occupied and wholly in use by the incorporated institution for the purpose of giving the instruction***, together with
 - (i) the land on which the building stands, and
 - (ii) an area of the land surrounding the land referred to in subparagraph (i) or improvements on the area of land, or both, that are owned by the incorporated institution and that are reasonably necessary for the purposes of the incorporated institution, including, without limiting this, the following areas of land and improvements:
 - (A) playing fields, athletic grounds and facilities, playgrounds and improvements related to any of them;
 - (B) storage, maintenance and administrative facilities;
 - (C) dormitories for students;
 - (D) parking lots, walkways and roads;

PROPERTY ISSUES

Community Charter & Bill 29 – Statutory Exemption

- ▶ Under 224(c) of the Community Charter there is a “permissive exemption”:
 - “land or improvements that the council considers would otherwise qualify for exemption under section 220 [general statutory exemptions] were it not for a secondary use”

BASIC CORPORATE AGREEMENTS

- ▶ General Agreements & General Principles
 - Written Agreements
 - Be Careful with Precedents
 - Mixing and Matching Precedents
 - Watch Definitions!
 - Assignment
 - Enurement
 - Be as “Reasonable” as possible
 - Conflict Resolution – Mediation and Arbitration
 - Renewal and Termination Provisions

BASIC CORPORATE AGREEMENTS

- ▶ **Property Acquisition & Use Agreements**
 - Standard Form Real Estate Contracts
 - Subject conditions
 - When to get legal advice
 - Offers to Lease and Lease Agreements
 - Terms and renewal rights
 - Operating Cost Exclusions:
 - Structural repairs & replacements
 - Capital Repairs (HVAC, Roof & Energy Conservation Equipment)
 - Depreciation, amortization & interest
 - Landlord Taxes
 - Landlord liability exclusions
 - Consider Options to Purchase

BASIC CORPORATE AGREEMENTS

- ▶ **Financing and Security Agreements**
 - Banking Agreements
 - Signing officers
 - Loan Commitments/Agreements
 - Bank Fees, Interest Calculation, Legal Costs
 - Security & Security Release provisions
 - Guarantees & Indemnities
 - Prepayment Conditions
 - Events of Default
 - Mortgages
 - Collateral vs. specific
 - Subsequent mortgages
 - General Security Agreements (GSA's) & Assignments of Rent
 - Ordinary Course exception

BASIC CORPORATE AGREEMENTS

- ▶ Property Development and Construction Agreements
 - Expert advice recommended
 - “Standard Form” Architect, Consultant and General Contractor (CCDC) Agreements
 - Builders Lien requirements and hold backs
 - Statutory Rights of Way
 - Easements
 - Restrictive Covenants

Third Party Use Issues

Use of Property by Third Parties

- ▶ Board and management should be made aware of the potential liability exposure in permitting third parties to use its property
- ▶ Has the school developed and implemented a third party property use policy?
- ▶ Has the school developed and implemented a third party property use agreement with appropriate indemnification?
- ▶ Does the school require evidence of liability insurance from third party users of its facilities?
- ▶ Does the school charge appropriate fair market rental fees to third parties?

Fundraising Issues

Overview

1. How CRA views Fundraising
2. Donor Rights
3. Estate Planning Programs
4. Donor Restricted Gifts
5. Soliciting Investments
6. Related Business

Fundraising Issues

How CRA views Fundraising

- ▶ The *Income Tax Act* stipulates that a registered charity must devote all of its resources to the charitable purposes and activities of the charity
- ▶ However, this requirement does not preclude the allocation of resources to *reasonable* fundraising and administrative costs
- ▶ Fundraising cannot be an end in itself nor amount to a collateral purpose
- ▶ Fundraising activities cannot compete with those that are normally carried on by for-profit enterprises

