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Specialty Vendors – the Sale of Property by Charities, Limited Partnerships and Trusts¹

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Distinction between a charity and a not-for-profit

Charities and not-for-profits are organizations that now pervade every level of our society. They include governments and their agencies at every level; the “mush sector” – municipalities, universities, schools and hospitals; charitable organizations of all types in the religious, educational, health, poverty relief, environmental and other public benefit fields; trade associations; unions; professional societies; business and standards organizations, and many other types of organizations. Charities and not-for-profits have many similarities; however under the *Income Tax Act*² they have a different definition. Generally, the issues in respect of status and capacity to contract in respect to the sale of land do not differ in the analysis between a charity and a not-for-profit organization. However, there are additional statutes which impose restrictions on charitable entities in respect to the ownership of land. The *Income Tax Act*, the *Charities Accounting Act*,³ and the *Charitable Gifts Act*⁴ all have provisions dealing with charities. Generally, the complexities in respect of these statutes arise when a charity is not holding land just for its own use, but when it is deriving income from its land holdings which has a greater impact on leasing than sales.

Charities and not-for-profit organizations generally are established in accordance with one of four legal frameworks. These four structures are trusts, unincorporated associations, corporate bodies under a corporations act, and special Act corporations.

Trusts

Trusts are not commonly used for not-for-profit organizations but are more commonly seen in respect of charities. A trust is generally established by a trustee under which a settler creates the trust and appoints trustees. A trust is not a juridical entity, but rather is a relationship between the trustees and the beneficiaries, with the trustees acting as agents for the beneficiaries with respect to the trust assets. In the case of charities, instead of beneficiaries, there would generally be “objects” or charitable purposes. The charitable trust document typically sets out the purposes or

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² Income Tax Act, R.S.C. 1985 (5th Supp) c.1

³ Charities Accounting Act, R.S.O. 1990, c.C.10

⁴ Charitable Gifts Act, R.S.O. 1990, c.C.8



objects of the trust, and how the trust property is to be managed by the trustees for the benefit of the charitable purposes. It is necessary to review the governing documents to determine whether the trust has the authority and power to dispose of real property. The powers of the trustees are usually set out in the trust document itself.

Trusts cannot execute documents in the trust's name. Rather the trustees must execute documents as trustees of the trust, and should be shown as ABC and DEF, trustees of the 123 Trust. It is important to determine who may execute documents on behalf of the trust. Prudently, a purchaser's solicitor would ask for a solicitor's opinion to confirm the trustee's authority to make the conveyance. Alternatively, the trust instrument will need to be reviewed.

Unincorporated Associations

Unincorporated associations have no separate existence. If they have an establishing document, it may purport to give certain officials power to act on their behalf. However, in the absence of special legislation (eg. union laws) such organizations can only contract through individuals, who may or may not be trustees and who may or may not be able to impose liability on all the members of the association. It is necessary to review the governing by-laws or constitution of the organization to determine whether the organization has the authority and power to dispose of real property. The powers are usually set out in some form of a constitution or by-laws. There are many examples of unincorporated associations that a real estate practitioner may encounter. Examples would be various types of sporting and social associations. Again, the most prudent approach would be to request a solicitor's opinion as to capacity. It should be noted that anyone who wishes to enter into an agreement of purchase and sale with an unincorporated association is essentially contracting with individuals and should proceed accordingly.

Incorporation under a Corporations Act

Corporations may be incorporated without share capital under the *Ontario Corporations Act*⁵ or the *Canada Corporations Act*⁶. Generally, unless otherwise restricted by the letters patent or by-laws of the corporation, the board of directors of such corporations will have authority to authorize the sale of land owned by the corporation.

