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## **DUE DILIGENCE BY DIRECTORS AND OFFICERS OF CHARITIES AND NFPs IN RESPONSE TO COVID-19**

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*By Terrance S. Carter and Ryan M. Prendergast \**

### **A. INTRODUCTION**

On March 11, 2020, the Director-General of World Health Organization (“WHO”) declared that the COVID-19 outbreak is a worldwide pandemic. COVID-19 has resulted in unprecedented action by governments and businesses to help “flatten the curve” of new cases of infection to manageable levels over the coming months. As well, the premier of Ontario and several other provinces have declared states of emergency and shut-down of non-essential business. In response, directors and officers of charities and not-for-profits (“NFPs”) need to consider what are the appropriate due diligence steps that they need to take in order to fulfill their fiduciary duty to protect the best interests of their organisation, reflecting the care and skill of what a reasonably prudent person would do under similar circumstances.

In this regard, under the *Canada Not-for-Profit Corporations Act* (“CNCA”), the Ontario *Not-for-Profit Corporations Act* (“ONCA”) (expected to be proclaimed later in 2020), and the Ontario *Corporations Act* (“OCA”), directors and officers of charities and NFPs are required to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

This *Bulletin* provides a brief overview of some of the basic issues that directors and officers of charities and NFPs will need to consider in light of the COVID-19 pandemic, recognising that the circumstances

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\* Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent, is the managing partner of Carters Professional Corporation and counsel to Fasken on charitable matters. Ryan M. Prendergast, B.A., LL.B., is a partner practicing in the area of charity and not-for-profit law.

of each organisation are unique and that “no one size fits all.” As well, the suggestions in this *Bulletin* do not replace the need for specific legal advice in order to determine what needs to be done in a particular fact situation.

## **B. BASIC ISSUES FOR DIRECTORS AND OFFICERS TO CONSIDER**

The following is a list of some due diligence issues that directors and officers of a charity or NFP may want to consider in response to COVID-19:

- First and foremost, always document in writing the steps that are being taken and the dates on which those action items are being undertaken. This will be helpful in evidencing the due diligence that the board and the officers of the charity or NFP are deciding to take if a legal challenge was to come up at a later time.
- The board of directors should be convened as soon as possible and continue to meet thereafter as frequently as may be necessary, possibly creating a special committee to oversee initiatives of the board. The bylaws of the charity or NFP should be consulted to determine that meetings of the board can be held by phone. If not, then consideration may need to be made to amending the bylaws, with the assistance of legal counsel, in order to authorise the board to meet by telephonic or other electronic means (see *Charity & NFP Law Bulletin* No. 466, *NFP Board and Members’ Meetings Amidst COVID-19 Pandemic* for additional information about member and director meetings).
- Monitor federal, provincial and local public policy and public health-related orders, directives and restrictions which may impact the operations of the organisation both inside and outside Canada.
- Monitor government actions in all jurisdictions in which the organisation is carrying out any programs that may be affected.
- Review any existing risk management, disaster recovery and remote access policies of the organisation and, if these are not in place, consider adopting and implementing such policies as soon as possible.
- Be aware of any appropriate health and safety measures for staff, volunteers, clients and beneficiaries so any potential exposure to COVID-19 is either reasonably minimized or eliminated, particularly with

respect to vulnerable beneficiaries that may be adversely impacted by COVID-19, and evaluate and manage risks related to employee shortages, project cancellations, disruptions, and delays.

- Review insurance policies, including directors' and officers' insurance and business interruption insurance, if applicable, as well as any travel insurance policies covering staff or volunteers unable to return to Canada as a result of international travel restrictions.
  
- Review all contracts with regard to the effect of COVID-19, as well as any government directive or public health recommendation as a result of COVID-19, on planned events or conferences, real estate transactions or the delivery or receipt of goods and services generally (see *Charity & NFP Law Bulletin* No. 467, *COVID-19 and the Performance of Contracts* for more on how COVID-19 may provide an excuse for the non-performance of contracts).
  
- Review all funding or other agreements with governments or other agencies to determine the charity's or NFP's obligations to deliver services or other goods and how that may be impacted by COVID-19.
  
- Review the financial health of the charity or NFP by determining the anticipated impact of COVID-19 upon donations, grants, investment returns, sponsorship income, membership income, sale of materials, and any other sources of income and then determine what the corresponding actions should be to offset the anticipated reduction in income.
  
- Ensure that salaries of employees continue to be paid on a timely basis, otherwise directors can be left exposed to personal liability for unpaid salary and vacation pay.
  
- To the extent that an organisation is having to consider layoffs and/or elimination of staff, legal advice from employment counsel needs to be sought (see *Charity & NFP Law Bulletin* No. 465, *Employer Obligations and Considerations in Response to the COVID-19 Pandemic* for additional information about employment law issues).
  
- Ensure that all employee statutory deductions and HST/GST remittances are paid on a timely basis, otherwise directors can be exposed to personal liability.

- Work with legal counsel to review bylaw provisions concerning members' meetings and determine if annual members' meetings may need to be postponed or whether alternative methods for holding member meetings may need to be considered, such as by telephonic or other electronic means if permitted in the bylaws or governing statute for the charity or NFP (see *Charity & NFP Law Bulletin* No. 466, *NFP Board and Members' Meetings Amidst COVID-19 Pandemic* for additional information about members' meetings).
- Determine the extent to which the organisation's measures in response to COVID-19 are in line with privacy legislation and consider what steps may be necessary in order to obtain appropriate consent (see *Charity & NFP Law Bulletin* No. 468, *Privacy and Data Security in Response to COVID-19* for additional information regarding the impact of COVID-19 on privacy).
- Manage external and internal communications with staff, volunteers, clients, beneficiaries and counterparties with a view to mitigate or reduce the impact of the crisis to the organisation as a whole.

## C. CONCLUSION

The COVID-19 pandemic has triggered unprecedented action by governments and businesses at a global scale, causing significant impact to the Canadian economy, which is expected to last for months. In this climate of uncertainty, directors and officers of charities and NFPs have a duty to act with skill and diligence with a view to the best interests of their respective organisations. Hopefully, this brief listing of due diligence issues for directors and to consider will be of help in that regard.