Fundraising Issues

- ▶ Fundraising events cannot be of equal or greater importance than an organization's principal charitable purpose
- ▶ All the participants of a fundraising event must be aware that the purpose of the event is to raise funds for a charitable purpose
- ▶ The people involved in the operation of the event should be volunteers especially if the activity in question is a related business

CRA's Fundraising Guidance

- ▶ First Principle – Charities have to report as fund-raising *all costs* related to *any activity* that includes a *solicitation of support* or that is in advance of an *ask*

Unless

- ▶ The charity can demonstrate that the activity would have been undertaken without the solicitation of support:
 - If substantially all resources advance a charitable objective other than fundraising then the costs are not entirely fund-raising
 - 4 part test (then allocation required)

Fundraising Guidance

- ▶ Evaluation “Grid”
- ▶ Considers ratio of fundraising costs/fundraising revenue in each fiscal period and categorizes them:
 - Rarely acceptable 70%+
 - Generally not acceptable 50 – 70%
 - Potentially not acceptable 35.1 – 49.9%
 - Generally acceptable 20 – 35%
 - Acceptable Less than 20%

Fundraising Guidance

- ▶ Prohibited Conduct
 - Illegal conduct
 - Fundraising becoming primary purpose
 - Excessive private benefit
- ▶ Conduct that may raise concerns
 - Non arms length fundraising contracts
 - Lack of proper documentation around fundraising
 - >50% of revenue going to fundraisers
 - Commission or bonus based remuneration
- ▶ Schools should take time to consider and put measures in place to assist with understanding the place of the organization on the grid and providing sufficient information to stakeholders

Fundraising: Donor Rights

Donor Rights

Potential areas of Liability to Donors in Fundraising

- ▶ Misrepresentation involving issuance of charitable receipts (or amount of receipt)
- ▶ Failure to comply with donor restrictions
- ▶ Failure to disclose excessive fundraising costs
- ▶ Donor relying upon improper tax advice involving donations
- ▶ Breach of fiduciary duty and/or breach of trust in applying funds to charitable purposes

Fundraising: Donor Rights

Donor Rights – Codes of Ethical Fundraising

- ▶ The Right to Disclosure
- ▶ The Right to Transparency
- ▶ The Right to Financial Information
- ▶ The Right to Protection from Undue Influence
- ▶ The Right to Expect Concern for the Donor's Well Being
- ▶ The Right to Independent Legal Advice
- ▶ The Right to Compliance with Donor Imposed Restrictions
- ▶ The Right to Confidentiality

Fundraising: Estate Gift Planning

Estate Planning Programs

- ▶ Liability may attach to charity, its directors and/or to fundraisers
- ▶ Allegations of undue influence in the estate planning process may lead to liability
- ▶ Liability risk where charity provides advice on Will structuring or tax planning without recommending independent legal advice
- ▶ Risks increase if charity provides legal services or assists in the preparation of Wills or Testamentary Instruments

Fundraising: Estate Gift Planning

Estate Planning Programs “Do’s”

- ▶ Both the charity and donor should use professional advisors in gift and estate planning
- ▶ Take steps to raise the shield of insurance in relation to gift and estate planning programs
- ▶ Do not retain original wills and codicils
- ▶ Exercise due diligence on gifts in kind

Fundraising: Estate Gift Planning

Estate Planning Programs “Don’ts”

- ▶ Directing legal work to one lawyer who may be, or may appear to be dependent upon referral work from the charity
- ▶ Paying any portion of the legal costs of the donor for will preparation or estate planning
- ▶ Acting as trustee under Will or attorney under Power of Attorney
- ▶ Preparing the Will or providing estate planning advice without the donor obtaining independent legal advice

Fundraising: Estate Gift Planning

Estate Planning Programs “Don’ts”

- ▶ Recommending how much the estate should give to a charity without the donor obtaining independent legal and tax advice
- ▶ Completing a Will guide on behalf of the donor (rather than the donor completing himself or herself)
- ▶ Meeting with the lawyer and donor when instructions are given for Will
- ▶ Being present when the Will is signed as a witness or observer
- ▶ Offering to store the original documents on behalf of the donor