The powers of the corporation may be limited in the letters patent or supplementary letters patent and it is necessary to review these or obtain an opinion from the solicitor to the corporation that there is no such restriction. Corporations without share capital incorporated under the *Ontario* and the *Canada Corporations Act* are often subject to other legislation which may limit or regulate their ability to enter into sales of land (see for example the *Religious Organizations Lands Act*⁷ discussed below). The types of organizations that one might find as a corporation without share capital are trade or business associations, sporting and athletic associations, social clubs, service clubs and other organizations whose objects are charitable. The

⁵ Ontario Corporations Act, R.S.O. 1990, c.C.38

⁶ Canada Corporations Act, R.S.O. 1990, R.S.C. 1970, c.C.32

⁷ Religious Organizations' Lands Act, R.S.O. 1990, c.R.23



vast majority of social clubs in Ontario are organized as non-share capital corporations under either the OCA or the CCA. However, some clubs are organized as share capital corporations under the OCA. An example of a social club that might be organized under the OCA would be a ski or a golf club which may be structured as share capital corporations in order to raise funds by soliciting subscriptions for shares in the clubs to prospective members. In the case of a charity or a not-for-profit organization incorporated under the OCA, if the organization is selling all or substantially all of its assets or undertaking, such a transaction must be authorized by a special resolution requiring approval of two-thirds of the members present at a member's meeting. Generally, the procedure for dealing with a corporate body under a corporations act will follow the normal procedure in respect to buying from any corporation. The purchaser's solicitor would look to see that there is proof that the corporation has been in existence during the entire period of the registered ownership of the lands, proof that the corporation has the power to sell the lands (including considering whether a special resolution will be required) and an examination of the latter's patent to see whether the corporation must obtain consent of another body or whether certain other procedures must be followed.

Special Act Corporations

In addition to incorporation under a corporation's act, a vendor may be incorporated under a special act of the legislature of Ontario or the Parliament of Canada. If an Ontario special act corporation has share capital, then unless specifically provided otherwise, it will be subject to the provisions of the *Business Corporations Act (Ontario)*⁸. If it is an Ontario corporation then it will have all of the powers of a corporation pursuant to the Corporation Act (except as otherwise expressly provided) in Sections 23 and 275 of the Act. In respect of special act corporations it will be necessary to review the special act to determine whether the Corporation has capacity to enter into the subject transaction. Most corporations that are functioning under a special act will have counsel that are familiar with the particularities of their client. Again, the most prudent approach would be to obtain an opinion of counsel in respect of status and capacity to contract, and who may execute the conveyancing documents.

Religious Organizations Lands Act

As mentioned previously, unincorporated associations do not hold property in their own name, but the property is held by individuals as trustees. To facilitate the ownership of land by religious organizations the *Religious Organizations Lands Act (ROLA)* permits trustees to be appointed on behalf of religious organizations to hold land on a perpetual succession basis notwithstanding that individual trustees may vary. The ROLA provides a comprehensive statutory code for the acquisition, holding, mortgaging, and selling of land through trustees who are appointed to act on behalf of the religious organization. The ROLA includes an association of persons that is charitable according to the law in Ontario and that is organized for the advancement of and for the conduct of worship, services for rights of the Buddhist, Christian, Hindu, Islamic, Jewish, Bahá'í, Longhouse Indian, Sikh, Unitarian or Zoroastrian faith or a subdivision or denomination thereof.

⁸ Ontario Business Corporations Act, R.S.O. 1990, c. R.23



Often the real estate practitioner will find on title that the property is held by Mr. X, Mr. Y and Mr. Z as trustees for X church. Section 6(1) of ROLA states that the ability of trustees to own land in perpetual succession or to do anything else under ROLA is only available if the unincorporated religious organization adopts a resolution conferring such authority upon the trustees.

The ability of trustees to sell land on behalf of a religious organization is limited to situations where the membership has determined by resolution that the land in question is no longer necessary for its purposes. Generally, this is not an issue, as usually what is being sold is surplus to the purposes of the church. In fact, in a number of denominations there must be first a designation that the land is indeed surplus by a denominational body.

