

Does a charity need a Charity lawyer?

With the proliferation of books and information on the internet dealing with legal issues affecting charities one may wonder whether a Canadian charity needs a lawyer to provide legal advice. Certainly many charities hire a lawyer when they are incorporating or when obtaining charitable status. They will often not retain a lawyer further until there is some crisis of a legal nature such as loss of charitable status, an audit, termination of an employee, some PR fiasco etc. Most of the larger charities like universities and hospitals have in-house counsel and regularly retain legal advice. Does a small to medium-sized charity also need legal advice?

The short answer is no. Charities are not required to retain a lawyer to assist with occasional or ongoing legal issues. There are no one size fits all situations with charities. The majority of charities, I understand, have revenue of under \$50,000 per year and many have no revenue whatsoever and the major activity of many charities in that group seems to be the filing of a nil T3010 return. Clearly this discussion is not about these very small or perhaps non-operating charities.

As I will discuss in this article, the long answer is that having a non-profit or charity lawyer is a good idea for most Canadian charities.

Why do some charities not have a lawyer or think they don't need one?

- a) The proliferation of available information on charities begs the question whether legal advice is necessary. After all, there is an article on almost every subject.
- b) The main concern with retaining a lawyer in a professional capacity is that lawyers are expensive – they typically charge by the hour and their rates vary from \$150 per hour to \$600 or more per hour. It is interesting that many budgets include a line for accounting but not for legal services or, if they have one for professional services, it often means accounting and bookkeeping.
- c) Some others have had bad experience with lawyers and have negative stereotypes that “all lawyers are ...”. It is not unheard of for a lawyer to use his or her legal skills to advance his or her own agenda or view on how an organization should operate.
- d) They have a lawyer on the board of directors. The lawyer may be a generalist lawyer whose predominant practice is anything but non-profit or charity law –he

or she may do real estate, wills, a little criminal law and a bit of civil litigation. The lawyer may be a for-profit corporate lawyer who cares about the charity. They are often well meaning and sometimes do a good job.

Why should a charity retain a non-profit or charity lawyer?

Time

Partly the issue is one of time – If one spent a few months straight reading at the library or on the internet about legal issues affecting Canadian charities one could learn a lot. Boards and senior staff of charities have many issues competing for their attention and very few have a large amount of time they can afford to devote to legal issues.

Training and Expertise

Partly the issue is one of training and resources - In many cases the board members and senior staff have the humility of understanding that they may not have a legal education which in some cases is useful for understanding and analyzing the legal issues facing a charity. In my opinion, you don't hire a criminal defence lawyer to obtain a patent so why would you think that a personal injury or environmental lawyer can deal with non-profit organizations and charity law. If you have a \$5 million endowment would you invest it yourself or hire a professional investment advisor? These non-charity lawyers understand some of the basics but in many cases don't know what they don't understand!

Legally Specific Resources

Law firms pay substantial amounts every year to access extensive collections of legal specific resources, buy books and periodicals, have in place people to conduct legal research or conduct certain types of appropriate searches.

Focus on charitable purposes and preservation of time of staff and board

Many issues that a charity has to deal with that are of a legal nature can be solved by a short conversation – instead of spending months rehashing the same issue at the board level – wasting board of directors time, wasting the ED's time and causing considerable stress for those involved. I am always amazed at how some organizations can waste the time of their staff and board. When 15 board members, many of whom are professionals who charge substantial amounts for their skills, are sitting around the table needlessly agonizing over an issue, this is wasteful and causes resentment from the board members who feel that their time is not being effectively used by the charity.

An ounce of prevention is worth a pound of cure

Lawyers generally prefer dealing with highly motivated clients who are willing to spend lots on legal services rather than a client who has no legal budget and no interest in spending any funds on legal services. There is nothing like a CRA audit, a negative

article in the local paper or some other crisis to motivate a charity. It is often a lot harder to explain to a person the importance of spending ten cents on the dollar to avoid the problem than when the charity is facing annihilation. One bad article in a local or national newspaper could cost a charity hundreds of thousands or even millions of dollars in lost donations – which could pay for decades of good legal advice!

Knowing there is a problem is not the same as fixing a problem

To deal with legal issues for charities one needs to first identify the issue and whether there is a problem. Some charities are better at doing this than others. But it does not add much to identify a problem without fixing the problem. For a lawyer whose practice involves a lot of work with non-profits and charities the solution is within reach and affordable. Many charities fret about matters that are not legally significant, although they think they are, while being wholly unaware of important legal issues with the operations of the charity.

Save money

In short, legal issues that are ignored or not properly handled can create many different types of liabilities including personal liabilities for the directors of the charity. In some cases senior staff has been either fired or blamed for legal issues that were not prevented. It is far more cost effective, less risky and less of a distraction to proactively deal with legal issues prior to them becoming a full blown legal problem.

Hire a good lawyer before you need one, not afterwards

When your charity is in crisis or is facing a major legal problem it is rarely the best time to evaluate who is the best lawyer with skills and values that are complementary to your organization. It is best to retain and work with a lawyer for either a small project such as answering some questions or conducting an informal legal audit rather than retaining a lawyer or law firm to deal with a major problem and then realizing that that was not the right person or firm to have hired. It is very difficult at that point to change lawyers.

You get what you pay for

Some organizations have tried to solve the problem by having a lawyer on the board but this is rarely a satisfactory solution for either the lawyer or the charity. A lawyer on the board can be a useful resource. Lawyers are trained in terms of analytical skills, however, having a lawyer on the board cannot be a substitute for impartial legal advice any more than playing golf with a cardiologist replaces an annual checkup. Rarely does the lawyer on the board have significant knowledge of non-profit and charity law. It is also very difficult for a board member lawyer to provide impartial legal advice as it is sometimes difficult for someone who is part of a collegial group that gets together every month to deal with certain difficult issues at hand. Lawyers who join boards do so to help. They may be willing to volunteer to help with a legal issue, but that does not mean they are prepared to take on the full burden of dealing with all legal issues. By forcing

the lawyer on your board to take on the role of legal counsel you are putting him or her in a difficult position and not necessarily doing your charity any good.

Availability

If you retain a lawyer to provide legal advice you can quickly obtain relevant and accurate advice when necessary. Many EDs and board members understand the importance of having a charity and non-profit lawyer who they can quickly call to obtain assistance when necessary.

Conclusion

Charities should have a charity lawyer - someone who is knowledgeable about non-profit and charity law. In many cases the goodwill of a charity is worth many millions of dollars and should be protected. It is not just about trade-marks and intellectual property – it is also about avoiding the reputation of the charity being sullied.

Mark Blumberg is a lawyer at Blumberg Segal LLP in Toronto, Ontario. He can be contacted at mark@blumbergs.ca or at 416-361-1982 x. 237. To find out more about legal services that Blumbergs provides to Canadian charities and non-profits please visit the Blumbergs' Non-Profit and Charities page at www.blumbergs.ca/non_profit.php or globalphilanthropy.ca

This article is for information purposes only. It is not intended to be legal advice. You should not act or abstain from acting based upon such information without first consulting a legal professional.