Fundraising: Estate Gift Planning

Play an Informational and Resource Role:

- ▶ Explanation why a Will and POA are necessary instruments, with or without a gift to charity
- ▶ Explanation of what happens if there is no Will or POA
- ▶ General Information re estate planning options
- ▶ Explain how donor can complete a basic Will guide
- ▶ Provide written description of full legal name of charity to assist lawyer preparing Will
- ▶ Recommend that donor get independent financial, tax and legal advice
- ▶ Establish broad network of experts

Fundraising: Restricted Gifts

Donor Restricted Gifts

- ▶ Unrestricted Gifts
 - Gift provided to further general charitable purposes – no restrictions or limits from donor
 - Can be used to further any of the charitable purposes at the discretion of the directors
 - May be internally restricted by board
- ▶ Restricted Gifts
 - Gift that is subject to binding restrictions, limitations or conditions that are imposed by the donor
 - Must be complied with by charity unless void as being contrary to public policy or varied by Court order. A failure to comply may = breach of trust
 - Generally considered a “charitable trust” (charity within an charity)

Fundraising: Restricted Gifts

- ▶ Varying Restricted Gifts
 - Charity may not unilaterally vary restrictions
 - Gifts from estate can not be varied with the consent of the Executor
 - Even the consent of the donor to a variation is technically insufficient (subject to terms of settlement document)
 - Court Order required (*cy pres* order)

Fundraising: Restricted Gifts

- ▶ Managing Restricted Gifts
 - Identify donor restricted gifts
 - Review and Approve Restrictions:
 - Are restrictions charitable?
 - Do they fall with Charity's purposes?
 - Are restrictions possible or practical?
 - Are the restrictions acceptable?
 - If "no" to any of the above consider Court application to vary terms or **RETURN THE GIFT**
 - Must retain and invest funds in accordance with specific powers granted
 - Charity may not borrow against restricted funds
 - Proceeds of Sale remain "impressed with trust"

Fundraising: Restricted Gifts

▶ Avoiding Donor Restricted Gifts

- Encourage donors to give unrestricted gifts. Consider providing sample bequest language that designates gift to charity “for its general purposes”
- Encourage non-binding direction language with bequests i.e. “without creating a binding legal obligations it is my desire that the funds be applied to....”
- Fundraising materials should contain a statement to explain that all gifts are considered to have been given to further the general charitable purposes in accordance with needs unless the donor specifically states that the gift is subject to binding restrictions and that the donor should contact the charity to discuss specific restrictions before making a restricted gift

Fundraising: Restricted Gifts

▶ Avoiding Donor Restricted Gift Problems

- Include a clear statement in fundraising material for specific programs that any surplus monies remaining after the sufficient funds have been raised for the designated project or program will be used to further the general charitable purposes of the charity
- When providing suggested language for donors or their lawyers where the donor wishes to provide a restricted gift, include a *cy pres* clause that will allow the charity to unilaterally alter the restrictions imposed by the donor in the event that the restrictions become impossible or impractical in the future

Fundraising: Soliciting Investments

Soliciting Investments

- ▶ Charities may seek investments because:
 - Donation opportunities exhausted
 - Borrowing from institutional lenders unavailable
 - Cost of borrowing from institutional lenders is excessive
- ▶ Types of Investments
 - Unsecured debt instruments such as promissory notes
 - Unsecured loan certificates and guaranteed loan certificates
 - Bonds, secured and unsecured
 - Debentures, secured and unsecured
- ▶ **INVESTMENT PROGRAMS OFFERED BY CHARITIES INCLUDING THE ABOVE LIKELY CONSTITUTE THE SALE OF SECURITIES AND ARE THEREFORE MAY BE SUBJECT TO THE SECURITIES LAWS**