Section 17 of ROLA provides that a resolution passed in accordance with ROLA is automatically adopted if a majority of those present at a meeting and entitled to vote at the meeting support the resolution. Section 18 of ROLA provides for the method of giving notice of the meeting which is to specify the purpose of the meeting, and to be given in accordance with the constitution, practice or custom of the religious organization. Where the constitution, practice or custom of the religious organization has no provision for calling of meetings, ROLA provides a regime as to the calling of such meeting.

Section 27(2) of ROLA states that it is specifically subject to the trusts in any deed, conveyance or instrument. Lands acquired prior to the enactment of ROLA may have been granted to trustees and on trusts that may be contradictory to the statutory authorization in ROLA, and even contradictory to the current practices and doctrines of the religious organization. ROLA is formulated in favour of religious organizations with a congregational form of government. Religious organizations that do not easily fit that mode, may be incorporated either under a general statute or under a special Act. A real estate practitioner acting on the sale of lands from a religious organization, or purchasing such lands will require the following:

1. a certified copy of the members' resolution of the religious organization appointing the trustees;
2. a certified copy of the members' resolution of the religious organization authorizing the sale of the property; and
3. if a deed of trust exists regarding the property it should be reviewed for any clauses that require observance by the trustees and a declaration should be requisitioned stating that such duties have been fulfilled by the trustees.

In the POLARIS[®] system it is possible to select an instrument type being "transfer by religious organization". One of several authorization statements must be selected. These statements are not statements of law, and so the prudent solicitor may wish to obtain the items listed above, or at least satisfactory affidavit evidence in respect to compliance with the various provisions of the ROLA.

In addition to considering ROLA, a religious institution may be subject to special legislation. For example, the United Church of Canada is governed by a statute of the federal government known as "an Act incorporating the United Church of



Canada”⁹. The General Synod of the Anglican Church in Canada was incorporated by Federal legislation in 1921 for the purpose of holding and managing the property and assets of the national church. Lands of local Anglican churches are often owned by trustees pursuant to special legislation incorporating the particular diocese. Generally, such established churches have well known regulations in respect to the denominational requirements for selling land. As well, there are often counsel that are conversant with the rules of those particular denominations. Churches that are not subject to special legislation may be subject to regulations or agreements between the religious body and the specific denomination to which the religious body belongs. If one is acting on behalf of a religious organization, then the inquiry should be made of the client as to whether this is the case, and if the client is unaware of the regulations, the factual situation should be verified with the governing body of the denomination.

The *Assessment Act*¹⁰ offers tax exempt status to a number of categories of property that may be owned by charities or not-for-profit organizations. The inquiry with the local tax authority will clearly determine whether the subject property is tax exempt. Generally, supplies provided by charities and not-for-profit organizations are considered to be exempt supplies. Most sales of real property by “a public service body” as defined in section 123(1) of the *Excise Tax Act*¹¹ will be exempt from GST. However, there are certain sales by such a body that are not exempt. For example, sale of property used primarily in commercial activity is not exempt. The exclusions should be reviewed in each conveyancing circumstance. As the sale will generally be an exempt sale, a specific GST certificate attesting to the nature of the exemption will need to be drafted. A sample certificate used on the conveyance of church property is annexed to this paper.

LIMITED PARTNERSHIPS

A limited partnership is a creature of statute. In Ontario a limited partnership is formed when a declaration is filed with the registrar under the *Limited Partnerships Act*¹² (Ontario). To create a limited partnership there must be at least one general partner and one limited partner. A limited partnership is a flow-through entity for the purposes of tax, and provides the investors (the limited partners) with the protection of limited liability. Therefore, limited partnerships are an attractive vehicle for the holding of real estate assets. A limited partnership is not a separate juridical entity. Ground J. noted in *Kucor Construction*¹³, that a limited partnership is no more a juridical entity than is a general partnership. A limited partnership carries on business through its general partner. There are two techniques by which limited partnerships generally hold title to real estate. The general partner may hold title on behalf of the limited partnership, or a nominee or bare trustee may be alternatively used.

