CANADIAN FUNDRAISER eNEWS

March 31, 2008
Article 2 of 14

CHARITY LAW - **Bryan Buttigieg**

Not knowing penalties could get executives in serious trouble

Nonprofit executive are generally well aware of the multitude of statutory obligations that govern the day-to-day operation of charitable and nonprofit organizations. They will also be aware that many of the applicable statutes will typically include an offence section which makes any person who contravenes any portion of the act (or underlying regulations) guilty of an offence punishable by fine or, in some cases, even imprisonment.

Often these offence sections go unnoticed and little attention is paid to them until some unfortunate individual or organization finds itself involved in a regulatory investigation. No one ever expects to be in violation of those regulatory requirements and no one really has the time to know what could be done proactively.

In some cases, the very existence of the obligation comes as a surprise. In what follows, we hope to provide a framework to help prepare for the unthinkable day when an organization finds itself the subject of an investigation that could ultimately result in a punitive sanction.

In Ontario, any provincial statute that declares any act to be an offence and imposes a fine or punishment is, in turn, governed by the rules of the *Provincial Offences Act.* Convictions under such statutes do not result in a criminal record but can still have very significant negative consequences.

Fines under statutes such as the *Occupational Health and Safety Act* can be in the hundreds of thousands of dollars. A conviction under a provincial statute, even where the penalty is relatively small, can, in turn, result in revocation of a licence by a professional body or licensing authority. (See for instance s.9 of the *Charitable Gifts Act* – anyone convicted of an offence is liable to a fine of up to $10,000, up to one year imprisonment, or both.)

Because the offences are not considered criminal, they may well not require the wilful intent that one normally associates with a crime. In other words, it is possible to commit an offence under a provincial statute without "intending to" but simply by failing to pay reasonable attention to preventing committing the offence.

In all but the most minor of offences, however, there are defences that are available if the defendant can show" "reasonable care" was taken. Offences of this type are

called “Strict Liability Offences”. Most provincial offences that may apply to charities fall into this category.

To avoid a conviction under a strict liability offence, assuming the act in question was in fact committed, the defendant will be obliged to show one of two general types of defences – either that the defendant was operating under a reasonable mistake of fact, which, if true, would have rendered the act innocent, or that the defendant had sufficient systems and checks and balances in place as to prove that reasonable care was being taken to prevent the prohibited act from occurring.

Note that ignorance of the law is never a defence. In short, it is up to the organization to find out what laws apply to it and then to develop systems to ensure compliance.

How is a charitable organization to take these abstract concepts and put them into day-to-day action? There might be hundreds of potentially applicable statutes, each with its own myriad of obligations. We suggest the following steps:

- Initially, engage in a systematic audit of all statutory obligations that cover the day-to-day operation of the organization.
- Undertake at least an informal risk analysis of the ones that are of most concern.
- Consider the size of the potential fines, the consequences of a conviction beyond the simple fine, and whether the offence relates to a type of activity which is part of the daily operation of the organization.
- Procedures should then be put in place to document that all affected individuals in the organization are aware of the legal obligation (thus making sure no one is ignorant of the law).
- If necessary, training should be provided to advise of the obligation and of steps that should be taken to ensure compliance. Policies, training manuals, minutes of meetings all then become part of the "due diligence" that can be demonstrated to a regulator should a need arise.

Industry organizations, competitors and sometimes even regulators can be good sources of information to identify crucial compliance issues and strategies to avoid contravention. One very good way to demonstrate that procedures are reasonable is to demonstrate that they meet or exceed the “standard of the industry” (as long as that standard is not in itself inadequate, of course).

The standard expected is not perfection. But it is an ever-improving standard. Organizations should be engaged in a legal form of continuous quality improvement such as to review their operations regularly, identify mistakes and implement changes to avoid repetition. The task sounds daunting, but can be made more manageable with the right processes in place, and it is one that organizations ignore at their peril.

For further information: Bryan Buttigieg, Miller Thomson, 416/595-8172, bbuttigieg@millerthomson.com; this article first appeared in the firm’s Charities Newsletter, www.millerthomson.com.