Fundraising: Soliciting Investments

General Overview of BC Securities Legislation:

- ▶ "security" includes a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, certificate of share or interest
- ▶ Exemption from Registration under the Act and from preparing and filing a Prospectus for "organizations organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit", if:
 - no part of the net earnings accrue to the benefit of a security holder,
 - no commission or other remuneration is paid in connection with the sale of the securities,

Fundraising: Soliciting Investments

Sale of Investments – Exposure to Liability:

- ▶ Failure to advise investors of unregulated nature of securities being offered
- ▶ Failure to disclose reasonable details of investment such as
 - Purposes for which monies are being raised
 - Explaining fully the security being offered
 - Explaining the nature of the risks associated with the investments
 - Explaining Investment Returns accurately
- ▶ False or misleading statements about financial strength of charity
- ▶ Suggesting Investment are secure when they are not
- ▶ Failure to recommend that potential investor first obtain independent tax and legal advice
- ▶ Failure to Disclose actual or pending financial crisis

Fundraising: Related Business

Related Business

- ▶ The *Income Tax Act* says that charities can lose their registration if they carry on an unrelated business
- ▶ By implication, the law allows charities to carry on a **related business**
- ▶ Charities designated as private foundations are an exception—they can lose their registration if they carry on any kind of business, whether related or unrelated
- ▶ The *Income Tax Act* does not define a related or unrelated business, apart from saying that a volunteer-run business is to be considered a related business, even if there is no link between the business and the objects of the charity

Fundraising: Related Business

- ▶ Some activities are intended to generate a profit but are **not** considered to be businesses:
 - *Soliciting donations* – This is not considered to be a commercial activity because donors do not expect any good or service in return for their contributions. Since the activity is not commercial, it is not considered to be a business.
 - *Selling donated goods* – This is not considered to be a commercial activity because businesses do not depend on donations to create their inventories. Also, in selling off donated items, the charity does not assume the costs or level of risk usually associated with running a business. Rather, it merely seeks to convert a donated asset into cash.

Fundraising: Related Business

- ▶ **Fees** are charged in the context of many charitable programs. The presence of fees does not necessarily mean that a program is non-charitable or that the charity is engaging in a business activity. Programs remain charitable as long as they manifest the two essential characteristics of charity—altruism and public benefit.
- ▶ Programs can cease to be charitable programs and become businesses if these elements are lost.
- ▶ Examples of fees earned in the context of charitable programs include rent in low-income housing programs, school tuition fees, and museum admission

Fundraising: Related Business

- ▶ What is a Related Business
 - volunteer run business (90% of those engaged are unpaid volunteers)
 - business that is “**linked** to a charity’s purpose” and is “**subordinate** to that purpose”
- ▶ Linked:
 - an activity necessary for effective operation of core program or one that improves service delivery or programs (gift store, parking lot, cafeteria, book store)
 - an off-shoot of a core program – creating an asset that can be exploited in a business which is a by-product (church charges for tapes of Xmas recording; heritage grist mill sells flour produced)
 - a use of excess capacity (buildings or equipment rentals)

Fundraising: Related Business

- ▶ Subordinate:
 - subservient to the dominant charitable purpose rather than an end unto itself
 - minor portion of charity’s resources and attention
 - integrated into other activities vs. ‘stand alone’
 - is the decision making dominated by the charitable objectives
 - is there an element of private benefit
- ▶ Operating a business that is not a related business can lead to de-registration so it is important to identify activities that do not fit within the policy and to develop a plan to take them out of the charity
- ▶ Helpful “Decision Tree” on CRA website

Asset Protection Strategies

- ▶ Operational Due Diligence
- ▶ Insurance
- ▶ Incorporation
- ▶ Multiple Incorporations
 - Consider separating particularly risky aspects of operations
 - Consider separating independent operations within a single entity
 - Consider legal separations where there are multiple locations

Thank you for Attending!

QUESTIONS?
&
DISCUSSION