9 14-15 *George v.*, Chapter 100

10 *Assessment Act*, R.S.O. 1990, c.A.31

11 *Excise Tax Act*, R.S.C. 1985, C.E.15

12 *Limited Partnerships Act*, R.S.O. 1990, c.L.16

13 *Kucor Construction & Developments Associates v. Canada Life Assurance Co.* (1998) 41 O.R. (3d) 577 (C.A.).



After the registration of a declaration, in a sophisticated limited partnership, the partners will usually enter into a limited partnership agreement. If there is no limited partnership agreement, then the provisions of the statute apply. The limited partnership agreement will establish the terms and conditions under which the general partner is entitled to sell the property. The inquiries that would be made in respect of a corporate general partner are the same that one would make in respect to acquiring real estate from any corporation.

Additionally, a purchaser acquiring land from a limited partnership should obtain representations and warranties from the limited partnership with respect to:

- (a) the due creation of the limited partnership, and that the partnership has all necessary power, authority and capacity to own the property and to transfer registered or beneficial title of the property to the purchaser;
- (b) that the execution of an agreement of purchase and sale or the performance of the vendor's obligations under the agreement will not violate:
 - (i) the limited partnership agreement constituting the partnership;
 - (ii) any agreement to which it is bound;
 - (iii) any judgment or order of a court of competent authority or government authority; or
 - (iv) any applicable law.
- (c) that the limited partnership has taken or has caused to be taken all requisite action required to be taken by it to authorize the execution and delivery of the agreement of purchase and sale and the performance of the vendor's obligations under the agreement.

A purchaser will wish such representations and warranties at a minimum. It remains a point of negotiation between vendor and purchaser as to whether there will be a supporting solicitor's opinion.

As stated previously, a limited partnership is a conduit for tax purposes. The partnership agreement will determine to how income and losses of the partnership are allocated to the partners. A sophisticated limited partnership agreement often contains detailed provisions as to distribution of income, and distribution of proceeds on sale or refinancing. The limited partners cannot take separate courses of action with respect to capital cost allowance on partnership property in order to tailor their particular tax positions. Capital cost allowance must be computed at the partnership level. Therefore, the concept of doing an allocation of the purchase price may be important not just in relationship to vendor and purchaser, but to ascertain the allocation of capital cost allowance among the limited partners themselves.

In dealing with a limited partnership that is holding real property, it should be kept in mind that the appropriate registrant for GST purposes is the limited partnership, and not the general partner. In order to obtain the registration in the name of the limited partnership, a separate application has to be made for a business number for the



limited partnership, as such number is not automatically assigned by the filing of the declaration creating the limited partnership.

The execution of documents by a limited partnership has been clarified by the Kucor decision. A limited partnership cannot sign in its own right and the general partner does not sign on behalf of the limited partnership. The purchase and sale documents and all documents executed on behalf of a limited partnership should be executed by the general partner on behalf of the partnership. The correct method would be as follows: ABC Ontario Limited in its capacity as general partner of the XYZ Limited Partnership. The POLARIS[®] forms provide a self-prompting mechanism when creating a transfer in which a limited partnership is a Party From.

TRUSTS

As stated previously, a trust is not a juridical entity, but rather is a relationship between the trustees and the beneficiaries with the trustee acting as agent for the beneficiaries with respect to the trust assets. The trust declaration, is the instrument entered into between the trustee and the settlor. No trust is created unless some property is vested in the trustee. Such a trust should not be confused with what is called a “bare trust” (see discussion further in this paper). Income trusts have become a common business vehicle. A real estate investment trust (a “REIT”) is a special type of business trust. Business trusts and REITs are generally publicly traded entities. However, there is a range of private business trusts that have been established.

The trustee’s powers are essentially limited to those powers conferred by the declaration of trust. The declaration of trust must provide the authority for a trustee to sell trust property.

Any purchaser acquiring land from a trust should obtain representations and warranties that:

- (a) the trust declaration is in full force and effect, and amended, that the transaction is not precluded by the terms of the trust declaration and that the trust declaration is the only document creating the trust;
- (b) the trust declaration remains in full force and effect, and amended;
- (c) the transaction is a permitted transaction in accordance with the terms of the trust declaration;
- (d) the trustee is the duly appointed trustee of the trust;
- (e) all necessary steps to be taken by the trustee to authorize the transaction have been done.
- (f) the sale of the property is a permitted transaction in accordance with the trust declaration.

A purchaser would wish such representations and warranties at a minimum. Again, as in the case of the limited partnership, it remains a point of negotiations between



vendor and purchaser as to whether there would be a supporting solicitor's opinion. In the case of a trust, the negotiating position to request a solicitor's opinion is strengthened by the fact that there is no capability to check with the government ministry or department as to the creation of the trust.

Trusts execute documents by the trustee. Unless the trust declaration provides for an alternate to unanimity, all trustees would be required to execute trust documents. For example, a document would be executed by A and B, as the trustees of the C trustee.

Given the new rules relating to the taxation of income trusts, REITs may be the category of business trusts that is not shrinking. The comments made previously in respect of business trusts apply equally for REITs.

As in the case of a limited partnership, a REIT is a flow-through vehicle for the purposes of distribution of income to the unit holders without income tax at the REIT level. A REIT usually is organized as a "mutual fund trust" pursuant to the *Income Tax Act*. As such there are some unique tax provisions that apply to REITs in respect of real property. A REIT can only hold real estate which is capital property, and therefore cannot participate in speculation in real estate. A major difference between a REIT and a limited partnership is that if there is a loss incurred, it cannot be flowed through to the unit holders, although it may be deducted by the REIT in future years. In the case of a limited partnership, the loss can flow through to the limited partners.

All the vehicles that have been discussed in this paper will often hold title to real property by the use of a "bare trustee" or "nominee". The function of a bare trustee is to hold the property for the beneficiary and to deal only with the property in accordance with the direction of the beneficiary. The trustee in this case is to take no independent action without the direction of the beneficiary. Due the provisions of the *Land Titles Act*,¹⁴ where the trustee relationship is not permitted to be noted, often the potential purchaser will have no knowledge that the vendor is merely a nominee and not the true beneficial owner of the property. In drafting an agreement of purchase and sale it is always wise to include a covenant that the vendor is both the registered and beneficial owner of the property. If the vendor cannot make this statement, it will become obvious to the purchaser that it may be dealing with a bare trustee for an undisclosed beneficiary.

In other instances, the purchaser will have knowledge of the underlying beneficial interest. In some cases, the agreement of purchase and sale may be entered into with the actual beneficial owner, and in which case, there will need to be a provision that the beneficial owner will direct the nominee to execute and deliver the transfer of title on closing and any other conveyancing documents that might be in the nominee's name.

A bare trustee corporation in most instances is merely a shelf corporation, and as such, where a purchaser is entering into an agreement of purchase and sale, where it is acknowledged that there is a beneficial owner, the purchaser will wish to address the quality of the covenant of the purchaser in respect of post-closing applications. Generally, when there is a beneficial owner, a separate off title transfer is prepared

¹⁴ Land Titles Act, R.S.O. 1990, c.L5



whereby the beneficial owner transfers its beneficial interest in the property in favour of the purchaser.

For tax purposes Revenue Canada ignores the existence of the bare trust corporation and treats the beneficial owner as the owner of the property. Correctly, the beneficial owner should be the registrant for GST purposes. As well, a Section 116 Certificate should be obtained from the beneficial owner. It is not uncommon for a Canadian nominee to be used to hold real property on behalf of foreign investors. It is one thing if the purchaser has no knowledge of the nominee arrangement. However, if the purchaser has such knowledge, the purchaser must undertake enquiries of the actual beneficial owner. A certificate obtained from a nominee vendor, where the purchaser has knowledge that there was a beneficial owner will not satisfy the reasonable enquiry test, and so may make the purchaser liable for payment of withholding tax pursuant to Section 116(5) of the *Income Tax Act*.

V.Stuart, 2008